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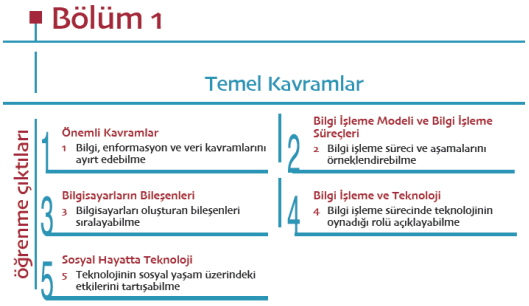

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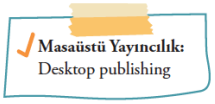

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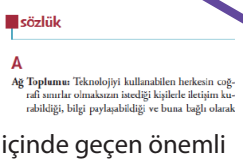

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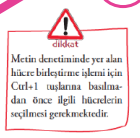

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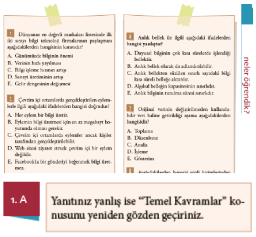

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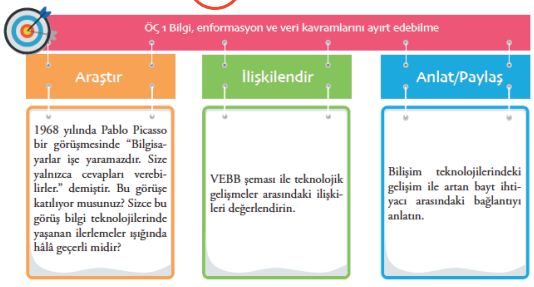

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ANADOLU UNIVERSITY

Introduction to Law

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Preface

Dear Students,

It is an honor and a privilege to introduce the very first edition of "The Introduction to Law" textbook. This book is the fruit of a collective effort of learned scholars from various Universities. It is an important contribution for the students enrolled in the programs offered by the Open Education Faculty of Anadolu University. Having said that, it will also be seen as an ideal textbook for the Introduction to Law courses offered by other Universities, as well as practicing lawyers, who would be willing to expand their knowledge on the Turkish Legal System.

It is always a burdensome task to organize and synchronize the cooperation among a high number of individuals. I, as the Editor of this book, have never experienced this frustrating challenge, since the authors devoted their time and knowledge to this project in an unyielding fashion, turning the whole process of preparing the book for print into a smooth and enjoyable experience. It has also been an illuminating experience for me to see the best legal minds of Turkey at their legal work. I am indebted for their professionalism and commitment. The book comprises eight chapters. The chapters are organized in such a way that the readers will be given a chance to be acquainted with basic terminology and reasoning of law. Following the first two chapters, each chapter deals with a specific legal area of specialization. We, as the authors and the editor, plan to cover essential points on legal matters. I enjoy this very opportunity to thank each and every one of the scholars, who were kind enough to allocate their time for the preparation of this book. I am sure, this book is going to assume the status of a reference book for years to come and will help students of other Colleges and Universities in their quest for perfection.

Editor

Assoc.Prof.Dr. Gökhan GÜNEYSU

Chapter 1

Fundamental Concepts of Law

After completing this chapter, you will be able to:

Learning Outcomes

1. Explain the functioning of legal rules in a society
2. Differentiate among various sources of law
3. Juxtapose different legal cultures and explain their differences.

Chapter Outline

Introduction
What is Law?
The Functions Of Law
Legal Traditions
The Sources Of Law: Where Does Law Come From?
Law And Morality

Key Terms

Definition of Law
Functions of Law
Justice
Order
Legal Traditions
Civil Law
Common Law
Religious Law
Sources of Law
Hierarchy of Laws in Turkey

INTRODUCTION

This is an introductory chapter which will familiarize the students with basic concepts and functions of law. On doing so, the chapter first provides answers to the question of what is law and how it functions. The chapter aims to provide an insight into the nature and function of law. After analysing the concept of law and its functions the chapter shall provide information about the most important living legal traditions in the world. What the common law and civil traditions are and how they evolved will be one of the main themes of the chapter. After introducing roots and basic concepts of these traditions, the chapter will provide you information about principle sources of law and the means by which laws are made.

Overall, after studying this chapter you should understand the following main points:

- The concept and functions of law
- The most important legal traditions in the world
- The development of common law and civil law traditions
- Principal sources of law with an emphasis on Turkish law

WHAT IS LAW?

Law is everywhere. It shapes our daily lives in various ways. Law regulates virtually every aspect of our lives, from the cradle to the grave, though we may not always be aware of this fact. The legal system lies at the heart of any society since it regulates the conduct of almost every social, political and economic activity. Depending on the complexity of a given society and its economic advancement, regulatory scope of law expands. By regulating our relations with other members of the society such as marriage in family law, school life in administrative law, or our life as a consumer in consumer protection law, the legal system seeks to uphold certain values such as justice, freedom, security and the like. And most of the time, law makes us do things we do not want to do.[1] Although law has a highly significant practical relevance, ordinary people oftentimes regard it as a distant, highly technical, bewildering mystery and an impenetrable thicket of rules and principles.[2]

It is hard to provide an all-encompassing or agreeable definition of law, but a standard definition that contains the most significant elements would read as follows: "*law is a set of rules which a particular country or community recognizes as regulating the actions of its members and which it may enforce by the courts*."[3] This definition is positivistic, since it limits law with already posited, positive laws. At this point, it would be useful to provide some definitions of law each of which emphasizes an important aspect of the concept of law in one way or another:

- What the ruling part of the state enacts after considering what ought to be done, is called the law. Xenophon
- Law is a definite statement according to a common agreement of the state giving warning how everything ought to be done. Anaximenes.
- Law (lex) is the highest reason, implanted in nature, which commands what ought to be done and prohibits the contrary. Cicero
- Ius (law) is the art of what is right and equitable. Lex (statute) is ius enacted by wise princes. Petri Exceptiones Legum Romanum
- A law is an ordinance of reason for the common good, promulgated by him who has charge of the community. Thomas Aquinas
- The sum of the circumstances according to which the will of one may be reconciled with the will of another according to a common rule of freedom. Kant
- The organic whole of the external conditions of life measured by reason. Krause
- An aggregate of rules which determine the mutual relations of men living in a community. Arndts.
- Law is the expression of the general will. Rousseau
- The sum of moral rules which grant to persons living in a community a certain power over the outside world. Sohm
- Those rules of intercourse between men which are deduced from their rights and moral claims; the expression of the jural and moral relations of men to one another. Woolsey

- Law is a body of rules for human conduct within a community which by common consent of this community shall be enforced by external power. Oppenheim
- The law of every country … consists of all the principles, rules, or maxims enforced by the courts of that country as being supported by the authority of the state. Dicey

Despite this rich variety of meanings and complexities, law is inescapably everywhere around us. Let's consider the rules of football through the lens of law. Indeed, the rules of football are illustrative of how law functions, enabling you to understand the abovementioned definitions of law better.

As a legal system in its own right, laws of football address the need for regulation to guarantee a fair play, which would enable a just competition. Thus, football, which is a source of amusement for billions of people and an important economic and professional activity for many others, is governed by complex and highly detailed "laws of the game", which regulate every aspect of the game, ranging from the size and weight of the ball to fouls and misconduct in a very detailed fashion. Let's analyse several examples from the laws of football for clarifying the structure and logic of law. Take, for example, the law 2 concerning qualities and measurements of the ball, which reads:

The ball is:

- spherical
- made of leather or other suitable material
- of a circumference of not more than 70 cm (28 ins) and not less than 68 cm (27 ins)
- not more than 450 g (16 oz) and not less than 410 g (14 oz) in weight at the start of the match
- of a pressure equal to 0.6 – 1.1 atmosphere (600 – 1,100 g/cm2) at sea level (8.5 lbs/sq in – 15.6 lbs/sq in)[4]

or consider the law 3 on the number of players, which reads:

A match is played by two teams, each consisting of not more than eleven players, one of whom is the goalkeeper. A match may not start if either team consists of fewer than seven players.

Law exists, in general, in the form of rules such as the rule that defines the ball or the one concerning the required number of players in a football game. Defining terms within the meaning of law, such rules are called "legal definitions". In other words, a ball within the meaning of laws of football shall be regarded as a ball only when it embodies the characteristics defined in law 2. Otherwise, it will not be regarded as a ball, though it may still be regarded as a ball in ordinary life. There is an abundance of examples of rules which contain definitions of terms that may not entirely correspond to the ordinary meaning of the phenomenon or thing to be defined by law. Convention on the Rights of the Child, for example, defines a child as follows: "*For the purposes of the present Convention, a child means every human being below the age of eighteen years […]*" A seventeen-year old may not be regarded as a "child" in the ordinary sense of the word; yet, he shall be regarded as a child within the ambit of the Child Convention.

The laws above are of substantive nature, as they define, prescribe and delimit the content of the law. The law concerning the ball excludes every other ball which does not have the qualities and measures as provided in the law. Likewise, law 3 excludes a game that may be played by three teams, or a match may not start if one of the teams consists of fewer than seven players.

Nonetheless, a legal system consists of not only substantive rules, but also it contains rules regarding the ways in which a right can be used or obtained. Such rules define the conditions within which a right can be claimed, which are called procedural rules. For another example, let's read the rule that regulates the substitution procedure in a game:

To replace a player with a substitute, the following conditions must be observed:

- the referee must be informed before any proposed substitution is made
- the substitute only enters the field of play after the player being replaced has left and after receiving a signal from the referee
- the substitute only enters the field of play at the halfway line and during a stoppage in the match

- the substitution is completed when a substitute enters the field of play
- from that moment, the substitute becomes a player, and the player he has replaced becomes a substituted player
- the substituted player takes no further part in the match, except where return substitutions are permitted
- all substitutes are subject to the authority and jurisdiction of the referee, whether called upon to play or not

In addition to prescriptive and procedural norms, most of the legal norms contain sanctions. It is highly important to recognize that formal sanctions are the distinctive features of law as opposed to other normative orders, such as morality. A typical legal norm contains a definition and a sanction, which is well illustrated in the following example from the law of the game:

If a substitute or substituted player enters the field of play without the referee's permission:

- the referee stops play (although not immediately if the substitute or Substituted player does not interfere with play)
- the referee cautions him for unsporting behaviour and orders him to leave the field of play
- if the referee has stopped play, it is restarted with an indirect free kick for the opposing team from the position of the ball at the time of the stoppage

In addition to the rules of definition, most laws contain rules of conduct which specify how people should behave or not behave ("do not steal", "pay taxes").[5] And if a person does not follow the precepts of law, he would be sanctioned by penalty or by tort damages. Sanctions for civil wrongs are primarily compensation. If a person, for instance, damages the property of others, he should pay a sum of money in order to compensate the harm that he has caused. Sanctions of law are by no means limited to the law of compensation. If a defendant fails to pay a compensation ordered by a competent court, agencies of the state shall make him pay the debt. This act of enforcement is called execution, which is carried out by the competent organs of the state.[6]

Most serious sanctions in any legal system are contained in criminal law which forbids certain activities, i.e. crimes, offences. If a person is found guilty of a crime, the result would be imprisonment or a fine. Furthermore, criminal law may intervene even before a court reaches a decision, say, by arresting a suspect or through confiscation. Criminal offences, indeed, in most cases deserve the harshest sanctions that exist in a legal system. Punishment is a formal condemnation of the offender, who has committed a crime. A crime is a wrongful and culpable act defined in the penal codes of a legal system. Grave offences like intentional killing shall be punished by life imprisonment, or in some countries by the death penalty. Thus, law divides legal wrongs into two categories, that is, criminal wrongs and civil wrongs.[7] Another type of sanction in law is the nullity. By declaring a legal action null and void an act performed in violation of law is rendered ineffective, or devoid of legal effect. If a legal act is void, this means that it was never in the eyes of the law a valid act. Indeed, such a legal act is regarded as "dead" from the beginning, and it is regarded as nullity. If a marriage is due to some defect (marriage before an unauthorized person, for example) existing at the time the marriage was celebrated is null and void, it will be non-existent meaning that it will produce no legal effect whatsoever. Unlike the cases of being void ab initio, in the instances of voidability, it is up to the parties to decide whether or not they wish to nullify the effect of a legal act.[8] Read the following examples from the law of contract which marks the distinction between the two:

- Void contract: a contract that has no legal force from the moment of its making. An illegal contract is void.
- Voidable contract: a contract that, though valid when made that can be later annulled by the court.

Legal rules, as shown above, often tells us what we ought or ought not to do. This "ought" form of command is said to be normative. A normative statement lays down standards of behaviour to which we ought to conform if we are the addressee of a particular norm in a particular situation. Thus, the rule (the ought-type normative formulation) "car is not to be driven while under the influence of alcohol" affects a person if he is driving a car while drunken. The rules as normative statements, therefore, tell what ought to happen (do not kill!), a factual statement, on the other hand, tell us what does happen (someone

is killed).[9] Most of the legal profession deals with the question that what type of 'ought-type" statement would conform to a particular 'is"-type situation or vice versa. Thus, a legal rule is a statement of what may, must or must not be done.

Things get complex here for the laymen since lawyers operate with at times highly complex concepts. Such as: condominium, tort, trust, culpa in contrahendo, strict liability, objective imputation, inadvertent negligence, dolus eventualis, unknown justification, reasonable man, civilized nations, transferred malice, equity, etc. You will be familiarised in the remainder of the book with some basic legal concepts that would enable you to get a basic grasp of the legal world.

So far so good. But who enforces law? Who is the decision-maker? Who enforces the laws of the game in football for example? Yes: the referee. The authority of the referee is defined in law 5 as follows:

Each match is controlled by a referee who has full authority to enforce the Laws of the Game in connection with the match to which he has been appointed.

Powers and duties of the referee, among others, are:

- enforcing the Laws of the Game,
- controlling the match in cooperation with the assistant referees,
- stopping, suspending or abandoning the match, at his discretion, for any infringements of the Laws,
- stopping, suspending or abandoning the match because of outside interference of any kind,
- punishing the more serious offence when a player commits more than one offence at the same time

The referee despite a very detailed set of rules enjoys the margin of discretion when he makes decisions, which is one of the characteristics of legal decision-making that involves inevitable a decision of human actor since vagueness in law cannot be avoided. Take an example again from the laws of the game. Even a detailed interpretive guideline that contains explains with regard to "celebration of goal" grants the referee a considerable margin of discretion[10]:

While it is permissible for a player to demonstrate his joy when a goal has been scored, the celebration must not be excessive.

Reasonable celebrations are allowed, but the practice of choreographed celebrations is not to be encouraged when it results in excessive time-wasting and referees are instructed to intervene in such cases. A player must be cautioned if

- in the opinion of the referee, he makes gestures which are provocative, derisory or inflammatory,
- he climbs on to a perimeter fence to celebrate a goal being scored,
- he removes his shirt or covers his head with his shirt,
- he covers his head or face with a mask or other similar item.

Leaving the field of play to celebrate a goal is not a cautionable offence in itself, but it is essential that players return to the field of play as soon as possible.

Referees are expected to act in a preventative manner and to exercise common sense in dealing with the celebration of a goal.

As the rule above provides the referee shall make the decision when a celebration is "reasonable" or "excessive" or not. In doing so, the referee shall make a decision in accordance with common sense. In a legal system depending on the particularities of system decisions are made by judges or juries. A judge may be professional who has appointed by the state or elected by the people. A jury is a body composed of an ordinary citizen who gives a verdict in a legal case on the basis of evidence submitted to them in court. Either case, judges or jury, enjoy a considerable discretionary power like the one a referee in football game enjoys.

From our analysis so far characteristics of law in a developed system could be identified as follows:

- Law is a system or set of rules. These rules are general, universally applicable to all cases that are within the confines of a particular rule; and finally, legal rules are predictable.
- Legal rules are binding
- Collective enforcement of law is ensured by an authority, say, police or court;
- Depending on the legal tradition laws man made either by the legislature or judges or both.

your turn 1

Please identify the basic characteristics of law in a developed system.

THE FUNCTIONS OF LAW (ORDER, JUSTICE, FROM STATUS TO CONTRACT)

Before explaining the functions of law, read the following examples that may give you an idea about the functions that law assumes in a society.

Case 1: In 1775, the sellers of new shoes (haffaf esnafı) took the sellers of old shoes to the imperial court, accusing them of buying new shoes from the cobblers and selling them among their wares, "contrary to the established custom". The new-shoe sellers also claimed [against the basic rules of supply and demand] that the practice of the old-shoe sellers caused a shortage of shoes and an increase in prices. In defending themselves, the old-shoe sellers indicated that in fact, the new-shoe sellers intruded into their line of business by selling old shoes along with new ones. The divan referred this case to the kadi of the district court of Istanbul. The kadi made the parties agree that henceforth they would never again intrude into each other's business.[11]

Case 2: In 1809, the sultan issued orders for the arrest and banishment of Salih, an olive-oil seller, because it was confirmed that instead of minding his own business like everybody else, Salih caused discord (ifsad) among olive-oil sellers and instigated (tahrik) them to keep the prices high. He ought to be punished in order to intimidate and chastise (terhib ü te'dib) the likes of him. He ordered his banishment to Karahisar-ı Sahip under strict supervision, forbidding him from taking even a single step to go to another place.[12]

Case 3: Francis Palmer made a last will in 1880 in which he left most of his large estate to his grandson Elmer Palmer. Elmer knew this and was afraid that his grandfather might change his will. To preclude this possibility, Elmer poisoned his grandfather. Mrs. Riggs, the daughter of Francis Palmer, sought for this reason to invalidate the last will.

New York State Law at that moment did not contain any written provisions to deal with such cases, and the question that was raised by this case was whether the rule that a convicted murderer cannot inherit from his victim was nevertheless part of the law.

The New York Court of Appeals decided that Elmer could not inherit from his grandfather, and invoked the principle that nobody should profit from his own wrongs. Implicitly it also adopted the view that such unwritten principles are part of the law, which is a view about law's nature.[13]

There are many significant functions of law, such as:

- Preserving order
- Achieving justice
- Protecting rights
- Imposing duties
- Establishing a framework for the conducts
- Promoting freedom
- Upholding the rule of law
- Protecting security
- Resolving disputes

One can add protection of property and protection of well-being of the community to the above list. Of these functions of law, our focus will be the main functions of law, that is, order and justice. In achieving these goals and preserving order, law should be enabled to fulfil its tasks. The main task of law is to enforce its precepts which vary according to particularities of the regulated area of life.

Table 1.1 Some Tasks of Modern Legal System

Offenders	Should be punished
Torts	Should be compensated
Agreements	Should be enforced

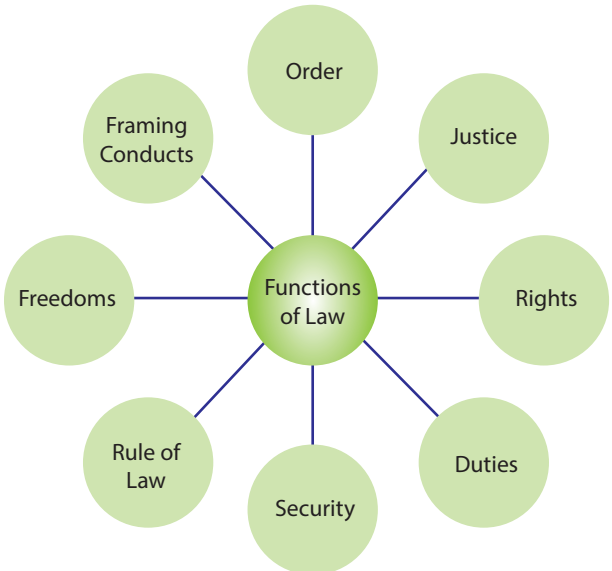


Figure 1.1

Order

Law makes a social life possible. Without law, society is barely possible. Law provides the security and self-determination to the members of society. Law creates a possibility for a peaceable ordering of the external relations of men and their communities to each other. Law's primary function is the realization of legal ideas prescribed in a state through commanding what is right and prohibiting what is wrong. A legal system provides remedies if the precepts of the legal system are not followed or broken. Law imposes a restraint on our liberty in order to guarantee a peaceful order among the members of society. This is the first function of law, i.e. establishment and preservation of *order* in a society. This aspect of law was pointed out by Savigny, the great German jurist when he contended:

"Man stands in the midst of the external world, and the most important element in his environment is contact with those who are like him in their nature and destiny. If free beings are to coexist in such a condition of contact, furthering rather than hindering each other in their development, invisible boundaries must be recognized within which the existence and activity of each individual gains a secure free opportunity. The rules whereby such boundaries are determined, and through them this free opportunity is secured are the law."[14]

Indeed, life in society requires a certain degree of respect towards others, or in other words, in a society, nobody is absolutely free. Law is the medium through which such limitations upon our very freedoms are regulated and enforced. The limitations that law imposes on our liberty is the price we pay for living in a community. Without law or other normative systems, our lives in society would be governed by the force of the powerful, but not the force of law. Professor *Aybay*, a prominent Turkish law professor, describes preservation of order as a function of law as follows:

"Society by definition requires an *order* to regulate relations amongst its members. Unregulated social life would be chaos. As members of society, people, therefore, search for order. Without some degree of order, society cannot serve its purpose and cannot provide security for its members. This is because order, generally speaking, is the condition in which everything in its right place and functioning properly; to put in another way, it is the absence of disturbances and unruliness. As a legal concept, the *order* is the body of laws, rules, regulations, and customs that apply to the relations between the members of a certain society. When we speak of the legal (or social) order, we refer to the set of rules that regulate the conduct of the individuals who make up a society. Every individual is expected to comply with the prevailing rules of the society in which he or she lives."[15]

Law regulates and delimits most of the activities of individuals, and it sanctions in case a breach of order would occur.

Justice

To be sure, order is only one part of the functions of law. Another and probably most well-known function of law is to do justice. One would incline to think that order and law always coincide. This is not always true, though. The two functions of law should be weighed against each another. If a legal system prioritizes order by putting certainty before the justice, this would be a too rigid system. The solution lies in keeping a proper balance between justice and order.[16]

The pursuit of justice must be the primary objective of any legal system since the dawn of history. In religious law justice regarded as the God's justice. In Islamic tradition, God ordains justice and this is one of His beautiful names: Al-Hakam al-'Adl (The Judge, The Just). The man is entrusted with the protection of the earth and the rectification of any evil that may occur. Of this duty, God, in the Holy Quran, says: *'O David! We did indeed make you a vicegerent on earth; so judge between man in truth (and justice): nor follow the lust (of your heart), for it will mislead you from the path.'* (Q 38:26)

Furthermore, in the modern constitutions justice regarded as one of the main functions of a government. The United States Constitution's preamble, for example, states that it is the role of the government "to establish justice", which is listed among other essential functions of government:

"We the People of the United States, in Order to form a more perfect Union, *establish Justice*, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." (Emphasis added)

Thus being so, it is not an easy to task to define what justice is. Justice is not synonymous with law. It is, therefore, possible for a law to be called unjust. In general terms, justice is regarded as a moral ideal that law seeks to uphold, and it is a challenging task ascertaining what is just and unjust in a particular situation. It is, therefore, no surprise that since Ancient Greek until today philosophers have developed and envisaged theories of justice. The main questions in this field are: What is justice? How is it to be secured? Is there a necessary connection between justice and law? It needs to be stressed that the subject of justice is an extraordinarily large one. To name a few, one can list most influential contemporary Western conceptions of justice as follows:

- Utilitarianism
- The economic analysis of law
- John Rawls's theory of 'justice as fairness'
- Robert Nozick's libertarian conception of justice

Of conceptions of justice, the Greek Philosopher Aristotle's approach still remains the starting point for most discussions of justice. In Aristotle's view, justice is a virtue, which is, in turn, a pursuit of the Golden Mean, i.e. a good compromise. In accordance with this approach, justice must be a type of mean, namely, finding a proper balance between two extremes: between excess and deficiency.[17] So, for Aristotle justice is a balancing act, a fair mean. Accordingly, he argues that justice consists of treating the equal equally and the unequal unequally, which is reflected in the motto of justice: 'treat like case alike and unlike cases differently'. This idea of justice rests on the idea of proportionate equality, which implies objectivity and neutrality in judicial-decision making, the *eyes of justice are blind*.[18]

Picture 1.1

Remember the sculptures of lady justice, the goddess Themis (meaning order). Her eyes are oftentimes blindfolded. Indeed, the three features of the traditional lady justice sculptures are scales, blindfold, and sword:

- The scales stand for the principle that justice requires weighing the claims of each side.
- The Sword represents the enforcement measures in law. It means Themis stands ready to force both parties to comply with her decision.

- The blindfold represents that decisions are made impartially, and it also means that decisions are not influenced by wealth, politics or popularity, etc. It is of note that in some cases the eyes of Lady are not blindfolded. The entrance to the Supreme Court of Canada in Ottowa, the statute of Lady Justice (Justitia) does not wear the traditional blindfold. According to one interpretation, the judges of the highest court in the country must clearly see the consequences of their decisions. Actually, the Blindfold is a relatively late addition, the blindfold was first deployed in the sixteenth century.

Aristotle distinguishes between corrective justice, on the one hand, and distributive justice, on the other. Corrective justice, in simple terms, is the justice of courts, which seeks to remedy and redress of crimes or civil wrongs. If, for example, a crime has been committed, punishment of the offender would serve corrective justice, in other words, re-establishing justice that has been damaged by a criminal offence. Consider cases 1 and 2 as examples of corrective justice from the Ottoman Empire. In case 2 the court balanced the interests of parties by ordering a non-intervention to one another's pre-established domains by custom. In case 2 punishment of Salih serves both to the redress of his crime, and furthermore, in its punishment court expects a deterrent effect upon the likes of him. So, corrective justice requires for wrongdoers to pay damages to their victims in accordance with the extent of the injury they have caused; or if they committed a criminal offence to be punished proportionately. The ancient principle *lex talionis* meaning '*an eye for an eye, a tooth for a tooth*' is an expression of corrective justice.

Justice requires in this sense that similar cases should be treated alike, which means not only Salih but others who have committed or would commit such acts should be punished as well. The Prophet of Islam, Muhammad, for instance, said, '*verily, those who came before you destroyed because when a noble person from among them was found guilty of theft, they would pass no sentence on him*'. So, justice requires a consistent and uniform application: "Treat like cases alike!".

The second prong of the Aristotelian conception of justice is distributive justice, which concerns giving each according to his desert or merit in the best interest of society. In essence, distributive justice means that political office or money to be apportioned in accordance with merit. Distributive justice concerns the just distribution of goods, benefits, and burdens in society. It is highly important to recognize that different ideologies in modern societies organize themselves with regard to what they think about the question of what is just, or, what are the components of a just society are. In this respect, the most influential ideologies are utilitarianism, libertarianism, liberalism, and socialism.

All of these modern ideologies in accordance with the world-view behind them revolves around the problem of formal justice versus substantive injustice. Formal justice or equality is based on the requirement of equal treatment before law without taking note of material injustice. Such an injustice would be compatible with liberalism, whereas it may be in contradiction with socialism, which has emerged a response to inequality and injustice experienced by so many people in a capitalist society. According to a pure capitalist approach, law plays a coercive function in maintaining material injustice. Adam Smith, a founding thinker of modern capitalism, explicitly makes this point, when he observed that:

When … some have great wealth and others nothing, it is necessary that the arm of authority should be continually stretched forth, and permanent laws or regulations made which may [secure] the property of the rich from the inroads of the poor, who would otherwise continually make encroachments upon it… Laws and government may be considered in this and indeed in every case as a combination of the rich to oppress the poor, and preserve to themselves the inequality of the goods which would otherwise soon be destroyed by the attacks of the poor, who if not hindered by the government would soon reduce others to an equality with themselves by open violence.[19]

In this vein, law has been criticised by thinkers for its failure, at some instances, to provide a remedy and justice. If justice regarded as a form of formal equality, it may lead to injustice. For example, people are born and raised under unequal

conditions, it would be unjust to apply an equally same set of norms to rich and poor, for instance, would lead to inequality, and eventually to injustice in society. This point eloquently made by Anatole France: "*The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.*" It is, therefore, necessary to complement formal equality with substantive equality and provide remedies to those in need, where necessary. If all we have is formal equality, the result is not going to be fair. Although formal equality might be regarded as an improvement vis-à-vis cast system or aristocracy, regulating all distributive scheme against the background of formal equality would be unjust. Philosophers have been trying to address this perennial issue by overcoming a formal conception of justice founded upon the assumption of equality of all subjects of law. John Rawls, American legal philosopher, for instance, developed his famous two principles of justice in order to address this issue. The two principles of justice are as follows: "*(1) Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others". (2) Social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.*"

One recurrent problem of justice is the issue of unjust laws. Is it justice to obey an unjust law? Put in other terms, if a conflict between the enacted law (i.e. the law on the statute books) and the sense of justice in a particular case arises which one should prevail? The enacted unjust law or what is being regarded as just in a concrete case? In this regard, there are two main approaches: legal positivism and natural law. These approaches described by Aybay in following terms:

"Legal positivists take their view of law from positive science. Law is studied on an objective and empirical basis. The question is not what law ought to be, but rather what actually law is. Only laws on the statute books and other written forms can be considered as law since they have an empirical form. Consequently, according to this view, the function of a judge is mechanical: it is simply to apply the objective (enacted law) […] In contrast, the natural law view has a moral (or "natural justice") dimension, in that it seeks to define law not simply as it is (i.e. in its empirical form) but also how it ought to be, that is, in line with "morally" correct or just behaviour. According to this view of law, whatever positive law may provide, there is always a set of moral norms dictating human behaviour. Thus, if the positive law is at odds with natural law (or sense of justice), the latter should serve as the basis for resolving the conflict."[20]

In simple terms, for natural law thinkers law is something beyond what is enacted, i.e. the rules of society or positive law. Positive law, on the other hand, is regarded as a compilation of rules which is established or recognized by governmental authority. In easy or routine cases, a natural lawyer and a positivist lawyer may converge in their solutions. Yet, in hard cases, it is quite likely that they will differ.

Table 1.2 Some major theories on law.

Natural Law	Law consists of a set of universal and unchanging moral principles accordance with nature
Positive Law	Law is nothing than a collection of valid rules, commands, or norms
Others	Law is a vehicle to protect the individual rights, to attain justice or economic, political or gender equality
A Dictionary	Law is the whole system of rules that everyone in a country or society must obey
A Marxist	Law cannot be a neutral body of rules which guarantees liberty and legality

Case 3 is a famous example which marks the contrast between the legal positivism and natural justice approaches to law. The main question in case 3 was whether a convicted murderer could inherit from his victim? At that time, the New York State Law was no concrete ordinance in effect against an heir murdering their testator. Besides, the will was a valid document and the existing relevant law (the Statute of Wills), read literally, made it clear that the grandson would inherit, the murder notwithstanding. In other words, at the time the case was decided, neither the statutes nor the case law governing wills prohibited a murderer

taking under his victim's will. The court decided not to award Palmer his gift under the will. The court decided based on the principle that "no man may profit from his own wrong".

According to one judge, Judge Gray, in this particular case, courts are bound by rigid rules of law even though this may lead to absurd consequences. Indeed, Judge Gray in his dissenting opinion gave a good example of legal positivism as he wrote:

I concede that rules of law which annul testamentary provisions made for the benefit of those who have become unworthy of them may be based on principles of equity and of natural justice. It is quite reasonable to suppose that a testator would revoke or alter his will, where his mind has been so angered and changed as to make him unwilling to have his will executed as it stood. But these principles only suggest sufficient reasons for the enactment of laws to meet such cases.

The majority of the court, in this case, thought and decided differently. Judge Earl, who wrote the majority opinion asserted:

What could be more unreasonable than to suppose that it was the legislative intention in the general laws passed for the orderly peaceable, and just devolution of property that they should have an operation in favor of one who murdered his ancestor that he might speedily come into the possession of his estate? Such an intention is inconceivable. We need not, therefore, be much troubled by the general language contained in laws. Besides, all laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.

Accordingly, the Court concluded that Elmer E. Palmer, the murderer of his grandfather Palmer, should not inherit from is from his grandfather. This case, until today, has been cited as a crystal clear example that marks the distinction between positivist and natural law conceptions of law.

LEGAL TRADITIONS

Law is, as shown above, a response to felt need for justice and order in any given society. Since the dawn of history, mankind has developed order of things either through unwritten customs or as in the example of the Roman law through a complex system of codes that achieved a condition of considerable sophistication.[21] Law as in the form of general codes first appeared around 3000 BC. Before the written law, laws were in the form of customary law. One can classify the law of this era into two:

- Jus non scriptum (unwritten law)
- Jus scriptum (written law)

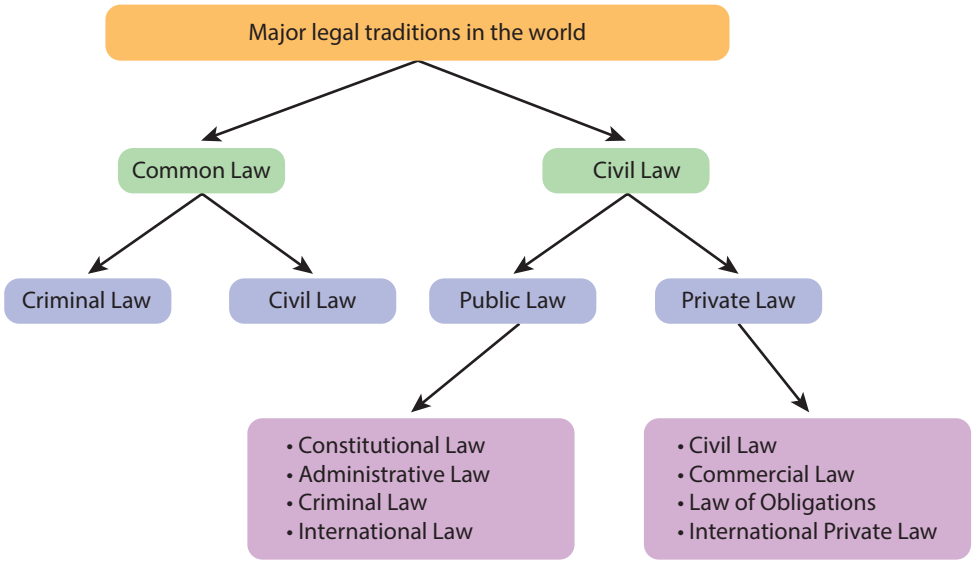
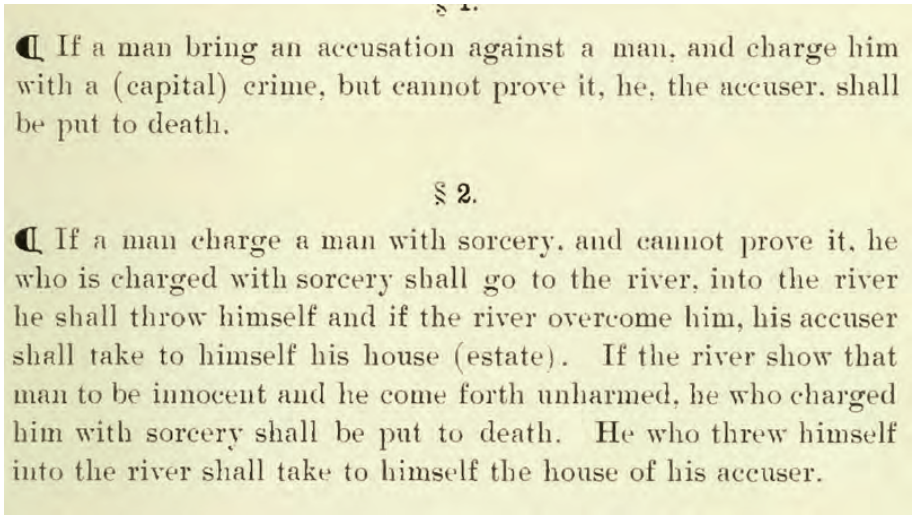


Figure 1.2

History has witnessed, from ancient times until today, many great efforts to codify law:

- The Code of Hammurabi
- The law of the Athenian statesman Solon
- Twelve tables
- Corpus Juris Civilis
- Napoleonic Codification Movement

Of these codes, the Code of Hammurabi is the oldest, which has created by the King of Babylon in about 1760 BC. The code consists of his legal decisions and sets out 282 laws. The code includes, among others, rules concerning the economy, family, criminal law and civil law.



¶ If a man bring an accusation against a man, and charge him with a (capital) crime, but cannot prove it, he, the accuser, shall be put to death.

§ 2.

¶ If a man charge a man with sorcery, and cannot prove it, he who is charged with sorcery shall go to the river, into the river he shall throw himself and if the river overcome him, his accuser shall take to himself his house (estate). If the river show that man to be innocent and he come forth unharmed, he who charged him with sorcery shall be put to death. He who threw himself into the river shall take to himself the house of his accuser.

Picture 1.2

In today's world, one can roughly make a distinction between western and non-western legal traditions. The Western legal tradition has a number of features that mark its distinctiveness vis-a-vis non-Western legal traditions:

- A fairly clear demarcation between legal institutions (including adjudication, legislation, and the rules they spawn), on the one hand, and other types of institutions, on the other; legal authority in the former exerting supremacy over political institutions.
- The nature of legal doctrine which comprises the principal source of law and the basis of legal training, knowledge, and institutional practice
- The concept of law as a coherent, organic body of rules and principles with its own internal logic
- The existence and specialized training of lawyers and other legal personnel[22]

These features of the modern western legal traditions signify a societal structure that has elevated law to the apex of mechanisms of social control. Indeed, the terms like "society governed by law" (Rechtsgemeinschaft) or "the rule of law" point out to this aspect of the notion of law in the western legal tradition. The rule of law, for instance, denotes that all persons and authorities within the state should be bound by and entitled to the benefit of laws.[23] A modern day analysis of the term has identified the following components of the rule of law:

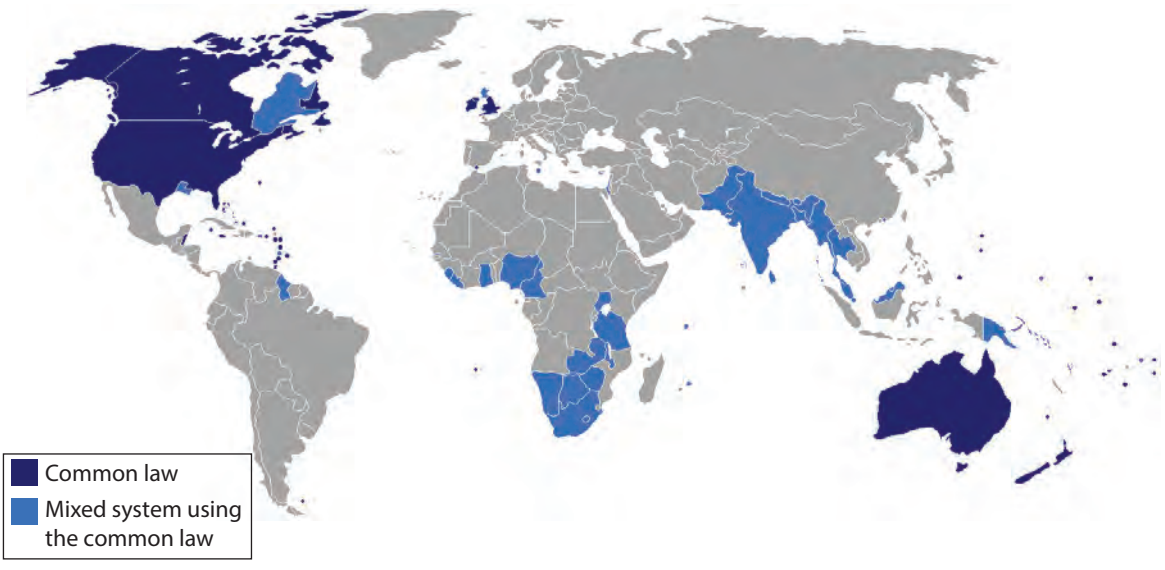
- Law must be accessible and so far as possible intelligible, clear and predictable;
- Questions of legal right and liability should be ordinarily resolved by application of law and not the exercise of discretion;
- Laws of the land should apply equally to all, save to the extent that objective differences justify differentiation;
- Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably;
- Law must afford adequate protection of fundamental human rights;

- Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve;
- Adjudicative procedures provided by state should be fair;
- The rule of law requires compliance by the state with its obligations in international law as in national law.[24]

In the contemporary world, there are two quite influential legal traditions in the western world that export their laws to other countries, which are in turn under the influence of these traditions. These traditions are civil law and common law. The dominance of said traditions both of which are of European origin is the direct outcome of European imperialism in earlier centuries.[25] A legal tradition, as described by Merrymen and Perez-Perdomo, is: "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught."[26] Of these traditions the civil law tradition is the older and the more widely distributed, and its roots could be traced back to the publication of the Twelve Tables in Rome in 450 B.C. The twelve tables are the earliest written legislation of ancient Roman law. Tables were written by 10 commissioners and later supplemented by two additional tables at around 451-460 B.C.

Western legal traditions dominate, to a large extent, the current legal systems in the world. The dominance of the said traditions is the direct outcome of European imperialism in earlier centuries[27] and the geographical dispersion of these traditions across the world confirms this point. Indeed, the common law tradition applies in England (the common law's birthplace), and it has been exported to the members of the British Commonwealth, most states of the United States and Canada (except Quebec). The civil law tradition that stems from continental Europe, which is a composite of several distinct elements and sub-traditions, is frequently divided into the following four groups:

- French civil law, which obtains also in Belgium and Luxemburg, the Canadian province of Quebec, Italy, Spain, and their former colonies, including those in Africa and South America;
- German civil law, which is, in large part, applied in Austria, Switzerland, Portugal, Greece, Turkey, Japan, South Korea, and Taiwan;
- Scandinavian civil law exists in Sweden, Denmark, Norway, and Iceland;
- Chinese civil law that combines elements of civil law and socialist law.[28]



Picture 1.3

Civil Law

Despite wide variety of sub-traditions the civil law tradition has but one initial source: the Roman law. Unquestionably, current state of European legal systems could be called Romanist systems, since these legal systems owe most of their legal institutes to the re-study of the law of Romans by jurists first in Bologna, Italy, and then all over the Europe from the eleventh century onwards.

As noted above, Twelve Tables are the earliest written sources of Roman law. The Tables documented the centuries old customary laws, it was rather a transfer of established customary law (ius) into a written form (lex).

Table 1.3

TABLES	
Table I.	Proceedings preliminary to trial
Table II.	Trial
Table III.	Execution of Judgment
Table IV.	Paternal Power
Table V.	Inheritance and Guardianship
Table VI.	Ownership and Possession
Tablı VII.	Real Propetrty
Table VIII.	Torts and Delicts
Table IX.	Public Law
Table X.	Sacred Law
Table XI.	Supplementary Laws
Table XII.	Supplementary Laws

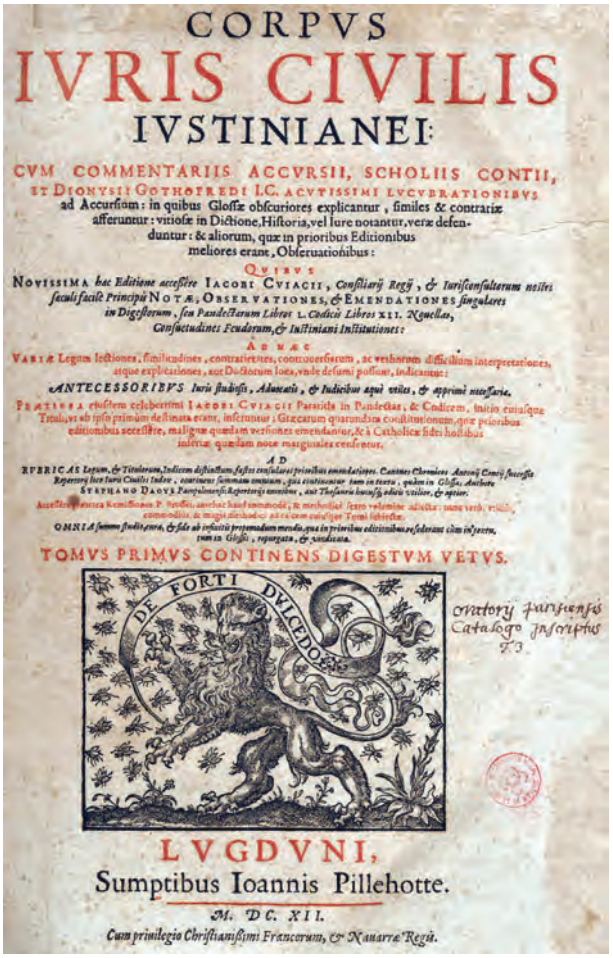
The term civil law derives from the Latin ius civile meaning the law applicable to all Roman citizens. Its origins and basic model are to be found in the compilation and codification of Roman law under Justinian in the sixth century A.D, which in the sixteenth century came to be known as *Corpus iuris civilis*, which can be translated as "Body of Civil Law". This compilation consists of three books: the Digest, Codex, and Institutes. These books contain rules regarding the law of persons, the family, inheritance, property, torts, unjust enrichment, and contracts and finally the remedies by which interests protected by the law are judicially protected.[29] Parts and themes of the Corpus could be listed as follows:

- Digesta: It collected all of the classical jurist's writings on law and justice;
- The Code (Codex). It outlined the actual laws of the empire;
- The Institutes (Institutiones). It summarised the Digest and intended as a textbook for students of law;
- A fourth part, the Novella (Novellae) was made later to update the Code with new laws of Justinian.

The Corpus is the collections of laws and legal interpretations. Justinian I was the Byzantine Emperor (Eastern Roman Emperor) from 529 to 534 A.D. The capital of the Empire was Constantinople, today's İstanbul. Features of the Corpus were:

- The code was a compilation of existing law; hence it did not constitute a new legal code;
- It was an authoritative collection of past laws and extracts of the opinions of the Roman jurists;
- It also included Justinian's own new laws.

Corpus Juris Civilis was a major codification in history and succeeding generations of jurists throughout Europe adapted the principles of the Roman Law as codified in Corpus Juris Civilis to the needs of the day.[30] Indeed, the rise of nation-states in the nineteenth century provided a significant opportunity for university-educated jurists, who were students of Roman law and regarded that the true law resided in the ancient texts that they had studied in the universities. Students of law at the University of Bologna, the first university in the Western World, were taught Corpus Juris Civilis alongside canon law. This study revived the once forgotten Roman law and Roman civil law spread throughout most of Europe. All later legal systems in the civil law tradition and beyond borrowed heavily from Roman law.


CORPVS
IVRIS CIVILIS
IVSTINIANEI
CVM COMMENTARIIS ACCVRSII, SCHOLIIS CONTII,
ET DIONYSII GOTHOFREDI I.C. ACVTISSIMI LVCVBRATIONIBVS
ad Accursium: in quibus Glossæ obscuriores explicantur, similes & contrariæ
afferuntur: vitiosæ in Dictione, Historia, vel Iure notantur, veræ defen-
duntur: & aliorum, quæ in prioribus Editionibus
meliores erant, Obseruationibus:
TOMVS PRIMVS CONTINENS DIGESTVM VETVS.
LVGDVNI,
Sumptibus Ioannis Pillehotte.
M. DC. XII.
Cum privilegio Christianissimi Francorum, & Navarræ Regis.

Picture 1.4

Bologna

The remarkable influence of Roman law on the modern civil law jurisdictions is demonstrated by Merryman/Perez-Perdomo, which reads as follows:

"In the nineteenth century, the principal states of Western Europe adopted civil codes (as well as other codes), of which the French Code Napoleon of 1804 is the archetype. The subject matter of these civil codes was almost identical with the subject matter of the first three books of the Institutes of Justinian and the Roman civil law component of the jus commune of medieval Europe. The principal concepts were the Roman law or rationalized Roman law, and the organization and conceptual structure were similar. A European or Latin American civil code of today clearly demonstrates the influence of Roman law and its medieval and modern revival. Roman civil law epitomizes the oldest, most continuously and thoroughly studied, and (in the opinion of civil lawyers) most basic part of the civil law tradition."[31]

Picture 1.5

Remarkably, the Code Napoleon of 1804 inspired by the Roman imperial law was exported by colonization to large tracts of Western and Southern Europe and thence to Latin America.[32]

Other principal components of the civil law tradition are the canon law of the Roman Catholic Church and commercial law developed by practical men engaged in commerce. The judges of commercial courts were merchants. Medieval Italian towns like Pisa and Venice were influential in the development of commercial law.[33] Comprised of Roman civil law, canon law and commercial law traditions, today's civil law jurisdiction typically contains the following five basic codes: the civil code, commercial code, code of civil procedure, penal code and code of criminal procedure.[34] Existence of comprehensive, continuously updated legal codes that seek to specify all matters capable of being brought before a court is the fundamental distinctive feature of a legal system based on the civil law tradition. Thus, a jurist in a civil law system looks at the provisions of the applicable code in solving a real life case. A judge, therefore, works within a framework provided by codified, at times very detailed laws. In a civil law system, a judge is, as a rule, solely an interpreter, a servant of the abstract code, as it were, rather than a creator of law. Accordingly, a typical legal education in a civil law system focuses on the analysis of the letter and meaning of complex body of existing laws. A civil code in a civil law system, for instance, prescribes the concepts and the terminology for thinking about all legal disputes.[35] The idea of certainty, that is, the desire for covering all cases via abstract norms contained in codes is to rationalize law and preventing arbitrariness in decision-making processes. It is, therefore, no surprise that the advocates of the French Code civil claim that it is the perfect embodiment of reason.[36] In order to understand the difference between the common and civil law traditions one needs to comprehend the difference between "statute" and "code". Fletcher and Sheppard identify the difference between the two:

"A code has structure. It reveals considerable thought in its choices of language and its internal organization. A statute states one provision after another. You need not master the whole of the statutes book in order to understand the parts. A code, by contrast, hangs together as an organic whole. Individual provisions are read against the background of the entire code. Also, though the language of a code does not exhaust the vocabulary of the legal culture, the words of the code enjoy an honoured place, an almost liturgical quality. The French Code *civil* is a cultural monument – both for its content and for its style. According to legend, the novelist Henri Stendhal reportedly revered the French code so much, he read ten provisions of the Code *civil* every night before retiring."[37]

It needs to be at this juncture entered that, despite this common background, the civil law tradition has a very varied existence that can best be grasped by a case-by-case analysis of civil law jurisdictions. Indeed, in today's world through globalization and legal borrowing majority of civil law legal systems are a mix of different legal traditions. Nonetheless, one can still identify the existence of two significant sub-traditions in the civil law tradition, i.e. the French and German families. The French family consists of countries that have been strongly influenced by the French codification movement. The fundamental traits of this family are, firstly, its emphasis on the role of parliament, and secondly, the vital role of democratic participation in making the codification. Thus, creation of law is primarily regarded as a political process. In the German family, however, the law is crafted by legal scholars, who are the masters of reason and system of complex system of laws.[38] Germany has, therefore, one of the most scientific legal systems in the world.

Common features of civil law systems are:

- Primary source of law is legislation;
- Based predominantly on codes and statutes.

Common Law

Unlike the civil law tradition, law of England, home of the common law, was not influenced by the reception of Roman law. Development of this tradition was led by the judges, who were the creator of the case law.

The phrase common law has a different variety of meanings. The term originally meant the law that was common to the whole of England. Common law is also a synonym for case law meaning the law that is not the result of legislation, that is, the law created by the decisions of the judges.[39] A third meaning of the term common law is the law that is not equity that reveals the dual system of this legal tradition.

The common law as a case law, is based on the principle of precedent. A binding precedent is a past decision in a legal case which is used as an authority for reaching the same decision in subsequent similar cases. The precedents are recorded in a law report which is a collection of case law known as yearbook or reports. In this sense, case law is the law that comes from the decisions of courts as opposed to legislation-a judge-made law as opposed to the law created by legislature. One can identify the basic characteristics of the traditional common law in following terms:

- It is uncodified;
- It is largely based on precedent and case law;
- It is developed from customs and decisions made by judges;
- It is not made by Parliament.

English common law's roots lie in the Middle Ages. It is a product of a gradual progress and accumulation, and, thus, it has seen no rupture in its historical development comparable to the codification movements in the civil law world.[40] The early common law was based on the writ system. The writ system was, however, too rigid, and they covered only the most common and obvious causes of action.[41] Thus, it was necessary that gaps left by the common law to be filled, and some softening, broadening influence should come to the assistance of common law, which became so highly formalized that the laws the courts could apply on this system often were too rigid to adequately achieve justice.[42] The relief was equity, a new kind of court. The principles that governed equity were in their nature more liberal and courts of equity relied on various sources, including Roman law and natural law to achieve a just outcome.[43] The emphasis on natural justice in the law of equity is well illustrated in equitable maxims. A legal maxim expresses a general legal rule or truth. A few examples are given below:

- **He who seeks equity must do equity.** A person will only be granted an equitable remedy if he is himself prepared to act fairly towards the other party.
- **He who comes to equity must come with clean hands.** The claimant must not be guilty of unconscionable conduct.
- **Equity looks to the intent rather than the form.** Equity will look at the substance rather than the form of a transaction or arrangement to determine the intention of the parties.[44]

The following example would illustrate the softening function of equity:

Case 4: Angela is an unmarried woman of means who has a two-year old son, Michael. Angela wants to give £50.000 to Michael, for the unexpected case that she might die. However, Michael is too young to deal with so much money. Therefore, A ngela trusts the money to her friend Jane, who will act as a safe keeper for Michaels' money. Under the regime of the common law Jane would be the only owner of the money, and it would depend on her benevolence whether she keeps the money for Michael. Michael would have no legal remedy if Jane abused her position. That is unfair, since the money was meant for Michael and Jane was only trusted with it to keep it for Michael. In equity, it is possible to provide Michael with a more robust legal position. Angela will be the legal owner of the money [at the common law], but acts as a "trustee". Michael will be the "beneficiary owner" (owner in equity) of the same money, has a legal remedy against Angela if she does not keep the money for him.[45]

Accordingly, contemporary common law tradition composed of common law and the law of equity, and other sources of law entertain the following characteristics that mark its difference vis-à-vis the civil law tradition:

- The common law is essentially unwritten, but recently legislation has started to play a more significant role among the sources of law in the common law jurisdictions too.
- The common law is casuistic: components of the legal body are cases, rather than abstract norms. It is, therefore, no surprise that legal education in the common law jurisdictions based on "reading cases".
- The doctrine of precedent is the supreme principle of the common law. The doctrine of precedent means that is binding for other courts and that the judgments of higher courts are binding on those lower in the judicial system. The rationale for this principle is, among others, the concerns of constancy, predictability, and objectivity, which are objectives of any legal system that seeks justice among its subjects.

- Trial by jury for both criminal and civil cases. This is, indeed, one of the most remarkable features of the common law. In a jury trial, the jury decides on the facts of the case; the judge determines the law.[46] One important aspect of the trial by jury is its emphasis on oral argumentation and rhetoric. In the civil law tradition, however, written argument prevails.

The common law tradition differs from the civil law tradition in terms of its trial process as well. The trial system in common law is called "the adversarial system". In an adversarial trial, parties to a dispute are regarded as equally matched opponents who "fight" before the court, while the judge acts as an independent umpire. Judges within the common law system remain passive, listening to evidence presented to them. They do not undertake their own investigations, that is, the parties involved are responsible for the presentation of their case and arguments. The emphasis is on oral evidence. Remember the court scenes from Hollywood movies. The performance and presentation of a lawyer are, therefore, crucial for winning his case. The lawyer in an adversarial trial is to convince the jury, which is composed of a group of citizens (jurors) selected at random to decide the facts of a case and give a verdict. Jury decides, for instance, in a murder trial whether they found the defendant guilty.[47]

A modern day jury is composed of 12 persons, randomly selected from society. Members of the jury are called jurors, who are ordinary people. The objective of trial by jury is to involve society as a whole in the judicial process. By doing so, the members of the general public directly participate in the dissemination of justice through deciding questions of fact in a court of law. The rationale for the jury system strengthens the legitimacy of the legal system by ensuring that not all judicial power is placed in the hands of professional judges.[48]

Justice Kennedy of the United States Supreme Court, in a 2017 decision, described the role and meaning of trial by jury as follows:

"The jury is a central foundation of our justice system and our democracy. Whatever its imperfections in a particular case, the jury is a necessary check on governmental power. The jury, over the centuries, has been an inspired, trusted, and effective instrument for resolving factual disputes and determining ultimate questions of guilt and innocence in criminal cases. Over the long course, its judgments find acceptance in the community, an acceptance essential to respect for the rule of law. The Jury is a tangible implementation of the principle that the law comes from the people […] Like all human institutions, the jury has its flaws, yet experience shows that fair and impartial verdicts can be reached if the jury follows the court's instructions and undertakes deliberations that are honest, candid, robust, and based on common sense."[49]

By contrast, trials within a civil law system are under the domination of professional judges. The trial system of the civil law tradition is called inquisitorial system. In an inquisitorial trial, the judge takes a much more active part in the proceedings and the process of investigation.[50]

Each system seeks to preserve and protect the credibility of its decision-makers. In a jury trial, the integrity of jurors is guaranteed by the rule of jury secrecy and preventing jury tampering. Jury secrecy means that statements made by jurors during the course of deliberations must be kept absolutely secret. The idea behind the rule of jury secrecy is that, allowing jurors to testify after a trial took place in the jury room would undermine the system of trial by jury. As the US Supreme Court justice Alito emphasized: "*The jury trial right protects parties in court cases from being judged by a special class of trained professionals who do not speak the language of ordinary people and may not understand or appreciate the way ordinary people live their lives. To protect that right, the door to the jury room has been locked, and the confidentiality of jury deliberations has been closely guarded*". Furthermore, jury tampering, that is, interference with members of a jury by intimidation, bribery or other persuasive is strictly forbidden.

In the civil law tradition, or more accurately, in a system where decision-making processes are mastered by professionals, there are also mechanisms that have been developed in order to guarantee the integrity of decision makers. As a result of an emphasis on the dogma of strict separation of powers, the civil law systems take special care to protect and safeguard the independence of the judiciary vis-à-vis the legislature and the executive branches. Indeed,

the goal of an independent, fair and competent judiciary that will interpret and apply the laws that govern people is vital for every legal system. Accordingly, courts, national or international, have adopted ethical standards for judges that seek to uphold the integrity and independence of the judiciary. The European Court of Human Rights to which Turkey is a state party, for example, adopted in 2008 a resolution on judicial ethics, which provides the following rules with regard to independence, impartiality and integrity of its judges:

- Independence: In the exercise of their judicial functions, judges shall be independent of all external authority or influence. They shall refrain from any activity or membership of an association, and avoid any situation, that may affect confidence in their independence;
- Impartiality: Judges shall exercise their functions impartially and ensure the appearance of impartiality. They shall take care to avoid conflicts of interest as well as situations that may be reasonably perceived as giving rise to a conflict of interest.
- Integrity: Judges' conduct must be consistent with the high moral character that is a criterion for judicial office. They should be mindful at all times of their duty to uphold the standing and reputation of the Court.

Indeed, as these ethical standards would show, any credible judicial system must be based on the assumption that a fair trial requires fair judges. A fair and unbiased judge is essential for a just decision in a case. Thus, legal systems have developed legal rules according to which a judge is excluded by from any judicial activity in a particular case. In quite many legal systems a judge cannot hear a case in a criminal trial in following circumstances:

- if he is the victim of the offence;
- if he is related to the victim or the offender by bloodline or marriage up to a certain degree or is the victim's guardian;
- if he was seized of the case previously as a prosecutor or police officer; or as the legal representative of either the victim or the offender;
- if he was heard as an expert or witness in the case.

Likewise, there are rules that seek to protect judicial independence, which is composed of the security of tenure and the principle of judicial immunity. *Özbudun,* a prominent constitutional law professor of law in Turkey, describes the independence of the courts and the security of tenure for judges as follows:

"The basic principle of the independence of the judiciary has been stated in Article 138 [of the 1982 Constitution]. Thus, judges are independent in the discharge of their duties; they render conscientious opinions in conformity with law. No authority or individual may give orders or instructions to courts or judges concerning the exercise of judicial power. No questions can be asked, debates held, or statements made in the legislative Assembly in relation to the exercise of judicial power in a case under trial. Legislative and executive authorities must comply with court decisions. They cannot alter them or delay their execution. Security of tenure for judges and public prosecutors has also been recognized by the Constitution (Art. 139), […] according to which "judges and public prosecutors shall not be dismissed, or retired before the age prescribed by the Constitution; nor shall they be deprived of their salaries, allowances, or other personnel rights, even as a result of the abolition of a court or a post."[51]

Overall, the differences between the civil and common law traditions are illustrated in the following table:

Table 1.4

Common Law Tradition	Civil Law Tradition
Unwritten	Written
Based on cases (casuistic)	Based on codes
Precedent has supreme position	Case law, as a rule, does not have binding force on other courts
There is a jury system	No jury system

Religious Law

Contemporary common and civil law systems are, to a greater extent, secular traditions based on the tradition and human reasoning. Yet, this does not mean that these traditions have completely divorced from their religious roots. As aptly put by Wacks: "*No legal system can be properly understood without investigating its religious roots. These roots are often both deep and durable.*"[52] Both in the common and civil law traditions, one can detect the traces of ecclesiastical law. It needs to be emphasized that the Roman Catholic Church has the longest, unbroken legal system in the western world.[53] Thus being so, separation of church and state, in shape or another, is one of the hallmarks of western legal tradition. Religious law is a term of art which is employed to denote a legal system based upon or inspired by a particular religion. Major religious legal traditions of the world are:

- Islamic Law (Sharia Law)
- Canon Law
- Jewish Law (Talmudic Law)
- Hindu Law

Of these most significant religious law traditions, Islamic law deserves the closer attention of ours for mainly two reasons: Firstly, one out of five people in the world today belongs to the Islamic faith; and secondly, the legal system of the Ottoman Empire was based on Islamic law. The Ottoman Empire is the predecessor of today's Turkey. The primary sources of Islamic law are Al Quran, Sunnah, Ijma, and Qiyas. Quran is divine revelation that contains basic, and. at times, detailed rules of law. Sunnah is the tradition of the Prophet comprised of his sayings, practices, and tacit approvals. Ijma is the unanimous decision of the Muslim scholars. Unanimity means that there should be no dissenting opinion on the particular matter under consideration. And finally, qiyas or analogy refers to the comparison of a case not covered by the text with a case covered by the text on account of their common value in order to apply the law of the one to the other. Secondary sources of Islamic law are, inter alia, juristic preference (istihsan), presumption of continuity (istihsab), custom, consideration of public interest (Masalih al-Mursalah).

THE SOURCES OF LAW: WHERE DOES LAW COME FROM?

The question of where the law comes from could be answered with reference to legal tradition, and, in particular, the legal system we are dealing with. In football, for instance, laws of the game are the primary sources of law. In any legal system, there are sets of recognized sources of law. A lawyer should base his arguments on recognized sources if he wants to win his case. If a judge asks a lawyer "to support his proposition", the lawyer in a common law system is very likely to cite either a previous decision of a court or a statute.[54] A civil lawyer will refer to an article of a code in support of his argument. Although he may also cite a court decision, it will not have the same weight as it has in a common law jurisdiction. All in all, courts in the civil law systems derive from the direct interpretation of the law; courts in common law system give greater authority to legal precedent.

As these examples illustrate, every legal system has its own recognized sources. That said, sources of law are more or less similar in most legal systems. One can classify sources of law into primary and secondary sources of law, or one can make a distinction between major and minor sources of law. In Roman law, for instance, the sources of law consist of

- statutes (leges),
- enactments of the plebeians (plebiscita),
- resolves of the senate (senatus consulta),
- enactments of the emperor,
- edicts of those who have an authority to issue them,
- the answers of those learned in the law (responsa prudentium).

A modern day example would be the law of European Union. The sources of law in EU are based on the distinction of primary and secondary legislations. Primary legislation is made from the constitutive Treaties, international agreements and general principles established by the Court of Justice of European Union. Secondary legislation is made from all the acts recognized by EU law. The secondary sources of EU law are regulations, directives, decisions, recommendations and opinions. Norms in EU law after Lisbon Treaty are as follows:

- Primary Law: Treaties and General Principles of Law
- International agreements
- Legislative acts
- Delegated acts
- Implementing acts

Laws of EU in terms of their binding force can be classified as follows:

Table 1.5

1. Binding legal instruments	(regulations, directives and decision)
2. Non-binding instruments	(resolutions, opinions)
3. Other instruments	(EU institutions' internal regulations, Eu action programmes, etc.)

In the civil law tradition, there is a hierarchy among the sources of law. The important sources of law are the constitution, treaties, and other laws that have been passed by parliament. In a civil law country sources of law are divided into categories of main or primary sources, on the one hand, and secondary sources, on the other.

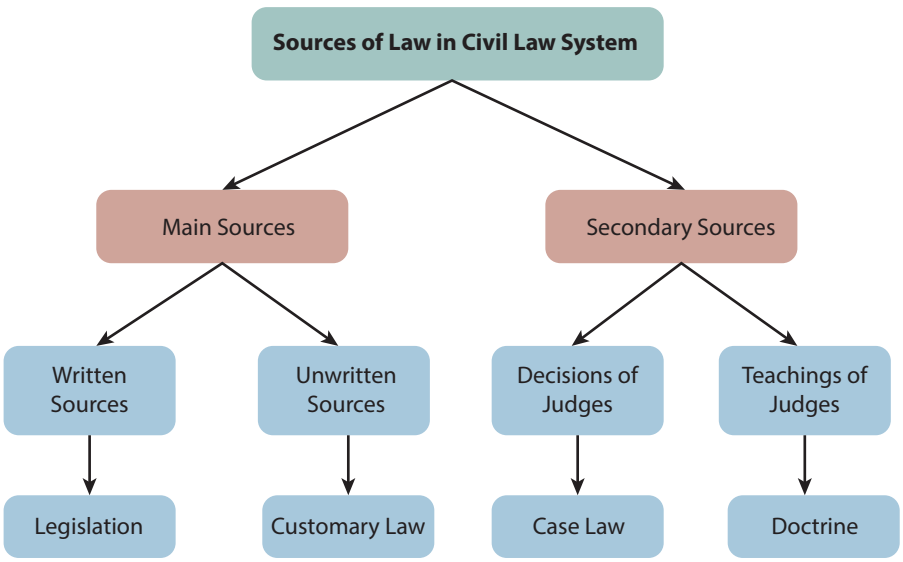


Figure 1.3

The primary source of law in any civil law jurisdiction is written law which can be made by a legislature (parliament) or by the executive power such as the council of ministers. A judge's duty in a civil law jurisdiction is to find, and then interpret the meaning of a statute or other legal instrument. The written sources of law are in a hierarchy among themselves. This is called "hierarchy of laws" that refers to the order or importance of a norm within a legal system. The hierarchy of laws enables coordination, systematization and coherence in a legal system. In other words, there are no free-floating norms. Today, almost every nation has a founding document, which is called the constitution, from which other written sources flow, manifesting a great deal of complexity but also a certain systematic unity. Hans Kelsen, the famous Austrian legal scientist, explains this structure by the following two postulates:

- Every two norms that ultimately derive their validity from one basic norm belong to the same legal system
- All legal norms of a given legal system ultimately derive their validity from one basic norm.

Turkish legal system is also based on the structure of a hierarchy of norms: The sources of law of Turkish law ordered in such a way from top to down may be listed as follows:

- The Constitution
- Statutes
- International treaties
- Decrees with the effect of law
- Regulations
- By-laws
- Customary law
- Judicial decisions[55]

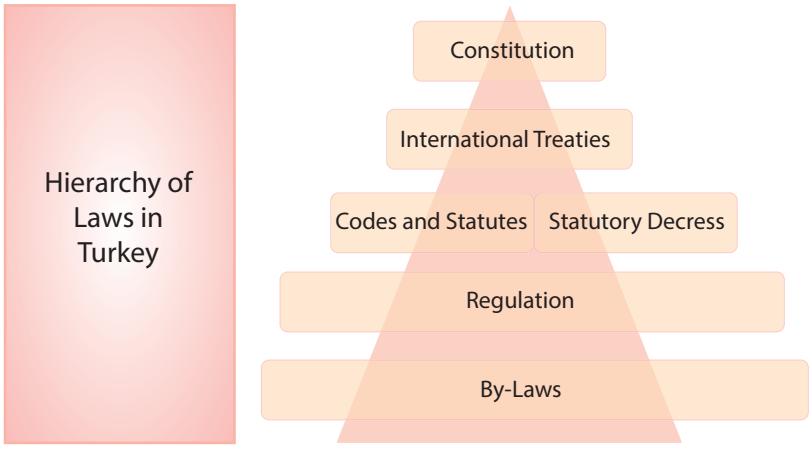


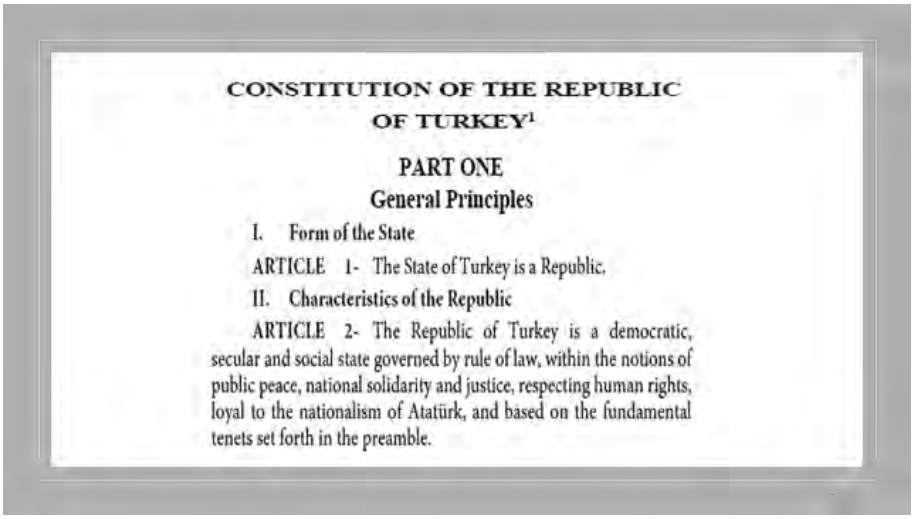
Figure 1.4

your turn 2

Please make a list of the sources of law of Turkish law in accordance with the hierarchy of norms.

The constitution is a founding document of any government and most of the countries today have written a constitution. A constitution, first, determines the composition and functions of the organs of a government. Second, it regulates the relationship between the citizens and the state. It sits at the apex of the hierarchy of laws, and all other laws must adhere to the constitution. Constitutions set out the relationships between the legislative, executive and judicial branches of a government. Supremacy and biding forces of Constitution is regulated in Article 11 of the Turkish Constitution, which reads: "*The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals*." Besides, most of the constitutions contain a bill of rights, which is a list of fundamental rights enjoyed by the citizens and in some instances residents in a country. Typically, legislation and amendment of constitutions are subject to more difficult procedures. Turkey has a relatively long history of written constitutions. The first Ottoman-Turkish Constitution dates back to 1876, at about the same time that many European countries adopted their constitutions. Since then Turkey has adopted four constitutions, those of 1921, 1924, 1961, and 1982 (which is currently in force), not to mention many radical amendments. Basic characteristics of the Turkish Republic, as enshrined in the constitution, are

- democracy,
- secularism,
- commitment to Atatürk nationalism,
- the rule of law,
- respect for human rights, and
- social state.



CONSTITUTION OF THE REPUBLIC OF TURKEY[1]

PART ONE
General Principles

I. Form of the State

ARTICLE 1- The State of Turkey is a Republic.

II. Characteristics of the Republic

ARTICLE 2- The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble.

Picture 1.6

International treaties are legally binding formal agreements between the subjects of international law, namely, states and international organizations. Each country has its own procedures with regard to ratification of an international treaty. With respect to ratification process of international treaties Article 90 of the Constitution of Turkey provides that: "The ratification of treaties concluded with foreign states and international organizations on behalf of the Republic of Turkey shall be subject to adoption by the Grand National Assembly of Turkey by a law approving the ratification." The place of international treaties in the hierarchy of sources of law in Turkish legal system is a disputed matter. The letter of the Constitution provides that international treaties duly put into effect are of equal status to codes and statutes. Thus being so, no claim of unconstitutionality of an international treaty can be brought before the Constitutional Court (Article 90/last para.). As a consequence of this rule, one would argue that international treaties are, in effect, above the statues and codes in the hierarchy of laws in Turkey.[56]

Codes and statutes come after the Constitution in the hierarchy of laws; hence, the laws of Parliament shall be in accordance with the Constitution. The authority to review the compatibility of law with the Constitution, and in case of contradiction to declare a law unconstitutional is, in Turkey, at the hands of the Constitutional Court.

Codes are the systematic collection of numerous articles. A typical basic code like criminal code consists of a general part and a special part. The general part contains all rules that are relevant and applicable to the special part. The special part contains particular offences such as intentional killing, bribery, fraud, sexual offences, defamation and the like. In Turkey, codes and statutes are in accord with article 87 of the Constitution enacted, amended and repealed by the Grand National Assembly of Turkey.

Bearing the force of law, decrees are official orders issued by a head of state, ruler, government or any other authority entitled to issue. In the Turkish legal system for example, Grand National Assembly of Turkey used to empower to the Council of Ministers to issue a decree which has force of law (The now abrogated Article 91 of the Constitution of Turkey).

As a form of delegated legislation, regulations provide details on the administration of principles in law. Regulations were issued for indicating the implementation of laws or designating the matters ordered by law. Regulations cannot be in conflict with laws (Article 115 of the Constitution of Turkey). Regulations are examined by Council of State.

By-laws are the rules or laws adopted by a governmental body. They are made for the government of its members and the regulations of its affairs. By-laws in Turkey are issued by the Prime Ministry, the ministries and public legal entities. They are issued to ensure the implementation of laws and regulations relating to their jurisdiction. As a consequence of hierarchy of laws, by-laws cannot be contrary to the statues and regulations (Article 124 of the Constitution of Turkey).

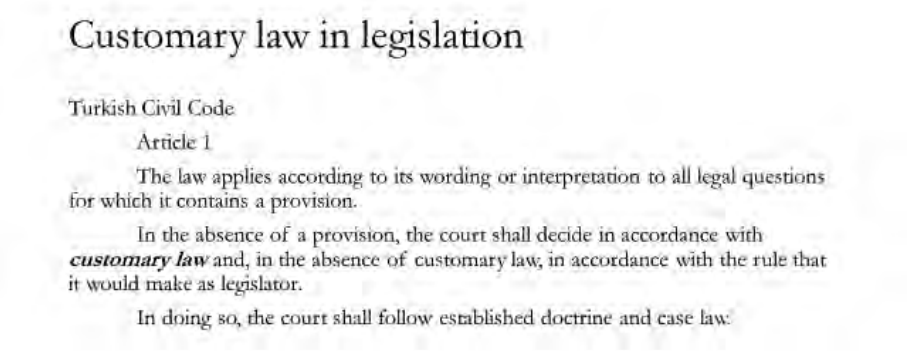
Table 1.6

Power	Institution	Source of law created
Legislative power	Parliament	Constitution/Amendments
Legislative power	Parliament	Statues
Executive power	Government	Regulations
Judicial power	Courts	Case law
---	Scholars, lawyers, merchants	Customary law

Another important source of law is customary law. Customary law is an unwritten source of law which is established by or based on the customs and practices in a society. A certain practice could be regarded as law if the following requirements are cumulatively met:

- A custom must have been existed for a long time;
- It must have been followed continuously;
- It cannot be abandoned;
- It cannot be interrupted;
- It must be reasonable in nature;
- It must not be in contraction with the existing canon of law.

Customary law especially plays a greater role in civil and commercial law.



Customary law in legislation

Turkish Civil Code

Article 1

The law applies according to its wording or interpretation to all legal questions for which it contains a provision.

In the absence of a provision, the court shall decide in accordance with ***customary law*** and, in the absence of customary law, in accordance with the rule that it would make as legislator.

In doing so, the court shall follow established doctrine and case law.

Picture 1.7

LAW AND MORALITY

Law is not the only normative system we have. Morality, etiquette and manners regulate and shape our behaviour as well. Moreover, in the historical development of law, the stage of customary law was identical with morality. In other words, law and morality were one and the same thing. Yet, history witnessed the separation of laws and morals. They still converge in some respects and diverge in others. Today, unlike morality, enforcement of legal norms is backed by the state power that possesses the resources to compel compliance.[57] Spitting on the ground or telling lies to others can be condemned, but disobeying such rules often brings no sanctions whatsoever. That said, many rules in law converge with moral norms. For example, the moral prohibition "Do not kill!" is also prohibited and enforced under criminal law, which amounts to a very serious offence in any legal system. Likewise, damaging or destroying property of the other are prohibited under both legal and moral norms. However, unlike morality, law attaches a legal obligation to compensate the damage caused by the destruction.[58] Indeed, it is a fact that the development of legal systems had been powerfully influenced by moral opinion, and in most cases, the content of many legal rules mirrored moral rules or principles.[59]

Without a doubt, law equipped with collective enforcement mechanisms contains a plethora of sanctions, such as incarceration, fines, compensation of damage and the like, while the sanctions of moral rules informal and less specific.[60]

One should, however, keep in mind the societal structure of a community when making assessments regarding the force of moral norms. Indeed, the force and conduct-shaping power of moral norms are much stronger in a village or

town than a metropolis where people most of the time pursue their deeds in an autonomous way. Anonymity of the big city increases the need for law as a formal social control mechanism, which is directed against and for shaping the conduct of the atomistic individuals. Let us clarify this point with an example. In a traditional town where virtually everybody knows everyone a rental act may be accomplished only through exchanges of words based on mutual trust. In an urban setting, however, a detailed rental contract is an absolute necessity for both parties who enter into rental relationship, since it is crucial perhaps the only way for guaranteeing and protecting their interests. This phenomenon is captured very well by the term "juridification", which denotes a process within which law's scope stretches to almost every aspect of our lives. Indeed, the growth in the scale and scope of legal regulation in the modern state has preoccupied many recent theorists of legal modernity. Juridification has both horizontal and vertical dimensions:

- Horizontal dimension: captures the phenomenon that in modern society law increasingly spread its reach and it now regulates a wide range of social activities. Law has spread into areas that were formerly considered private and beyond the reach of law. Aspects of domestic and family relations are, for example, now regulated by law.
- Vertical dimension: concerns the expansion of increasingly detailed normative standards. In England have been, for instance, more than 3000 new offences in the last 15 years created.[61]

Overall, the distinction between law and morals with regard to the application and content could be summarized as follows:

- Morality looks to thought and feeling; whereas law looks to acts;
- Ethics aims at perfecting the individual character of men; whereas law seeks only to regulate the relations of individuals with each other and with the state;
- Moral principles must be applied with reference to circumstances and individuals; whereas legal rules are typically of general and absolute application
- Law does not necessarily approve what it does not condemn;
- Resistance to law may be moral, but cannot be legal.[62]

LO 1 Will be able to explain the functioning of legal rules in a society

Law is a set of rules which a particular country or community recognizes as regulating the actions of its members and which it may enforce by the courts. Laws contain rules of conduct which specify how people should behave or not behave ("do not steal", "pay taxes"). If a person does not follow the precepts of law, he would be sanctioned by penalty or by tort damages. Sanctions for civil wrongs are primarily compensation. If a person, for instance, damages the property of others, he should pay a sum of money in order to compensate the harm that he has caused. Sanctions of law are by no means limited to the law of compensation. If a defendant fails to pay a compensation ordered by a competent court, agencies of the state shall make him pay the debt. This act of enforcement is called execution, which is carried out by the competent organs of the state.

Most serious sanctions in any legal system are contained in criminal law which forbids certain activities, i.e. crimes, offences. If a person found guilty of a crime, the result would be imprisonment or a fine. Furthermore, criminal law may intervene even before a court reaches a decision, say, by arresting a suspect or through confiscation. Criminal offences, indeed, in most cases deserve the harshest sanctions that exist in a legal system. Punishment is a formal condemnation of the offender, who has committed a crime. A crime is a wrongful and culpable act defined in the penal codes of a legal system. Grave offences like intentional killing shall be punished by life imprisonment, or in some countries by the death penalty. Thus, law divides legal wrongs into two categories, that is, criminal wrongs and civil wrongs.

Another type of sanction in law is the nullity. By declaring a legal action null and void an act performed in violation of law is rendered ineffective, or devoid of legal effect. If a legal act is void, this means that it was never in the eyes of the law a valid act. Indeed, such a legal act is regarded as "dead" from the beginning, and it is regarded as nullity. If a marriage is due to some defect (marriage before an unauthorized person, for example) existing at the time the marriage was celebrated is null and void, it will be non-existent meaning that it will produce no legal effect.

LO 2 Will be able to differentiate among various sources of law

Every legal system has its own recognized sources. That said, sources of law are more or less similar in most legal systems. One can classify sources of law into primary and secondary sources of law, or one can make a distinction between major and minor sources of law. In Roman law, for instance, the sources of law consist of: statutes (leges); enactments of the plebeians (plebiscita); resolves of the senate (senatus consulta); enactments of the emperor; edicts of those who have an authority to issue them; the answers of those learned in the law (responsa prudentium).

A modern day example would be the law of European Union. The sources of law in EU are based on the distinction of primary and secondary legislations. Primary legislation is made from the constitutive Treaties, international agreements and general principles established by the Court of Justice of European Union. Secondary legislation is made from all the acts recognized by EU law. The secondary sources of EU law are regulations, directives, decisions, recommendations and opinions.

Norms in EU law after Lisbon Treaty are as follows: Primary Law: Treaties and General Principles of Law; International agreements; Legislative acts; Delegated acts; Implementing acts .

Turkish legal system is based on the structure of a hierarchy of norms: The sources of law of Turkish law ordered in such a way from top to down may be listed as follows: The Constitution; Statutes; International treaties; Decrees with the effect of law; Regulations; By-laws; Customary law; Judicial decisions.

LO 3 Will be able to juxtapose different legal cultures and explain their differences

Summary

In today's world, one can roughly make a distinction between western and non-western legal traditions. The Western legal tradition has a number of features that mark its distinctiveness vis-a-vis non-Western legal traditions:

- A fairly clear demarcation between legal institutions (including adjudication, legislation, and the rules they spawn), one the one hand, and other types of institutions, on the other; legal authority in the former exerting supremacy over political institutions.
- The nature of legal doctrine which comprises the principal source of law and the basis of legal training, knowledge, and institutional practice.
- The concept of law as a coherent, organic body of rules and principles with its own internal logic.
- The existence and specialized training of lawyers and other legal personnel.

These features of the modern western legal traditions signify a societal structure that has elevated law to the apex of mechanisms of social control. Indeed, the terms like "society governed by law" (Rechtsgemeinschaft) or "the rule of law" points out to this aspect of the notion of law in the western legal tradition. The rule of law, for instances, denotes that all persons and authorities within the state should be bound by and entitled to the benefit of laws.

Contemporary common and civil law systems are, to a greater extent, secular traditions based on the tradition and human reasoning. Yet, this does not mean that these traditions have completely divorced from their religious roots. As aptly put by Wacks: "No legal system can be properly understood without investigating its religious roots. These roots are often both deep and durable." Both in the common and civil law traditions, one can detect the traces of ecclesiastical law.

It needs to be emphasized that the Roman Catholic Church has the longest, unbroken legal system in the western world. Thus being so, separation of church and state, in shape or another, is one of the hallmarks of western legal tradition. Religious law is a term of art which is employed to denote a legal system based upon or inspired by a particular religion. Major religious legal traditions of the world are

- Islamic Law (Sharia Law)
- Canon Law
- Jewish Law (Talmudic Law)
- Hindu Law.

1 What are the three branches of government?

A. The legislature, the executive and the judiciary
B. The police, the judiciary and the legislature
C. The armed forces, the police and the legislature
D. The judiciary, the civil service and the executive
E. The police, the executive and the judiciary

2 Which of these statements most accurately describes the Turkish legal system?

A. It is a common law system
B. It is a civil law system
C. It is a mixed legal system
D. It is an equitable system
E. Both A and C

3 Which of these statements best describes the most fundamental functions of law?

A. It establishes and maintains order
B. It has no effect on society as a whole
C. It provides profit
D. Both A and B
E. None

4 What does 'code' mean?

A. Law deriving from cases
B. Law created by judges
C. Law in general
D. Law created by Parliament with a comprehensive content and structure
E. Any law created by Parliament in the form of legislation

5 What is meant by the phrase "common law" as a source of law?

A. Law created by Parliament
B. Law created by judges
C. Law deriving from Commonwealth countries
D. Law in general
E. Both B and D

6 Which the following sources of law in Turkish law sit at apex of hierarchy of norms?

A. Constitution
B. Basic Codes
C. Statutes
D. By-laws
E. Both A and B

7 What are the distinctive features of the civil law tradition?

A. Inquisitorial system and codified laws
B. Customary law and codified laws
C. Adversarial system and codified laws
D. Judge made law and codified laws
E. Inquisitorial system and case law

8 Who is responsible for making a statute in Turkish legal system?

A. The Constitutional Court
B. The Prime Minister
C. The President
D. The Turkish Parliament
E. Turkish Court of Cassation

9 Which one of the following is not required for a general rule of customary law to be formed?

A. It must have existed for a long time.
B. It must be reasonable in nature.
C. It must have been followed continuously.
D. It should be/not in contradiction with the existing law
E. The Turkish Parliament should give its consent.

10 Which is not one of the basic characteristics of the Turkish Republic?

A. Democracy
B. Secular state
C. The rule of law
D. Social state
E. Socialist state

Answer Key for "Test Yourself"

1. A	If your answer is wrong, please review the "What is Law?" section.
2. B	If your answer is wrong, please review the "Legal Traditions" section.
3. A	If your answer is wrong, please review the "The Functions of Law" section.
4. D	If your answer is wrong, please review the "Civil Law" section.
5. B	If your answer is wrong, please review the "Common Law" section.
6. A	If your answer is wrong, please review the "The Sources of Law: Where Does Law Come From?" section.
7. A	If your answer is wrong, please review the "Civil Law" section.
8. D	If your answer is wrong, please review the "The Sources of Law: Where Does Law Come From?" section.
9. E	If your answer is wrong, please review the "The Sources of Law: Where Does Law Come From?" section.
10. E	If your answer is wrong, please review the "The Sources of Law: Where Does Law Come From?" section.

Suggested answers for "Your turn"

Please İdentify basic characteristics of law in a developed system.

your turn 1

Characteristics of law in a developed system could be identified as follows:

- Law is a system or set of rules. These rules are general, universally applicable to all cases that are within the confines of a particular rule; and finally legal rules are predictable;
- Legal rules are binding;
- Collective enforcement of law is ensured by an authority, say, police or court;
- Depending on the legal tradition laws man made either by the legislature or judges or both.

Please make a list of the sources of law of Turkish law in accordance with the hierarchy of norms.

your turn 2

The sources of law of Turkish law ordered in such a way from top to down may be listed as follows:

The Constitution

Statutes

International treaties

Decrees with the effect of law

Regulations

By-laws

endnotes

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47 Sims, p. 46-47.

48 Sims, p. 49.

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Chapter 2 Legal Methods

After completing this chapter, you will be able to:

Learning Outcomes

1. Differentiate between different legal reasoning methods
2. Interpret statutes

Chapter Outline

Introduction
Foundations
Legal Education
Legal Reasoning
Interpretation of Statutes
Interpretation of Contracts
Role of Case Law and its Interpretation
Gaps in Law
Conflicts Between Legal Norms

Key Terms

Legal Education
Legal Reasoning
Deduction
Analogy
Interpretation of Statutes

INTRODUCTION

Law, as an independent discipline, has its own sources and methods. This chapter will introduce basic knowledge about legal methods. It will teach students to engage with legal texts and methods of interpretation. It will familiarize students with how lawyers reason and with characteristics of legal education. Besides, the chapter will introduce students with the basic knowledge about methods of legal reasoning including judicial syllogism and analogy. The subject of interpretation of statutes and contracts will also be addressed. In so doing, canons of interpretation, i.e. textual, historical, systematic and teleological interpretation shall be introduced to the reader. Furthermore, students will be familiarized with canons of construction in common law tradition. Finally, the chapter will familiarize the students with the issues of gaps in law and conflicts between legal norms.

FOUNDATIONS

This chapter is about how lawyers think. Legal methods designate the ways in which lawyers solve a given case. How do they approach a case? How do they reason in order to decide which solution should be provided for a case from a legal perspective? In this chapter, we will address these questions, and many more, to equip readers with basic knowledge and understanding of the legal reasoning and rules of statutory interpretation employed by lawyers in different legal traditions.

This chapter will familiarize readers with basic methodological tools of lawyers. It is not possible to understand and explain the law and legal process without a basic understanding of the arguments of lawyers and judges. Lawyers make these arguments in support of their clients and judges make them in the course of forming their opinions.[1] Therefore, mastering these methods is essential for any person who wants to comprehend how a legal system functions.

"Thinking like a lawyer" always deserves high praise. But why? Is there something unique about thinking like a lawyer and ordinary thinking? Other professions also have their special expertise. Yet, one does not hear similar remarks like "thinking like a doctor" or "thinking like an engineer." There is a significant difference between a lawyer and other professions. As Professor Weinreb observes: "*The reasoning of a doctor or an engineer is readily and in the normal course put to the test. The patient's health improves, or it does not; the bridge stands, or it falls. There is no comparable test of legal reasoning.*"[2] Accordingly, the outcome of legal reasoning does not furnish an objective test of its merit; lawyers give special attention to legal reasoning.[3]

Consistency of solutions and legal certainty are the basic requirements for the legitimacy of any legal order. In this regard, coherent applications of legal methods with respect to each case provides, to some extent, certainty in the application of law. Legal methods are used by lawyers for convincing the judge while judges use them for convincing the parties, providing an insight into why they decided as such, as well as for convincing the appellate courts. In general, legal methods are concerned with convincing the people that the legal system in which they live in is just.

Before digging deeper into legal methods, information regarding the nature of law, the influence of the sources of law on the methods employed by lawyers as well as the influence of legal education on legal methodology will be given. Lawyers look to law for answers, which fundamentally means looking to the sources of law. Each legal system has, thus, its sources and methods which identify how law is, in a particular case, to be found. Different legal systems possess dissimilar patterns of legal reasoning.

All these issues have a bearing upon the very methodology and its status within legal thinking and beyond.

To begin with, I will address the following questions: Is there such a thing as legal science? Does legal science transcend national systems? Indeed, we cannot discuss about what kinds of methods and arguments are appropriate in law unless we have some idea of what law is.[4]

There are, indeed, numerous views with respect to the nature of law. According to some, law attempts to operate as a science, but overwhelmingly functions as an art. There are also views that regard law as a science, since it is a systematic body of coherent and ordered knowledge about the institutions, principles, and rules regulating human conduct in society. In civil law, particularly in the continental law tradition, law is regarded as

a science. Germany, for instance, is occasionally referred to as the land of *Rechtswissenschaft*, which literally means "legal science". Germany is, therefore, known for its seemingly relentless legal conceptualism and systematization. In France, the term "sciences juridiques" likewise refers to the legal research as "science'.[5]

In Germany, under the influence of Idealist thought shaped by Kant, jurists like Feuerbach emphasized the vital role of systematization in law. According to this approach, a science should process through systematization. Legal science is thus defined as systematic thinking about actual law (legal dogmatic), encompassing every occupation with the law, including its making, application, exposition, and transmission.[6] By the same token, the French Cartesian propensity for conceptual thinking, whereby particulars are subsumed under universals by an act of categorization, according to Steiner, explains why the deductive method, when applied in a legal context, is considered to have the best ability to settle legal issues conclusively in France.[7] This approach to law as a science has also influenced the reigning ideal image of jurists particularly in the nineteenth century, which is described by an eminent legal scholar as follows:

A higher civil servant with academic training, sits in his cell, armed only with a thinking machine, certainly one of the finest kinds. The cell's only furnishing is a green table on which the State Code lies before him. Present him with any kind of situation, real or imaginary, and with the help of pure logical operations and a secret technique understood by only him, he is, as is demanded by his duty, able to deduce the decision in the legal code predetermined by the legislature with absolute precision.[8]

This consideration of law as a science and lawyer as a scientist decidedly resulted from the new epistemology of Descartes and Galileo, primarily whose mode of thinking forced scientific method into law. Legal method in modern times is, therefore, understood as the exact application of abstract norms to a case without any interpretation. The objective of such scientific conception was to obtain certainty in law. Accordingly, legal solution to a case is derived by deduction, reasoning from the general to particular.

The definition of science is an integrated body of knowledge in which particular occurrences of phenomena are systematically explained. The legal dogmatic can be described as the systematic working out of the ramifications of legal rules, their interconnections and application in specific types of situations. Law as a science, thus, adopted the objectivity, scepticism, openness, and general spirit of rationalism that characterize scientific inquiry.[9]

The legal science assumed the function of institutionalizing the processes of resolving conflicts in authoritative texts. Indeed, as put forth by Berman: "*The legal method which was taught in the European universities was one which made possible the construction of legal systems out of preexisting diverse and contradictory customs and laws. The techniques of harmonizing contradictions, coupled with the belief in an ideal body of law -an integrated structure of legal principles- made it possible to being to synthesize canon law and then feudal law, urban law, commercial law, and royal law*." In Western Europe, the autonomy of legal thought was maintained by the universities. Obviously, the role of Bologna tradition was indispensable for the development of law as science. As emphasized by Berman:

[…] the Western universities raised the analysis of law to the level of a science, as that word was understood in the twelfth to fifteenth centuries, by conceptualizing legal institutions and systematizing law as an integrated body of knowledge, so that the validity of legal rules could be demonstrated by their consistency with the system as a whole […] the universities produced a professional class of lawyers, bound together by a common training and by the common task of guiding the legal activities of the church and of the secular world of empires, kingdoms, cities, manors and merchant and other guilds.[10]

The kind of model that regard law as a science which submits that positivistic perception of law and its methods of acquiring knowledge are a combination of observation, hypothesis, verification, and experimentation is, according to some, in crisis. Strikingly, as early as 1847, a German jurist, Julius von Kirchmann gave a lecture to the jurists of the Berlin Law Society, on the worthlessness of jurisprudence as a science ("*Über die Wertlosigkeit der Jurisprudenz als Wissenschaft*"). In this speech, among others, he remarked that:

"Even a partial revision of law can turn whole law libraries into collections of waste paper". Kirchmann was criticizing the rising influence of the legislature in creation of law as a result of which law amounted to what legislature had said rather than an objective truth discovered through scientific method. The other problem with finding law through deducing the solution from abstract norms is that it may well lead to injustice in some cases. Jurists from civil law tradition have occasionally contested this mode of mechanical reasoning. For example, at the end of the nineteenth century, a French judge named Mangnaud challenged the rigidity of French legal system by refusing to adhere in his decisions to the purely deductive model of reasoning. In one of his famous decisions, he found a poor woman not guilty who was prosecuted for having stolen a loaf of bread because she was hungry. He decided that, given the circumstances of the case, the poor woman (the defendant) was not guilty of theft on the grounds that it was, according to judge Mangnaud, "*within the power and duty of judges to construe humanely the inflexible prescriptions of the law.*"[11] Despite its systematization and rational construction of the legal science, no legal system can make a direct claim to universality, thereby each articulating the meaning of law and justice in its own way.[12]

Today, legal scholarship is at times criticized as case law journalism. And more effort has been devoted tidying up after judges. Despite the issue of arbitrariness and vagueness in law, the scholars in civil law tradition view the law as a system of principles and axioms. Legal knowledge is, for such a jurist, systematically collected propositions in an abstract world of concepts. Consequently, legal methodology in civil law tradition is a scientific discipline which pertains to defining and systematizing the knowledge, which can be regarded as a scientific discipline dealing with methods of discerning law and legal phenomena. There is, therefore, in continental Europe, a propensity to think and work like a scientist among jurists.

By contrast, common law tradition was organized and developed mainly as a by-product of litigation. It is more concerned with securing decisions rather than exhibiting virtues of logic. Indeed, the reasoning of common lawyers is different than that of civil law jurists. The frame of mind for common lawyers is such that they look at things in the concrete, not in the abstract. They place their confidence in experience rather than in abstractions.[13] Lord Justice Cooper, an eminent English jurist, highlighted the difference of approach between common law and civil law as follows: "*The civilian naturally reasons from principles to instances, the common lawyer from instances to principles. The civilian puts his faith in syllogisms, the common lawyer in precedents; the first silently asking himself as each new problem arises, 'What should we do this time?' and the second asking aloud in the same situation, 'What did we do last time?*".[14]

These different conceptions of law have also influenced the sources of law and vice versa. Indeed, in civilian tradition, jurists looks at codes in which the abstract norms are contained. When faced with a case, the typical reasoning of a civilian jurist would be mostly deductive. He will first identify the likely applicable rule or rules, then check whether their conditions of application are met, and finally announce the results the application of rules gives. In this tradition of reasoning the interpretation is, accordingly, regarded highly significant as a process of determining the exact meaning and scope of application of the rules.[15]

Common law traditions, however, look for similar cases in resolving the legal dispute at hand. A case, according to this tradition, should typically be resolved not by applying a general rule. In his reasoning, a common lawyer rather searches for the solution reached in previous and similar cases. Inevitably, the emphasis is here laid on the issue of distinguishing cases from one another, that is, determining when the facts at hand are different enough from those of a previous case in order to indicate that the resolution of the latter case is not to be applied.

This situation has without doubt a bearing upon legal education itself. We will now deal with legal education models in different legal systems and their differing approaches to legal reasoning in turn.

LEGAL EDUCATİON

It is a plain fact that legal methodology is highly dependent on how professors understand and teach law. In most of the countries, legal training starts at university. There are indeed striking differences

in legal education. Stolker, for instance, describes: "*the American approach as bottom-up: by endlessly varying the details of the case, students are forced into the role of the attorney. By contrast, the civil law approach* is more top-down: law students invariably start with the codes, supplemented with cases and the doctrine. And though in the course of time civil law and common law legal education have started to overlap in many aspects, this pedagogical difference between the two remains relatively prominent."[16] Jurists in each tradition, however, learn how to ply their craft during their vocational training.

The American approach to legal education is best described by Karl Llewellyn, who contended that:

We have discovered that students who come eager to learn the rules and who do learn them, *and who learn nothing more*, will take away the shell and not the substance. We have discovered that rules *alone*, mere forms of words, are worthless. We have learned that the concrete instance, the heaping up of concrete instances, is present, vital memory of multitude of concrete instances, is necessary in order to make any general proposition, be it rule of law and any other, *mean* anything at all. Without the concrete instances the general proposition is baggage, impedimenta, stuff about the feet. It not only does not help, it hinders.[17]

The so-called case dialogue method described by Llewellyn was introduced in the 1880s by Harvard Law School's then dean Christopher Langdell, as a reaction to the previously common method by students across the world. According to the classical model, students were lectured on current law in mainly abstract terms. Langdell considered law teaching as dialectical process between teacher and student, using concrete cases and opinions. Langdell employed a "Socratic pedagogical" method, which meant rather than studying highly abstract summaries of legal rules, teachers could now play with the details of real cases, their values and perspectives.[18] American legal education is, therefore, principally based on the study of decided cases. Most importantly, American case method teaching often uses a particular case to evaluate the appropriateness of the legal rules. Accordingly, the solution in a case is not exclusively a legal matter. The main pedagogical goal of a thorough discussion of cases in the class is to determine how the legal order should be structured so that it would resolve the case before the court in a satisfactory manner.[19] As a consequence of this method, the student acquires more self-esteem and learns to stand up in class and argue that, despite statute or precedent, a rule is not what it ought to be. This method is: "an *impressionistic attempt to integrate statutory provisions, case law, policy considerations, jurisprudential theories, and notions of fairness and justice. What counts is what works, what convinces the socially and politically concerned listener.*"[20] By discussing past cases, American law schools generally aspire to reorganize the past and prepare the future, and thus there is not just one correct answer.[21]

Likewise, the principal object of German legal education is to develop the skill of case resolution method. Unlike the case method of the American law school, success in resolving the German hypothetical cases depends on the law student's knowledge of the remedial scheme and a comprehensive and systematic examination of the relevance of the various provisions to the facts at hand.[22] In general, in German system of legal teaching, greater emphasis is placed on the framework for the analysis than on the result. It needs to be highlighted that a hypothetical case cannot be resolved unless one finds authority in a code provision or a well-established case-law principle.[23] Such activities in Germany are typical examples of civil law tradition, since it is mostly about subsumption. In other words, this model of education rests on the implementation of the legal syllogism, which will be discussed below.

In any case, reflexive competencies and fostering of critical thought are essential for a successful legal education. It is, therefore, imperative that law schools create a didactic practice that combines knowledge acquisition with critical reflection. One can list the characteristics of a good jurist as follows:

- A sense of justice;
- Judgmental reticence;
- Feeling for and interest in the social and ethical dimensions of law;
- Sympathy for people and their behaviors;
- Empathy;
- Objectivity;

- A sense of the different characteristics of the various fields of law and their roles in the state
- Courage to ask and answer questions.

LEGAL REASONING

Although lawyers may survive without logical formulations, they cannot survive without logic. In the following cases, we will deal with basic tools and methods of legal reasoning.

a. Deduction: Judicial Syllogism; A typical judgment in a legal system based on civil law tradition is a logical deduction or series of logical deductions drawn from pre-existing premises. Deduction means reasoning that moves from general premises, which are known or presumed to be known, to certain conclusions. Induction, by contrast, is reasoning that moves from specific cases to more general, but uncertain, conclusions.

The method of finding law based upon deductive reasoning, thus, means subsuming a case under a legal rule. It is called syllogism or, in French legal literature, *syllogisme judiciare*. Based on the virtues of traditional formal logic, for example in the French legal system, court judgments are very short and consist of a single statement with no dissenting opinions. By contrast, common law courts rarely take as their starting point an abstract rule which then has to be applied to the established facts before them. Common law courts deal, first and foremost, with the facts of the case at hand and arguments of parties, and arrive at a solution through a reasoning process that tends to focus on the particularities of the actual institutions that are germane to the case before them.[24] Accordingly, one can contend that, as a form of deductive reasoning, judicial syllogism is mostly applied in civil law countries, including Turkey.

As a matter of fact, putting emphasis on deduction in judicial reasoning is common in other civil law systems, such as Germany and Italy. In these countries, final judgments of courts presented as the necessary outcome of a logical set of arguments are structured in a syllogistic form. As explained above, that syllogistic logic is particularly applied by lawyers from the civil law tradition, since these jurists, for centuries, have been exposed to the abstract process of reasoning prevalent in continental law schools.[25] As Steiner observes: "*French judges usually take the view that the rigid and logical from of the syllogism provides them with an ideal form of reasoning, minimizing their contributions to the law making process*".[26]

The classical model of syllogism is based on the Aristotelian logic, an example of which reads as follows:

All men are mortal (major premise)

Socrates is a man (minor premise)

Therefore, Socrates is mortal. (conclusion)

This example shows that the logical form the syllogism rests on is a process of inferring from two given premises, a further proposition, i.e. the conclusion. The truth of the conclusion is believed to follow from the previous two premises.[27] To put it in simple terms, the first statement constitutes the major premise, the second one the minor premise and the third one the conclusion.

The logical process here moves from the general to the particular, bringing the different classes together in a way. Using the same example of Socrates, this logical structure can be illustrated as follows:

Since men belong to the class of mortals

Then Socrates, who belongs to the class of men

Also belongs to the class of mortals.[28]

Syllogistic inferences of this kind appear clearly in Turkish or French judicial decisions. In a judicial syllogism the facts of a case (minor premise) are subsumed under a general rule (major premise) and then a conclusion is inferred with regard to the applicability or non-applicability of the rule to the facts of the case.[29]

Here are some simple examples of judicial syllogism:

Majority is attained by reaching the age of eighteen years (legal rule, major premise)

A has completed his eighteenth year (fact, minor premise)

Therefore, A has attained majority (judgment, conclusion).

A minor cannot enter into legally binding contract (legal rule, major premise)

X is a minor (fact, minor premise)

X cannot enter into a legally binding contract (judgment, conclusion).[30]

A more complicated example of the legal syllogism reads as follows:

Whoever sets fire to woodlands of other persons with intent will be incarcerated for one to ten years (the crime of arson, major premise)

A sets fire to a 10 hectare forest, which belongs to another, knowingly and willingly (fact, minor premise)

Therefore, A is guilty of arson (judgment, conclusion).[31]

Thus, a typical judgment logically moves from the applicable rules, followed by an outline of relevant facts, and eventually to a final part that constitutes an inescapable conclusion.[32]

Table 2.1 The judicial syllogism can be set out in a table

Components	Relationships
Major Premise (Legal Rule)	The legal rule (in most cases a conditional sentence)
Minor Premise (Facts)	Facts of a case that fits to the definition or conditions contained in the legal rule
Conclusion (Legal Judgment)	The consequences designated by the rule now apply

Remember Case 3 from the first chapter. Solution of the case in the form judicial syllogism reads as follows:

In general, the legal methodology, particularly the judicial syllogism, serve a number of essential functions which are outlined by Seiner as follows:

Table 2.2

Rule	A person cannot inherit from another person whom he murdered
Facts	Elmer murdered his grandfather
Legal Judgment	Elmer cannot inherit from his grandfather

- ***Rationality-*** the syllogism has often been described as the hallmark of rationality. Indeed, unlike other traditional modes of reasoning, the syllogistic logic presents a cogent form of argument with its set of premises and its exposition of logical links, and provides an alternative to what would otherwise look like an arbitrary decision.
- ***Certainty-*** the syllogism facilitates the building up of a logically consistent system of propositions which enhance consistency and predictability and lead to a greater degree of certainty and predictability within the legal system.
- ***Justification-*** since judges are required to state the grounds for their decisions, they must expound them in an open manner. Once again, the syllogism provides the courts with an ideal mechanism for justifying what they do. To the party losing a case, it shows in a most objective and straightforward way that the judgment has been given in conformity with the law and is nothing other than a straightforward deduction from the principles of this law. Similarly, the syllogism with its function of justification allows the Court of Cassation to which a case has been referred to exercise control over the correct application of the rule of law by the lower courts.
- ***Guidance-*** for the resolution of further cases- the syllogism provides a working guide for the judges, the litigants and their legal advisers.[33]

Table 2.3

Functions of the Judicial Syllogism
Rationality
Certainty
Justification
Guidance

As the fundamental merits of the judicial syllogism, rationality and certainty should not be exaggerated, however. The limitations of the syllogistic reasoning must also be acknowledged. This form of reasoning, for instance, may lead to the impression that the judicial process is nothing more than a mechanical application of given premises.[34] This is not true. In reality, the most difficult task that awaits every court is not subsuming facts under a rule, but rather the resolution of legal disputes, i.e. the judge has to find the 'correct' premises. He should find out facts of the case after having considered arguments presented by each side. The establishment of facts, in other words, completion of the process of finding appropriate premises, is what actually matters in judicial decision-making. Accordingly, the most important tasks of judges are discovery and the exact limitations on the establishment of premises.

A judge may, for example, quite often confront a situation in which two or more rules are equally applicable. His decision or his choice between these rules does not depend on the use of logical deduction. He should also employ other interpretative tools as well as weigh up interests of the parties against each other.[35] Thus, the determination of what rule should be applied to a particular case depends on the characterization of facts as ones which fit within the class governed by one of those rules.[36]

b. Analogy; Known as one of the most commonly used arguments in legal reasoning in every legal system, legal analogy simply means finding the solution to a problem by reference to another similar problem and its solution.[37] An analogy consists of an observed similarity between two phenomena, namely source and target. Analogical reasoning is an extension of the source to the target. Furthermore, it is an extension of a legal rule from one case to another due to a similarity which is regarded by the judge to be material. The logical form of an analogy proceeds as follows:

(1) A (the source) has characteristics p, q, and r;

(2) B (the target) has characteristics p, q, and r;

(3 A has characteristics s;

(4) Therefore, B has characteristic s.[38]

To establish a valid proposition, one more premise should be added in brackets to the premise (3) which reads: If anything that has characteristics p, q, and r has characteristic s, then everything that has characteristics p, q and r has characteristic s.[39]

This schematic explanation of analogical reasoning may at first appear highly complex. Yet, we use practical analogical reasoning quite often in our daily lives. Read the following examples:

A spills cranberry juice on a white tablecloth. "Try pouring salt on it," B says. "It works with wine."

C cannot start his lawn mower. It occurs to him that when his car does not start, it sometimes helps to turn off the motor and let it stand for a while. He goes inside to watch television.[40]

In the above examples, B and C reason by analogy. Observing the similarity between (red) wine and cranberry juice –both are red and liquid– and knowing salt helps to remove a wine stain, B thinks that cranberry juice shares that characteristic with wine as well. Likewise, C knows his car and lawn mower are both powered by internal combustion engines, and that sometimes when his car does not start, it is because he has flooded the engine. Therefore, he decides to wait for the excess gasoline to evaporate. Thus, practical analogy is an educated guess, based on one's experience of situations that are more or less similar. [41]

Case: Adams was a passenger on the defendant's steamboat, going from New York to Albany. During the night, having locked the door and fastened the windows of his stateroom, he left a sum of money in his clothing. The money was stolen by someone who apparently managed to reach through one of the windows. Adams sued to recover the amount of

his loss. The jury returned a verdict for Adams, and judgment was entered in his favor. On appeal, the judgment was affirmed, and the defendant made a further appeal to the New York Court of Appeals.

This case is a famous example of how analogy is used in legal practice. The legal question here was whether steamboat operators were responsible for the losses of their customers in the manner the innkeepers were. The court decided that the relations of a steamboat operator to its passengers differ in no essential respect. As the court put: "the passenger procures and pays for his room for the same reasons that a guest at an inn does. Since the same considerations of public policy apply to both relationships, the rule in the two cases should be the same." According to the court, a steamboat is regarded as a modern floating palace in which a traveler establishes legal relationships with the carrier that cannot well be distinguished from those that exist between the hotelkeeper and his guests. The two relations, if not identical, bear such a close analogy to each other that the same rule of responsibility should govern.[42]

As abovementioned in the examples, analogy is an extension of the scope of a norm to be applied. Yet the purpose of a statute may sometimes prohibit analogical reasoning. In such cases, the argument of reduction may come into play, which is called teleological reduction.

The other most important argument types related to analogy are:

- argumenta e contrario
- argumenta a fortiori
- argumenta a minore ad maius
- argumenta a maiore ad minus

INTERPRETATION OF STATUTES

a. Introduction; interpretation is the process of clarifying the true meaning of a written document.[43] As a result of interpretation, the interpreter shall decide whether the rule in consideration is applicable to the case at hand. To be sure, interpretation is not confined to statutes; other written texts such as case law, contracts, testaments, or international treaties require interpretation as well. Indeed, the common law tradition takes cases as its starting point, in contrast to civil law systems that focuses on reasoning on the basic rules contained in codes and in other written sources.[44]

Interpretation is a common method employed by all the so-called textual sciences like literature, philology, or theology. Law shares with these disciplines the characteristic that it is an interpretative discipline.[45] The difference between a legal interpretation and interpretation of poem, for example, lies in the fact that the former is a binding interpretation exercised, in most cases, by a judge. Indeed, as put by Aybay: "*Only the courts have the final say on what a certain legal rule means. Since, for practical purposes, it is only the interpretations made by the courts through judicial decisions that have legal and final effect, it can be argued that the meaning of a legal rule is what the courts say it is.*"[46] Indeed, interpretation of legislative provisions today is mainly a task belonging to the courts when they face with problems of interpretation arising out of legal disputes. Yet, this has not always been the case in France. Given the strong conception of separation of powers of the French legislator, the so-called *référe législatif* was introduced in 1790. This institution forced judges to refer a case to the legislature on questions of statutory interpretation. It soon proved unworkable and was finally abolished in 1837.[47]

Interpretation in law is one of the most important tasks of jurists, especially in a legal system which is characterized by codifications. A sound and reasonable interpretative practice by courts is highly important in maintaining the consistency and coherence of a legal system. Particularly, if one considers the necessity of adapting codes and statutes in a codified system to rapid social transformation, it would be ill-advised to stick to a strict construction of meaning of code provisions. As a matter of fact, in code-based civil law systems, provisions of a code are generally drafted loosely and rely, in many cases, on general statements of principles rather than the narrow and detailed legislative provisions to be found in the common law tradition.[48] There is, therefore, a direct relationship between drafting a code and its interpretation. These are mutually independent. As Steiner observes:

[…] legal texts designed, as in France, in an open-textured manner will more likely carry within themselves the germ of further development, in the sense that task of filling in the details of their provisions is being handed on to interpreters. In such a context, French judges have never felt

they were under much pressure to be tied too closely to the wording of the statutory text and have never felt it wrong to accomplish what was necessary in order to fill the gaps, very often left there on purpose by the legislature. This accounts for the fairly liberal, mainly purposive approach to interpretation traditionally adopted by French courts. This approach seeks to give effect to the true spirit of legislation rather than its letter and which is prepared to look at any extraneous material that has a bearing upon the background against which the legislation was enacted.[49]

Interpretation of statutes is at times a complex matter. In order to understand the basic issues pertaining to interpretation, it would be helpful to start with an example. Read the following simple statutory rule: "*No vehicles are permitted in the park*."

It is clear that regular cars and motorcycles are clearly forbidden from entering the park. We need no interpretive skill to find out that such vehicles are within the confines of the rule. Think about the following case and rule: For instance, what about the ambulance driver who enters the park in order to get a heart attack victim to the hospital quickly? It is obvious that ambulances are vehicles. Should we regard ambulances as "vehicles" within the meaning of vehicle ban in the park? If your answer is yes, does "No vehicles" mean *absolutely* no vehicles? Or consider the following case: The gardener wants to use a riding lawn mower to cut the grass in the park. Is a riding lawn mower a vehicle within the meaning of the rule? To be sure, riding a lawn mower is a borderline case. In order to answer the question, one needs more than a purely mechanical or algorithmic mode of thinking. If we only take the plain (literary, grammatical) meaning of the vehicle rule, the ambulance should not be allowed to enter into the park, since ambulances undeniably fall within the plain meaning of the statute. Riding lawn mowers, however, fall neither within nor without the plain meaning of "vehicle". Thus, juristic syllogism alone, as shown above, cannot tell us whether the gardener is legally permitted to use this machine.[50] In challenging cases, a solution to the problem at hand cannot simply be found in the mere wording of a statute by applying the rules of logic and of legal methodology. Policy considerations and value judgments are also required which are reflections of moral values immanent in a legal system.[51]

Please note the following real life examples of statutory interpretation from the American legal system:

- Under the Tariff Act of 1883, a 10% import duty must be imposed upon "vegetables", but not "fruit". Despite the fact that tomatoes are botanical fruits, should they be considered as "vegetables" within the meaning of the Act?
- A rule of the Massachusetts Constitution states that members of the House of Representatives "shall be chosen by written votes." Can state representatives be chosen by modern voting machines?
- A federal statute made it a crime to transport a stolen "motor vehicle" across state lines. Does the statute apply to someone who flew an airplane which he knew was stolen from New York to Washington?
- A contract is valid only when there has been an offer and acceptance by the parties to contract. Is an offer deemed accepted at the time the offeree drops an acceptance letter into the mailbox or is it deemed accepted when it is actually received by the offeror?[52]

In none of these cases does the text of the relevant rule provide a clear answer. In order to solve these cases, one needs to know rules of interpretation, or to put it more generally, one must "think like a lawyer", for which there is no basic formula. Yet one must initially consider both sides of the issue and make use of good sense to pick the best interpretation.[53] When interpreting the statutes each of which are illustrated in the above examples, three main problems are confronted, namely ambiguity, vagueness and evaluative openness. Let's consider these problems respectively:

- A word in a statute or in general is ambiguous when it has a different meaning in different contexts.
- A concept is deemed vague if there are some subjects that unquestionably fall within its scope, some subjects that unquestionably do not fall within its conceptual scope and a third class of subjects that cannot be certainly said to belong to one or the other. The third category is most difficult in terms of interpretation, since they are neutral candidates that fall neither within

nor without the scope of the respective concept. Consider the example of the riding lawn mower variation in the vehicle ban case.

- Evaluative openness simply means that the scope of the respective concept is determined as a result of an evaluative assessment that must be executed by the interpreter himself. Some concepts are, indeed, has the character of evaluative openness. Concepts like "good morals" and "good faith" are examples of evaluative openness.[54]

In solving these problems, legal systems have developed the so-called canons of construction, which are the most important means of interpretation. Although they might be named differently in various legal systems in the civil law tradition, major canons of construction are as shown below:

Table 2.4

Canons of Construction (Methods of Interpretation) in Civil Law Tradition
Textual (Literal) Interpretation
Historical Interpretation
Systematic Interpretation
Teleological Interpretation

Table 2.5

Canons of Construction in Common Law Tradition
The Literal Rule
The Golden Rule
The Mischief Rule

Usually, in civil law systems, we do not find any general authoritative statement regarding the law on interpreting statutes. The currently employed rules and techniques of interpretation in France, Germany, or Turkey are rather the results of customary law, judicial practice and legal writing. By contrast, in common law jurisdictions, there are special "Interpretation Acts" which are intended to assist the draftsmen or to guide the judge in interpretation.[55] Interpretation Act of 1978 (originally 1889) of the United Kingdom defines a number of common words and expressions and provides that the same definitions are to apply in all other Acts, excluding those specifically indicating otherwise. According to this Act, for example, "person" includes not only an individual but also body of legal persons.[56] In English law, some statutes also have their own interpretation sections. For example, section 61 of the Law of Property Act 1925 provides that:

In all deeds, contracts, wills, orders, and other instruments executed, made or coming into operation after commencement of this Act, unless the context otherwise requires

(a) Month means calendar month;

(b) Person includes a corporation;

(c) The singular includes the plural and vice versa;

(d) The masculine includes the feminine and vice versa.

This type of definitions is called "legal definition", sometimes containing a broader meaning than a word would ordinarily carry. As you can see, unless otherwise stated, the male gender includes the female and the singular includes the plural as well. In plain language, however, the male gender includes solely the male gender and the singular includes solely the singular.

b. Textual (Literal) Interpretation; Literal interpretation, also known as grammatical or semiotic interpretation, requires an investigation into the semantic content and the syntactic structure of a provision. The literal interpretation may at first sight seem simple. The basic rule of literal interpretation is that the literal meaning shall prevail whenever the words of a statute are clear and unambiguous and addresses the

point at issue.[57] Thus, the basic rule with respect to literal interpretation is: "Where the meaning of a statute is clear, it must be followed." This principle of interpretation simply means when the meaning of a statute or concept is plain and clear, then it must be followed without any recourse. The maxim used to express this proposition reads as follows:

Interpretatio cessat in claris: Interpretation stops when a text is clear. This legal maxim needs to be complemented by additional rules. The French courts, for example, add the following additional propositions to the plain meaning rule when they interpret statutes:

- They refuse to extend or to restrict the scope of a text which is clear and unambiguous, i.e. what the legislature has not written must not be written by the court as well.
- They set the plain meaning of a statute against the intention of the legislature, i.e. deciding, when there is conflict between the two, that the former should override the latter.[58]

In the common law tradition, textual interpretation is covered by the term "literal rule", which requires if the words used in the statute are plain and unambiguous, they should be given their ordinary signification. The ordinary meaning of a word is its meaning in its plain, ordinary and popular sense. This sense may be a sense among a particular group of persons.[59] In case a statute contains a legal term of art, the court should give it its technical meaning, but not the ordinary meaning, unless there is something in the context to displace the presumption that it was intended to carry its technical meaning.[60]

Example: A group life assurance scheme was set up by a company for its employees. Payments were made to certain classes of people including "descendants" of the employee in question. It was held by the Court that "descendant" was a legal term of art meaning legitimate descendant, and consequently no payment could be made to an illegitimate child of the employee. This presents an example of how the legal meaning of a term may supersede its ordinary meaning as a word.[61]

Nonetheless, in some instances the literal interpretation might lead to absurd, inconsistent or inconvenient results. If this is the case, the court might put on them some other signification, which avoids such absurdity or inconsistency.[62] This is the "golden rule", which will be explained below.

reductio ad absurdum argument means that one has to exclude that meaning of a norm which would bring about 'absurd' effects. The rational ground for such an argument is that the legislator is deemed not to favor any absurdity. This assumption is called the presumption of the "reasonable' or 'rational' law-giver.[63]

In any case**,** if the words of the statute are ambiguous, then all legal systems need to consider the permissible methods of determining the 'proper-construction' of the statute in order to give effect to the legislative intention and to apply it to a particular case.[64]

c. Historical Interpretation or Legislative Intent; Historical (genetic) interpretation is an inquiry into the meaning of legal terms as intended by the historical legislator. This method requires an investigation into the purposes the legislator pursued by enacting the statute. Historical interpretation is about the legislator's actual intention.[65] This method is expressed in the French proposition regarding the historical interpretation: "*Where the language of a statute is obscure or ambiguous, one should construe it in accordance with its spirit (l'esprit) rather than its letter in order to determine its legal meaning*." According to this principle, judges have the duty to search for what the legislature meant when enacting the text.[66], which raises the question of how the intention of the legislator is to be ascertained in such a case. In doing so, judges usually look at the preparatory works of the codes in order to identify the legislator's actual intention and to clarify the content of the norm which is to be applied.[67]

In France, this method of interpretation is called the exegetical method. The basic assumption of the method is that any statute is an act of will, and thus, the most appropriate method for interpreting this will is to investigate into the legislator's intention at the time when the law was made (*ex tunc*). This definition also crystalizes the difference between the literal and exegetical methods: "*whilst the literal approach holds that the judge should look exclusively at the words and grammar of the text of a statute in order to construe its meaning, the exegetical method looks beyond the words of the text in an attempt to determine the reasons for its enactment.*"[68]

Historical interpretation acquires, in some legal systems, a further meaning than that of the will of the historical legislator. In the Italian legal doctrine, for example, this canon also means the interpretation of the norm on the basis of pre-existing law or of legal tradition (especially, the precepts of the ancient Roman law).[69]

The mischief rule in common law is akin to the legislative intent in the civil law tradition. This rule takes a purposive approach. As described by Sims, the court in applying mischief rule: "*looks at the mischief, i.e. the defect in the law which the statute aims to remedy, and adopts the interpretation which is best suited for achieving that objective*."[70] In this regard, if a judge gives the rule an interpretation that makes it suit the intention, the *ratio legis* behind a rule, he is said to apply the Mischief Rule.[71]

d. Systematic Interpretation; Systematic interpretation looks at the context of a norm; hence, it involves an investigation into the relations between the norm to be applied and other relevant norms and codes of the same legal system. This mode of interpretation serves the interests of consistency and coherence of the legal system as a whole. The systematic interpretation is a significant canon of construction in the civil law tradition. The Italian Civil Code, for instance, imposes the systematic interpretation regarding the interpretation of contracts. Article 1363 of the Italian Civil Code reads: "*Clauses in contracts are to be interpreted each by means of the others, by attributing to each of them the meaning which ensues from the whole of the contract.*" This canon is actually an ancient one in the legal tradition. Digest I, 14 sets out: "*It is contrary to civil law to interpret without reference to the whole statute (incivile est nisi tota lege interpretari).*"[72]

e. Teleological; Purposive Interpretation or the Golden Rule Most rules are created to address and solve problems. The legislator's objective is to solve problems, creating the rules so that particular results are obtained. The legislative intent method consists of an investigation into the purpose of the norm to be applied by analyzing its legislative history, within the context of the cultural, social and economic values as well as the balance of interests that existed at the time the norm was enacted.[73] There are two versions of this canon, namely, the subjective-teleological and the objective-teleological interpretation:

- Subjective-teleological interpretation: This form of teleological interpretation is an inquiry into the actual intention of the legislator, which is, therefore, a variation of historical interpretation.
- Objective-teleological interpretation: This form of teleological interpretation requires an inquiry with respect to the sense and purpose of the norm to be applied. It is about the reasonable goals and policy considerations behind the norm to be applied.[74] It is about *ratio legis* of the norm. The ratio or telos is actually the reason for the being of any norm. The legal maxim about the teleological interpretation reads as follows:

Cessante ratione legis cessat ipsa lex: The reason for a law ceasing, the law itself ceases. In this manner, teleological method takes into account the so-called 'nature of the thing'.

f. Relationship between methods of interpretation; What is the relationship between these canons of construction? Has one prevailed over others or are they all equal?

There is no complete priority order among these canons of construction. The answer to this question relies upon whether one adopts the subjective or objective theory with respect to the goals of interpretation. If one adopts the subjective theory, the literal and historical interpretation shall absolutely prevail over the teleological interpretation. The reason for this is that the subjective theory regards interpretation as an inquiry into the historical legislator's actual intention. On the contrary, if one adheres to the objective theory, he will give priority to the teleological interpretation, particularly to the objective-teleological interpretation, since the aim of interpretation is to find the law's objective reasonable meaning in accordance with this approach. In any case, in a civil law system judges hardly ever resolve issues of interpretation without recourse to legislative texts. In so-called challenging cases, however, the objective-teleological interpretation gains importance. It should be noted that, in some areas of law such as criminal law, arguments based on the wording of the norm have strict priority over other canons of interpretation.

Hage compares these methods to a toolbox. Imagine a carpenter's toolbox. He chooses a tool from his toolbox such as a pliers wrench or a hammer when he needs. Likewise, a lawyer chooses from different techniques. As Hage observes: "Some of these techniques are relatively formalist; the decision maker refers to the decision of someone else, a legislator, or a court, and avoids to give a value judgment himself. Other techniques are substantive: the decision maker engages into reasoning about what would be a good rule. He makes his own value judgment and bases his interpretation of the rule on this value judgment. In both cases, however, the decision maker has to choose a technique."[75] Therefore, one can compare these different sources, the reasoning techniques, and the canons of interpretation to a set of decision-making tools in a lawyer's toolbox.

Table 2.6 Maxims of Interpretation

Ubi lex non distinguit, nec nos distinguere debemus	Where a text is expressed in general terms, it is forbidden to introduce restrictions.
Exceptio est strictissimae interpreationis	Exceptions must be construed restrictively.
Exceptio est strictissimae interpreationis Specialia generalibus derogant	Where there is a conflict between a general and a specific provision, the specific provision must prevail over the general one.
Kelâmda asl olan ma'nay-ı hakikîdir (Majalla, art. 12).	It is a fundamental principle that words shall be construed literally.
Mevrid-i nasda içtihada mesağ yokdur (Majalla, art. 14).	Where the text is clear, there is no room for interpretation.
Kelâmın i'mali ihmalinden evlâdır (Majalla, art. 60)	If any particular meaning can be attributed to a word, it may not be passed over as devoid of meaning.
Ma'nay-ı hakikî müteazzir oldukta mecaza gidilir (Majalla, art. 61).	When the literal meaning cannot be applied, the metaphorical sense may be used.
Bir kelâmın i'mali mümkün olmaz ise ihmal olunur (Majalla, art. 62).	If a word can be construed in neither a literal nor a metaphorical sense, it is passed over in silence as being devoid of meaning.
Expressio unius est exclusion alterius	The inclusion of the one is the exclusion of the other.

Excursus on interpretation: "The interpretation of legal texts such as statutes and constitutions has presented problems from the earliest times to the present day. Plato urged that laws be interpreted according to their spirit rather than literally. Voltaire expressed the view that to interpret the law is to corrupt it. Montesquieu regarded the judge as simply the mechanical spokesman of the law. The role of judges has been transformed since Montesquieu's day, but the historic tension still exists between the search for the 'true intent' of a legal norm and the desire for certainty and transparency in the application of law.

That such tensions persist to the present day is not surprising when one considers that first, there is the law; then there is the law. This simplified reference to the judicial process emphasizes that, when courts apply a legal norm, the interpretation which they give has ultimate authority. The process of interpretation grants wide discretionary powers to judges. Voltaire's misgivings would not be altogether misplaced in a judicial environment where the methods of interpretation of legal norms were lax or applied subjectively or simply exploited to justify a desired end. Then, there would be a real likelihood that, in some

your turn [1]

The rule: "Dogs are not allowed in our shop."

Case 1: Mrs. A enters into the butcher shop with her terrier.

Case 2: Mr. B enters into the butcher shop with his guide dog for the blind.

Question: Does the rule that forbids the presence of dogs in a butcher shop apply to cases 1 and 2? Please discuss!

cases, the courts would usurp the functions of the legislature and call into question their legitimacy."[76]

THE INTERPRETATION OF CONTRACTS

In many respects, the interpretation of contracts resembles to that of statutes. However, there some aspects of interpretation that are peculiar to the contracts. For example, when interpreting wills, the interpreter must give effect, as far as possible, to the testator's intention expressed in the will.

Otherwise, canons of construction employed in the interpretation of contracts and statutes are pretty much similar. For instance, the basic canon of construction in interpreting statutes reads as follows:

The words of a contract should be construed in their grammatical and ordinary senses, except to the extent that some modification is necessary in order to avoid absurdity, inconsistency, or repugnancy.[77]

As Lord Wensleydale put in *Grey v. Pearson*[78]: In construing all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistence with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency.

Where a document contains a legal term of art, the court should give it its technical meaning in law. If there is something in the context to displace the presumption that it was intended to carry its technical meaning, ordinary meaning should be given to it by the court.[79]

In interpreting contracts, the interpreter may face a problem, that is, whether to give preference to the intention of the promisor or the declaration and the external expression of the intention. For example, in a sales contract, a tension may arise between giving priority to the party's subjective view or his objective declaration. European jurisdictions adopt a solution which is a compromise between subjective and objective approaches.[80] For instance, the principles of European contract law in this regard state that:

(1) A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words.

(2) If it is established that one party intended the contract to have a particular meaning, and at the time of the conclusion of the contract the other party could not have been unaware of the first party's intention, the contract is to be interpreted in the way intended by the first party.

(3) If an intention cannot be established according to (1) or (2), the contract is to be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.[81]

In any case, the reasonableness of the result of any particular construction is a vital consideration in choosing between rival interpretations of a contract.

In a similar fashion to the systematic interpretation of statutes, other documents should also be construed as a whole. Therefore, a clause must not be considered in isolation, but must be considered in the context of the whole of the document.[82]

In the common law of contracts, the following guiding principles are also employed in interpreting contracts:

- A contract will be construed so far as possible in such a manner as not to permit one party to it take advantage of his wrong.[83]
- Where the words of a contract are capable of two meanings, one of which is lawful and the other unlawful, the former construction should be preferred.[84]
- The expression of a term which the law implies as a necessary part of the contract has no greater effect than the implied term would have had.[85]
- The ejusdem generis rule: If it is found that things described by particular words have some common characteristic which constitutes them as genus, the general words which follow them ought to be limited to things of that genus.[86]

THE ROLE OF CASE LAW AND ITS INTERPRETATION

To be sure, interpretation of case law is also an important element of legal method, especially in common law jurisdictions. Indeed, as emphasized before, in order to find the law, the common law

judge looks at decided cases rather than statutes or codes. Methodologically, case is inductive as opposed to the deductive structure of abstract norms contained in codes. Induction, in this sense, simply means that broad principles are derived from a large number of individual decisions of courts. Judges' reasoning moves from the particular decision to the general rule. Thus, a common law judge has to look for a so-called precedent case, and if there is a binding precedent in a case he must follow that precedent, i.e. an earlier decision of another court.[87] To put it in plain terms, the doctrine of precedent means that cases must be decided the same way when their material facts are the same. To be sure, this does not require that all the facts should be the same. Rather, it requires that the legally material facts must be the same.[88] Two elementary components of a system of precedent are as follows:

- According to the rule of stare decisis, lower courts must follow the decisions of higher courts in the same court hierarchy. Some courts are even bound by their own previous decisions (rationes).
- A reliable system of case reporting is necessary, enabling judges and lawyers to find out a precedent correctly.[89]

The binding part of the decision is called *ratio decidendi*, which refers to the reason for a decision. In case law, it means any rule treated by the judge, 'be expressed, explicitly' or implicitly as a necessary step in reaching his decision. Given that it is a core element of the judgment, finding *ratio decidendi* is an important part of the training of a lawyer in common law countries. It is not a mechanical process acquiring knowledge regarding a particular field of knowledge, but is an art gradually acquired through practice and study.[90]

A decision contains at times *obiter dicta*, which are no binding authority. That said, an *obiter dicta* may be persuasive, which means that lower courts quite usually follow such *obiter dicta*, even though they don't have to.[91]

There are two exemptions to the doctrine of precedent each of which involves the use of tools of legal reasoning:

- Distinguishing: Distinguishing enables a court not to follow a binding precedent. If a judge finds that the facts of the case he is dealing with are very similar to those of the precedent while at the same time thinking that there is a material difference between the two, he may distinguish the precedent.
- Overruling: A judge can also overrule a decision of a lower court, if he thinks that the lower court has wrongly decided.[92]

Case law also plays a significant role in civil law jurisdictions. Thus being so, they do not enjoy the binding force as their common law counterparts do. The question is then to what extent cases in civil law are treated as authoritative. Exceptional cases put aside, as a rule, the case law in civil law is not treated as authoritative. Nonetheless, in most cases, lower courts do follow superior courts' decisions. The following reasons may be pointed out for this phenomenon:

- most of codes formulated in the nineteenth century, say French Civil Code, could not possibly envisage developments in the twentieth and twenty-first centuries. Therefore, where there has been a gap in the law that is not covered by the codes, judges are required to consider whether to indulge in some sort of 'law-making' or law-creating process.
- it promotes certainty and predictability in law;
- it has been regarded as a means of promoting equality of justice;
- it has been deemed convenient and efficient to do so;
- judges do not like being reversed or overturned on appeal;
- as members of hierarchy with a tradition, the practice of following cases has been viewed as a form of judicial co-operation.[93]

Excursus on legal reasoning in Islamic law: "The function of the qadi (judge) is to resolve disputes in accordance with Islamic law, and the process is characterized by a high degree of integrity and impartiality […] Qadi dispute resolution takes place in what has been described in the west as a "law-finding trial" (Rechtsfindungsverfahren), so the notion of simple application of pre-existing norms, or simple subsumption of facts under norms, is notably absent from the overall understanding of the judicial process. It is understood as a dynamic

process, one in which all cases may be seen as different and particular, and for each of which the precisely appropriate law must be carefully sought out. The law of each case is thus different, and all parties along with the qadi are under an obligation of service to God to bring together the objectively determined circumstances of the case and the appropriate principles of the Sharia. Since the parties are so obliged, they are not free to obstruct in any way the judicial process and are rightly seen as partners of qadi in the law-seeking process."[94]

your turn 2

What is the doctrine of precedent?

GAPS IN LAW

Gap is one of the most contested concepts in legal methodology. According to the assumption of legal positivism, a state legal order is a complete system without gaps. The prevailing view is, however, that gaps exist and must be closed. Although gap-filling in law uses the methods of interpretation, the distinction between interpretation and gap-filling needs to be acknowledged. Indeed, an interpretation is the possible meaning of the terms in which a norm is stated. In this regard, a decision which remain within the literal meaning of a statute's wording is considered as interpretative. If a decision, on the other hand, goes beyond the literal meaning such an activity is regarded as gap-filling.[95] In most legal systems in the world, including Turkish law, gap-filling is permissible. Analogy plays an important role in closing gaps within the legal system. Gap-filling is, in a sense, a judicial law-making, which is also called as judge-made law. In certain instances, legal systems limit closing the gaps. In criminal law, for example, for the sake of legal certainty, analogical or customary justifications of criminal sanctions are excluded. Accordingly, in criminal law, the possible meaning of the wording of a statute marks the outer limit of admissible judicial interpretation. And the judge determines the meaning of the wording from the citizen's point of view.[96]

In some legal systems, such as in France, even where there are gaps in law, judges always manage to base their decision on one or more legislative texts by using various techniques of logical deduction. The legal French system puts great emphasis on code provisions as sources of law.[97] The general proposition in the French law concerning gaps, thus, reads as follows: "*Where there is gap in the law, judges must resort to customary laws and equity when deciding a case*." This proposition suggests that, before resorting to sources other than statutory law, the French courts would always first make use of techniques of logical interpretation in order to extend the scope of existing rules to analogous situations.[98] In doing so, the French judges recourse to general statements of principles and the tendency within the codes to use general notions, known as *notions-cadres,* examples of which are public order (ordre public), good morals (bonnes moeurs, Art. 6 Civil Code), the interests of the family (intérêt de la famille, Art. 1396, Civil Code) and the like. These concepts are sufficiently flexible to accommodate any unforeseen situation that may be brought before the courts.[99]

Likewise, in the Turkish law, a judge must first examine a provision which is often expressed in extremely general terms, or a general principle of law in order to give it a content (meaning) and apply it to a particular case. If he confronts with a new set of circumstances which the legislator could not foresee or could not have foreseen, the judge then may indulge in the kind of free scientific research and fill the gap in law.[100] This very process that must be followed by the judge is described in Article 1 of the Turkish Civil Code as follows:

"The code applies according to its wording or interpretation to all legal questions for which it contains a provision.

In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator.

In doing so, the court shall follow established doctrine and case law."

This approach of the Civil Code recognizes the possibility of gaps in law, and assigns the judge the duty of the legislator, namely creation of law. In other words, Article 1 instructs the judge to decide "as if he were himself acting as legislator" whereby both legal and customary rules are lacking in a particular case.[101] It should be noted that, although the judge creates the law, it shall be binding upon

solely the case which he has decided through filling the gap. In other words, his law creating activity is not binding upon other courts.

CONFLICTS BETWEEN LEGAL NORMS

Sometimes legal norms within a legal system may conflict with one another. Indeed, if there are several bodies that enact legislation that can apply to the same case, this would lead to, in some cases, to the conflict of rules.[102] In this regard, the following solutions should be considered:

- One of the conflicting norms could be altered;
- An exception could be added;
- One of the conflicting norms could be invalidated.

The first two options are within the confines of the legislator. The third solution is applied by judges who confront with such a conflict between legal norms within the legal system. In this regard, the following principles of priority are generally recognized:

1. The principle of posteriority: "lex posterior derogat legi priori".
2. The principle of speciality: "lex specialis derogat legi generali".
3. The principle of superiority: "lex superior derogat legi inferiori".

The lex posterior rule shall be applied if a new rule comes into conflict with a preexisting rule. If the older rule is simultaneously and explicitly abolished, the application of the lex posterior rule is taken into consideration. According to the lex posterior rule, the newer rule prevails over the older one.

The applicability of the lex superior principle requires a legal order based on a hierarchy among legal norms. As you may remember the hierarchy of norms in the Turkish law explained in the first chapter, the constitution sits at the apex of the hierarchy of norms. That is, if a conflict arises between a provision of the constitution and a statute, the constitution shall prevail in accordance with the lex superior principle.

The problem of a conflict between a specific and a more general rule is dealt with the lex specialis principle. According to this principle, if such a conflict arises the more specific rule prevails over the more general one.

LO 1 To differentiate between different legal reasoning methods

Summary

Deduction means reasoning that moves from general premises, which are known or presumed to be known, to certain conclusions. Induction, by contrast, is reasoning that moves from specific cases to more general, but uncertain, conclusions.

The method of finding law based upon deductive reasoning, thus, means subsuming a case under a legal rule. It is called syllogism or, in French legal literature, *syllogisme judiciare*. Based on the virtues of traditional formal logic, for example in the French legal system, court judgments are very short and consist of a single statement with no dissenting opinions. By contrast, common law courts rarely take as their starting point an abstract rule which then has to be applied to the established facts before them. Common law courts deal, first and foremost, with the facts of the case at hand and arguments of parties, and arrive at a solution through a reasoning process that tends to focus on the particularities of the actual institutions that are germane to the case before them. Accordingly, one can contend that, as a form of deductive reasoning, judicial syllogism is mostly applied in civil law countries, including Turkey.

Legal analogy simply means finding the solution to a problem by reference to another similar problem and its solution. An analogy consists of an observed similarity between two phenomena, namely source and target. Analogical reasoning is an extension of the source to the target. Furthermore, it is an extension of a legal rule from one case to another due to a similarity which is regarded by the judge to be material.

LO 2 To interpret statutes

Interpretation is the process of clarifying the true meaning of a written document. As a result of interpretation, the interpreter shall decide whether the rule in consideration is applicable to the case at hand. To be sure, interpretation is not confined to statutes; other written texts such as case law, contracts, testaments or international treaties require interpretation as well. Indeed, the common law tradition takes cases as its starting point, in contrast to civil law systems that focuses on reasoning on the basic rules contained in codes and in other written sources.

Interpretation is a common method employed by all the so-called textual sciences like literature, philology, or theology. Law shares with these disciplines the characteristic that it is an interpretative discipline. The difference between a legal interpretation and interpretation of poem, for example, lies in the fact that the former is a binding interpretation exercised, in most cases, by a judge.

Interpretation in law is one of the most important tasks of jurists, especially in a legal system which is characterized by codifications. A sound and reasonable interpretative practice by courts is highly important in maintaining the consistency and coherence of a legal system. Particularly, if one considers the necessity of adapting codes and statutes in a codified system to rapid social transformation, it would be ill-advised to stick to a strict construction of meaning of code provisions. As a matter of fact, in code-based civil law systems, provisions of a code are generally drafted loosely and rely, in many cases, on general statements of principles rather than the narrow and detailed legislative provisions to be found in the common law tradition.

Usually, in civil law systems we do not find any general authoritative statement regarding the law on interpreting statutes. The currently employed rules and techniques of interpretation in France, Germany, or Turkey are rather the results of customary law, judicial practice and legal writing. By contrast, in common law jurisdictions there are special "Interpretation Acts" which are intended to assist the draftsmen or to guide the judge in interpretation. Interpretation Act of 1978 (originally 1889) of the United Kingdom defines a number of common words and expressions and provides that the same definitions are to apply in all other Acts, excluding those specifically indicating otherwise. According to this Act, for example, "person" includes not only an individual but also body of legal persons. In English law, some statutes also have their own interpretation sections.

Literal interpretation, also known as grammatical or semiotic interpretation, requires an investigation into the semantic content and the syntactic structure of a provision. The literal interpretation may at first sight seem simple. The basic rule of literal interpretation is that the literal meaning shall prevail whenever the words of a statute are clear and unambiguous and addresses the point at issue.

Historical (genetic) interpretation is an inquiry into the meaning of legal terms as intended by the historical legislator. This method requires an investigation into the purposes the legislator pursued by enacting the statute. Historical interpretation is about the legislator's actual intention.

Systematic interpretation looks at the context of a norm; hence, it involves an investigation into the relations between the norm to be applied and other relevant norms and codes of the same legal system. This mode of interpretation serves the interests of consistency and coherence of the legal system as a whole. The systematic interpretation is a significant canon of construction in the civil law tradition. The Italian Civil Code, for instance, imposes the systematic interpretation regarding the interpretation of contracts. Article 1363 of the Italian Civil Code reads: "*Clauses in contracts are to be interpreted each by means of the others, by attributing to each of them the meaning which ensues from the whole of the contract.*".

Test Yourself

1 What is meant by the interpretation of statutes?

A. The interpretation of a statute by the courts
B. The interpretation of a statute by lawyers
C. The interpretation of a statute by prime minister
D. The interpretation of a statute by Parliament
E. Both A and B

2 What is the teleological interpretation?

A. The interpreter must interpret the statute in the light of its ratio legis
B. The interpreter must interpret the statute based solely on its letter
C. The interpreter must interpret the statute based on its history
D. The interpreter must interpret the statute in a free manner
E. Both A and B

3 What is case law?

A. Law derived from courts
B. Law created by the Parliament
C. Law created by custom
D. Law created by executive
E. Both A and B

4 Which is not one of characteristics of the "rule of law"?

A. Everyone must follow the law
B. Leaders must obey the law
C. Government must obey the law
D. No one is above the law
E. Administration does not have to obey law

5 Which is the most common form of legal reasoning in a civil law system?

A. Judicial syllogism
B. Deduction
C. Induction
D. Reasoning by analogy
E. Dogmatism

6 Which is one of the following characteristics does not belong to a good jurist?

A. A sense of justice
B. objectivity
C. empathy
D. judgmental reticence
E. selective reading of law

7 Which is not one of functions of a judicial syllogism?

A. rationality
B. certainty
C. justification
D. guidance
E. arbitrariness

8 Which of the following argument-types is not related to analogy?

A. argumenta e contrario
B. argumenta a fortiori
C. argumenta a minore ad maius
D. argumenta a maiore ad minus
E. argumentun ad absurdum

9 Which is not one of the canons of construction in civil law tradition?

A. The golden rule
B. historical
C. systematic
D. textual
E. teleological

10 Who is under certain circumstances entitled to fill the gaps in law?

A. judges
B. lawyers
C. jury
D. prosecutors
E. police officers

1. E	If your answer is wrong, please review the "Interpretation of Statutes" section.
2. A	If your answer is wrong, please review the "Interpretation of Statutes" section.
3. A	If your answer is wrong, please review the "The Role of Case Law and Its Interpretation" section.
4. E	If your answer is wrong, please review the "Foundations" section.
5. A	If your answer is wrong, please review the "Legal Reasoning" section.
6. E	If your answer is wrong, please review the "Legal Education" section.
7. E	If your answer is wrong, please review the "Legal Reasoning" section.
8. E	If your answer is wrong, please review the "Legal Reasoning" section.
9. A	If your answer is wrong, please review the "Interpretation of Statutes" section.
10. A	If your answer is wrong, please review the "Interpretation of Statutes" section.

The rule: "Dogs are not allowed in our shop."
Case 1: Mrs. A enters into the butcher shop with her terrier.
Case 2: Mr. B enters into the butcher shop with his guide dog for the blind.
Question: Does the rule that forbids the presence of dogs in a butcher shop apply to cases 1 and 2? Please discuss!

your turn 1

Case 1: This case is an example of an easy interpretation. The judicial syllogism in this case reads as follows:

Rule: Dogs are not allowed in the shop.

Facts: Terrier is a dog.

Legal Judgment: Therefore, the terrier cannot enter into the shop.

Case: 2: If you apply the literal interpretation the answer would be plain. Guide dogs also belong to the class of dogs. Therefore, guide dogs are dogs. The easy juristic syllogism shall arrive at the conclusion that: Therefore, the dog prohibition rule is also applied to guide dogs for blind. Accordingly, the literal interpretation in this case shall clearly deem the dog prohibition rule applicable to all sorts of animals that belong to the class of dogs. If we consider the legislative intent would the answer change? If one supposes that the legislator created the dog prohibition rule in order to prevent unhygienic conditions in butcher shops, it would. If a decision maker prefers the legislator's intention, he must interpret the rule so that it applies to guide dogs for blind as well. If a decision maker would exercise the teleological, purposive interpretation, he may weigh up the interest of maintaining hygiene in butcher shops and the interest of visually handicapped persons. Therefore, in this particular case if he pays attention to Mr. B's interest as a visually handicapped person, he might interpret the dog prohibition rule in the butcher shop in such a manner that guide dogs for the blind fall outside the rule's scope.

What is the doctrine of precedent?

your turn 2

The doctrine of precedent means that previously decided cases are binding on subsequent decisions of other courts. The rule sets out that a lower court must follow the ruling of a higher court. The binding part of a decision is called ratio decidendi, that is, the rule of law upon which the decision is founded. Other nonbinding comments of a judge are called obiter dicta.

Endnotes

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Chapter 3

Introduction To Human Rights Law

After completing this chapter, you will be able to:

Learning Outcomes

1 Explain the principles and institutions of human rights law in international and national level

2 Explain the individual application/constitutional complaint under Turkish Legal System

3 Conduct research regarding ECHR Case Law

Chapter Outline

Introduction
Human Rights
International Human Rights Standards
Human Rights Under Turkish Legal System
Selected Cases of the European Court of Human Rights on Applications From Turkey

Key Terms

Human Rights
Human Rights Conventions
European Convention on Human Rights
European Court of Human Rights
Constitutional Complaint/Individual Application

INTRODUCTION

In this chapter the concept of human rights is going to be examined. The definition of human rights, international human rights standards, procedures and institutions for protection and promoting human rights are going to be explained. In this context, especially protection of human rights under the European Convention on Human Rights will be taken in hand with the European Court of Human Rights and its landmark cases as regards to applications from Turkish citizens.

After setting up a ground on human rights in general, Turkish Legal System is going to be elaborated with human rights perspective. In that sense, the protection of human rights under Turkish Law, the place of international human rights treaties in Turkish Legal System and individual application procedure will be set forth.

Picture 3.1

HUMAN RIGHTS

Human rights put human dignity in the center of concern. The characteristics of human rights are as follows:

- universal: human rights are applied equally and with no discrimination.
- inalienable: no one can have his/her human rights' taken away without any justification.
- indivisible and interdependent: all human rights have equal importance. Neither of them are overriding another by being more important than the other.

Human rights are universal rights, which are equal, inalienable, indivisible, interdependent and inherent to human being.

The existence of human rights is a result of a struggle against unrestricted absolute power of rulers.[1] In that sense early examples of documents limiting absolute power in a constitutional status are

- Magna Carta, 1215
- Petition of Rights, 1628
- The American Declaration of Independence, 1776
- The French Declaration of Human and Citizen Rights, 1789.

Human rights is defined in terms of generations by former Director of the Human Rights and Peace Division of UNESCO, Karel Vasak.[2] First generation concerns civil and political rights such as freedom of expression, right to vote, etc. Second generation rights concern social and cultural rights, such as right to form a union, right to education, etc. Third generation rights –called "solidarity rights" – concern right to development, right to peace, right to environment, right to ownership of the common heritage of mankind, etc.[3]

There does not exist any hierarchical understanding concerning human rights. In other words, there is no given priority to any generation of rights or any human rights than the other.

INTERNATIONAL HUMAN RIGHTS STANDARDS

The principle to respect human rights is established by the Charter of the United Nations. The General Assembly of the United Nations adopted the Universal Declaration of Human Rights on December 10th, 1948. It sets common standards of achievements for all individuals and nations.

Under the Universal Declaration of Human Rights, among others, right to life, liberty, security, right to movement and residence, right to a nationality, right to marry and found a family, right to own property, freedom of thought, conscience and religion, freedom of opinion and expression, freedom of peaceful assembly and association, right to work, right to an effective remedy by the national competent tribunals for acts violating the fundamental rights, are granted. In total, the Universal Declaration of Human Rights embraces economic, cultural, social, civil and political rights. It is considered

that the Universal Declaration of Human Rights has achieved the status of customary international law.[4]

Promotion and protecting of human rights has always had a great significance worldwide. Such protection and promotion is carried out by United Nations, Council of Europe and other inter-governmental bodies and regional human rights organizations.

Protecting and Promoting Human Rights under the United Nations

The Universal Declaration of Human Rights carries provisions setting principles to which members of United Nations commit themselves. However, such provisions are not legally binding. To give provisions of the Universal Declaration of Human Rights legal force, they shall be articulated in conventions.

Principal United Nations Human Rights Conventions

In order to codify human rights standards in legally binding conventions, some steps were taken by the United Nations. As a result, several conventions have been adopted to safeguard human rights in different areas of life. As human rights generally classified in two categories of rights (civil and political economic, social and cultural), it is better to start with covenants in relation.[5]

-The International Covenant on Civil and Political Rights (1966) for protection against abuses of power.

-The International Covenant on Economic, Social, and Cultural Rights (1966) to enable individuals to live a decent life and fulfill their essential needs.

Other than these two covenants -so called twin covenants- there are various covenants specialized in different part of rights or groups' rights:

-Convention on the Prevention and Punishment of the Crime of Genocide (1948) in which the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

-Convention relating to the Status of Refugees (1951) is both a status and rights-based instrument and is underpinned by a number of fundamental principles, most notably non-discrimination, non-penalization and non-refoulement.

-International Convention on the Elimination of all Forms of Racial Discrimination (1965) affirms the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person.

-Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968) underlines that effective punishment of war crimes and crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms.

-Convention on the Elimination of all forms of Discrimination against Women (1979) which is accepted as an international bill of rights of women by both defining what constitutes discrimination against women and sets an agenda for national action to end it.

-Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) is an instrument aiming effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.

-Convention on the Rights of the Child (1989) by underlining that childhood is entitled to special care and assistance articulates basic human rights of children.

-International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (1990) by realizing the importance and extent of the migration phenomenon and the impact of the flows of migrant workers on States and people concerned, and desiring to establish norms which may contribute to the harmonization of the attitudes of States through the acceptance of basic principles concerning the treatment of migrant workers and members of their families.

-International Convention for the Protection of all Persons from Enforced Disappearance (2006) underlines the extreme seriousness of enforced disappearance, which constitutes a crime, and prevents enforced disappearances and to combat impunity for the crime of enforced disappearance.

-Convention on the Rights of Persons with Disabilities (2006) to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Regional Human Rights Conventions

Other than the human rights conventions of the United Nations there exist regional human rights conventions. Examples of regional human rights conventions are as follows:

- The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
- The European Social Charter (1961)
- The American Convention on Human Rights (1969)
- The African Charter on Human and People's Rights (1981)
- The Inter-American Convention on Prevent and Punish Torture (1985)
- The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987)
- The African Charter on the Rights and Welfare of the Child (1990)
- The Inter-American Convention on Forced Disappearance of Persons (1994)
- The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994)
- The Framework Convention for the Protection of National Minorities (1995)

Monitoring Bodies of Human Rights under the United Nations

In order to monitor the implementation of human rights universally and for universal human rights complaints the Human Rights Committee-United Nations Human Rights Office of the High Commissioner and United Nations Economic and Social Council were established. The former works for monitoring civil and political rights under the International Covenant on Civil and Political Rights while the; latter stands for economic, social and cultural rights under the International Covenant on Economic, Social, and Cultural Rights.

The High Commissioner for Human Rights provides assistance to Governments in the fields of legislative reforms, trainings on administration of justice, and so on by helping them to implement human rights standards on the ground. The way the High Commissioner for Human Rights works through comprises standard setting, monitoring and implementation on the ground. In order to protect and promote human rights the High Commissioner for Human Rights cooperate with governments, national human rights institutions, civil society, private sectors and others.

The Human Rights Committee shall be composed of nationals of the States Parties to the International Covenant on Civil and Political Rights. According to the article 40/1 of the International Covenant on Civil and Political Rights, the States Parties to the International Covenant on Civil and Political Rights undertake to submit reports on the measures they have adopted which give effect to the rights recognized in it and on the progress made in the enjoyment of those rights: (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;(b) Thereafter whenever the Committee so requests. The Human Rights Committee shall study the reports submitted by the States Parties. It shall transmit its reports, and general comments as it may consider appropriate, to the States Parties. The Committee may also transmit these comments to the Economic and Social Council.

As for the individual complaints of individuals who claim to be victims of a violation by a State party to the International Covenant on Civil and Political Rights *Optional Protocol to the International Convention on Civil and Political Rights,* article 2 states that individuals claiming that any of their rights enumerated in the International Covenant on Civil and Political Rights have been violated and who exhausted all available domestic remedies may apply to the Human Rights Committee. If such application is anonymous or considered to be an abuse of the right of submission or incompatible with the provisions of the International Covenant on Civil and Political Rights, the application would be considered inadmissible.

The United Nations Economic and Social Council stands for promoting sustainable development; and besides humanitarian coordination, policy integration operational activities for development are key issues of it. The Economic and Social Council shall consist of fifty-four members of the United Nations elected by the General Assembly, for three years. According to the article 62 of the United Nations Charter, the Economic and Social Council "may make or initiate studies and reports with respect to the international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters" to the United Nations General Assembly and specialized agencies. Besides, the Economic and Social Council may make recommendations "for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all", "draft conventions", "call international conferences on matters falling within its competence".

Protecting and Promoting Human Rights under European Convention on Human Rights

The European Convention on Human Rights (Convention for Protection of Human Rights and Fundamental Freedoms), drafted within the Council of Europe, adopted in 1950, entered into force in 1953 and has been ratified by all forty seven members of the Council of Europe. Created by the European Convention on Human Rights, European Commission and European Court of Human Rights entrusted with the observance of the undertakings of the High Contracting Parties to the Convention.

Picture 3.2

European Convention on Human Rights

The European Convention on Human Rights is an international treaty that member States of the Council of Europe undertakes to secure fundamental civil and political rights to everyone within their jurisdiction.[6] In particular, the rights and freedoms secured by the European Convention on Human Rights are, among others, the right to life, the right to a fair hearing, the right to respect for private and family life, freedom of expression, freedom of thought, conscience and religion, the protection of property. The rights enshrined in and protected by the European Convention on Human Rights have been extended by Protocols. A Protocol to the European Convention on Human Rights is statements adding rights to the original Convention and/or amending certain provisions of it. These protocols are binding on those States that have signed and ratified them. Additional Protocols to the European Convention on Human Rights are as follows:

> The European Convention on Human Rights particularly prohibits torture and inhuman or degrading treatment or punishment, death penalty, arbitrary and unlawful detention, slavery and forced labor, and discrimination in the enjoyment of the rights and freedoms set out in it.

Protocol No 1[7], adds new fundamental rights such as "right to property", "right to education" and "right to free elections" to those protected in the European Convention on Human Rights.

Protocol No 4[8], secures certain rights and freedoms other than those already in the Convention such as "prohibition of imprisonment for debt", "freedom of movement", "prohibition of expulsion of nationals".

Protocol No 6[9], regards the abolition of the death penalty.

Protocol No 7[10], extends the list of rights protected under the Convention and its Protocols in

-the right of aliens to procedural guarantees in the event of expulsion from the territory of a State

-the right of a person convicted of a criminal offence to have the conviction of sentence reviewed by a higher tribunal,

-the right to compensation in the event of a miscarriage of justice

-the right not to be tried or punished in criminal proceedings for an offence for which one has already been acquitted or convicted

-equality of rights and responsibilities as between spouses.

Protocol No 11[11] restructures the control machinery of the European Convention on Human Rights and sets up the European Court of Human Rights in order to strengthen the enforcement of rights and liberties guaranteed by the European Convention on Human Rights.

Protocol No 12[12] deals with the general prohibition of discrimination stating that " (t)he enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Protocol No 13[13] concerns the abolition of death penalty in all circumstances, including crimes committed in war times and imminent threat of war.

Protocol No 14[14] amends the control system of the European Convention on Human Rights.

Protocol No 15[15] and 16[16], not yet entered into force, are going to deal with shortening the time limit of application to the European Court of Human Rights, advisory opinion and principle of subsidiarity and doctrine of margin of appreciation among other issues.

European Court of Human Rights

In order to monitor respect for human rights in the member states of the Council of Europe the European Court of Human Rights was established. While monitoring the European Court of Human Rights interprets the provisions of the European Convention on Human Rights by its case law which in turn results in keeping the European Convention on Human Rights a living instrument.[17]

The scope of the jurisdiction of the European Court of Human Rights covers violations of the European Convention on Human Rights brought as individual applications or inter-state applications. The article 32 of the European Convention on Human Rights states:

> "1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.
>
> 2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide."

There are two types of applications that could be brought before the European Court of Human Rights against member state(s) to the European Convention on Human Rights:

- individual applications brought by an individual, group of individuals, non governmental organizations and companies (article 34 of the European Convention on Human Rights)
- inter-state applications brought by state(s) (article 33 of the European Convention on Human Rights).

The European Court of Human Rights consists of judges from the member states of the European Convention on Human Rights. Therefore, till to date, forty seven judges seat in the European Court of Human Rights from each member state (national judges). The Parliamentary Assembly of the Council of Europe elects these judges from lists of three candidates presented by each member state. Although the judges are elected in respect of states, they are not representatives of member state, which proposed them to the Council of Europe. Judges are independent and forbidden to engage in any activity incompatible with their duty.

Composition of the European Court Human Rights may vary for different cases:

-Single judge examines manifestly inadmissible applications. National judges shall not sit as a single judge. The competence of single-judge is articulated in the article 27 of the European Convention on Human rights as

> "1. A single judge may declare inadmissible or strike out of the Court's list of cases an application submitted under Article 34, where such a decision can be taken without further examination. 2. The decision shall be final.
>
> 3. If the single judge does not declare an application inadmissible or strike it out, that judge shall forward it to a committee or to a Chamber for further examination."

-A three-judge committee may examine and decide unanimously on the admissibility and merits of the cases that are already covered by well-established case law of the European Court of Human Rights. National judges exceptionally may sit in a three-judge committee. The competence of committees is articulated in the article 28 of the European Convention on Human rights as

> "1. In respect of an application submitted under Article 34, a committee may, by a unanimous vote, (a) declare it inadmissible or strike it out of its list of cases, where such decision can be taken without further examination; or (b) declare it admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court.
>
> 2. Decisions and judgments under paragraph 1 shall be final.
>
> 3. If the judge elected in respect of the High Contracting Party concerned is not a member of the committee, the committee may at any stage of the proceedings invite that judge to take the place of one of the members of the committee, having regard to all relevant factors, including whether that Party has contested the application of the procedure under paragraph 1.(b)."

-A seven-judge chamber may decide by a majority vote on the admissibility and merits of a case.

-The Grand Chamber consisting of seventeen judges, exceptionally, examines "cases referred to it after relinquishment of jurisdiction by a Chamber or when a request for referral has been accepted."[18] The Grand Chamber also considers requests for advisory opinion.

There are also ad-hoc judges appointed by concerned states when the national judge is unable to sit in the case as a result of withdrawal, exemption or inability.

In order for applications to be examined by the European Court of Human Rights they have to meet the requirements laid down in the European Convention on Human Rights. At first stage the European Court of Human Rights examines the application to see whether it is admissible or not. If declared inadmissible by the European Court of Human Rights no further examination would be made on merits of the application. In order for the European Court of Human Rights to proceed with merits the application shall be made,

- by a personally and directly affected victim of a violation of one or more rights under the European Convention on Human Rights

- after exhaustion of domestic remedies

-within six months following last judicial decision on the case.

The article 35 of the European Convention on Human Rights articulates admissibility criteria as follows:

> "1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.
>
> 2. The Court shall not deal with any application submitted under Article 34 that
>
> (a) is anonymous; or
>
> (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.
>
> 3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:
>
> (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or
>
> (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.
>
> 4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings."

In examining the case at any stage of the proceedings, the European Court of Human Rights may "place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights" under the article 39 of the European Convention on Human Rights. According to the article 40 of the European Convention on Human Rights, hearings are public unless decided otherwise in exceptional circumstances by the European Court of Human Rights.

The judgments of chambers and the Grand Chamber shall be final and include reasons according to the article 42, 44 and 45 of the European Convention on Human Rights. During the examination of the case, the Chamber, the President of the Section or a duty judge "at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings", according to the article 39 of the *Rules of Court*[19].

Judgments of the European Court of Human Rights have binding force on the member states, which undertake to execute the judgments. The execution of judgments is monitored by the Committee of Ministers of the Council of Europe. After delivering the judgment, the European Court of Human Rights hands the judgment to the Committee of Ministers of the Council of Europe that confers with the state concerned in order to execute the judgment. This in turn may result in individual measures and/or amendment in legislation. Article 46 states regarding binding force and execution of the judgments as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
>
> 3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two-thirds of the representatives entitled to sit on the committee.
>
> 4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph1.
>
> 5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case."

In the proceedings an individual other than the applicant or another state (party to the European Convention on Human Rights) other than that against which the application has been brought may become party to the case by as a third party. Third party intervener is entitled to file pleadings and may take part in public hearings. Article 36 of the European Convention on Human Rights lays down third party intervention as follows:

> "1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.
>
> 2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.
>
> 3. In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings."

Recently the European Court of Human Rights has developed a new procedure for the frequent applications on similar issues, the so-called "systematic issues" or "repetitive cases". In pilot cases the European Court of Human Rights identifies the structural problems implicit in the repetitive cases and imposes obligations on states regarding those problems.[20] In such, the European

Court of Human Rights examines few applications of same kind and adjourns similar cases for a period of time while calling the state concerned to adopt measures to come in line with the judgment. Pilot judgment procedure is enshrined in the Rules of the Court article 39 as follows:

> "1. The Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications.
>
> 2. (a) Before initiating a pilot-judgment procedure, the Court shall first seek the views of the parties on whether the application under examination results from the existence of such a problem or dysfunction in the Contracting Party concerned and on the suitability of processing the application in accordance with that procedure. (b) A pilot-judgment procedure may be initiated by the Court of its own motion or at the request of one or both parties. (c) Any application selected for pilot-judgment treatment shall be processed as a matter of priority …
>
> 3. The Court shall in its pilot judgment identify both the nature of the structural or systemic problem or other dysfunction as established as well as the type of remedial measures which the Contracting Party concerned is required to take at the domestic level by virtue of the operative provisions of the judgment. …
>
> 6. (a) As appropriate, the Court may adjourn the examination of all similar applications pending the adoption of the remedial measures required by virtue of the operative provisions of the pilot judgment. (b) The applicants concerned shall be informed in a suitable manner of the decision to adjourn. They shall be notified as appropriate of all relevant developments affecting their cases. (c) The Court may at any time examine an adjourned application where the interests of the proper administration of justice so require. …
>
> 8. Subject to any decision to the contrary, in the event of the failure of the Contracting Party concerned to comply with the operative provisions of a pilot judgment, the Court shall resume its examination of the applications which have been adjourned …"

HUMAN RIGHTS UNDER TURKISH LEGAL SYSTEM

Fundamental Rights and Freedoms under Turkish Law

Under Turkish Constitution (1982) human rights are articulated as "fundamental rights and freedoms". It is stated in the preamble of the Constitution that every Turkish citizen has the right to the fundamental rights and freedoms laid down in the Constitution in accordance with "equality" and "social justice", to lead an honorable life and to improve his/her material and spiritual well-being under the aegis of national culture, civilization, and the rule of law.

Provisions governing human rights under Turkish Constitution give first a definition, than stipulate rules on restriction and prohibition of abuse of them.

> Nature of fundamental rights and freedoms
>
> Article 12- *Everyone possesses inherent fundamental rights and freedoms, which are inviolable and inalienable. The fundamental rights and freedoms also comprise the duties and responsibilities of the individual to the society, his/her family, and other individuals.*
>
> Restriction of fundamental rights and freedoms
>
> Article 13- *(As amended on October 3, 2001; Act No. 4709) Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence.*
>
> *These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality.*
>
> Prohibition of abuse of fundamental rights and freedoms Article 14- *(As amended on October 3, 2001; Act No. 4709) None of the rights and freedoms embodied in the Constitution shall be exercised in the form of activities aiming to violate the indivisible integrity of the State with its territory and nation, and to endanger the existence of the democratic and secular order of the Republic based on human rights. No provision of this Constitution shall be interpreted in a manner that enables the*

State or individuals to destroy the fundamental rights and freedoms recognized by the Constitution or to stage an activity with the aim of restricting them more extensively than stated in the Constitution. The sanctions to be applied against those who perpetrate activities contrary to these provisions shall be determined by law.

Picture 3.3

The Turkish Constitution also sets minimum standards for protection of human rights under state of emergency.

Suspension of the exercise of fundamental rights and freedoms

Article 15- *In times of war, mobilization, martial law, or a state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures derogating the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated. (As amended on May 7, 2004; Act No. 5170) Even under the circumstances indicated in the first paragraph, the individual's right to life, the integrity of his/her corporeal and spiritual existence shall be inviolable except where death occurs through acts in conformity with law of war; no one shall be compelled to reveal his/her religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties shall not be made retroactive; nor shall anyone be held guilty until so proven by a court ruling.*

In order to comply with international standards set of amendments in the Constitution and some legal reforms took place under Turkish Legal System. The most important one could be considered as the article 90/5 of the Constitution. It states:

"International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. (Sentence added on May 7, 2004; Act No. 5170) In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail."

According to article 90/5 of the Constitution, international agreements ratified by the Republic of Turkey are considered to be an integral part of Turkish Law. In that sense, it has to be noted that two main approaches have been accepted as regards to the effect of international law in national law. Such approaches are considered as monist theory and dualist theory. As for the monist theory international law and national law are accepted as two components of one legal system; where dualist theory considers international law and national law as two separate legal systems. Therefore, according to the dualist theory, it is necessary to incorporate international agreement into national law. Under Turkish legal doctrine above mentioned theories have been discussed and yet there is no consensus whether monist or dualist theory applies. Some assert that Turkish Law would be considered under monist theory. Some other accept that, such ratification act is considered as incorporation of the international agreement as there is a ratification act in order for any international agreement to be applicable under Turkish Law.[21]

With its wording of the article 90/5, international human rights agreements precede national laws. In other words, if there exists a conflict between an international agreement and national law, the former will prevail. Therefore, the article 90/5 of the Constitution gives priority to international human rights agreements over statutory norms. However, if there is a conflict between international human rights agreements and constitutional provisions Constitution will prevail.

Individual Application / Constitutional Complaint under Turkish Law

The individual application has been introduced into the Turkish Legal System by the constitutional amendment made on 12.09.2010 with the Law No 5982. By this amendment the individual application was enshrined in the article 148 of the Constitution as follows:

> "1. The Constitutional Court shall … decide on individual applications.
>
> …
>
> 3. Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights, which are guaranteed by the Constitution, has been violated by public authorities. In order to make an application, ordinary legal remedies must be exhausted.
>
> 4. In the individual application, judicial review shall not be made on matters required to be taken into account during the process of legal remedies.
>
> 5. Procedures and principles concerning the individual application shall be regulated by law."

Under this scheme rules and procedures governing the individual application have been set out by the *Law on Establishment and Judicial Procedures of the Constitutional Court*[22]

There is no clear definition of the individual application in constitution and in the Law No 6216. In doctrine individual application is defined as;

> "an extraordinary legal remedy to be used before the constitutional court after exhaustion of ordinary legal remedies, and granted for the individuals, whose fundamental rights and freedoms guaranteed both by the Constitution and the ECHR, were alleged to be violated by public acts, actions or negligence."[23]

The Scope of the Individual Application

Law No 6216 expands the sphere of protected fundamental rights and freedoms as the wording of it takes the scope of the individual application further than the Constitution by referring to the fundamental rights and freedoms covered in Protocols of the European Convention on Human Rights. Such coverage also includes the case law of the European Court of Human Rights. It has to be noted that individual application is not about Constitution or constitutional review; it regards only the violation of fundamental rights and freedoms protected by the Constitution, and the European Convention on Human Rights and its Protocols.

The article 45/1 of the Law No 6216 states that:

> "Everyone can apply to the Constitutional Court based on the claim that any one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights and the additional protocols thereto, to which Turkey is a party, which are guaranteed by the Constitution has been violated by public force."

As for exhaustion of remedies, the Law No 6216 expands the scope laid down in the Constitution. While the Constitution requires exhaustion of legal remedies, the article 45/2 of the Law no 6216 covers administrative and judicial remedies regarding act, action or negligence causing violation as follows:

> "All of the administrative and judicial application remedies that have been prescribed in the code regarding the transaction, the act or the negligence that is alleged to have caused the violation must have been exhausted before making an individual application."

In its case law, the Constitutional Court underlined that recourse to a legal remedy merely does not satisfy the requirement of exhaustion of legal remedies. Individual, after applying for legal remedy, has to wait for the outcome, in order for exhaustion of legal remedies.[24] Besides, withdraw from application of a legal remedy also does not amount to exhaustion of a legal remedy.[25] Therefore, application to a legal remedy does not suffice for exhaustion; such application has to be completed.

However, in cases where exhaustion of legal remedies has no effect the Constitutional Court accepts the case for individual application. As in its case law, the Constitutional Court stated that:

> "… if exhaustion of legal remedies has no effect in order to overcome violation, or if a serious and irrevocable harm arises while waiting for exhaustion of legal remedies, principle of respect to constitutional rights might necessitate examination of such a case even without exhausting legal remedies."[26]

Regarding subject matter of the individual application, while the Constitution stipulates "violation by public authorities", the Law No 6216 article 45/3 restricts public authority acts and states:

> " Individual applications cannot be made directly against legislative transactions and regulatory administrative transactions and similarly, the rulings of the Constitutional Court and transactions that have been excluded from judicial review by the Constitution cannot be subject of individual application."

Under that scheme below cannot fall under the competence of the Constitutional Court with regards to the individual application:

- legislative acts and legislative decrees,
- regulatory administrative acts,
- decisions of the Constitutional Court,
- acts of the President of the Republic in his/her own competence (Article 125/2 of the Constitution)
- decisions of the Supreme Military Council on promotion and retiring due to lack of tenure, (Article 125/2 of the Constitution)
- decisions of the High Council of Judges and Prosecutors other than dismissal from the profession (Article 159/10 of the Constitution)

Although it is not possible to bring legislative and administrative acts before the Constitutional Court under the individual application, secondary acts for the application of regulatory acts violating fundamental rights and freedoms protected under the Constitution and the European Convention on Human Rights should be brought before the Constitutional Court by individual application procedure.[27]

Standing in Individual Application

Standing designates who is eligible for individual application. Under the article 46/1 of the Law No 6216

> "The individual application may only be lodged by those, whose current and personal right is directly affected due to the act, action or negligence that is claimed to result in violation."

Application by affected ones are confined with individuals and private legal persons, as the article 46/2 of the Law No 6216 restricts the application of public legal persons as follows:

> "Public legal persons cannot make individual applications. Legal persons of private law can make individual application only with the justification that only the rights of the legal person have been violated."

However, there exist public legal persons acting as private legal persons under private law in some circumstances. This happens when public legal persons do not use public power and act as private legal persons. In that scheme, professional organizations, non-governmental organizations and unions are not considered to be eligible for individual application. However, as exclusion of above mentioned persons from applying individual application would not be considered in compliance with the function of individual application that protects objective legal order[28], such persons should be considered in the scope of individual application when they act as private legal persons.

Concerning foreigners the article 46/3 of the Law No 6216 states that foreigners may have standing for fundamental rights and freedoms, except for the rights exclusively recognized for Turkish citizens.

Application Procedure

Under the article 47/1 of the Law No 6216 individual applications could be made

- directly,
- through courts,
- through representatives abroad.

Application in other means that specified above shall be regulated with the Internal Regulation of the Constitutional Court.

The petition for individual application shall consist of:

- identification and address of the applicant and (if any) representative (if there is a representative proxy must be submitted),
- the right(s) and freedom(s) alleged to be violated,
- provisions of the Constitution relied upon
- reasoning,
- the stages regarding the exhaustion of legal remedies,
- the date on which remedies for application have been exhausted or if remedy of application has not been envisaged the date on which the violation has been acknowledged and the damage incurred,
- evidence relied upon and the originals (or samples) of the transaction or the decisions that are claimed to have led to the violation,
- document of payment of the fee for application.

Under the article 47/6 of the Law No 6216, if there is any shortcomings in the application documents, an extension up to fifteen days might be granted to the applicant by informing that lack of remedying shortcomings would result in rejection of the application.

According to the article 47/5 of the Law No 6216 the individual application should be made

- within thirty days starting from the exhaustion of legal remedies
- from the date when the violation is known if no remedies are envisaged.

In the case of failure to make application within these time limits by asserting a just excuse, the time limits might be extended fifteen days starting from the ending date of such excuse and with evidence bearing proof of the excuse. The Constitutional Court decides on whether to accept the excuse or not.

Admissibility Criteria and Examination by the Constitutional Court

In order for the Constitutional Court to examine the application on merits, the Court first makes pre-examination and considers standing, subject matter, exhaustion of legal remedies and duration. Despite the above mentioned criteria have been fulfilled, still the Constitutional Court is not obliged to examine the case. As the article 48/2 of the Law No 6216 stipulates that the Constitutional Court decides on inadmissibility in cases of

- applications that both have minor importance regarding the application and interpretation of the Constitution or the scope and limits of fundamental rights, and where the applicant does not incur any loss
- applications that lack any ground.

Examination of the individual application by the Constitutional Court is laid down in the article 49 of the Law No 6216. Accordingly, if the Constitutional Court deems an application admissible, it then sends a copy of the application to the Ministry of Justice for information. If the Ministry of Justice finds it necessary, it gives an opinion on the case.

While examining the case on merits, the Constitutional Court carries out all sorts of research; and all related documents, evidence and information deemed necessary by the Constitutional Court shall be requested from concerned ones. The examination is made on the file, however the Constitutional Court may decide on hearings if it deems necessary.

Examination on merits does not cover issues that have to be dealt within the legal remedies. The Constitutional Court may take necessary measures it deems necessary for the protection of the rights and freedoms during he examination of the case either ex officio or upon a request of the applicant. If decided to take a measure, the Constitutional Court has to decide on the merits of the case within six months. Otherwise, the decision on measure is automatically lifted.

The power of the Constitutional Court in examination of the case is limited to whether there exists any violation of fundamental rights and freedoms, and if so, to determine how such violation could be remedied.

According to the Article 50/1 of the Law No 6216, the Constitutional Court decides on whether fundamental rights and freedoms of the applicant are violated or not. If the Constitutional Court finds a violation of fundamental rights and freedoms of applicant, it shall decide on any means necessary in order to remove all consequences of the violation. In addition, review of expediency is not allowed and the Constitutional Court is not allowed to give decisions that could be characterized as and has the quality of an administrative act and action.

The Constitutional Court in its case law underlines that it does not function to examine whether decisions of other courts are in compliance with laws or not; as the Constitutional Court is not considered as a superior court. According to the Constitutional Court,

> "… in principle, to prove facts of a case, consideration proofs, interpretation and application of law, whether decisions given by courts are just in substance is not subject to the constitutional complaint/individual application. The only exception would be cases in which courts' decisions are arbitrary to the extent that determinations and decisions disregard justice, common sense, and such a situation, *per se*, violates fundamental rights and freedoms protected by the constitutional complaint/individual application. Within this scope, applications having quality of legal remedy could not be considered within the constitutional complaint/individual application, unless they are apparently arbitrary."[29]

According to the article 50/2 of the Law No 6216 the Constitutional Court, after examination of the case on merits, finds that the violation arises out of a court decision it may decide on renewal of the trial and sends the case to the related court. In that sense, the court responsible for retrial shall decide in a way to remove violation and all of its consequences. If the Constitutional Court decides that there is no legal interest in renewal of the trial, then it may decide on compensation in favor of the applicant or directs the applicant to file a case in general courts.

SELECTED CASES OF THE EUROPEAN COURT OF HUMAN RIGHTS ON APPLICATIONS FROM TURKEY

Case of Ünal Tekeli V. Turkey

(Application no. 29865/96)

Facts: Applicant Ayten Ünal was a Turkish national and lawyer. She started her professional career and made business network with her maiden name. She couldn't use her maiden name at official documents after her marriage. The case she filed at national courts rejected on the basis of Article 153 of the Civil Code, which prescribed that married women must use her husband's surname after getting married. Referred article amended afterwards and married women acquired the right to use her maiden name beside her husband's surname; however, the applicant preferred to use her surname merely.

Related Rights/Alleged Breach of Articles: Alleged breach of article 14 of the European Convention on Human Rights taken in conjunction with article 8.

"43. The applicant complained that the authorities had refused to allow her to bear only her own surname after her marriage whereas Turkish law allowed married men to bear their own surname. She submitted that this resulted in discrimination on grounds of sex and was incompatible with Article 8 taken together with Article 14 of the Convention.

44. The Government acknowledged that it amounted to a difference in treatment on grounds of sex but argued that this was based on objective and reasonable grounds which prevented it from being in any way discriminatory."

Article 8, Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the

law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 14, Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Court's Judgment: Firstly Court founds "difference in treatment" against woman with respect to using her own surname after marriage. Then examination carried out over whether this distinction is justifiable or not. Court acknowledged the social reasons behind the legislation but did not deem them compatible with values shared by member states of European Council. Court emphasized that the new Turkish Civil Code abolished the status of the men as head of the family and introduced equality for both parties of marriage to representing family. As Turkish law itself provides the same status for married couples to represent family, it should be possible to choose woman's surname as well as man's. Court did not found justification for different treatment and ascertained that: *"The Government have not shown in the present case that concrete or substantial hardship for married partners and/or third parties or detriment to the public interest would be likely to flow from the lack of reflection of family unity through a joint family name."*. The Court found violation of Article 14 taken in conjunction with Article 8 and did not determine whether there has also been a breach of Article 8 taken alone.

Quotations: "*66. The Court observes in this regard that, according to the practice of the Contracting States, it is perfectly conceivable that family unity will be preserved and consolidated where a married couple chooses not to bear a joint family name. Observation of the systems applicable in Europe supports this finding. The Government have not shown in the present case that concrete or substantial hardship for married partners and/or third parties or detriment to the public interest would be likely to flow from the lack of reflection of family unity through a joint family name. In these circumstances the Court considers that the obligation on married women, in the name of family unity, to bear their husband's surname – even if they can put their maiden name in front of it – has no objective and reasonable justification.*

67. The Court does not underestimate the important repercussions which a change in the system, involving a transition from the traditional system of family name based on the husband's surname to other systems allowing the married partners either to keep their own surname or freely choose a joint family name, will inevitably have for keeping registers of births, marriages and deaths. However, it considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the name they have chosen (see, mutatis mutandis, Christine Goodwin v. the United Kingdom [GC], no. 28957/95, § 91, ECHR 2002-VI)."

Case of Leyla Şahin V. Turkey

(Application no.44774/98)

Facts: Applicant Leyla Şahin, a student of Cerrahpaşa Faculty of Medicine at Istanbul University, was refused to attend to lectures and enroll exams as Istanbul University issued a circular which set forth that students with Islamic headscarf would not be accepted to lectures, courses or tutorials. She applied to administrative court in order to annul the circular, however her request was denied. Administrative court found that University has the power to regulate dress code of students in order to maintain an order in the campus. University also imposed disciplinary sanction on applicant and suspended her studentship for one semester.

Related Rights/Alleged Breach of Articles: Alleged breach of Article 9.

"70. The applicant submitted that the ban on wearing the Islamic headscarf in institutions of higher education constituted an unjustified interference with her right to freedom of religion, in particular, her right to manifest her religion."

Article 9, Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others

Court's Judgment: Court examined the foreseeability of Turkish law on the issue of headscarf ban at university and convenience of this ban with the European Convention on Human Rights standards. At first, the European Court of Human Rights took into consideration of Turkish Constitutional Court's cases on secularism, which later accepted strong relation between secularism and democratic system. After finding restriction legitimate Court accepts University has right to decide proper sanction and it is hard for the Court to grasp local needs. Court did not find violation of Article 9.

Quotations: "*114. As the Chamber rightly stated (see paragraph 106 of its judgment), the Court considers this notion of secularism to be consistent with the values underpinning the Convention. It finds that upholding that principle, which is undoubtedly one of the fundamental principles of the Turkish State which are in harmony with the rule of law and respect for human rights, may be considered necessary to protect the democratic system in Turkey. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention (see Refah Partisi (the Welfare Party) and Others, cited above, § 93)."*

"116. Having regard to the above background, it is the principle of secularism, as elucidated by the Constitutional Court (see paragraph 39 above), which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn."

"121. In that connection, the Court does not accept the applicant's submission that the fact that there were no disciplinary penalties for failing to comply with the dress code effectively meant that no rules existed (see paragraph 81 above). As to how compliance with the internal rules should have been secured, it is not for the Court to substitute its view for that of the university authorities. By reason of their direct and continuous contact with the education community, the university authorities are in principle better placed than an international court to evaluate local needs and conditions or the requirements of a particular course (see, mutatis mutandis, Valsamis v. Greece, judgment of 18 December 1996, Reports 1996-VI, p. 2325, § 32). Besides, having found that the regulations pursued a legitimate aim, it is not open to the Court to apply the criterion of proportionality in a way that would make the notion of an institution's "internal rules" devoid of purpose. Article 9 does not always guarantee the right to behave in a manner governed by a religious belief (see Pichon and Sajous v. France (dec.), no. 49853/99, ECHR 2001-X) and does not confer on people who do so the right to disregard rules that have proved to be justified (see Valsamis, cited above, opinion of the Commission, p. 2337, § 51)."

CASE STUDY

Applicants (A) and his daughter (B) are adherents of Bahaism. (B) is subject to compulsory religious education at high school and both of the applicants think that content of the lesson is inconvenient with their religious beliefs. Applicant (A) submitted a request to the Provincial Directorate of National Education ("the Directorate") at the Istanbul Governor's Office, seeking to have his daughter exempted from religious culture and ethics classes. Pointing out that his family was followers of Bahaism, he stressed that, under international treaties such as, for example, the Universal Declaration of Human Rights, parents had the right to choose the type of education their children were to receive. In addition, he alleged that the compulsory course in religious culture and ethics was incompatible with the principle of secularism. Administration rejected applicant's request by virtue of Section 12 of the State Education Act. While Turkish law provides Christians and Jewish pupils right not to enroll, Bahavis were not deemed as a different religious group and have to attend compulsory religious class.

RELEVANT DOMESTIC LAW

State Education Act (Law no. 1739) Section 12 of the State Education Act (Law no. 1739) provides:"Secularism is the basis of Turkish state education. Religious culture and ethics shall be among the compulsory subjects taught in primary and upper secondary schools and in schools of an equivalent level."

QUESTIONS

Discuss legality of exemption provided for different religious group and consider the necessity to declaring religious belief to use exemption.

Discuss legality of application for the religious groups that are not allowed to enjoy the exemption.

Case of Cumhuriyet Vakfı and Others V. Turkey

(Application no. 28255/07)

Facts: Applicants Ilhan Selcuk, Guray Tekin Oz, joint stock company Yeni Gün Haber Ajansı Basın ve Yayıncılık and Cumhuriyet Vakfı are respectively chief editorial writer, editor in chef, publisher and owner of the Cumhuriyet newspaper. In the course of presidential election, Cumhuriyet published an advertisement tha covers words appeared to be quoted from candidate Abdullah Gul. Mr. Gul alleged his sentences falsely published at English newspaper Guardian and used by Cumhuriyet to defame him and brought a civil action for compensation against the applicants before the Ankara Civil Court of First Instance. Without listening to applicants and depending on documents that claimant provided court ordered an injunction as follows: *"In accordance with Articles 24 and 25 of the Civil Code and Article 103 and the succeeding provisions of the Code of Civil Procedure, the publication of the material attributed to the claimant Abdullah Gül, as published on the front page of the newspaper Cumhuriyet in the issues of 29 April 2007 and 1 May 2007, as well as any news that may be subject to the [present] court proceedings, be suspended/prevented as a precautionary measure."*. Mr. Gul withdrew his request concerning compensation at main case after presidential election he won and court dismissed the case and lifted interim injunction.

Related Rights/Alleged Breach of Articles: Alleged breach of Article 10.

"41. The applicants complained under Article 10 of the Convention that the interim injunction ordered by the Ankara Civil Court of First Instance constituted an unjustified interference with their right to freedom of expression and freedom to impart information, as well as with the right of the public to receive such information."

Article 10, Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The practice of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Court's Judgment: Interference introduced by Turkish law legitimate as its aim is protection of the reputation or rights of others within the meaning of Article 10§2. On the other hand Court finds very important procedural deficiencies. Court finds that the scope of the restriction was unclear. There was no specific time limit about how long injunction will be applied. It is also vague which expressions and news should not be used at newspaper. Domestic court did not use reasoning for injunction that deprived applicant from important safeguard and such also prevents European Court of Human Rights to examine domestic court's decision with respect to balancing public interest and human rights. Applicant's first opportunity to present their counter arguments against injunction was at the first hearing which took place one month and two days after the injunction was issued. As for the abovementioned deficiencies causing problems on proportionality and legitimacy in a democratic society, the European Court of Human Rights decided that Article 10 of the Convention was breached.

Quotations: *"64. The Court secondly notes that as a result of the absence of a specific time-limit for its duration, coupled with the lack of a periodic review as to its continuing necessity or a prompt determination on the merits of the main case, …*

66. The restriction on the applicants' freedom of expression was, therefore, made unduly onerous by reason of the unexplained delays in the procedure (see, mutatis mutandis, Ekin Association, cited above, § 61), and the failure to limit the impugned measure to a reasonable period of time. The Court emphasises that what is required here is not the setting of strict time-limits for interim injunctions with absolute certainty, which is neither attainable nor desirable in view of the excessive rigidity it would entail.

69. The Court further considers that the absence of reasoning in the domestic court's decision not only deprived the applicants of an important procedural safeguard, but also prevented the Court from examining whether the domestic court duly balanced the parties' interests at stake by taking into account questions such as: whether the applicants had, in the way they presented the statement allegedly made by Mr Gül, complied with their duties and responsibilities to act in good faith to provide accurate and reliable information in accordance with the ethics of journalism

73. In the instant case, the first opportunity for the applicants to present their counter-arguments was at the first hearing, which took place one month and two days after the injunction was issued. Considering the "perishable" nature of news and the specific political environment in which the impugned measure was applied, the inability of the applicants to contest the interim injunction for over thirty days placed them at a substantial disadvantage vis-à-vis their opponent and thus constituted a significant procedural shortcoming that undermined their freedom of expression disproportionately.

75. In the light of the procedural deficiencies noted above, and bearing in mind the severity of the punishment failure to comply with the interim injunction would have entailed (see Article 113/A of the Code of Civil Procedure noted in paragraph 33 above), it cannot be held that the interference in question was proportionate to the legitimate aims pursued and necessary in a democratic society."

Case of DISK and KESK V. Turkey

(Application no. 38676/08)

Facts: Applicants DİSK (Devrimci İsci Sendikaları Konfederasyonu – Confederation of Revolutionary Workers' Trade Unions) and the KESK (Kamu Emekcileri Sendikaları Konfederasyonu – Confederation of Public Employees' Trade Unions) organized a demonstration on 1 May to celebrate Labour Day. Applicants properly notified Beyoğlu District Governor about their will of gathering at Taksim square to commemorate their friends who had lost their lives during the demonstrations of 1 May 1977. Beyoğlu District Governor declared only representatives of trade union may gather at Taksim square and larger

scale demonstrations were not authorized. Security measures were taken to prevent demonstration. Certain schools in the nearby districts were shut down, operation of ferries and subways were stopped, the roads leading to Taksim Square were blocked and extra police for that day were deployed to Taksim location. On 1 May, members of DİSK and KESK encountered police intervention before DİSK headquarter at Şişli from 6.30 am till 10.30 am. In the course of police intervention, which took place before the demonstration started, gas bomb and spray gas were used and many demonstrators were injured. The group broke up at 10.30 on its own accord to forestall any further violence.

Related Rights/Alleged Breach of Articles: Alleged breach of Article 8, 10 and 11.

"18. The applicants alleged that the police intervention in the Labour Day Celebrations of May 2008 constituted a violation of their right to private life, freedom of expression and freedom of assembly. In this respect, they invoked Articles 8, 10 and 11 of the Convention."

Picture 3.4

Article 11, Freedom of Assembly and Association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Court's Judgment: The Court firstly declared that police intervention caused an interference of applicants' right to peaceful assembly. Taking into considerations of the facts that demonstrators did not engage in any violent acts and infringe public order. Court emphasized that it is government's duty to take measures to protect right to peaceful assembly. Court held that police intervention was disproportionate and was not necessary for the prevention of disorder.

Quotations: *"27. The Court also notes that States must not only safeguard freedom of peaceful assembly, but must also refrain from applying unreasonable indirect restrictions upon that right. Finally, it considers that, although the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities in the exercise of the rights protected, there may also be positive obligations to secure their effective enjoyment (see Djavit An, cited above, § 57, and Oya Ataman, cited above, § 36).*

34. The Court further notes with concern that the police officers threw a gas bomb in the Sisli Etfal Hospital premises while chasing the demonstrators. The Government maintained that some of the demonstrators had attacked the hospital and that they had tried securing the area by using a gas bomb. In this respect, they submitted the testimony of the Chief of Hospital (see paragraph 11). According to this statement, some demonstrators tried hiding in the hospital, opening a banner, and the police threw a gas bomb in the hospital's garden in their pursuit. The Court recalls that it has recognized that the use of gas bombs against individuals can produce several serious health problems and expressed concern over the use of such gases in law enforcement (see Ali Günes v. Turkey, no. 9829/07, §§ 34-37, 10 April 2012). It therefore considers that the use of a gas bomb in hospital premises cannot be considered as necessary or proportionate in the circumstances of the present case.

36. In the Court's view, where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance (see Nurettin Aldemir and Others v. Turkey, 32/02, 32133/02, 32137/02 and 32138/02, § 46, 18 December 2007)."

In Practice

Constitutional Court's Decision on Ayşe Zıraman and Cennet Yeşilyurt Application (App. No:2012/403)[30]

"A. Claims of the Applicants

13. The applicants asserted that the registry of the land of which they were the owners in the name of another person violated the freedom to claim rights and the right to property by stating that the land of which they were the owners in the title deed was recorded and registered in the name of another person through the cadastral work carried out in 1994 and that they were able to find out about this situation in 2008 as they resided abroad, that the acquisition of property through unlawful registry needed to be null and void, that a case filed in 2003 for the same cadastral action needed to interrupt the foreclosure period, that the protection of the properties of private persons was under the responsibility of the state.

B. Evaluation

14. Paragraph three of article 148 of the Constitution is as follows:

"…In order to make an application, ordinary legal remedies must be exhausted."

15. Paragraph (2) of article 45 of the Code on the Establishment and Trial Procedures of the Constitutional Court with the side heading of ''Right to individual application" is as follows:

"All of the administrative and judicial application remedies that have been prescribed in the code regarding the transaction, the act or the negligence that is alleged to have caused the violation must have been exhausted before making an individual application."

16. According to the mentioned provisions of the Constitution and the Code, in order to be able to apply to the Constitutional Court via individual application, the ordinary legal remedies must be exhausted. The respect to fundamental rights and freedoms is a constitutional obligation of all state organs, and the correction of rights violations that emerge as a result of the negligence of this obligation is the duty of administrative and judicial authorities. For this reason, it is essential that claims to the effect that fundamental rights and freedoms have been violated be brought forward firstly before courts of instance, that they be evaluated and resolved by these instances.

17. For this reason, individual application to the Constitutional Court is a legal remedy of secondary nature that can be seized in the event that the alleged rights violations are not rectified by courts of instance. Due to the secondary nature of the individual application remedy, it is obligatory that ordinary legal remedies be exhausted in order for an individual application be lodged at the Constitutional Court. In accordance with this principle, the applicant needs to primarily convey the complaint which she has brought before the Constitutional Court to the administrative and judicial authorities of venue within due period in accordance with the due procedure, to submit the information and evidence that she has about this subject within due period and to have paid the necessary attention to following her case and application in this process.

18. In accordance with paragraphs (1) and (2) of provisional article 3 of the Code numbered 6100, until the date when the regional courts of appeal will begin their duties which will be announced in the Official Gazette, the applicable provisions of the Code numbered 1086 with regard to appeal shall continue to apply.

19. In civil cases, according to paragraph (1) of article 440 of the Code numbered 1086, the remedy of correction can be resorted to against the decisions of the Supreme Court of Appeals within 15 days following pronouncement or notification. In the event that this remedy is resorted to, until a decision is issued with regard to the request for correction, it is not the case that the court decision becomes final and application remedies are exhausted. In this case, it cannot be said that legal remedies are exhausted without a decision being issued with regard to the request for correction.

20. Within this framework, if the remedy of correction has been resorted to in civil cases, in order for an individual application to be lodged to the Constitutional Court, it is clear that, first of all, this remedy needs to be exhausted by awaiting the decision with regard to this request. In the incident which is the subject matter of the application, as it has not been decided on the applicants' request for correction yet, it is considered that ordinary legal remedies are not exhausted.

21. Due to the reasons explained, as it is understood that an individual application was filed before all judicial application remedies prescribed in the code against the action which is the subject matter of the application were exhausted, it should be decided that the applications are inadmissible due to "the fact that application remedies were not exhausted" without examining them in terms of other conditions of admissibility.

V. JUDGMENT

It is decided UNANIMOUSLY on 26/3/2013 that the applications are INADMISSIBLE due to "the fact that application remedies were not exhausted", that the trial expenses be left on the applicants."

your turn 2

CASE STUDY

On 22 January 2004 Istanbul was hit by a heavy snowstorm. Consequently, upon the instructions of the Ministry of Education, schools in Istanbul recessed for the winter break a day earlier than scheduled. (C) was not enrolled for the paid school bus, but was using the shuttle that was operated free by the municipality. As the early dismissal of the classes had not been notified to the municipality, the shuttle did not come when the school was closed. (C) therefore tried to walk back home, which was 4 km away from his school. Late in the afternoon, when he did not return from school, the applicants called the police. However, it was not possible to find (C). His body was found the following day, frozen near a riverbed.

QUESTION

(C)'s father (D) filed a compensation case against Ministry of Education at Istanbul Administrative Court and declared his needs for legal aid. The domestic court did not take to consideration of documents provided by (D) and rejected the request. Discuss the case under the European Convention on Human Rights Article 6.

Summary

LO 1 Ability to explain the principles and institutions of human rights law in international and national level

Human rights are universal rights, which are equal, inalienable, indivisible, interdependent and inherent to human being. Human rights put human dignity in the center of concern. Human rights is defined in terms of generations. First generation concerns civil and political rights such as freedom of expression, right to vote etc. Second generation rights concern social and cultural rights, such as right to form a union, right to education etc.. Third generation rights –as called "solidarity rights" – concern right to development, right to peace, right to environment, right to ownership of the common heritage of mankind etc. The principle to respect human rights is established by the Charter of the United Nations. The General Assembly of the United Nations adopted the Universal Declaration of Human Rights on December 10th, 1948. It sets common standards of achievements for all individuals and nations.

In order to monitor the implementation of human rights universally and for universal human rights complaints the Human Rights Committee-United Nations Human Rights Office of the High Commissioner and United Nations Economic and Social Council were established. Former works for monitoring civil and political rights under the International Covenant on Civil and Political Rights; latter stands for economic, social and cultural rights under the International Covenant on Economic, Social, and Cultural Rights.

In order to monitor respect for human rights in the member states of the Council of Europe the European Court of Human Rights was established. While monitoring the European Court of Human Rights interprets the provisions of the European Convention on Human Rights by its case law which in turn results in keeping the European Convention on Human Rights a living instrument.

Under Turkish Constitution (1982) human rights are articulated as "fundamental rights and freedoms". It is stated in the preamble of the Constitution that every Turkish citizen has the right to exercise the fundamental rights and freedoms laid down in the Constitution in accordance with "equality" and "social justice", to lead an honorable life and to improve his/her material and spiritual well-being under the aegis of national culture, civilization, and the rule of law. Provisions governing human rights under Turkish Constitution give first a definition, than stipulate rules on restriction and prohibition of abuse of them.

LO 2 Ability to explain the individual application/constitutional complaint under Turkish Legal System

The individual application has been introduced into the Turkish Legal System by the constitutional amendment made on 12.09.2010 with the Law No 5982. By this amendment the individual application was enshrined in the article 148 of the Constitution as follows:

"1. The Constitutional Court shall … decide on individual applications.

…

3. Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights, which are guaranteed by the Constitution, has been violated by public authorities. In order to make an application, ordinary legal remedies must be exhausted.
4. In the individual application, judicial review shall not be made on matters required to be taken into account during the process of legal remedies.
5. Procedures and principles concerning the individual application shall be regulated by law."

Under this scheme rules and procedures governing the individual application have been set out by the Law on Establishment and Judicial Procedures of the Constitutional Court.

LO 3 Ability to conduct research regarding ECHR Case Law

Please review the Case Law presented in this Chapter. For further reading on the cases, European Court of Human Rights Database allows the students of human rights to access invaluable information on cases. http://hudoc.echr.coe.int

Test Yourself

1 Which of the following statements is wrong as regards to human rights?

A. Human rights are applied equally and with no discrimination.
B. Deprivation of human rights with a justification is possible.
C. Human rights put dignity in the center of concern.
D. There is a hierarchy in human rights.
E. Human rights existed as a result of a struggle against unrestricted absolute power of rulers.

2 Which one of the matchups is correct?

A. Right to health – I. Generation Rights
B. Freedom of expression – II. Generation Rights
C. Right to education – III. Generation Rights
D. Right to environment – III. Generation Rights
E. Right to ownership of the common heritage of mankind – I. Generation Rights

3 Which one of the following matchups is/are correct as regards to monitoring human rights?

I. International Covenant on Civil and Political Rights –Human Rights Committee
II. International Covenant on Economic, Social and Cultural Rights – United Nations Economic and Social Council
III. European Convention on Human Rights – European Court of Human Rights

A. Only I
B. Only II
C. I and II
D. II and III
E. I, II and III

4 Which is not one of the conditions of admissibility of the European Court of Human Rights?

A. Applications can also be lodged against the States that are not party to the Convention.
B. An applicant's allegations must concern one or more of the rights defined in the Convention.
C. Cases can only be brought to the Court after domestic remedies have been exhausted.
D. The applicant must be, personally and directly, the victim of a violation of the Convention, and must have suffered a significant disadvantage.
E. The application shall be made within six months following last judicial decision on the case.

5 Which of the following protocol created the European Court of Human Rights and changed the monitoring system of the European Convention on Huaman Rights?

A. Protocol No. 1
B. Protocol No. 4
C. Protocol No.7
D. Protocol No.11
E. Protocol No 13

6 Which of the following statements is false under the European Convention on Human Rights?

A. Third party intervener (an individual other than the applicant or another state party to the European Convention on Human Rights other than that against which the application has been brought) may become party to the case yet is not entitled to file pleadings and may take part in public hearings.
B. The European Court of Human Rights identifies the structural problems implicit in the repetitive cases and imposes obligations on states regarding those problems under pilot cases.
C. The European Court of Human Rights shall not deal with any application that is unanimous.
D. The Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
E. The European Court of Human Rights may only deal with the matter after all domestic remedies have been exhausted.

7 Which of the following is wrong under the Constitution as regards to the protection of fundamental rights and freedoms?

A. The fundamental rights and freedoms may be restricted only by law.
B. The fundamental rights and freedoms may be restricted in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence.
C. Restrictions on the fundamental rights and freedoms shall not be contrary to the principle of proportionality.
D. Restrictions on the fundamental rights and freedoms shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic
E. The legal regime of fundamental rights and freedoms under war times, mobilization, martial law, or a state of emergency is the same as in other times.

8 Which one of the following statements is true as regards to the individual application under Turkish Constitution?

A. Private legal persons are not allowed to file an individual application.
B. Public legal persons are allowed to file an individual application.
C. Foreigners may file an indiviudal application concerning all of the rights and freedoms laid down in the Constitution
D. An individual application could not be lodged against acts and actions outside the scope of judicial review under the Constitution.
E. Individual application procedure under the Constitution gives right to Turkish citizens abroad to file an indiviual application.

9 Which of the following statement(s) is/are true as regards to the decision of the Constitutional Court on individual application under the Constitution?

I. The Constitutional Court may decide on renewal of the trial and sends the case to the related court.
II. The Constitutional Court may decide on compensation in favor of the applicant.
III. The Constitutional Court may refer to the legislation resulting the violation of the fundamental rights and freedoms to the Turskish Grand National Assembly for consideration.

A. Only A
B. Only B
C. I and II
D. II and III
E. I , II and III

10 Which of the following statements is wrong as regards to the competence of the Constitutional Court in individual application under Turkish Constitution?

A. Legislative acts and legislative decrees are subject to individual application.
B. Regulatory administrative acts are not subject to individual application.
C. Constitutional Court decisions are not subject to individual application.
D. Decisions of the High Council of Judges and Prosecutors other than dismissal from the profession are not subject to individual application.
E. Decisions of the Supreme Military Council on promotipon and retiring due to lack of tenure are not subject to individual application.

Answer Key for "Test Yourself"

1. D	If your answer is wrong, please review the "Human Rights" section.
2. D	If your answer is wrong, please review the "Human Rights" section.
3. E	If your answer is wrong, please review the "Protecting and Promoting Human Rights under the United Nations" section.
4. A	If your answer is wrong, please review the "Protecting and Promoting Human Rights under European Convention on Human Rights" section.
5. D	If your answer is wrong, please review the "Protecting and Promoting Human Rights under European Convention on Human Rights" section.
6. A	If your answer is wrong, please review the "Protecting and Promoting Human Rights under European Convention on Human Rights" section.
7. E	If your answer is wrong, please review the "Human Rights under Turkish Legal System" section.
8. D	If your answer is wrong, please review the "Human Rights under Turkish Legal System" section.
9. C	If your answer is wrong, please review the "Human Rights under Turkish Legal System" section.
10. A	If your answer is wrong, please review the "Human Rights under Turkish Legal System" section.

CASE STUDY
Applicants (A) and his daughter (B) are adherents of Bahaism. (B) is subject to compulsory religious education at high school and both of the applicants think that content of the lesson is inconvenient with their religious beliefs. Applicant (A) submitted a request to the Provincial Directorate of National Education ("the Directorate") at the Istanbul Governor's Office, seeking to have his daughter exempted from religious culture and ethics classes. Pointing out that his family was followers of Bahaism, he stressed that, under international treaties such as, for example, the Universal Declaration of Human Rights, parents had the right to choose the type of education their children were to receive. In addition, he alleged that the compulsory course in religious culture and ethics was incompatible with the principle of secularism. Administration rejected applicants request by virtue of Section 12 of the State Education Act. While Turkish law provides Christians and Jewish pupils right not to enroll, Bahavis were not deemed as a different religious group and have to attend compulsory religious class.
RELEVANT DOMESTIC LAW
State Education Act (Law no. 1739) Section 12 of the State Education Act (Law no. 1739) provides:"Secularism is the basis of Turkish state education. Religious culture and ethics shall be among the compulsory subjects taught in primary and upper secondary schools and in schools of an equivalent level."
QUESTIONS
Discuss legality of exemption provided for different religious group and consider the necessity to declaring religious belief to use exemption.
Discuss legality of application for the religious groups that are not allowed to enjoy the exemption.

your turn 1

Answer of Q1: As the European Court of Human Rights rendered the judgment in Case of Hasan and Eylem Zengin v. Turkey *(Application no. 1448/04): "73. The Court considers at the outset that, whatever the category of pupils concerned, the fact that parents must make a prior declaration to schools stating that they belong to the Christian or Jewish religion in order for their children to be exempted from the classes in question may also raise a problem under Article 9 of the Convention (see, mutatis mutandis, Folgerø and Others, cited above, § 97). In this connection, it notes that, according to Article 24 of the Turkish Constitution, "no one shall be compelled ... to reveal religious beliefs and convictions..." (see paragraph 16 above). Furthermore, it reiterates that it has always stressed that religious convictions are a matter of individual conscience (see, inter alia, Sofianopoulos and Others v. Greece (dec.), nos. 1977 /02, 1988/02 and 1997/02, ECHR 2002-X, and also, mutatis mutandis, Buscarini and Others, cited above, § 39)."*

Answer of Q2: As the European Court of Human Rights rendered the judgment in Case of Hasan and Eylem Zengin v. Turkey *(Application no. 1448/04): "76. In consequence, the Court considers that the exemption procedure is not an appropriate method and does not provide sufficient protection to those parents who could legitimately consider that the subject taught is likely to give rise in their children to a conflict of allegiance between the school and their own values. This is especially so where no possibility for an appropriate choice has been envisaged for the children of parents who have a religious or philosophical conviction other than that of Sunni Islam, where the procedure for exemption is likely to subject the latter to a heavy burden and to the necessity of disclosing their religious or philosophical convictions in order to have their children exempted from the lessons in religion."*

Suggested answers for "Your turn"

CASE STUDY
On 22 January 2004 Istanbul was hit by a heavy snowstorm. Consequently, upon the instructions of the Ministry of Education, schools in Istanbul recessed for the winter break a day earlier than scheduled. (C) was not enrolled for the paid school bus, but was using the shuttle that was operated free by the municipality. As the early dismissal of the classes had not been notified to the municipality, the shuttle did not come when the school was closed. (C) therefore tried to walk back home, which was 4 km away from his school. Late in the afternoon, when he did not return from school, the applicants called the police. However, it was not possible to find (C). His body was found the following day, frozen near a riverbed.
QUESTION
(C)'s father (D) filed a compensation case against Ministry of Education at Istanbul Administrative Court and declared his needs for legal aid. The domestic court did not take in to consideration of documents provided by (D) and rejected the request. Discuss the case under the European Convention on Human Rights Article 6.

your turn 2

As the European Court of Human Rights rendered the judgment in Case of Hasan and **Case of Ilbeyi Kemaloğlu and Meriye Kemaloglu v. Turkey *(application no. 19986/06)*** "*52. The Court reiterates the basic principles laid down in its established case law regarding legal aid (see Kreuz v. Poland, no.28249/95, § 52-57, ECHR 2001-VI, Bakan v. Turkey, no.50939/99, §§ 66-68, 12 June 2007 and Mehmet and Suna Yiğit, cited above, § 33-34). In the present case, the court fees that the applicants were required to pay were calculated on the basis of the value of the litigation and amounted to TRL 5,072,600,000 and TRL 4,384,100,000 respectively while the monthly minimum wage was TRL 444,150,000 at the time. Although the Government argued that the applicants had failed to submit documents attesting to their poverty, the Court observes that both applicants submitted certificates proving their poor financial situation in support of their legal aid request before the Istanbul Administrative Court. It is clear from that certificate delivered by the office of the headman that the applicants had no income and that they were in a poor financial situation (see paragraph 10 above). Nevertheless, their legal aid request was rejected by the Administrative Court, which did not indicate a specific reason in its decision, but merely referred to the relevant legislation.*

53. The Court observes that it has already examined similar grievances in the past and has found a violation of Article 6 § 1 of the Convention on the ground, inter alia, that the legal aid system in Turkey fails to offer individuals substantial guarantees to protect them from arbitrariness (see Bakan, cited above, §§ 74-78; Mehmet and Suna Yiğit, cited above, §§ 31-39; Eyüp Kaya v. Turkey, no.17582/04, §§ 22-26, 23 September 2008; and Kaba v. Turkey, no.1236/05, §§ 19-25, 1 March 2011). The Court has also examined the present case and finds no particular circumstances which would require it to depart from its findings in the aforementioned cases. It considers that the refusal of the applicants' legal aid request deprived them of the possibility of submitting their case before a tribunal and concludes that in the instant case there has been a disproportionate restriction on the applicants' right of access to a court.

54. There has accordingly been a violation of Article 6 § 1 of the Convention."

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Chapter 4

Introduction to Administrative Law

After completing this chapter, you will be able to:

Learning Outcomes

1. Explain the basic principles of Administrative Law
2. Explain organization, functioning and liability of Turkish Administration

Chapter Outline

Introduction
Constitutional Law
Basic Principles of Administrative Law
Organization of Administration in Turkey
Judicial Review of Administration

Key Terms

1982 Constitution
Constitutional Law
Administrative Law
Rule of Law
Judicial Review of Administration
Organization of Turkish Administration

INTRODUCTION

In this chapter basic principles of Republic of Turkey and her administration will be examined. While doing that, constitutional history of Republic of Turkey will be briefly laid down and components of her will be explained. Afterwards, legal framework of Turkish Administrative Law with its principles will be set forth.

As Administrative Law governs composition of the government and agencies, legal status of public personnel and public domain, acts, actions and activities of administration and liability of administration, law governing relations between public authority and individuals and judicial review of administration will be expressed in this chapter.

CONSTITUTIONAL LAW

The main subject of constitutional law is the form and main organs of the State, structure and functions of State organs and fundamental rights and freedoms. Constitution is, among other rules, at the heart of Constitutional Law.

Constitution is defined as a body of fundamental principles or established precedents according to which a state or other organization is acknowledged to be governed.

A constitution is found either with an establishment of a new state or after a war or a revolution.

Brief History of Constitutions in Turkey[1]

-Senedi İttifak (1808) was a kind of document in order to set balance and maintain relationships between the Sultan and nobles.

-Gülhane Hattı Humayunu/Tanzimat Fermanı (1839) was the first action taken in the way of constitutional steps. The document granted equal rights to muslims and minorities regarding honour, modesty, right to property and life, judiciary, military service and tax liabilities. Undertakings of Tanzimat Fermanı was approved by Islahat Fermanı (1856).

-Kanuni Esasi (1876) was the first constitution-like document in order to limit powers of rulers. In this era and document the supreme authority and personality of the Sultan was kept as the Ottoman Monarchy remained while two assemblies Heyeti Ayan (members appointed by Sultan) and Heyeti Mebusan (members elected by citizens) constituted parliament (Meclis-i Umumi). The competence of the parliament was limited and without the consent of the Sultan, laws could not enter into force. In addition, responsibility of the Sultan was not articulated in the Kanuni Esasi, accordingly, Sultan was predominant as regards to powers. Soon after, in 1878, Sultan dissolved Heyeti Mebusan and autocracy was back in stage.

Equality, security of property, personal immunity, right to education, prohibition of angaria and tax duties under laws were examples of fundamental rights and freedoms stated in Tanzimat Fermanı.

In 1909, major amendments took place and powers of the Sultan were restricted while powers of Meclisi Mebusan were expanded. Then, consent of the Sultan for promulgation of laws was abolished and duty of the Sultan towards Meclisi Mebusan was articulated.

-Teşkilatı Esasiye Kanunu, namely the Constitution of 1921, was made by the Grand National Assembly that was established on April 23, 1920. The main principle underlining democracy in the Constitution of 1921 was the sovereignty belonged unconditionally to the nation. Besides, principle of unification of powers was accepted while assembly government system was in force. Under the ruling of the Constitution of 1921 the proclamation of the Turkish Republic took place on October 29, 1923.

-The Constitution of 1924 was the first constitution of the Turkish Republic. It consisted of principles for both assembly government and parliamentary system at the same time. Sovereign powers of the nation –legislative and executive– were vested in the Grand National Assembly. As for the powers[2];

Article 6, States That The Grand National Assembly of Turkey exercises the legislative power directly.

Article 7, According to The Assembly exercises the executive power through the intermediary of the President of the Republic, whom it elects, and

through a Cabinet chosen by him. The Assembly control the acts of the government and may at any time withdraw power from it.

The judicial power is exercised in the name of the Assembly by independent tribunals constituted in accordance with the law.

Article 8 foresees that, as for the fundamental rights and freedoms, the Constitution of 1924 did not have detailed provisions. Fundamental rights and freedoms were enumerated and it was stated that law would prescribe limits of those. However, none of any provisions of the Constitution of 1924 provided judicial review of laws.

The first version of the Turkish Constitution of 1924 accepted Islam as the religion of the State; however, this provision was abolished in 1928. Long after the Constitution of 1924 also introduced the principle of secularism.

- The Constitution of 1961 was the second constitution of the Turkish Republic. The characteristics of the Republic were stated to be "nationalistic, democratic, secular and social State governed by the rule of law, based on human rights and the fundamental tenets set forth in the preamble." Supremacy and binding force of the constitution was guaranteed by article 8 that stated, "Laws shall not be in conflict with the Constitution. The provisions of the Constitution shall be the fundamental legal principles binding the legislative, executive and judicial organs, administrative authorities and individuals."

The sovereignty was vested in the nation unconditionally and without reservation. State organs to exercise sovereignty were legislative, executive and judiciary. Separation of powers was accepted. The legislative power was vested in the Turkish Grand Assembly; the President of the Republic and the Council of Ministers used executive "function"; the independent courts on behalf of the Turkish nation exercised judicial power. As for constitutionality of laws the Constitutional Court was established and introduced in the Constitution of 1961.

As for the fundamental rights and freedoms it is accepted that "every individual is entitled, in virtue of his existence as a human being to fundamental rights and freedoms, which cannot be usurped, transferred or relinquished." In addition, it is stated in the article 10 that "the State shall remove all political, economic and social obstacles that restrict the fundamental rights and freedoms of the individual in such a way to be irreconcilable with the principles embodied in the rule of law, individual well-being and social justice. The State prepares the conditions required for the development of the individual's material and spiritual existence." Moreover "the fundamental rights and freedoms shall be restricted by law only in conformity with the letter and spirit of the Constitution" according to the article 11 of the Constitution of 1961.

In 1971, major changes took place in the Constitution including restrictions on fundamental rights and freedoms, expansion of executive powers and establishment of military courts.

Picture 4.1

1982 Constitution

The Constitution of 1982 is the current constitution of the State of Turkish Republic. The characteristics of the Republic are stated in the article 2 as "The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble."

Supremacy and binding force of the Constitution is set forth in the article 11 as follows: "The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative

authorities and other institutions and individuals. Laws shall not be contrary to the Constitution."

Equality before the law is granted in the article 10 as "Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds."

Sovereignty that belongs to the nation unconditionally and without any restriction is vested in the authorized organs designated in the constitution as prescribed by the principles set forth in the Constitution. It is guaranteed under the Constitution that exercise of sovereignty shall not be delegated by any means to any individual, group or class. In addition, it is underlined that no person or organ shall exercise state authority that does not emanate from the Constitution.

As for the powers of the State;

Legislative power is vested in the Turkish Grand National Assembly on behalf of the nation and shall not be delegated. Members of the Grand National Assemblye represent the nation as a whole. Duties and powers of the Turkish National Assembly are laid down in article 87 of the Constitution as follows:

- to enact, amend and repeal laws,
- to scrutinize the Council of Ministers and the ministers,
- to authorize the Council of Ministers,
- to issue decrees having the force of law on certain matters,
- to debate and adopt the budget bills and final accounts bills,
- to decide to issue currency and declare war,
- to approve the ratification of international treaties,
- to decide with the majority of three-fifths of the Grand National Assembly of Turkey to proclaim amnesty and pardon, and
- to exercise the powers and carry out the duties envisaged in the other articles of the Constitution.

The President of the Republic and the Council of Ministers in conformity with the Constitution and law shall carry out executive "power" and "function".[4] Executive function involves acts, actions and activities of the State other than legislative and judicial function.

Independent courts on behalf of the nation exercise judicial power. Judicial review by judiciary is the key concept of rule of law. It is guaranteed by the Constitution that judges comprising courts shall be independent in discharging their duties and they shall render judgments in accordance with the Constitution, laws, and their personal conviction conforming to the law. According to the article 138 of the Constitution "(n)o organ, authority, office or individual may give orders or instructions to courts or judges relating to the exercise of judicial power, send them circulars, or make recommendations or suggestions." In addition, any questions to be asked, debates to be held, or statements to be made in the Grand National Assembly as regards to the exercise of judicial power concerning a pending case. Concerning judgments rendered by judiciary, legislative and executive organs and the administration are under obligation to comply with them and these organs stated neither alter judgments nor delay their execution.

BASIC PRINCIPLES OF ADMINISTRATIVE LAW

The Nature of Administrative Law

Administrative Law has distinct nature than the other branches of law. The reason of such is that Administrative Law has not yet been codified to date. As a result, there are no rules in a single document systematically governing procedures that must be conducted in administration or the functioning of Administrative Law as a whole. There exist few exemptions such as Law of Planning, Law of Procurement, and Law of Expropriation. Thus, development of Administrative Law is provided mostly by jurisprudence. However, it is highly important for the principle of Rule of Law and for good administration to have set of rules as administration functions and exists for the pursuit of public interest, carrying out public services, respecting fundamental freedoms and rights of individuals by following equality and proportionality and acting transparently for the impartial application of the law.

The Rule of Law and Administrative Law

The principle of Rule of Law established under the Constitution would give clues on the principles of the Administrative Law. At first, article 2 of the Constitution with a heading of "characteristics of the Republic" states that the Republic of Turkey is governed by the rule of law. "The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble." Following the article 5 of the Constitution with the heading of "fundamental aims and duties of the state" underlines the principle of rule of law as follows:

> "The fundamental aims and duties of the State are to safeguard the independence and integrity of the Turkish Nation, the indivisibility of the country, the Republic and democracy, to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence."

The Rule of Law is defined as;

> "… means in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government …. IT means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts …, lastly, … the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land."[5]

attention

As for the components of the Rule of Law:

- Fundamental Rights and freedoms shall be guaranteed by the State,
- Separation of powers shall be granted,
- Judicial review of acts, actions and activities of State shall be granted, including the Parliament and the administration,
- Independency and impartiality of the courts shall be provided,
- The acts, actions and activities of the State shall be done within the framework of laws,
- Responsibility of the administration shall be granted,
- The principle of "no offence and penalty without law" shall be granted,
- Democracy shall be granted.

Picture 4.2

Protection of Fundamental Rights and Freedoms of Individuals

With a view of the Rule of Law on the Constitution, firstly, it has to be noted that fundamental rights and freedoms are guaranteed under the Constitution. The nature of fundamental rights and freedoms have been set out in article 12 of the Constitution as the rights that everyone possesses are inherent, inviolable and inalienable. Regarding the regime of fundamental rights and freedoms article 13 sets forth that they may be restricted only by law and in conformity with

the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. In addition, it is added that these restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality. Besides, abuse of fundamental rights and freedoms have been prohibited in article 14 of the Constitution by stating that "(n)one of the rights and freedoms embodied in the Constitution shall be exercised in the form of activities aiming to violate indivisible integrity of the State with its territory and nation, and to endanger the existence of the democratic and secular order f the Republic based on human rights. No provisions of this Constitution shall be interpreted in a manner that enables the State or individuals to destroy the fundamental rights and freedoms recognized by the Constitution or to stage an activity with the aim of restricting them more extensively than stated in the Constitution."

As for the regime of fundamental rights and freedoms under times of war, mobilization, martial law, or a state of emergency the Constitution stipulates that they may be partially or entirely suspended, or measures derogating the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, yet undertakings under international law still has to be obeyed under article 15 of the Constitution. In addition, in these circumstances right to life, the integrity of individual's corporeal and spiritual existence shall be inviolable (with an exception of deaths in conformity with law of war); no one shall be compelled to reveal his/her religion, conscience, thought, opinion and shall not be accused on account of them; retroactivity on offences and penalties shall not be made; presumption of innocence shall be applied.

Separation of Powers

Separation of powers refers to the vesting of powers of State in different bodies as legislative, executive and judiciary. In that sense, Turkish Constitution while conferring various functions to separate bodies of the State underlines in its preamble that

> "The separation of powers, which does not imply an order of precedence among the organs of the State, but refers solely to the exercising of certain state powers and discharging of duties, and is limited to a civilized cooperation and division of functions; and the fact that only the Constitution and the laws have the supremacy."

Judicial Review

As regards for judicial review, judicial power is vested to independent courts according to article 9 of the Constitution. The formation, powers and duties of the courts and their functioning and trial procedure shall be regulated by law according to article 142 of the Constitution. As stated above, independence of the courts is guaranteed under article 138 of the Constitution; thus judges shall give judgments according to the Constitution, laws and their personal conviction conforming with the law while they do not get any orders from any organ or any individual. Their judgments are binding upon legislative and executive organs and administration. Security of tenure of judges and public prosecutors are also guaranteed under article 139 of the Constitution as accordingly they shall not be dismissed (unless they request), retired before the age prescribed by the Constitution, deprived of their salaries or other rights, even in the case of abolition of a court.

Judicial review of acts, actions or activities of the State would be taken in hand in two different categories, one being the judicial review of the legislative, and the other being the judicial review of the executive. The former is called constitutional review fulfilled by the Constitutional Court while the latter is called judicial review of administration fulfilled by administrative and tax courts, district administrative courts and the (Danıştay) Council of State.

Picture 4.3

According to article 148 of the Constitution, powers and functions of the Constitutional Court are stated as follows:

> "The Constitutional Court shall examine the constitutionality, in respect of both form and substance, of laws, decrees having the force of law and the Rules of Procedure of the Grand National Assembly of Turkey, and decide on individual applications. Constitutional amendments shall be examined and verified only with regard to their form. However, decrees having the force of law issued during a state of emergency, martial law or in time of war shall not be brought before the Constitutional Court alleging their unconstitutionality as to form or substance. …
>
> Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities. In order to make an application, ordinary legal remedies must be exhausted.
>
> In the individual application, judicial review shall not be made on matters required to be taken into account during the process of legal remedies.
>
> Procedures and principles concerning the individual application shall be regulated by law
>
> The Constitutional Court in its capacity as the Supreme Court shall try, for offences relating to their functions, the President of the Republic, the Speaker of the Grand National Assembly of Turkey, members of the Council of Ministers; presidents and members of the Constitutional Court, High Court of Appeals, Council of State, High Military Court of Appeals, High Military Administrative Court, High Council of Judges and Prosecutors, Court of Accounts, and Chief Public Prosecutors and Deputy Public Prosecutors."

As for the judicial review of administration, there are administrative and tax courts, district administrative courts and Council of State (Danıştay), as a high court. Article 125 of the Constitution together with the liability of administration lay down rules on judicial review of administration as follows:

> "Recourse to judicial review shall be available against all actions and acts of administration. … Judicial power is limited to the review of the legality of administrative actions and acts, and in no case may it be used as a review of expediency. No judicial ruling shall be passed which restricts the exercise of the executive function in accordance with the forms and principles prescribed by law, which has the quality of an administrative action and act, or which removes discretionary powers. …
>
> The administration shall be liable to compensate for damages resulting from its actions and acts."

Council of State is established under article 155 of the Constitution as the last instance court for reviewing judgments delivered by administrative courts, tax courts and district administrative courts while it also functions as first and last instance court for the cases specified by law.

The Principle of "Legality" and "Statues" Under Administrative Law

One of the key features of the principle of Rule of Law is, as mentioned above, obligation of the State to act within the framework of laws namely the principle of legality of administration. As "law" is considered as a tool to protect individuals' fundamental rights and freedoms, legality works as the basis of both framework and functioning of an administration. The principle of legality covers establishment and functioning of administration.

As acting under the law, the administration shall use powers conferred upon it and shall have competence to act, shall have legal reason to act, shall be hold responsible and accountable and shall be transparent. All of these components would amount to the principle of legality of administration.

Article 8 of the Constitution manifestly put forth the principle of legality by stating,

"Executive power and function shall be exercised and carried out … in conformity with the Constitution and laws." This principle also infers that administration shall act in accordance with laws/statutes. Thus, in several articles of the Constitution legality is underlined as "The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law." (article 26); " … the principles relating to the recovery by the State of the land thus distributed shall be prescribed by law." (article 44); "The State and public corporations shall be entitled, where the public interest requires, to expropriate privately owned real estate wholly or in part and impose administrative servitude on it, in accordance with the principles and procedures prescribed by law, provided that the actual compensation is paid in advance." (article 46); "Principles and rules concerning the privatization of enterprises and assets owned by the State, state economic enterprises, and other public corporate bodies shall be prescribed by law." (article 47).

As a result of the principle of legality, statues determine administration during intercourse with individuals. Such statues are well established by laws before administration forms it acts. Therefore, administration is not free to act on its own will, but has to obey laws and realize statues prescribed by laws.

Unilateralism of Administration

While acting administration is not free with its own will as opposed to private legal persons. Administration, in the exercise of public power, has to obey laws enacted prior to its acts and actions and unilaterally creates/makes changes in/to abolish one's statues in fulfilling its functions. This is relevant even in the contracts of administration concluded under administrative law – the so-called administrative contracts. Most of the administrative acts are unilateral such as regulations, circulars, licenses, where bilateral transactions are very rare in Administrative Law, such as administrative contracts.

ORGANIZATION OF ADMINISTRATION IN TURKEY[6]

The central administration and the decentralized administration are the main components of the Turkish Administration. Article 123/2 of the Constitution states that "(t)he organization and functions of the administration are based on the principles of centralization and decentralization." Under that scheme, central administration consists of central departments and provincial departments, where decentralized administration consists of local administrations and functionally decentralized administrations.

The basic principle governing administration in Turkey would be "integrity". This means central administration and decentralized administration together considered to be one single unit. Article 123/1 of the Constitution underlines this character of administration as follows:

> "The administration forms a whole, with regard to its constitution and functions, and shall be regulated by law"

Integrity shall be guaranteed by hierarchy within the same public legal personality, such as within a Ministry; and by administrative tutelage between central public legal personality and other public legal personalities, such as between ministries and municipalities. Hierarchy is administration means a system of officials ranked one above another in which the official above supervises the below by controlling acts and organs; while administrative tutelage is considered to be the control of the central administration over the acts and organs of the public legal persons.

Under that scheme, it has to be mentioned that in the organization of administration public personnel is the core element in functioning of the State. Public personnel means persons employed by the State to fulfill public duties and exercise public power. Article 128 of the Constitution states as regards to public personnel that

> "The fundamental and permanent functions required by the public services that the State, state economic enterprises and other public corporate bodies assigned to perform in accordance with

principles of general administration, shall be carried out by public servants and other public employees."

Furthermore, article 129 of the Constitution lays down constitutional guarantees for public personnel as:

- Obligation to carry out duties with loyalty to the Constitution and the laws,
- Guarantee to enjoy the right to defense and of judicial review in case of disciplinary measures,
- As regards to liability in fulfilling their duties compensation suits shall be directed to the administration,
- As regards to prosecution of offences committed within their duties a permit shall be asked from the administration.

As regards for the functioning of the administration, public personnel works under hierarchical order. However, if an unlawful order is directed by the superior under that hierarchy, the public personnel is entitled to reject the order, and further if the order is renewed by the superior, then the public personnel has to execute the order but the liability under such order belongs to the superior. In the cases of such order involving an offense then the public personnel shall reject the order, otherwise he/she will be liable as to the principle of individual criminal responsibility. Article 137 of the Constitution governs this issue as "unlawful order":

> "If a person employed in any position or status in public services finds an order given by his/her superior to be contrary to the provisions of by-laws, regulations, laws, or the Constitution, he/she shall not carry it out, and shall inform the person giving the order of this inconsistency. However, if his/her superior insists on the order and renews it in writing, his/her order shall be executed; in this case the person executing the order shall not be held responsible. An order which in itself constitutes an offence shall under no circumstances be executed; the person who executes such an order shall not evade responsibility. …"

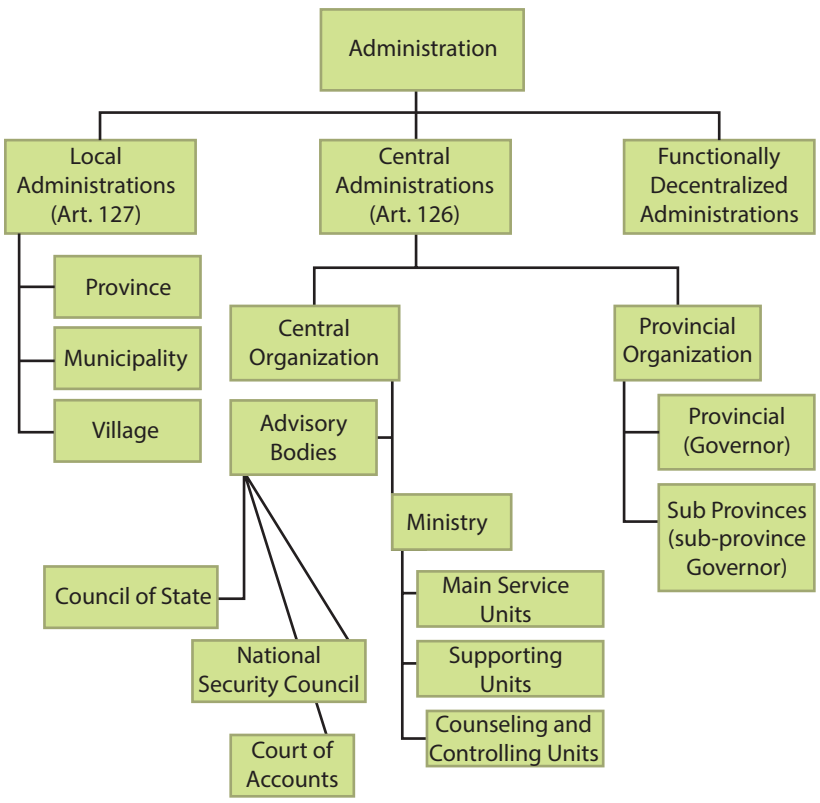

Figure 4.1

Central Administration

Central Administration is the central public legal personality to provide public services throughout the country.

Central Departments

Central administration is where the public power is unified and exercised throughout the country. Ministries are the main body of Central Departments. Ministries have Minister as the hierarchical chief of their department and the responsible for the functioning of the Ministry to the Prime Minister. Each ministry is in charge of a public service, such as justice, health, defense, internal affairs, foreign affairs, education, trade, etc. In each ministry there are central and provincial departments, and in central departments there are under secretaries occupied with advisory duties to the ministers; and below director generals, directors, specialists, and officers.

Besides, there are some other components in the central departments as advisory bodies:

- National Security Council to "submit to the Council of the Ministers the advisory decisions taken with regard to the formulation, determination, and implementation of the national security policy of the State and its views on ensuring the necessary coordination." (article 118 of the Constitution)
- The Council of State to "give its opinion within two months on government bills submitted by the Prime Minister and 81 the Council of Ministers and the conditions and the contracts under which concessions are granted concerning public services, examine draft regulations, …" (article 155 of the Constitution).
- The Court of Accounts to audit "on behalf of the Grand National Assembly of Turkey, revenues, expenditures, and assets of the public administrations financed by central government budget and social security institutions, with taking final decisions on the accounts and acts of the responsible officials, and with exercising the functions prescribed in laws in matters of inquiry, auditing and judgment. (article 160 of the Constitution).

Provincial Departments

Ministries, having their headquarters in capital city, have provincial departments in every political division of the country. According to the article 126 of the Constitution as provincial administration Turkey is divided into provinces on the basis of "geographical situation", "economic conditions", and "public service" requirements. In addition the article also states that provinces are divided into lower levels of administrative districts. Under the *Law on Provincial Administration*[7] (No 5442) lower levels of provinces are laid down as sub-provinces and districts. Provinces are controlled by the central government under the principle of devolution as article 126/2 of the Constitution states that "the administration of the provinces is based on the principle of devolution of powers." Devolution is a phase of hierarchical power of central bodies (Ministries) on provinces.

The provincial departments are under the hierarchy of Ministries. The head of the province is the governor; head of the sub-province is the sub-governor. The governor is the chief executive of the province and is responsible for the coordination and cooperation of government authorities within the province.

In addition, article 126 of the Constitution lays down another type of administration called regional administration as follows: "Central administrative organizations comprising several provinces may be established to ensure efficiency and coordination of public services. The functions and powers of these organizations shall be regulated by law."

As an example of central department, the organization theme of Ministry of Interior[8] is as follows:

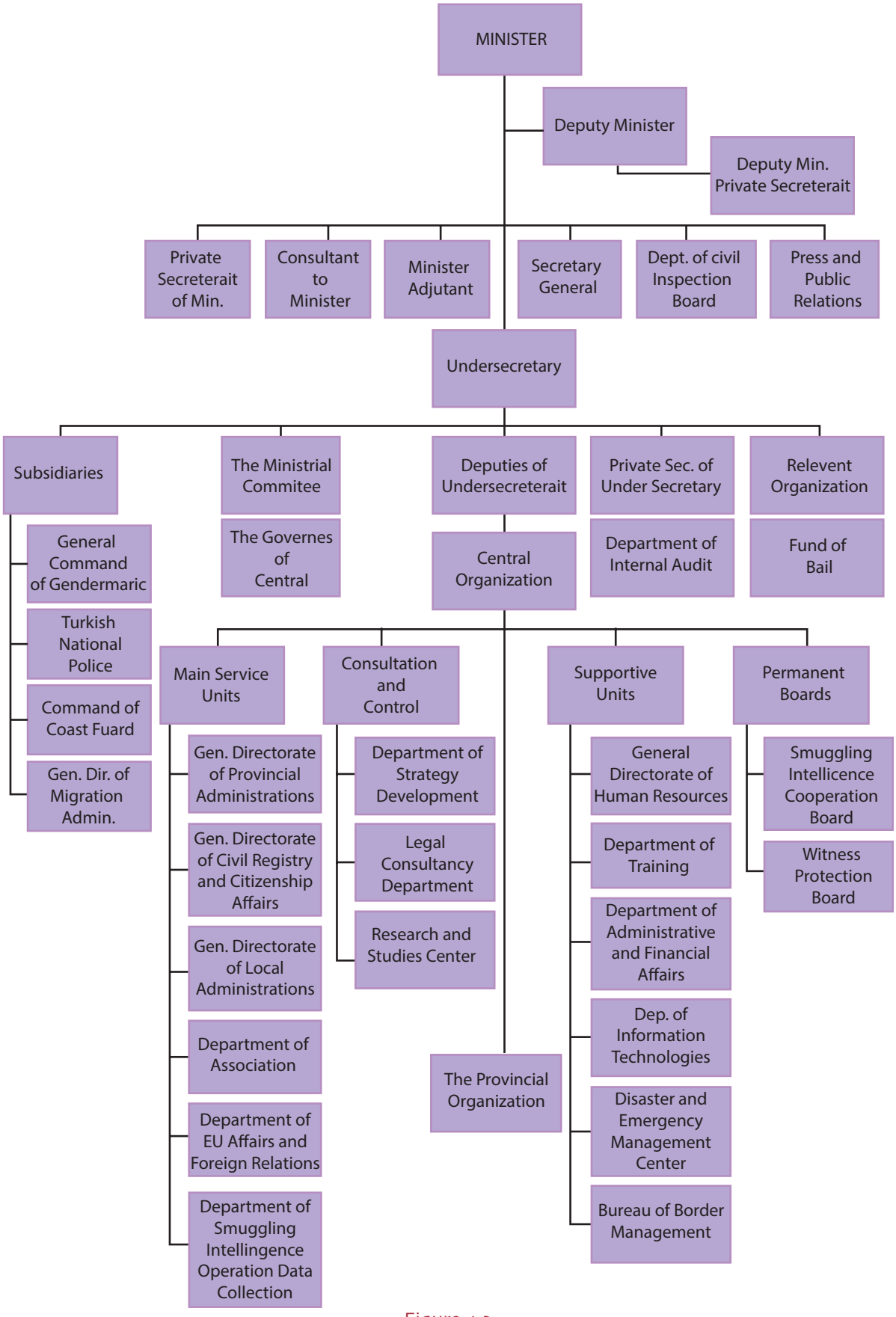
MINISTER
Deputy Minister
Deputy Min. Private Secreterait
Private Secreterait of Min.
Consultant to Minister
Minister Adjutant
Secretary General
Dept. of civil Inspection Board
Press and Public Relations
Undersecretary
Subsidiaries
The Ministrial Commitee
Deputies of Undersecreterait
Private Sec. of Under Secretary
Relevent Organization
General Command of Gendermaric
Turkish National Police
Command of Coast Fuard
Gen. Dir. of Migration Admin.
The Governes of Central
Central Organization
Department of Internal Audit
Fund of Bail
Main Service Units
Consultation and Control
Supportive Units
Permanent Boards
Gen. Directorate of Provincial Administrations
Gen. Directorate of Civil Registry and Citizenship Affairs
Gen. Directorate of Local Administrations
Department of Association
Department of EU Affairs and Foreign Relations
Department of Smuggling Intellingence Operation Data Collection
Department of Strategy Development
Legal Consultancy Department
Research and Studies Center
The Provincial Organization
General Directorate of Human Resources
Department of Training
Department of Administrative and Financial Affairs
Dep. of Information Technologies
Disaster and Emergency Management Center
Bureau of Border Management
Smuggling Intellicence Cooperation Board
Witness Protection Board

Figure 4.2

Decentralized Administration

Centralized administration itself is not sufficient to provide the needs of individuals as the concept of public service (depending on public needs) has been evolving, especially when taking into account the local needs.

Local Administrations/Geographically Decentralized Administrations

Article 127 of the Constitution enumerates local administrations as "provinces" (other than the ones in central administration), "municipalities" and "villages", and defines their function as to provide the common local needs of the inhabitants of provinces. These public legal persons have administrative and financial autonomy.

The Constitution underlines that decision-making organs of local administrations shall be elected by electorate determined by law. Besides, article 127/4 provides a guarantee for the decision-making organs of local administration as follows: "(l)oss of status and objections regarding the acquisition of the status of elected organs of local administrations shall be decided by court judgment." However, the Constitution gives the Minister of Interior a right to remove from office the elected organs of local administration or their members in the case of an investigation or prosecution on the grounds of offences related to their duties, as a provisional measure.

The relations between local administrations/ geographically decentralized administrations and central administration are provided with administrative tutelage.[9] As mentioned above, administrative tutelage is a means of control of the central bodies on acts, actions, officers and financial resources of local administration. Administrative tutelage has a constitutional base as article 127/5 of the Constitution states this control mechanism as:

"The central administration has the power of administrative tutelage over the local administrations in the framework of principles and procedures set forth by law with the objective of ensuring the functioning of local services in conformity with the principle of the integrity of the administration, securing uniform public service, safeguarding the public interest and meeting local needs properly."

Thus, the Constitution sets forth the objective of administrative tutelage as integrity in functioning of administration as a whole while protecting the public interest and supplying local needs.

Provinces, within the boundaries of the province, are in charge of duties laid under the Law on Province Private Administration. The organs of the provinces are also enumerated in the same legislation as the governor, provincial council and provincial committee. As the importance and significance of provinces are declining in importance; day by day municipalities are becoming in the focus of local administrations. By Law No 6360 (12.11.2012)[10] fourteen provinces have been abolished and metropolitan municipalities have been established instead as local administration.

As regards for municipalities Law No 5393 (03.07.2005) namely Municipal Law governs municipalities where Law No 5216 (10.07.2004) namely Metropolitan Municipal Law governs metropolitan municipalities. The Law No 5393 sets forth the organs of a municipality as mayor, municipal council and municipal committee and powers of municipalities under article 15 as "carrying out activities in order to meet the common requirements of inhabitants", "to publish regulations, give orders, take and implement restrictive measures, impose punishments, within the limits of authority conferred upon them by laws", "to grant permissions and licenses", "to impose and collect taxes", "to acquire immovable property and expropriation", "to borrow loans and accept donations", and so on.

Regarding villages the Law No 442 (18.03.1924) namely Village Law lays the organs of the village as Chief Alderman, Village Assembly and Executive Board of the Village.

Functionally Decentralized Administrations

Functionally decentralized administrations consist of various public legal persons having administrative and financial autonomy that serve specific public services nationwide. They are not enumerated or defined in Constitution, yet several functionally decentralized administrations are laid down in the Constitution, while some others are established by law.

Examples of functionally decentralized administrations are as follows;

- Universities (under article 130) "(f)or the purpose of training manpower to meet the needs of the nation and the country under a system of contemporary education principles, universities comprising several units and having scientific autonomy and public legal personality shall be established by the State and by law …"
- The Council of Higher Education (under article 131) "to plan, organize, administer, and supervise education provided by institutions of higher education, …" "The organization, functions, authority, responsibilities, and operating principles of the Council shall be regulated by law."
- The Turkish Radio and Television Corporation (TRT) (under article 133) as "(t)he unique radio and television institution established by the State as a public corporate body …"
- The High Institution of Atatürk, Culture, Language and History (under article 134) "established as a public corporate body, under the moral aegis of Atatürk, under the supervision of and with the support of the President of the Republic, attached to the Office of the Prime Minister, …"
- Public Professional Organizations (under article 135) "having the characteristics of public institutions and their higher bodies are public corporate bodies established by law, with the objectives of meeting the common needs of the members of a given profession, to facilitate their professional activities, to ensure the development of the profession in keeping with common interests, to safeguard professional discipline and ethics in order to ensure integrity and trust in relations among its members and with the public; their organs shall be elected by secret ballot by their members in accordance with the procedure set forth in the law, and under judicial supervision."
- Public Economic Enterprises[11] (Decree Having Force of Law No 233)[12] are the public legal personalities by which the State intervenes the economic field as an entrepreneur. It consists of Public Economic Establishment (established to do business in economic field with commercial rules and principles and whose whole capital is owned by the State) and Public Economic Organization (established to produce and for marketing the goods and services having monopoly nature by considering public benefit and whose whole capital is owned by the State).
- Independent Regulatory agencies[13] (under article 166 of the Constitution and laws that establish them) -independently from central administration- are established to regulate the operation of markets and make regulations in order to both set and protect the public interest in these markets by setting standards, issuing licenses, prohibiting unlawful practices. The independent regulatory agencies in Turkey are. Central Markets Board, Radio and Television Supreme Council, Competition Authority, Banking Regulation and Supervision Authority, Telecommunications Authority, Energy Markets Regulatory Authority, Sugar Authority, Tobacco, Tobacco Products and Alcoholic Beverages Regulation Authority and Public Procurement Authority.

JUDICIAL REVIEW OF ADMINISTRATION

The main function and raison d'être of the State is to pursue public interest on the basis of law by providing public services. As defined by the Constitutional Court, public service, in broadest sense, is the constant and regular activities aiming public interest and provided by administration itself or by private legal persons under the supervision of the administration[14] in order to meet general and common needs of the society.[15] It also covers law enforcement activities that is based on the notion of creating, maintaining and restoring public order, in sum entire rules directed to the order of the society in almost every field.[16]

Accordingly, the power, administration is entrusted with in order to satisfy common needs, is determined by law. While acting under the principle of legality to serve in public interest, administration is not free to act, rather it is bound

by rules confining its power. Thus, administration is on the one hand restricted -by the principle of legality- and on the other hand exercises public power – having different nature and source than individuals' subjective rights[17] and which gives.

Administration is not free to act on its self-interest, rather it is entrusted with powers in order to realize public interest. According to the Constitutional Court, public interest aims at the "common interest distinct from and superior to and other than individual interest"[18]. Therefore, administrative function as a whole has to observe public interest.[19] While acting under public interest, the administration issues both general and abstract acts and individual acts. As regards to the general and abstract acts, the administration is exercising its rule-making power conferred to it especially by articles 115 and 124 of the Constitution. In that sense, for the implementation of laws, the Council of Ministers may issue regulations while the Prime Ministry, the ministers and public legal personalities may issue by-laws in order to ensure the implementation of laws and regulations. Other than that, the administration may issue general orders, circulars and other similar general and abstract acts in practice. As for the implementation of these general and abstract rules, the administration also issues individual and concrete acts, such as permits, licenses, etc. where it creates/changes/abolishes statues in accordance with the law.

attention

As for the realization of the Rule of Law principle, it is essential to subject acts, actions and contracts of the State to judicial review. In that sense, both principle of legality and judicial review confine administration in using powers conferred upon it.

Legal Basis of Judicial Review and Administrative Courts

The constitutional base of judicial review of administration lies in article 125 of the Constitution that states "(r)ecourse to judicial review shall be available against all acts and actions of administration." In addition the same article in its last paragraph refers to the financial liability of administration as "(t)he administration shall be liable to compensate for damages resulting from its actions and acts." Exemptions on judicial review of administration are also laid down in article 125 and various other articles of the Constitution.

Regarding the limits of judiciary, while reviewing administration, article 125 of the Constitution confines judicial power into review of legality and forbids review of expediency. In addition, it is underlined in the Constitution that judiciary is also restrained from the exercise of the executive function that has the quality of administrative action or act, or which removes discretionary powers of executive.

The procedure for judicial review of administration and organization of the administrative courts are laid down in three different pieces of legislation namely Law on Council of State (Law No 2575)[20], Law on the Organization and Duties of the Regional Administrative Courts, Administrative and Tax Courts (Law No 2576)[21] and Law on the Procedure of Administrative Justice (Law No 2577)[22].

The Council of State is the highest administrative court in the organization of administrative courts according to the article 155 of the Constitution. Council of State is,

- the last instance court for judgments rendered by administrative courts and district administrative courts and not referred by law to other administrative courts,
- the first and last instance court for judgments specified by law.

As having the nature of court of cassation Danıştay deals with legality review and thus does not take into hand the case with merits review. In addition, it has a function to deal with disputes of competence, venue and conjunction in cases falling under the jurisdiction of administrative courts.

Council of State consists of an administrative chamber, several judicial chambers, each having specialization in the cases before them, a plenary session of the members of chambers both for administrative and tax cases.

The chart on the organization of Council of State is as follows;[23]

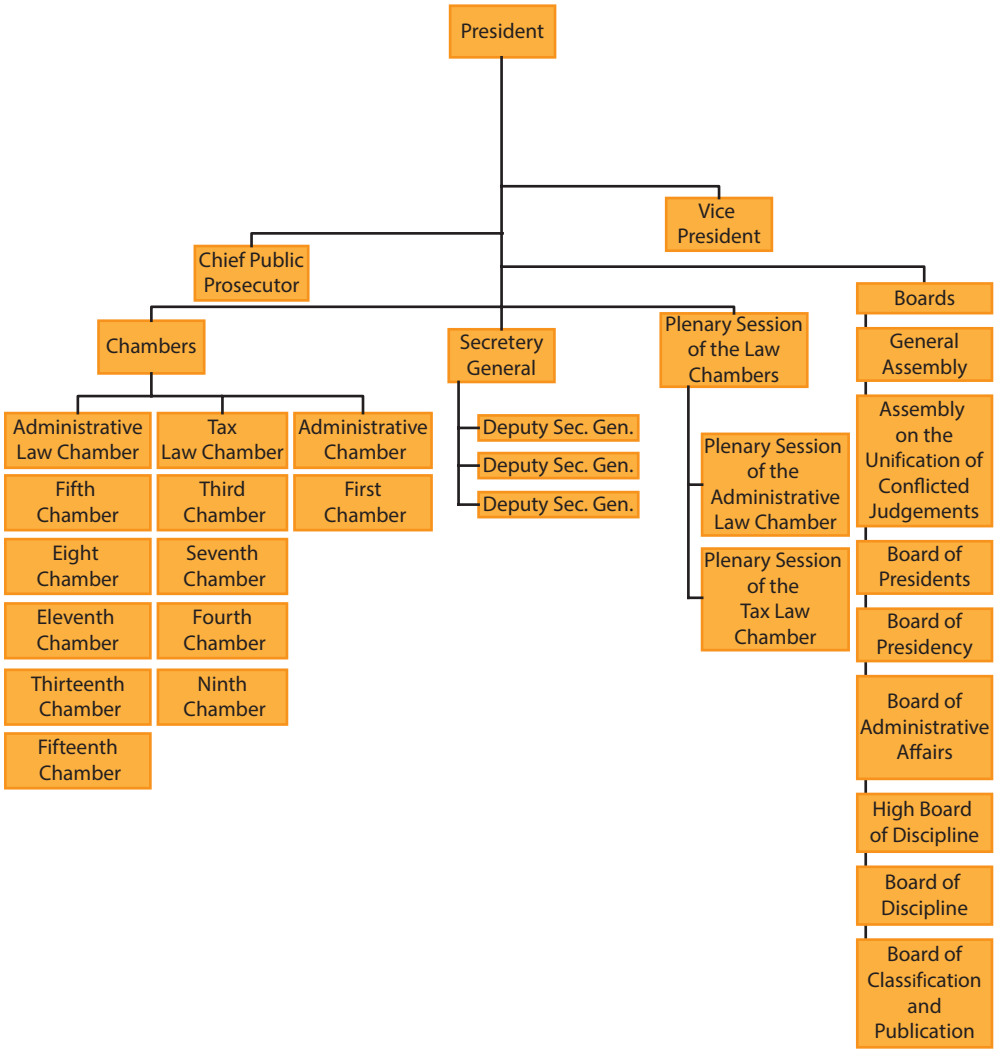

Figure 4.3

The District Administrative Courts are the appellate courts for the judgments rendered by administrative and tax courts.

The Administrative and Tax Courts are courts of first instance with general jurisdiction.

In the organization of administrative courts there is Supreme Military Court set forth in article 157 of the Constitution as both first and the last instance court for disputes "arising from administrative acts and actions involving military persons or relating to military service, even if such acts and actions have been carried out by non-military authorities. However, in disputes arising from the obligation to perform military service, there shall be no condition that the person concerned be a member of the military body".

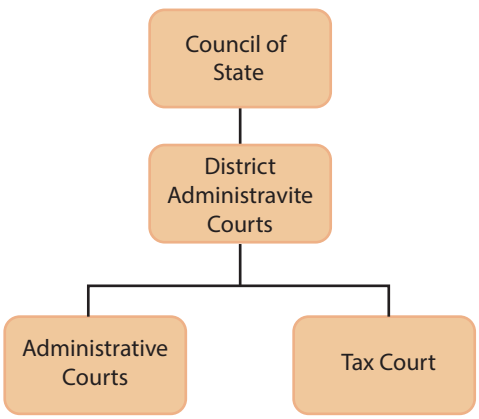

Figure 4.4 Organization of Administrative Courts

Judicial Remedies

Law on the Procedure of Administrative Justice introduces two types of remedies for disputes arising under Administrative Law; one being "action for annulment" and other being "full remedy action". Article 2/1 articulates judicial remedies as follows:

> *a. Action for annulment concerning administrative acts brought by persons whose interests is adversely effected by an administrative act alleged to be unlawful as regards to its components of competence, form, reason, subject and intention.*
>
> *b. Full remedy actions concerning administrative acts and actions brought by persons whose personal rights have been directly affected.*
>
> *c. Disputes arising out of contracts to carry out public services, except for the concession contracts for public services in which arbitration is decided.*

Action for Annulment

In order for a person to sue administration under action for annulment he/she has to prove a link between him/herself and the administrative act that amount to an adverse effect on him/her. Requirements of standing has been set out by jurisprudence as "personal", "actual" and "legitimate". In order for an administrative act to be subject to action for annulment such act both has to have executory nature and be final and be unlawful as regards to one or more of its components. Applicant of action for annulment would seek to annul the allegedly unlawful act and such annulment by administrative court would have retroactive effect.

Full Remedy Action

In order for a person to sue administration under full remedy action he/she has to prove that he/she is directly affected and incurred loss as a result of administrative act, action or contract. Full remedy action covers the liability issues of administration. In that sense, liability with fault (service fault) and liability without fault would be the bases of full remedy action.

your turn [1]

Before a soccer game between two rival football teams Governor of Province (C) declared that some roads will be blocked for security reasons and supporters of away team will be transported to stadium by buses that belong to the Metropolitan Municipality of (C). (A), one of the supporters of the away team, tried to enter the stadium apart from the group using transportation provided by the municipality and thus caught by police. Governor of Province (C), in accordance with the regulations, issued a sanction directed to (A) involving a restraining order from entering sports events in (C) Province.

Answer the questions below in the light of given case.

1. Please determine administrations and their places in the organization of administration in Turkey.
2. Please specify the administrative acts in the given case.
3. Please specify administrative activities in the given case.
4. Explain legal remedies, if any, for (C) to challenge decisions ordered by Governor.

In Practice

"As for the situation in the case file referring to the rules of the Constitution and the international convention, it must be acknowledged that pursuant to the judgment of the judicial body the tax was claimed excessively, and the debt arisen to be considered within the scope of the right of property by the plaintiff. Owing to the excessive claim of the tax the plaintiffs were deprived of disposing of the money for a definite period of time that they should have had. Furthermore, the money paid and the real value of the property depreciated within that period of time due to inflation; the plaintiff could not dispose of the money as an investment tool."

".. owing to the breach of the right of property by the administration with its own act and action, the administrative body must pay the damage. In addition, in order to claim the damage, it is a rule that the administration must have a direct or indirect fault."

"In compliance with the Article 2 of the Turkish Constitution, The Republic of Turkey is a social state governed by rule of law; as per the Article 35 Everyone has the right to own and inherit property and these rights may be limited by law only in view of public interest; as per the Article 125 Recourse to judicial review shall be available against all actions and acts of administration. The administration shall be liable to compensate for damages resulting from its actions and acts. As per the Article 1 of the Protection of Property of the Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."[24]

LO 1 Ability to explain the basic principles of Administrative Law

Administrative Law has distinct nature than the other branches of law. The reason of such is that Administrative Law has not yet been codified to date. As a result, there are no rules in a single document systematically governing procedures that must be conducted in administration or the functioning of Administrative Law as a whole. There exist few exemptions such as Law of Planning, Law of Procurement, and Law of Expropriation. Thus, development of Administrative Law is provided mostly by jurisprudence. However, it is highly important for the principle of Rule of Law and for good administration to have set of rules as administration functions and exists for the pursuit of public interest, carrying out public services, respecting fundamental freedoms and rights of individuals by following equality and proportionality and acting transparently for the impartial application of the law.

The principle of Rule of Law established under the Constitution would give clues on the principles of the Administrative Law. At first, article 2 of the Constitution with a heading of "characteristics of the Republic" states that the Republic of Turkey is governed by the rule of law. "The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble.".

As for the components of the Rule of Law:

Fundamental Rights and freedoms shall be guaranteed by the State. Separation of powers shall be granted and Judicial review of acts, actions and activities of State shall be granted, including the Parliament and the administration.

Independency and impartiality of the courts shall be provided, the acts, actions and activities of the State shall be done within the framework of laws. Responsibility of the administration shall be granted, The principle of "no offence and penalty without law" shall be granted, Democracy shall be granted.

LO 2 Ability to explain organization, functioning and liability of Turkish Administration

The central administration and the decentralized administration are the main components of the Turkish Administration. Article 123/2 of the Constitution states that "(t)he organization and functions of the administration are based on the principles of centralization and decentralization." Under that scheme central administration consists of central departments and provincial departments, where decentralized administration consists of local administrations and functionally decentralized administrations. The basic principle governing administration in Turkey would be "integrity". This means central administration and decentralized administration together considered to be one single unit.

It has to be mentioned that in the organization of administration, public personnel is the core element in functioning of the State. Public personnel means persons employed by the State to fulfill public duties and exercise public power.

Test Yourself

1 I. Senedi İttifak granted equal rights to muslims and minorities in several issues.

II. According to the Kanuni Esasi the competence of the parliament was not limited.

III. According to the Teşkilatı Esasiye Kanunu (the Constitution of 1921) sovereignty belonged unconditionally to the nation.

Which of the following statement is are correct as regards to the constitutional history of Turkey?

A. Only I
B. Only II
C. Only III
D. I and II
E. II and III

2 I. Under the Constitution of 1961 the President of the Republic and the Council of Ministers used executive function.

II. With 1971 Amendments made to the Constitution of 1961 powers of executive diminished.

III. Under the Constitution of 1982 the executive is considered both as "function" and "power".

Which of the following statement is are correct as regards to the nature of the executive under Turkish Law?

A. I and II
B. I and III
C. II and III
D. I, II, III
E. II

3 Which one of the following statements is false as regards to the Rule of Law and Administrative Law?

A. Fundamental rights and freedoms shall be guaranteed.
B. Political control of administration is sufficient as regards to review of administration.
C. The legality principle shall be granted for administrative functioning.
D. Administration shall be held liable for its acts and actions.
E. Separation of powers shall be granted.

4 I. Administration exercises public power.

II. While functioning administration acts unilaterally.

III. With its actions administration creates/makes changes/abolishes statues.

Which of the following statement is are correct as regards to the basic principles of administration?

A. I and II
B. I and III
C. II and III
D. I, II, III
E. I

5 I. The principle of Rule of Law shall be observed by administration

II. The principle of legality of administration means that both powers and functions shall be exercised and carried out in conformity with the Constitution and laws.

III. In its actions administrative is not free to act on its self-interest, it shall act to realize public interest.

Which of the following statement is are correct as regards to the basic principles of Administrative Law?

A. Only I
B. Only II
C. I and III
D. I, II, III
E. Only III

6 Which one of the following statements is false as regards to the organization of administration in Turkey?

A. The organization and functions of the administration are based on the principles of centralization and decentralization.
B. In order to maintain integrity in administration hierarchy and administrative tutelage are being used.
C. Central administration consists of central departments and local administrations.
D. Local administrations are enumerated in the Constitution as provinces, municipalities and villages.
E. Functional decentralized administrations have public legal personality.

7 Which one of the following statements is false as regards to the organization of administration in Turkey?

A. Ministries have provincial departments in every political division of the country.
B. The administration of the provinces is based on the principle of devolution.
C. Devolution is a means of control consisting similar features as administrative tutelage.
D. According to the Constitution, loss of status and objections regarding the acquisition of the status of elected organs of local administrations shall be decided by court judgment.
E. Functionally decentralized administrations have administrative and financial autonomy.

8 I. Public personnel fulfills duties in order to realize public services provided by the State, state economic enterprises and other public legal personalities.

II. Compensation suits concerning damages arising from offences committed by public personnel in the exercise of their duties shall be filed against the administration and the public personnel.

III. If public personnel finds an order given by his/her superior to be contrary to the provisions of by-laws, regulations, laws, or the Constitution, he/she shall not carry it out and shall inform the person giving the order of this inconsistency. However, if his/her superior insists on the order and renews it in writing, his/her order shall be executed.

Which of the following statement is are correct as regards to the public personnel?

A. Only I
B. Only II
C. I and II
D. I and III
E. Only III

9 Which one of the following statements is false as regards to the judicial review of administration in Turkey?

A. According to article 125 of the Constitution, recourse to judicial review shall be available against all acts and actions of administration.
B. According to article 125 of the Constitution, the administration shall be liable to compensate for damages resulting from its acts and actions.
C. Under the Constitution all acts and actions of the administration is subject to judicial review without any exemption.
D. Judicial review of administration acts and actions are done by Danıştay, District Administrative Courts, administrative and tax courts.
E. Judicial review of administration is limited with legality.

10 I. Law on Procedure of Administrative Justice introduces two types of remedies: "action for annulment" and "full remedy action".

II. Action for annulment concerns administrative acts, actions and contracts.

III. Full remedy action concerns only administrative acts that have adverse affect on applicant.

Which of the following statement is are correct as regards to the judicial review of administration?

A. Only I
B. I and II
C. Only II
D. II and III
E. I and III

Answer Key for "Test Yourself"

1. E	If your answer is wrong, please review the "Constitutional Law" section.
2. B	If your answer is wrong, please review the "Constitutional Law" section.
3. B	If your answer is wrong, please review the "Basic Principles of Administrative Law" section.
4. D	If your answer is wrong, please review the "Basic Principles of Administrative Law" section.
5. D	If your answer is wrong, please review the "Basic Principles of Administrative Law" section.
6. C	If your answer is wrong, please review the "Organization of Administration in Turkey" section.
7. C	If your answer is wrong, please review the "Organization of Administration in Turkey" section.
8. D	If your answer is wrong, please review the "Organization of Administration in Turkey" section.
9. C	If your answer is wrong, please review the "Judicial Review of Administration" section.
10. A	If your answer is wrong, please review the "Judicial Review of Administration" section.

Before a soccer game between two rival football teams Governor of Province (C) declared that some roads will be blocked for security reasons and supporters of away team will be transported to stadium by buses that belong to the Metropolitan Municipality of (C). (A), one of the supporters of the away team, tried to enter the stadium apart from the group using transportation provided by the municipality and thus caught by police. Governor of Province (C), in accordance with the regulations, issued a sanction directed to (A) involving a restraining order from entering sports events in (C) Province.

Answer the questions below in the light of given case.

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2. Please specify the administrative acts in the given case.
3. Please specify administrative activities in the given case.
4. Explain legal remedies, if any, for (C) to challenge decisions ordered by Governor.

your turn 1

Province: Ministries, having their headquarters in capital city, have provincial departments in every political division of the country. According to the article 126 of the Constitution as provincial administration Turkey is divided into provinces on the basis of "geographical situation", "economic conditions", and "public service" requirements. The provincial departments are under the hierarchy of Ministries. The head of the province is the governor.

Municipality: Article 127 of the Constitution enumerates local administrations as "provinces"(other than the ones in central administration), "municipalities" and "villages" and defines their function as to provide the common local needs of the inhabitants of provinces. These public legal persons have administrative and financial autonomy. Article 127 of the Constitution defines local administrations as "public corporate bodies established to meet the common local needs of the inhabitants of provinces, municipal districts and villages, whose principles of constitution and decision-making organs elected by the electorate are determined by law." The relations between local administrations/ geographically decentralized administrations and central administration is provided with administrative tutelage.

Administrative acts are unilateral, executory decisions of administrative authorities in the field of administrative law with respect to administrative activities. Such acts might be either general and abstract in nature, or concrete and individual. For the first ones, regulation according to which the individual act is established would be example from the given case while blocking roads for security reasons would be a general order and for individual acts and restraining order for the entrance of sports events would be specified.

Administrative activities are classified under two groups, namely public services and law enforcement activities. Providing and maintaining public order is considered as law enforcement activities of administration. Blocking roads and carrying supporters in order to provide public order thus falls within the scope of law enforcement activities.

Action for annulment concerns administrative acts brought by persons whose interests is adversely effected by an administrative act alleged to be unlawful as regards to its components of competence, form, reason, subject and intention. As for the given case (A) would file an action for annulment as his/her interest is adversely affected by the act of Governor.

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Chapter 5 Criminal Law

After completing this chapter, you will be able to:

Learning Outcomes

1. Explain the basic functions of criminal rules in a society
2. Differentiate among various excuses
3. Juxtapose different liability requirements

Chapter Outline

Introduction
Defining Crime and Criminal Law
Liability Requirements
Excuses

Key Terms

Crime
Criminal Law
The Principal of Personal Responsibility
The Principle of Legality, Presumption of Innocence
Actus Reus, Mens Rea

INTRODUCTION

As an omnipresent topic, criminal law is a part of our daily life, the examples of which we find from newsletters, literature and television programs. It seems to fascinate and awe us at the same time. This an introductory chapter on the basic concepts and foundations of criminal law. After studying this chapter you should understand the following main points:

- Definition of crime and criminal law
- What constitutes a crime?
- Elements of crime
- Basic knowledge with regard to criminalizaton theories
- Purposes of punishment
- Relationhip between criminal law and human rights law
- Reasons which would justify or excuse a criminal act

DEFINING CRIME AND CRIMINAL LAW

What is Crime

According to Herring, this is a question which is surprisingly difficult to answer. Most people would imagine that criminal law is related to murder, assault and theft, which, by all means, is. The scope of criminal law, however, is wider. Unlike the general opinion regarding the scope of crime, criminal law is wider than murder, theft, assault and rape. It also includes environmental offenses, crimes against public morals, as well as traffic offenses. It is the values and culture of a particular society which determine what conducts are regarded as criminal. It should be noted that a certain conduct which is contrary to criminal law at one point in time may not be regarded as criminal afterwards or in another country. Although there are a number of definitions concerning 'what crime is', the definition of Blackstone, a famous English jurist, stands out as the most remarkable and comprehensible. According to Blackstone, a crime is 'an act committed or omitted in violation of public law, either forbidding or commanding it'[1]. In other words, crimes are described and distinguished from other acts or omissions with respect to giving rise to judicial proceedings and the prospect of state punishment[2]. According to Williams, a crime is 'an act that is capable of being followed by criminal proceedings having one of the types of outcome (punishment etc.) known to follow these proceedings'. Although this may be the best definition, it is not useful, especially as it tends to be an ambigious one- What is criminal law? It is that part of the law which uses criminal procedures. What are criminal procedures? Those which apply to criminal law[3].

What is Criminal Law

Criminal liability is the strongest formal condemnation that society can inflict. Therefore, criminal law plays a distinctive role in society, including the following functions: to deter people from doing acts that harm others or society; to set out the conditions under which people who have performed such acts will be punished; and to provide guidance on the kinds of behaviours which are considered as acceptable by society[4].

The major concerns of criminal law may be expressed as follows:

The support of public interests in;

- preventing physical injury. This accounts for the crimes of murder, manslaughter, arson and other crimes of violence, as well as certain road traffic offenses and those relating to public health and safety.
- proscribing personal immorality deemed injurious to society's well-being. This accounts for the criminalisation of bigamy, incest, sado-masochism, bestiality and obscenity, drug possession and supply.
- preventing the moral corruption of the young through crimes such as gross indecency and unlawful sexual intercourse with children.
- maintaining the integrity of the state and the administration of justice through crimes such as treason, perjury, perverting the course of justice, tax evasion.
- maintaining public order and security through offenses such as riot, affray, breach of the peace, public drunkenness.

The support of private interests in remaining free from;

- undesired physical interference through crimes such as rape, assault, indecent assault, false imprisonment, harassment;
- offenses through crimes such as indecent exposure, indecency in public, solicitation;
- undesired interference with property through crimes such as theft, robbery, taking and driving away a road vehicle, fraud.

Where a behaviour is condemned as a crime, the values and culture of the society are considered to be the most decisive factors. For example, whilst abortion is permitted upon the woman's request in the early weeks of pregnancy and in the later periods of time under certain circumstances (time limitation) in some countries, including Turkey and the EU countries, others ban the abortion without any exception such as in Ireland (Only the life of the woman is at risk.) As previously mentioned, the nature of criminal law has a changing characteristic that varies over time and from one country to another. A good example of how criminal behaviours can change over time can be seen from the manner in which the law on adultery acts has changed.

- Adultery was a punishable criminal offense according to Article 440 (men adultery) and 441(woman adultery) of the Turkish Penal Code numbered 765 ('TPC'), which aimed to protect the institution of marriage and children. The crime of adultery damaged not only the institution of family, but also the public order.
- In 1996, the Turkish Constitutional Court decided that adultery would no longer constitute a criminal offense for men, while Article 441 regarding the woman adultery remained valid.
- In 1999, Article 441 of the TPC that required imprisonment for women convicted of adultery was repealed.
- From this date on, adultery would no longer constitute a criminal offense, while remaining as a cause of action for divorce under Article 161 of the Turkish Civil Code.

The governing principles which lie at the core of modern criminal law are as follows:

- The principle of welfare and upholding the common good,
- The principle of prevention of harm to others,
- The principle of minimal intervention: Law should not criminalize too much behaviour,
- The principle of social responsibility: Society requires a certain level of cooperation between citizens,
- The principle of proportionate response: The response of criminal law should be reasonably in proportion to the harm committed or threatened to be committed,
- The non-retroactivity principle: A person should not be convicted or punished except in accordance with a previously declared offense,
- The thin-ice principle: Those who skate on thin ice can hardly expect to find a sign denoting the precise spot where they will fall in,
- The principle of maximum certainty: People should have sufficiently certain and clear warnings about the forbidden conducts,
- The principle of fair labelling: Offenses should be labelled in a manner to reflect the seriousness of the law violated,
- The principle of strict construction: Ambiguities in criminal law should be construed in favour of the defendant,
- The presumption of innocence: A principle of procedural fairness that the defendant should be presumed innocent until proved guilty[5].

Purposes of Criminal Law

The purpose of criminal law is to protect society so that its members can be reasonably secure in carrying out constructive activities. Only behaviors that are detrimental to the welfare of society should be made criminal. A balance is always to be achieved between the rights of the individual and the protection of society. In the social contract, a concept originating with Thomas Hobbes and John Locke, individuals give up certain liberties in return for being protected by society. We give up the "right" to steal what we want in return for

society's protection against being victimized by others. We also give up other liberties as members of a lawful society, however, society must, in return, impose only laws that have a purpose consistent with the protection of and minimally intrusive on our individual liberties[6].

These fundamental principles are invaluable, yet it remains important to try and work out the purpose of criminal law. When you have read about people being prosecuted for anything from aiding and abetting suicide to outraging public decency, you may well want to ask some fundamental questions about what the criminal law is seeking to achieve. Criminal law seeks:

- to enforce moral values;
- to punish those who deserve punishment;
- to protect the public from harm;
- to reform the offender;
- to deter offenders and potential offenders;
- to educate people about appropriate conduct and behaviour;
- to preserve order;
- to protect vulnerable people from exploitation and corruption[7].

According to prevailing legal theories, the general purpose of criminal law is the protection of certain individual and collective interests. The threat of punishment is expected to deter potential violators from committing offenses; the general purpose of criminal law is thus to prevent crime. Whenever someone has nevertheless committed a criminal act and the issue of punishing that person arises, the main purpose of imposing a criminal sanction is not preventive but retributive[8]. On the basis of these arguments, it is said that theories of punishment regarding the purposes of criminal law, are divided into absolute and relative theories. Absolute theories look back to the past and relative theories look to the future. The difference of the theories arise from the difference between the punishment and prevention perspectives[9].

Absolute Theories of Punishment

Absolute theories of punishment –revenge, retribution, atonement- look back to the past, to the criminal deed and aim at balancing the harm done. The legitimacy of the theories are based on the idea of justice and punishment is directly related to the guilty. Deliberately doing harm to a perpetrator reimburses harm done by him and thus tries to re-establish the balance of justice. For that matter punishment does not serve any social purpose or goal apart from the re-establishment of equivalence by punishing neither harsher nor lighter than the perpetrator's quilt. Although retribution can not heal wounds or repair damages, and can only re-establish the claim of law for integrity, it can reinforce the expectation of law-abiding behaviour[10]. Society feels satisfied by paying back perpetrators. Society pays back perpetrators by retaliation; perpetrators pay back society by accepting responsibility through punishment[11].

Relative Theories of Punishment

Relative theories of punishment, namely the prevention theories, focus on preventing the repetitive behaviours rather than on what has happened before. The legitimacy of these theories is based on the idea of its social benefit. In regard to the goal of the theories, two distinctions are usually made under the name of deterrence: In general, deterrence prevents future crime by frightening the perpetrator or the public. The so-called specific deterrence aims at the individual perpetrator. Punishment serves as a means of deterring the perpetrator. When the government punishes an individual perpetrator, he or she is theoretically less likely to commit another crime because of fear of another similar or worse punishment[12]. In response to this, general deterrence applies to the public at large. When the public learns of a perpetrator's punishment, the public is theoretically less likely to commit a crime because of fear of the punishment the defendant experienced. When the public learns, for example, that a perpetrator was severely punished by a sentence of life in prison or the death penalty, this knowledge can inspire a deep fear of criminal prosecution. In another words, general deterrence addresses everybody as a potential law breaker that can be deterred by the threat of punishment. On the other hand punishment addresses everybody as law-abiding citizens who are confirmed in their common beliefs in the law.

Unified Theories of Punishment

Trying to unite ideas of retribution with ideas of prevention in different variants, absolute and relative theories of punishment have led to so-called unified theories of punishment. According to the unification, society shall threaten to punish and the penalty shall be pronounced and executed with the aim of protecting society against further offenses but all this shall be done in a way adequate to the wrongdoers' guilt[13]. One of the reasons of punishment is based upon the idea that public interest can be satisfied through punishment. Punishment as a reaction to individual wrong delimited by general common interests is not distinguishable from punishment delimited by guilt. In this view, punishment is simultaneously retrospective and prospective, looks backward and forward[14].

Here are other forms of punishmet in a variety of ways:

1. *Incapacitation/restraint:* Executing a criminal is the most extreme form of rendering a person incapable of committing future crimes. Criminals restrained in prison cannot cause further harm to the general public during the length of their sentence.
2. *Specific deterrence:* By punishing the criminal for the crime, society demonstrates its ability and willingness to protect itself against those who commit crimes. The theory is that after being exposed to society's power to punish, the criminal will be taught a lesson and will refrain from any future misconduct.
3. *General deterrence:* When the general public observes criminals being punished for their crimes, the public is deterred from criminal conduct for fear of similar punishment. The effectiveness of this rationale depends on the degree of punishment and the degree of certainty that criminals will be caught, convicted, and punished.
4. *Rehabilitation:* Society may seek to prevent a criminal from committing other crimes by forcing that person to undergo training, psychological counseling, or some form of moral or social education as to the need for law-abiding patterns of behavior. If successful, rehabilitation will allow the individual to reenter society as a productive human being.
5. *Retribution:* Punishment may express the moral condemnation of the community and is a lawful means of avenging a wrong. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate wrongs." Public retribution also lessens the desire for private retribution by the victim or others who might seek personal revenge for the criminal's wrongdoing. For example, if society punishes the killer, the victim's friends and family have less need to avenge the death[15].

What Conduct should be Criminal?

In the broadest sense, both civil and criminal law intent to create and maintain the good society by the way of prohibition and requirement of special conduct. However, in the preservation of social order, the criminal law plays a unique role. One of the paramount roles is to prevent people from doing acts that harm others or society. It is generally said that the purpose of criminal law is to protect society in order to ensure that members of that society can be reasonably secure in carrying out their actions. For the sake of the preservation of the social order, among others, criminal law is the most commonly referred instrument. Because of that, to criminalize a certain kind conduct is to declare that it amounts to a public wrong, and that such behaviours ought to be avoided. For this reason, at the point of the legislation, legislature should decide what behaviour should be criminalised and what should not.

The frequent response to this question is that it should be the behaviour, which is immoral and harmful[16]. Unlike the general opinion, not all immoral or harmful behaviours are combated by means of a crime. To this respect more motives are required to defining crimes than opting whether behaviour is immoral or harmful[17]. In order to criminalize the behaviours, two leading phenomenon is governed by states by exercising the criminal law power in particular: The harm principle in Anglo-American Law and the Legal Good (Rechtsgut) principle particularly in German Law and civil law (continental law).

The Harm Principle

According to harm principle in John Stuart Mill's *On Liberty,* harm principle is described that a behaviour should not be criminal unless the behaviour causes harm to another person. Unlike moralism, harm principle does not concern the behaviours, which are not detrimental but unpleasant or impudent. According to Mill, society should not prevent the free choice of the another person's behaviour unless that behaviour harms society[18]. The state should intervene to protect society when harm is caused but what is harm? Harm has to be such that it threatens the mere fabric of society. It is for society to determine what constitutes 'harm'. In a democratic society this should pose little difficulty. We all accept that murder, rape, manslaughter, robbery, burglary and theft are all acts which are clearly wrong. Here, the victim should be protected from the 'wrong' and the wrongdoer should be punished. However, even here morals play a role. For example, we all agree that theft is wrong; harm is caused if I steal a wallet from the person sitting next to me on the train. Harm is caused to the individual, and society needs to be protected from my actions. Compare my act to the single unemployed mum who steals a pint of milk and a loaf of bread to feed her family. Is harm caused here? Is her act equally as reprehensible as mine? We all know that one should not steal, but does society really need protection from her? Arguably not. Although the quality of the act is the same the motives are very different. Although motives play no role in criminal law, this simple example shows there are varying differing standards as to what amounts to an act that causes harm. Not only is this dependent on the morals of those who represent our 'society' but it is also largely dependent on society's expectations and the changing values of that society[19].

The principle was initially designed to prevent the criminalization of conduct merely rested on moral or paternalistic grounds. Although this principle has been widely accepted, there has been much controversy over the term of harm. Today, the criminal law is not only concerned with the causing of direct harm to other people but also outlaws harm to state, public morals and the environment. The criminal law goes further and punishes conduct which may not cause harm but put others or itself in jeopardy, attempted crimes and acts which help others commit crimes[20].

Legal Good Principle

In continental legal thought, the concept of legal good which base on the idea that all offenses are there to defend specific legally protected interest has played an important role in the theory of criminalization[21]. According to legal goods principle, a legal good comprise two conditions in order to be considered worthy of protection by the criminal law: - the good must be of essential social importance and the adequate protection of the good requires the intervention of the criminal law. Legal goods are legally protected interests of the individual or other legal entities (e.g. corporate organisations) or of certain collectivities. They can be either natural material goods (e.g. land, water) or products of human labour; the latter can be further on divided into material goods (e.g. food, money etc.) and immaterial goods (e.g. privacy, education, freedom, security, etc.). These are just some classifications of legal goods. Normatively speaking, 'legal goods' are the goods or values of a particular society that may be mirrored in, and protected by, the law[22]. The concept of legal good is meant to properly limit the intervention of criminal law to protection of fundamental legal goods[23]. Continental legal thought, when dealing with the interpretation of the Criminal code's provisions, defining their objects and interrelation with other norms, in their majority, subscribe to the so-called doctrine of protected legal interests and the concept of the specific protective purpose of a law.

The General and Special Parts of Criminal Law

Criminal law consists of two sections: a general and a special part. In general, principles that are applied to every kind of crime regulated in the special part, are located in the general part. Defining the specific crimes and arranging them into the groups by subject matter pertain to the special part of criminal law. The general principles are the fundamental regulations and apply, without exception, to defined crimes in special part. Pursuant to the TPC, article 1- 76 contains general regulations that are applicable to every kind of specific crime. The special part of criminal law defines specific crimes, according to the principles set out in the general part.

Sources of criminal Law

1. *Legislature*: According to the principle of legality, criminal prohibitions and sanctions should be based on written law. The main body of criminal law is contained in the Penal/Criminal Code. But numerous legal norms providing for criminal liability can be found in other statutes, for example, in statutes regulating commercial matters, road traffic, or the handling of potentially dangerous drugs. Such statutes typically establish certain duties and requirements and add one or more paragraphs defining as crimes, the violation of specified duties.
2. *Judiciary:* The role of the jurisdiction is to interpret the criminal law not to make it. Also judges have no power to establish criminal liability without a clear statutory basis. The judge has a power to interpret the statute in line with the new insights or technological developments. However, due to prohibition of making comparison, when courts are of the opinion that certain conduct not covered by a statute should be treated as criminal, they cannot extend the reach of the statute. Their only recourse is to acquit the defendant and to write an opinion alerting the legislature to the gap in the present statutory law[24].
3. *Executive:* Especially for technical matters, the Turkish law system authorize administration to execute regulations in order to regulate details whose contents, purpose and scope are determined by the statute. The statute must describe exactly the conduct that is to be criminally prohibited and the maximum sanction to be imposed.

Criminal Law and Human Rights – The Function of the ECHR

There are certain rights that we have many of which are treasures[25]. For example, the rights of life, liberty, security, free speech, dignity, and prohibitions of slavery, forced labour, torture. These are seen as essential features of being human. In consideration of the importance of human rights, they are protected, without exception, by criminal law. Behaviour which severely breaches the human rights of another person will often be a criminal offense.

Human rights are protected also by the supranational conventions. One of those significant conventions is the European Convention on Human Rights, to which Turkey is a party. The European Convention on Human Rights (ECHR), which was signed in 1950 by all 47 member states of the European Council, aims at protecting and guaranteeing the human rights of people in countries that belong to the council of Europe. (With the 47 members, Council of Europe is separate from the European Union and was founded after the Second World War in order to protect human rights and the rule of law.

As an implementing court of the Convention, European Court of Human Rights (ECtHR), rules on individual or state applications alleging violations of the civil and political rights set out in the ECHR. The court's duty is monitoring respect for the human rights within the member states.

Principles of Criminal Law

As the core of the rule of law in criminal law, a set of principles can be found in the ECHR and national criminal codes. In relation to these principles the ECHR foresees, the following can be listed 'no punishment without law'; certainty in Article 7; 'presumption of innocence' in Article 6.

The Principle of Personal Responsibility

The principle of personal responsibility means that a person is responsible for her actions and no one else.

The Principle of Legality - Nulla Poena Sine Lege, Nullum Crimen Sine Lege

Criminal law looks back to the past. This is a logical and necessary consequence of principles deriving from the age of enlightenment, in which a scholar by the name Feuerbach first wrote the legality principle 'Nulle Poena Sine Lege, Nullum Crimen Sine Lege,' which states that an act may only be punished if criminal liability had been established by law before the act was committed. As a stance against the arbitrary treatment in the course of ongoing trial, Feuerbach proposed that there can be no punishment without a prior and precise rule stating so[26].

In view of the wide-ranging forms of the legality principle, it is preferred to divide it into four distinct principles.

1. Punishability requires a written act of parliament and cannot be based on custom. (No Punishment without Law)
2. Criminal prohibitions must determine the prohibited conduct, they must be definite (the principle of certainty)
3. Acts cannot be punished retroactively. (the principle of non retroactivity) The penalty and any ancillary measures shall be determined by the law which is in force at the time of the act. If the penalty is amended during the commission of the act, the law in force at the time the act is completed shall be applied. If the law in force at the time of the completion of the act is amended before judgment, the most lenient law shall be applied. A law intended to be in force only for a determinate time shall be continued to be applied to acts committed while it was in force even after it ceases to be in force, unless otherwise provided by law[27].
4. The statutory prohibition cannot be extended by analogy to conduct not covered by the ordinary meaning of the words used. (the principle of the interdiction of analogy)[28]. As a fundamental principle, *'No Punishment Without Law'* is regulated under most state constitutions, Criminal Codes and supranational Treaties including the ECHR. The ECHR, with its Article 7, defines the principle as '***No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offense was committed.'*** Also, according to Article 38 of the Constitution of the Republic of Turkey; '***no one shall be punished for any act which does not constitute a criminal offense under the law in force at the time committed; no one shall be given a heavier penalty for an offense other than the penalty applicable at the time when the offense was committed***'.

According to Article 2 of the TPC, '***A person may neither be punished nor be imposed cautionary judgment for an act which does not explicitly constitute an offense within the definition of the Law***.' As it is seen in the examples, the statutes do one of the two things:

- No one is in charge of any act or omission which did not constitute a criminal offense under national/ international law at the time when it was committed.
- No one shall be given a heavier penalty for an offense other than the penalty applicable at the time when the offense was committed

As well as Article 7 of the Convention, the TPC (Turkish Penal Code) requires the existence of a legal basis in order to impose a sentence or a penalty.

As another aspect of the legality principle, the principle of non-retrospectivity of criminal law is also ensured by the ECHR as well as the TPC. The meaning of this principle that the state cannot punish a person for an offense, unless it is accepted as a crime at the time, when the act was committed. The people must be able to find out what the law is and the law must deliberately avoid catching people by surprise. The essence of the principle is that a person should never be convicted or punished except in accordance with a previously declared offense governing the conduct in question. In other words, a criminal sanction may only be imposed if the conduct in question existed under the relevant law at the time when the impugned conduct occurred. Hence, the law maker may not execute ex post facto criminal laws and judges may only apply criminal provisions that are applicable during the conduct occurred[29].

The principle does not apply to retrospective changes that benefit an accused person. In cases where the changes in the penal code are in favour of an accused, the non retrospectivity principle will not be applicable[30]. Hence, the application of a law enacted after the commission of a crime that decriminalized conduct or reduces the penalty for such conduct, does not violate the principle.

Theoretically, penal codes would have been very short with the definition of an offense such as:

'It is an offense wrongfully to harm someone in a blameworthy way.' However, there would be two main reasons to object such a criminal law. Because of the severe consequences of imprisonment, criminal offenses are drafted with clarity so that people recognise what they are free to do and what not to do. Law abiding citizens are entitled to check the criminal law and arrange for themselves obviously what they must do or not do to ensure they do not infringe the law. For that reason, criminal law, especially crimes, must be predictable, fairly certain and capable of being obeyed[31]. On the other hand, punishment apportioned to crime is the second reason to object a very short criminal law. It would be inappropriate to censure someone who parks his car illegally with the same level of blame as a deliberate killer[32]. Because of this reason the offenses should be certainly defined thus one can recognise what level of blame is attached to which offense. Contrary to this, if crimes are defined too tightly, the way is left open for a defendant to attempt to use technical arguments that he was not charged with exactly the right offense and so escape a conviction[33]. Also Article 7 of the ECHR requires the offenses and corresponding penalties to be clearly defined by law.

Principle of the interdiction of analogy is directly linked to the prohibition against retroactivity and hence a generally accepted component of the legality principle. Interdiction of analogy means that on the purpose of the filling the gaps in the criminal law, the judge can not apply a statute beyond its wording or by extending a precedent through the creation of a new unwritten crime[34].

The Presumption of Innocence

With a simple definition, no one is accused until proven guilty. The burden is on the prosecution to prove the case. The principle burdens the prosecution with the proof of the committed offense. A person however clear the evidence seems to be, is innocent until proved guilty. It is enshrined in Article 6/2 of the ECHR as: '***Everyone charged with a criminal offense shall be presumed innocent until proved guilty according to law'***. However, the European Court suggested that placing a burden of proof on the defendant may be permissible, but the state would need to demonstrate that to do so is necessary given the gravity of the issues involved.

your turn [1]

Please describe briefly the principles of criminal law (ECHR 6 and 7)?

Criminal Law Distinguished from Civil Law

Criminal law is not the only body of law that regulates the conduct of persons. Civil law essentially provides remedies for private wrongs that are offenses in which the state has a less direct interest. Most civil wrongs are classified as breaches of contract or torts. A breach of contract occurs when a party to a contract violates the terms of the agreement. A tort, on the other hand, is a wrongful act that does not violate any enforceable agreement, but nevertheless violates a legal right of the injured party. Common examples of torts include wrongful death, intentional or negligent infliction of personal injury, wrongful destruction of property, trespass, and defamation of character. A crime normally entails intentional conduct; thus, a driver whose car accidentally hits and kills another person would not necessarily be guilty of a crime, depending on the circumstances. If the accident resulted from the driver's negligence, the driver would have committed the tort of wrongful death and would be subject to a civil suit for damages. Criminal law and civil law often overlap. A conduct that constitutes a crime can also involve a tort. For example, A intentionally damages a house belonging to B. A's act might well result in both criminal and civil actions being brought against him. On the one hand, A may be prosecuted by the state for the crime of willful destruction of property. On the other hand, A may also be sued by B for the tort of wrongful destruction of property. The state would be seeking to punish A for his antisocial conduct, whereas B would be seeking compensation for the damage to his property[35]. Another example would be deterrence from crime which occurs as a result of social influence and pressure from families, friends and communities. Criminal law is, however, different from such influence in that it is the established state response to crime. Further, breaking of a criminal law is seen as different from that of other branches of law in that a breach of criminal law involves a degree of

official moral censure. To be ordered by a court to pay damages following a breach of contract (which is not a criminal offense) does not bring along the same kind of moral message or stigma that it would if you had been found guilty of a criminal act and then ordered to pay a fine[36].

LIABILITY REQUIREMENTS

In view of the criminal liability, criminal law is established on a three-legged stool. The first leg consists of objective and subjective elements that are related to the question of whether a person has fulfilled each element of the statutory description of an offense. The second leg is concerned with the question of whether the person's behaviour was unlawful, and the third leg is related to the individual accountability of the person for the wrongdoing. (Weigend, s. 259)

The two main elements required for a crime to have been committed are guilty act and guilty mind, which are derived from the Latin phrase, 'Actus non facit reum nişi mens sit rea', meaning 'a man is not liable for his action alone unless he acts with a guilty mind.'

Objectıve and Subjectıve Elements

Objective Element-Actus Reus

Voluntary Act

The objective element- also called physical or external element- that describes a voluntary act or omission, refers to the part of the definition of the offense in the statutory law which relates to the actions of the perpetrator and their consequences. The movements are willed by the conscious mind of the defendant. Otherwise, the conducts are regarded as involuntary, with the defendant not having performed the actus reus[37]. The element will mostly involve activity on the part of the accused, such as an assault, an act of appropriation of property (in theft) or entry into a building (in burglary). For example, in murder, the death of the victim must result from the perpetrator's act/omission, or in case of criminal damage, property must be damaged or destroyed. In view of this example, the perpetrator is punished for what he/she does or, when there is a duty to act (omission), punished for what he/she does not do. A person can be legally responsible for his/her voluntary bodily movements and, in some cases, speech, but not for the effects that are beyond his/her control. For instance, a person does not act voluntarily when he/she is used by another person as a physical instrument such as the case in which the person is pushed into a swimming pool, causing another one to fall and drown who happens to be on the scene. Another example would be related to a man who killed his mother while sleepwalking.

The actus reus of a crime must reflect the free will and autonomy of a person and, therefore, the performance must be voluntary. Although in some cases, the act can be involuntary, the person can be held liable if he/she omits to take precautions against harming others in an unconscious state. For example, a mother who takes her newborn into her bed and smothers the baby in her sleep can be held criminally liable for negligent manslaughter (or even murder if she acted intentionally) for the prior conduct of taking the baby into her bed without taking care to protect her from possible harm[38].

Omissions

As a general rule, omission does not attract criminal liability. Although a voluntary act is required in most cases for criminal liability, both civil and common law consist of several offense definitions that do not require an act while giving rise to criminal liability, which is referred to as acts of omission or failure to act.

As an example of the statutory duty, Article 98 of the TPC regulates that:

(1) Any person who fails to render assistance to an old, disabled or injured person at the extent of his ability, or fails to notify the concerned authorities in time, is punished with imprisonment up to one year or punitive fine.

(2) In case of death of a person due to failure in rendering assistance or notification of concerned authorities, the person responsible is sentenced to imprisonment from one year to three years.

The duty derives from rendering assistance to someone in danger. Note that the Code creates a duty to act only to the extent that the citizen can do

it without danger to self; further, only intervention to the extent of one's abilities is required. This means, for instance, that if a person cannot swim, he/she is not required to jump in the river to save a drowning person; he/she would have a duty, however, to alert others or to help the drowning victim by throwing in a life ring or doing some other affirmative act[39].

Another type of the statutory duty refers to relationship duties. For example Article 97 of the TPC sets out that:

Any person who abandons another person who is under protection and observation due to state of disability bound to old age or sickness, is sentenced to imprisonment from three months to up to two years.

If the victim suffers an illness or subject to injury or death due to abandonment, the offender is punished according to the provisions relating to aggravated offense.

Criminal liability may also derive from the statute which foresees a duty to act, particularly arising from relationships, contractual duties as well as failure to maintain care duties.

Where a person has a contractual duty to protect or care for others and fails to carry out the duty, he/she may be held liable for remaining passive or not performing the duty. For example, lifeguards towards swimmers, childcare providers towards those under their care, doctors towards patients. Another type of duty is his/her previous behaviour (creation of danger) which constitutes a risk against others' life.

According to the TPC, gross negligence in failing to perform one's duties may attach criminal liability, if there is a death or serious injury. Pursuant to Article 83 of the TPC, in order to hold a person criminally responsible from death due to failure to perform an obligation, with the failure or negligence, these should create consequences that are equal to commissive acts in degree.

In order for negligence and commissive acts to be regarded as equal, a person:

a) should have undertaken liabilities arising out of a law or a contract to execute a commissive act,

b) His previous performance should constitute a risk against others' life.

Any person causing death of a person due to failure to perform a legal obligation or requirement is basically punished with imprisonment of twelve years to twenty years instead of heavy life imprisonment, and of fifteen years to twenty years instead of life imprisonment. In other cases, the court may order for imprisonment of ten years to fifteen years or reduction of punishment.

According to Article 88 of the TPC, in the event that it is possible to diminish the effect of felonious injury by a simple medical surgery, the offender is sentenced to imprisonment of four months to one year or punitive fine upon complaint of the victim.

In case of commission of felonious injury by negligence, the punishment to be imposed may be reduced up to two thirds. The conditions relating to negligent homicide are taken into consideration in the application of this provision. A mother/nanny who passively watches as her toddler walks into a pool and drowns is presented as an example.

- In accordance with the abovementioned example, contractual obligation could be illustrated with the person employed as the baby's nanny who is under the duty to act.
- On the other hand, the baby's parents would be under the duty to act arising from a close family relationship with the victim.
- Furthermore, causing the risk of harm against the victim, the mother who puts the baby in the lake -even if by accident- is under a duty to act and will be punished for murder by omission40.

Consequently, a person can also be held criminally liable for mere nonfeasance when he/she is under a legal duty to avert a particular harm and neglects to fulfill that duty. If a person has violated a legal duty to avert the harm as defined in an offense description and the harm has occurred, the person becomes liable only if he/she could have averted the harm by fulfilling the duty to act. For example, if a mother sitting at the seashore does nothing although she sees that her child swimming outside is close to drowning in the high waves, she cannot be held responsible for "causing" the child's eventual death by her remaining passive when she cannot swim and there was no means available to obtain help from others[41].

Subjective Element-Mens Rea

The subjective element- also called the mental element- in crime is one of the most significant concepts of substantive criminal law. In general terms, an accused is held liable only if he/she has mens rea. Mens rea is the state of mind or, in the case of negligence, the failure to attain a certain standart of behaviour which the offense definition requires before the accused can be convicted. The Latin for 'guilty mind', 'mens rea' refers to the notion according to which a court should not find a person guilty of a crime unless he/she has a blameworthy state of mind. The philosophical foundation for mens rea is that the accused can control his conducts, including whether to engage in the conducts breaking criminal law[42].

Most criminal offenses require the accused to have intented or foreseen the consequences of their actions. In criminal law, actus reus is divided into two sublevels, namely intention and negligence. With the highest level of culpability with regard to mens rea, intention means that the accused deliberately causes harm. On the other hand, negligence means that the accused carelessly or recklessly causes harm.

Intention

Intent is the will of realizing all objective elements of a crime defined in criminal code, with the knowledge that these elements exist. According to Article 21 of the TPC, only intentional commission of a crime is punishable unless liability is explicitly extended to to negligent conduct by statute. Intent is classified into two types, namely direct intention and conditional-indirect intention. Intention is characterized by the fact that it is the offender's primary purpose to achieve what the crime definition describes; it is not necessary that the offender is convinced that he/she will obtain that goal. For example, an assailant acts with the intention to kill his victim if that is the purpose of shooting at him; it does not matter if the actor, because of the great distance at which he shoots, is not certain that he will actually hit the intended victim[43]. Direct intention occurs whereby the consequence of an intention is actually desired. Another example of direct intention would be the case in which A shoots at B because A wants to kill B. On the other hand, indirect intention covers the situation when a perpetrator foresees that a certain consequence that he/she does not desire will come about after the act and goes ahead anyway. For example, A throws a rock at B standing behind a closed window, hoping to smash B's window but it hits B on the head with it. A may not actively want to hit B on the head, but knows that it may result as such. Therefore, A intends to break the window as well as taking into account the harmful results of the possibility to hit B on the head.

Intention embodies two elements: will and knowledge. According to Emile Garçon, a prominent French criminal lawyer during the 19th century, "intent is, in its legal sense, to desire/will to commit a crime as defined by the law; it is the accused's awareness that he is breaking a law."[44]. Awareness requires the accused to be aware of the fact that he/she is breaking the law. Also will is interpreted as committing the wrongful act. In the conditional intention, the offender acknowledges the possibility that a certain result will follow the act and takes the risk. According to Article 21/2 of the TPC, the conditional intention includes the situation when the offender conducts an act while foreseeing that the elements in the legal definition of an offense may occur. Even though the offender does not want the consequences of his/her behaviour to occur, he/she approvingly takes into account the results of the possibility of violating the law by way of committing the relevant crime.

Negligence/Recklessness

A crime cannot be essentially punishable if the offender does not act with intention[45]. However, negligence is specified as a sufficient fault element for certain crimes. A person acts "negligently" only if he/she is to foresee the harmful consequences of his/her conduct while being unaware of the substantial risk that follows the conduct. Although the definition of negligence takes place in the general part of the TPC, it must be specifically referred to in the special part. In other words, negligence is punishable only when the statute specifically includes liability for negligence. According to Article 22 of the TPC, negligence is the failure to foresee the results that are described in the legal definition of a crime, as a consequence of carelessness or lack of diligence.

An example for negligence would be as follows:

Article 85 of the TPC:

(1) Any person who causes the death of another by reckless conduct shall be sentenced to a penalty of imprisonment for a term of two to six years.

(2) If the act results in the death of more than one person, or the injury of more than one person together with death of one or more persons, the offender shall be sentenced to a penalty of imprisonment for a term of two to fifteen years.

Article 182 of the TPC:

(1) Any person who discharges waste or refuse material into the earth, water or air through his recklessness such as to cause environmental damage shall be sentenced to a penalty of a judicial fine. Where the waste or refuse material has the propensity to remain in the earth, water or air then the penalty to be imposed shall be imprisonment for a term of two months to one year.

(2) Any person who causes, by his recklessness, the discharge of waste or refuse material which has a characteristic which may cause the alteration of the natural characteristics of plants or animals, enhance or create infertility or cause an incurable illness in humans and animals, the offender shall be sentenced to a penalty of imprisonment for a term of one to five years.

Two other categories of negligence are unconscious and conscious negligence. Unconscious negligence is defined as conducting an act without foreseeing the results as stated in the legal definition of the offense, due to a failure to discharge a duty of care and attention. Conscious negligence occurs when the offender is aware of a risk but thinks/hopes that the harmful result will not happen even if he/she performs an act he/she knows to be dangerous[46]. The foreseeability of the offender is assessed in consideration of the subjective conditions of his/her individual capabilities. A defendant can be convicted from a negligence offense only to the extent of ability to foresee a risk that an average person/a reasonable man could have foreseen. Hence, the defendant is required to do everything necessary within his/her power to prevent the ocurrence of harm in a situation where he/she is to warn against the potential harm.

For example, even though it is allowed to drive in the city centre up to 50 km/h, a man who drives 100 km/h and hits a pedestrian and causes him/her injury is held responsible for injuring the pedestrian. Not only he/she violates the law, but also he could have foreseen the possibility of hitting a pedestrian crossing the street. Therefore, the driver is liable for the injury through her concious negligent offense.

In another example, a car driver who suddenly becomes drowsy because of a disease of which he had not previously been aware cannot be held liable for negligent wounding of a cyclist whom the driver was unable to recognize because of his sudden drowsiness. But the subjective standard does not save the driver from criminal responsibility when he was aware of the defect, because in that case he could have foreseen the risk of an accident and should have, therefore, abstained from driving altogether. Thus, the driver is held responsible for the injury through his unconcious negligent offense.

Criminal Attempt

A person is guilty of an attempt to commit a crime if he/she acts with culpability. Otherwise, if he/she:

- purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
- when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or
- purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act constituting a substantial step in a course of conduct planned to culminate in his commission of the crime

the person is regarded to have attempted to commit the crime.

A person attempts a crime by taking steps which will immediately lead to the completion of the crime as envisaged by him/her. In order to punish the attempt to commit an offense, the perpetrator must have had intention with regard to committing that offense and must have immediately proceeded to fulfilling the act. (Article 35 of the TPC). To this end, the perpetrator must undertake the actions which, according to his/her concept of the crime, will lead directly to fulfillment of its

definition if there is undisturbed progress without interludes. The commission of acts as described in the statutory definition is, admittedly, not necessary. It suffices if the perpetrator's action is a direct precursor to the fulfillment of an element in the definition of the crime or is in direct spatial and temporal connection with the fulfillment of the definition[47]. The perpetrator should have directly started to execute the appropriate acts of committing an intentional crime–in case of negligence, attempt is not punished[48]. As a starting point of an offense, 'direct execution' to commit a crime will be determined for each type of crime. Yet, roughly speaking, the perpetrator's act of direct execution is assumed to have started when he/she had undertaken the actions defined by the actus reus of a crime and made no bones of intention to commit a crime, starting to walk along *iter criminis*. And, this is the reason why attempt liability should not be extended to perpetratory acts, whereby the perpetrator is not in direct spatial and temporal connection with the fulfillment of an element in the definition of a crime, in other words, the perpetrator is not very close to doing the act proscribed. A perpetrator who intends to commit a crime through the appropriate acts, but is not able to complete the act due to unavoidable reasons or circumstances beyond his/her control, shall be held liable for the attempt.

The TPC provides for impunity for those perpetrators who voluntarily abandon an attempt. In this regards, liability for attempt is extinguished when the perpetrator refrains from taking the last steps he/she deems necessary for the completion of the offense, or when the perpetrator, after having done everything necessary to bring about the desired consequence, becomes active and prevents the harm from occurring. For example, a burglar who breaks into a house and then retreats without taking anything with him is held to have voluntarily abandoned the performance of the acts of committing the offense. In another case, a man, who inflicts a life-threatening injury with the intent to kill his victim, but then rushes the victim to the hospital where his life is saved, is said to have prevented the completion of the offense or its consequences[49]. In these situations, the perpetrator will not be liable for attempted burglary or murder but he/she remains liable for those completed offenses, including breaking into the house or dangerous assault, if the completed part of an act constitutes another crime defined in the statute. The crucial element of the abandonment is to act with 'voluntariness'. This means that the perpetrator endeavors to prevent the consequence without being forced by external factors that make the completion of the act impossible or considerably riskier for the offender.

Forms of Participation-Principal and Secondary Participant-Incitement and Assistance

In criminal law, almost all offenses are described taking into consideration the sole perpetrator. Yet, many of the worst crimes are committed by several persons who participate in a common scheme. While some of the participants may be the driving force behind the activities, others may merely take instructions or orders or wish to help. Some of them do not wish to be seen at the crime scene and stay in the back as organisational superintendents. As a system of state reaction to the degree of personal guilt in law-breaking, criminal law must provide for different answers and prescribe liabilities depending on the type of participation in criminal behaviour[50]. To that end, criminal law systems distinguish three forms of principal and two forms of complicity.

Principal

As the main perpetrator of the offense, principal is usually the person who commits the actus reus. Where more than one person is directly responsible for the actus reus, there may be more than one principal; those are known as joint principals. In general, criminal law systems distinguish three forms of principals: principal, joint principal and indirect principal. To put it another way, whoever commits an offense individually or through another person is liable as a principal.

Joint principal is an agreement between two or more persons to behave in a shared manner that will automatically constitute an offense commited by at least one of them[51]. According to the TPC, any person who jointly performs an act prescribed by law as an offense shall be culpable as well. What stands out as the most important matter is that joint principal requires a common plan shared by

all accomplices. No verbal agreement is required, meaning that any offender can act nonverbally or spontaneously. Moreover, any offender can be already in the process of committing the crime. For example, A forcefully restrains the victim while B takes the victim's wallet out of his jacket, neither A nor B applies force *and* takes away the victim's wallet. Here both A and B can be held liable for robbery if they have worked together in accordance with a common plan; the respective acts of A and B are attributed to each joint principals. Joint principles are also not required to be present at the crime scene where the plan is being carried out; even a gang leader who has designed the criminal plan but leaves to others the actual performance can be a joint principal.

Indirect principal refers to committing the offense through another person who conducts the criminal act. Another person –the agent– becomes an instrument while committing the offense. The indirect principal exercises control over the offense through the agent who directly commits the crime. Jurisprudence and commentators have acknowledged the following categories with regard to indirect principal:

a) The agent is not fulfilling either the actus reus or mens rea of the offense. Example: Indirect principal P asks the agent A to take Victim's car and bring it to P's house; he tells A that the car is his own and V had borrowed but did not return it despite P's demands. In reality, the car belongs to V. Here A lacks the mens rea for the actus reus element of 'property belonging to someone else'.

b) The agent lacks a specific mens rea component or has the mens rea for a different offense. Example: P tells A that he only wants to borrow V's car for a short ride and will return it immediately afterwards. A has the necessary mens rea for all the actus reus elements of theft, but lacks the additional intention to appropriate the car for himself or P.

c) The agent is acting objectively lawfully under an accepted defense. Example: A, a police constable, is told untruthfully by P that V has just stolen a handbag from her. A pursues V and arrests her. A is acting under his power to arrest persons suspected of an offense.

d) The agent is acting without personal guilt under an accepted defense. Example: P forces A to commit an armed bank robbery by holding his wife and children hostage, threatening to kill them; A is acting under duress. P is telling A, who suffers from a mental illness amounting to insanity in the legal sense, to kill V. Alternatively: P tells elderly A that V is approaching to attack her with a knife, A hits V over the head with a large stick. Although A is not acting in self-defense, he may be acting without guilt or intent because of his error.

e) The agent lacks criminal capacity. Example: P asks A, a 10-year-old child, to steal a packet of cigarettes. Even if she thinks that she is committing an offense, A is not held criminally liable as she is under 14[52].

Complicity

In general, criminal law systems distinguish two forms of complicity: incitement and assistance. Incitement and assistance can occur only in terms of the basic kinds of intention-based offenses. The article 40 of the TPC indicates and acknowledges this rule as follows: In order for an offense to constitute a jointly committed offense, it is sufficient that the act is unlawful and committed intentionally. Each person participating in the commission of an offense shall be sentenced according to his unlawful act, irrespective of the individual circumstances of others which may prevent the imposition of a penalty. Also, in order to be held responsible for a jointly committed offense, there must have been at least an attempt to commit the offense.

Incitement-Instigator

The instigator who incites another person to commit an offense shall be subject to the penalty appropriate to the offense that is committed. The inciter is punished in the same manner as the principal perpetrator of the offense even though he/she does not directly perform the act described by law. Incitement includes encouragement with regard to committing the crime, which is given at the time that the crime is committed. The principal is probably required to be aware of such encouragement, although the encouragement need not have caused the principal to go ahead

and commit the principal offense. Instigation of the principal consists of causing another person to conduct an intentional and unlawful act. The instigator uses psychological influence on the person who performs the criminal act. In other words, the abettor plants the idea in the principal's mind, after which the principal decides whether and how to commit the act. If the principal is already determined to commit a crime, it is impossible to instigate the same crime to be committed[53].

Aiders

Aiding refers to helping the principal at the time when the offense is committed. In order to convict the aider of a committed offense, the aider must have given some support which is described in Article 39 of the TPC as follows:

- encourages the commission of an offense,
- reinforces the decision to commit an offense,
- promises that he will assist after the commission of an act,
- provides counsel as to how an offense is to be committed,
- provides the means used for the commission of the offense,
- facilitates the execution of an offense by providing assistance before or after the commission of the offense.

There need not be any direct contact between the perpetrator and the aider, and the perpetrator does not even have to know about the support that is given. Also, mere psychological support may be treated as punishable by courts. Unlike an instigater, an aider does not impose the idea of committing a crime. Yet aider facilitates the commission of the offense. The scope of the aiding must not be extended to the crucial points in the commission of a crime. To put it another way, in cases where the assistance of the aider becomes essential in order for the crime to succeed, the aider transforms into a joint principal.

Corporate Liability

It is generally acknowledged that personal blameworthiness is the basis of liability of natural persons. Corporations have the ability neither to act nor to be blamed. However, corporations may be subjected to non-criminal fines such as administrative fines.

Causation

The principal is accused of the result only if there is a casual relationship between the act committed by the principal and the result of the act. Even though most criminal laws do not, in general, explicitly indicate or define causation, it is a central component of criminal responsibility, as many provisions threaten punishment to those who cause a specified result. Criminal offenses can be classified into result crimes and conduct crimes. Result crimes require proof that the defendant's acts or omissions caused the consequence prohibited by the crime charged. Examples would include murder and manslaughter in which the defendant's conduct must cause another person's death. In the case of assault, the defendant's assault must cause actual bodily harm on another person. Furthermore, criminal damage requires that the defendant's conduct cause a damage or destruction on the property of another person. In some pollution offenses, the defendant's conduct must cause polluting matter to enter into a river or stream[54].

If two persons have independently acted in a manner so that their contributions worked together to bring about the effect, each contributor is deemed to have caused the effect. For example, A, as well as B, give X one dose of poison, and two doses were necessary to kill X. In the exceptional case of two independent sufficient causes acting simultaneously to bring about a consequence, each factor is regarded as causal. If, in the example just posed, both A and B independently pour two doses of poison into X's drink and X dies after drinking the fatal potion in one gulp, both A and B are regarded as having caused X's death[55]. In another example, if T knocks V unconscious and leaves him on the beach below the high watermark so that V is drowned by the incoming tide, T is regarded to have legally caused V's death. The natural event of the tide coming in is not abnormal or 'extraordinary', but exactly what could be expected and foreseen. It does not break the chain of causation. If, on the other hand, V dies through a lightning strike, the courts might well say that this was 'extraordinary' and not reasonably foreseeable so superseding T's conduct as the legal cause of death. Conduct crimes shall be committed by way of negligence as well.

According to Article 170 of the TPC:

(1) Any person who acts in such a way which is capable of creating panic, fear or anxiety in the public or endangering the life, health, property of the public by:

a) causing fire;

b) causing the collapse of a building, landslide, avalanche, flood or breaching of an aquatic boundary; or

c) using weapons fire or explosives

shall be sentenced to a penalty of imprisonment for a term of six months to three years.

(2) Any person who creates a danger of causing a fire, the collapse of a building, a landslide, an avalanche, a flood or a breaching of an aquatic boundary, shall be sentenced to a penalty of imprisonment for a term of three months to one year, or a judicial fine.

Article 171 of the TPC:

(1) Where, by recklessness, a person causes;

a) a fire,

b) the collapse of a building, a landslide, avalanche, flood or a breach of aquatic boundary, which creates a risk to the life, health or property of others

shall be sentenced to a penalty of imprisonment for a term of three months to one year.

Causation is a general element of result offenses. Causation is not the only element of criminal liability and punishment; however, it requires proof that the result can be attributed to the principal's act. Causation is a part of the objective element – actus reus- of the offense.

Theories of causation:

According to the theory of last cause, the last condition is necessary for criminal liability. If another behaviour intervenes between the behaviour and its consequence, then the link is broken[56].

According to the theory of adequate causation, some acts are regarded as effective means for the commission of the crime, whereas other acts create a greater possibility of such commission.

According to the equivalence theory, each condition necessary for carrying out an action is considered as a cause. In this regard, there is no distinction between a more and less important cause or first and last cause[57]. If, for example, the defendant wires up the electrics on a central heating system wrongly so that the victim is electrocuted when he touches a live radiator, many things apart from the defendant's act, must happen before victim's death is produced. The victim must touch the radiator, must not be wearing rubber gloves or rubber-soled shoes, the electricity must be switched on, the electricity company must be transmitting power down the lines, and so on. The law typically focuses on whether the act performed by the defendant is a cause of the death. In the case postulated, the law would regard the defendant as causing the death[58]. In order to limit the widening of the theory, a limitation called 'condition sine qua non'– 'but for'– 'objective attribution' test is used by jurisdictions.

Anglo-American criminal law distinguishes between two aspects of the causation analysis: Factual cause and legal (or proximate) cause. Factual cause is "but-for cause", meaning that "the conduct is the cause of the result when it is an antecedent but for which the result in question would not have occurred." In contrast, factual cause is rarely discussed; almost all causation cases are concerned with legal or proximate cause: "The relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense[59].

Under the continental criminal law doctrine, "objective attribution" is established as an additional filter besides causality: The offender's conduct must have created a wrongful risk of this specific result, and the result must be the product of this very risk[60]. For example, D cannot evade liability by arguing that V's own actions contributed to the result in its actual form. The same applies if V's physical or mental constitution is special or even abnormal. Fortuity of consequence has no room in negating causation[61]. Other forms of objective attribution are alternative and cumulative causes. Where there are several offenders acting seperately and not as joint principals, alternative causation covers those situations whereby there are two or more causes, each of which would have been sufficient to cause the result, and impact at the same time.

For example: D1 and D2 each independently administer a lethal dose of poison to V, V dies of the simultaneous effect of both poisons. D1 and D2 are both guilty of murder. If, however, it cannot be

established whether one of them did not take effect before the other, both D1 and D2 are each only guilty of attempted murder. Alternative causality may also apply if D initiated two causes, each of which in itself could have caused the result alone; this can be important with respect to the mens rea in which the causes were set. D, who had been drinking heavily together with V, retired to his room. Shortly afterwards, he heard noises downstairs. He took his pistol and, with conditional intent to kill, fired a shot at the person he saw standing at the bottom of the stairs, who was V, whom D did not recognise. The injury caused by the shot was lethal, but could have been treated successfully had V been given immediate medical care. D returned to his room and a few minutes later heard more noises downstairs. He went back to the stairs and fired a random shot in the assumption that there might be several people downstairs. V was hit a second time; again the injury caused was lethal in itself. V died as a result of the injuries received by both shots. The first shot was regarded as a sufficient cause of V's death and D was found guilty of murder already through firing the first shot, and of negligent killing through firing the second—although the trial court was critisized for not examining the question thoroughly of whether or not D had also have conditional intent for the second shot. Based on the doctrine applying to multiple charges, the negligent killing was, however, a subsidiary offense to the murder anyway and D was thus only convicted of murder.

If, in the above example of D1 and D2 using poison on V, the lethal result was only reached by the combined effect, we speak of cumulative causality. In this context, both are still causal. The question of whether V's death could be fully attributed to both D1 and D2 as in the case of alternative causality is much more difficult. The tendency appears to be not to do so and, depending on the mens rea of D1 and D2, thay may be convicted of attempted murder and/or causing grievous bodily harm or administering noxious substances[62].

your turn 2

What are the objective and subjective elements of crime?

Justification

As aforementioned, relating to the question of whether the person's behaviour was unlawful, the justificatory defenses constitute the second step of the crime defined in the criminal code. Provisions of a statute, orders from superior, legitimate defense, use of a right and consent are the main justificatory defenses regulated in the TPC. These exculpating reasons prevent establishing the crime. Although certain behaviours that would normally fulfill the elements in the definition of the crime and entail criminal liability, the existence of the justificatory defenses/exculpating reasons prevent the condemnation of the person who behaves in conformity with actus reus and mens rea of the crime.

Self Defense and Defense of Another

As one of the main exculpating reasons, self defense has always been recognized as a ground of justification. Article 25 of the TPC defines self defense as:

'No penalty shall be imposed upon an offender in respect of acts which were necessary to repel an unjust assault which is directed, carried out, certain to be carried out or to be repeated against a right to which he, or another, was entitled, provided such acts were proportionate to the assault, taking into account the situation and circumstances prevailing at the time.'

The reason behind recognizing self-defense as a justification is twofold: First, a person must have a right to preserve his/her life, health, and property when/she has been unlawfully attacked; and the defender represents the interest of the community in upholding the legal order[63]. The preconditions to be met before the right to self-defense arises are, on the one hand, imminence and unlawfulness of the attack and, on the other hand, proportionality. The self-defense situation must in fact exist, meaning that the perpetrator's reasonable belief that he/she is being unlawfully attacked is insufficient to satisfy this objective element of self-defense. Self-defense applies to the defensive acts aimed at protecting any legal interest including property[64]. In order to take the advantage of self-defense, the perpetrator defends himself/herself against an unlawful assault which is directed at a legal good of his/her right or another's right. The unlawfulness of such assault points out that such act is proscribed

under all branches of law. The unlawful assault may be directed, carried out, certain to be carried out or repeated. That is, a person who is or will be attacked has the right to defend himself/herself or prevent the directed assault before it is carried out. Another key term for self-defense is necessity. If it is possible to escape without danger, self-defense is not allowed[65], which could be inferred as drawing certain normative boundaries, such as a proportionality test. The test would require weighing the harm inflicted through the defensive action against the harm to be prevented. The defendant can be justified if he/she causes serious physical injury to fend off attacks on property[66].

A person who goes beyond the limits of necessity with respect to self-defense by using excessive force is regarded to have acted unlawfully. But if that person is said to have been in a state of confusion, fear, or terror due to the attack, the unlawful act will be excused. In other words, if the limits were exceeded in the course of legitimate defense as a result of excitement, fear or agitation and the act is regarded as excusable, the offender shall not be subject to a penalty.

Consent

A victim's consent to the defendant's behaviour can exempt the defendant from liability. The issue normally arises in relation to non-fatal offenses against the person and has already been touched upon in the context of rape where, instead of being viewed as a defense, it is treated as part of the definition of the offense. For example, tattooing, surgery and ear-piercing normally constitute the crime of injury. Yet the consent of the victim prevents the act from being proscribed.

According to the TPC, no one shall be punished if he/she acts within the scope of the consent that has been declared by an individual concerning a right, on which he/she has an unrestricted right to use. The consent of a victim to the defendant's behaviour is valid only if it has been given voluntarily. Before the commission of the relevant act, the victim has a full authority to give consent on a voluntary and well-informed basis. In order to establish its validity, the consent must be rational and voluntary, which means that it is freely given by a person legally competent and well-informed to give consent. The assault must be directed to the victim's certain legal interest which he/she can can dispose over in full, such as property or bodily integrity. The holder of a certain legal interest may not effectively give consent even if the interest is an individual one, if public policy does not allow him/her to dispose freely over it; the best example is the protection of one's own life and bodily integrity. Consent with regard to attacks on common or public interests is, as a rule, of no effect.

Certain people do not have capacity to consent to the use of physical force over their body. They may lack such capacity due to, for example, minority or ill mental health. Capacity to consent also requires that the victim has the necessary intellectual maturity, the lack of which appears at people with mental disorders or minors- to understand what he/she is consenting to and that he/she can make an informed decision and understand the consequences of his/her actions[67]. In certain cases, consent can be given on behalf of a child or an incompetent adult through the legal representatives or the authorisation of a court, particularly in relation to surgery required in an emergency.

Consent has to be externally declared before the act consented to is performed. Moreover, consent, once given, must continue to exist from the beginning of the act until the end. It can normally be freely revoked; from that point onwards the act becomes unlawful. That is, consent must be present and continuous, revoking consent at a later time is invalid.

Execution of Statutory Provisions and Superior Orders

A person who carries out the provisions of a statute shall not be culpable.

A perpetrator who carries out an order given by an authorized body as part of his/her duty the execution of which is compulsory, he/she shall not be held liable for such act. It is of noteworthy, however, that the order given by the superior must not constitute an offense. Otherwise, both the person who carried out and the person who gave the order will be culpable. The reason behind the law's approach is the principle of the rule of law: No one can escape the umbrella of the law. Even the most senior army officer is bound by criminal law and cannot give an exemption to others[68].

Exercising of a Right

A person who exercises his/her legal right shall not be punished provided that legal practice has recognized a subjective right to an individual that can be exercised directly by him/her, there is no criminal responsibility if the right has been used in a proper way and within its limits[69]. For example, Article 90 of the Turkish Criminal Procedure Code ('TCPC') contains a right for everyone to make an arrest if the offender is caught during the commission of a criminal offense.

Article 90 of the TCPC:

(1) In the instances listed below, any individual is entitled to make an arrest of another person temporarily without a warrant.

a) If the other person was seen committing an offense,

b) If the other person was under pursuit after committing an offense, if there is the possibility of escape of the person under pursuit after committing an offense or, if the establishment of his identity rightaway is not possible.

…..

A person who makes an arrest of another person will not be punished for deprivation of liberty (Article 109 of the TPC). According to the respective article, 'Any person who unlawfully restricts the freedom of a person to move, or to remain, in a particular place shall be sentenced to a penalty of imprisonment for a term of one to five years.' The TCPC converts unlawfulness to lawfulness. Another example would be sporting competitions, whereby it is unavoidable to hurt the competitor in terms of physical injury, notwithstanding the fact that none of the scorers shall be convicted of injury except aggravated consequences. The defendants are treated as having consented to even serious injuries provided that such injuries are brought about when the players were acting within the rules of the game or are resulted from the conduct to which the players could reasonably be regarded as having consented. As such, it can be deduced that many injuries that are brought about during sporting competitions are regarded to have been implicitly consented. To put it another way, those taking part in sport competitions are accepted to have given implied consent to physical injury, as it is an inevitable risk[70].

EXCUSES

Excuses are the third step in determining the person's individual accountability for the wrongdoing. There are several ways in which accused persons may try to reduce the level of liability for the alleged offense, or lower the level of punishment if convicted. Even though excuses do not abolish the existence of the offense, they reduce the level of or remove the liability of the perpetrator.

Necessity

There is a wide range of conceptions of necessity in legal systems. Yet, in all legal systems, these conceptions are designed in the form of defense to address the cases where the perpetrator commits a crime in order to save himself or others from a danger which may derive from a natural force or, as in the case of duress by threats, from a human agent. A threat as such must be against life and limb, excluding those against other interests such as freedom of property. The threat must also be imminent. In case of duress, which emanates from a natural force, the threat must have resulted from circumstances beyond the actor's control, which means that a self-induced necessity shall not suffice. If a threat meets the prescribed criteria, the act must be further objectively necessary and reasonable and the actor must not have intended to cause a greater harm than the one sought to be avoided[71]. In case of necessity, the unlawfulness of the perpetrator's act does not negate but only provides ground for negating the perpetrator's criminal responsibility.

Necessity can be applicable to all types of offenses, provided that three conditions must be satisfied for its application according to the TPC: First, there must be an existing or imminent and serious danger. Second, such danger must have necessitated the commission of the offense. And third, the offense must have been proportionate to the danger[72]. It is of noteworthy that, in necessity cases, the victims of the danger-averting acts are innocent third parties who were neither endangered nor responsible for creating the danger. In case of emergency, the person has no choice but to violate the law to avoid death or serious injury to himself/herself or another. Duress by threats requires the defendant to 'act reasonably and proportionately in order to avoid a threat of death or serious injury'.

In deciding whether the defense is available, jurisdiction should particularly focus on initially whether the perpetrator was 'or may have been impelled to act as he/she did because as a result of what he/she reasonably believed to be the situation he/she had good cause to fear that otherwise death or serious injury would result'. Then, if so, would a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to the situation by acting as the accused did?'[73]. In order to prevail on a claim of necessity, the perpetrator must show the following;

- The act charged as criminal must have been done to prevent a significant damage.
- There must have been no adequate alternative to the commission of the act.
- The harm caused by the act must not be disproportionate to the harm avoided.
- The accused must entertain a good faith belief that this act was necessary to prevent greater harm.
- Such belief must be objectively reasonable under all the circumstances.
- The accused must not have substantially contributed to the creation of the emergency[74].

The TPC includes different forms of necessity. While one of them is defined in general provisions which can be implemented in terms of each kind of offenses, other necessity forms are defined under the related articles in the special part of the code. For example,

Article 147 of the TPC:

(1) Where the offense of theft is committed as a result of an urgent and serious need, the penalty to be imposed may be either reduced or waived altogether, having taken into account the circumstances of the situation.

Article 91 of the TPC

(1) Any person who removes an organ from another person without his lawful consent shall be sentenced to a penalty of imprisonment for a term of five to nine years. If the subject of the offense is tissue, then the offender shall be sentenced to a penalty of imprisonment for a term of two to five years.

.....

(3) Any person who purchases, or sells, an organ or tissue, or acts as an intermediary in such activities, shall be sentenced to the penalty in paragraph one.

.....

Article 92 of the TPC

(1) A penalty may be reduced (or not imposed at all), after considering the social and economic conditions of the person selling his own organs or tissue.

Apart from the examples mentioned above, jurisdiction has accepted necessity in the following cases:

- criminal trespass by police informers into the house of a suspect for the purpose of uncovering facts about drug offenses,
- leaving the scene of an accident in order to avoid physical abuse,
- disturbing the peace of the dead by performing an organ transplant if the consent of the relatives could not be obtained, or by taking a blood sample from a deceased accident victim for the purposes of excluding drunkenness in the context of potential insurance claims,
- violation of the privacy of the spoken word by making secret phone recordings for the purpose of using them in civil or family proceedings,
- or to prove the bias of a judge in a criminal case for the purpose of recusing him,
- taking away someone's car key to prevent him from driving whilst drunk[75].

Mistake

There are two types of mistakes—mistake about the legality of an action ("I did not know it was against the law.") and mistake about an essential fact ("I did not know the goods were stolen.") Whoever at the time of the commission of an act is unaware of a fact that is a definitional element of an offense shall be deemed not to have acted intentionally. Any liability for negligent commissions, however, remains unaffected. If the perpetrator lacks the awareness that he is acting unlawfully on the ground of an unavoidable mistake, he shall not be punished.

Mistake of fact: A mistake of fact occurs whereby the perpetrator violates criminal law since his/her grasp on reality is erroneous. In such cases, the basic assumption is that the perpetrator would not have acted in the way he did had he/she known the facts of the case. If the perpetrator's intention is nonetheless criminal, his mistake about the facts does not relieve him of criminal liability, as in the case of an error in person. In other words, the perpetrator must have committed an illegal act without intending to do so, lacking mens rea. If that is the case, the perpetrator should be treated as if the facts were what he believed them to be. In principle, the perpetrator will be relieved of criminal responsibility[76]. For example, a hunter mistakes a helper for a bear and shoots the helper. He does not have the intent to kill a human being and, therefore, cannot be punished for intentional homicide. If the mistake resulted from the actor's lack of proper care, that person may well be liable for an offense of negligence. If the definition of an offense includes a legal element (e.g. theft under Article 147 of the TPC requires that the object taken belong to another person, which may depend on rules of property law), the offender acts with intent only if he/she draws correct conclusions with regard to the legal situation[77].

Mistake of law: A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the court shall not be a ground for excluding criminal responsibility. The TPC recognizes mistake of law as a defense if the mistake was unavoidable for the perpetrator. As such, it reflects the acknowledgement of the principle of culpability. Although the perpetrator's act is still deemed intentional, he is excused if he cannot be blamed for being ignorant of the law. For example, the perpetrator in this situation is deemed to act with intent, since intent does not presuppose a correct evaluation of the legal relevance of one's conduct. But a person does not act culpably if he/she thought that the behavior was lawful and was unable to avoid this mistake. Mistake of law would, accordingly, be regarded as a valid excuse only under unusual or unexpected circumstances. A perpetrator could, at the time of his act, point to a favorable statement of the law subsequently reversed, such as a court decision later overturned by the same, or a higher, court or an opinion by an official later revised by the same official, overridden by a superior, or invalidated in court. The most liberal approach would accept any mistake of law as excuse, even if the perpetrator was ignorant in a blameworthy way[78].

Insanity and Diminished Responsiblity

Any person who at the time of the commission of the offense is incapable of appreciating the unlawfulness of their actions or of acting in accordance with any such appreciation due to a pathological mental disorder, a profound consciousness disorder, debility or any other serious mental abnormality, shall be deemed to act without guilt but the verdict leads perpetrator to a medical disposal[79]. In some criminal cases, the defendant claims that he is entitled to an acquittal because at the time of the crime he was so impaired by mental illness as to be "insane" within the meaning of the criminal law definition. Insanity is a legal term, not a medical term. It refers to any mental illness that meets the legal threshold for incapacity. Mental incapacity or insanity may be used by one accused of crimes at several points in the criminal process. The following describe the various ways mental incapacity may become an issue in a criminal proceeding[80]. In this situation, the court will rely on psychiatric expertise in making a finding on this issue.

The mental capacity of a perpetrator precludes his/her criminal liability, if at the time of his/her conduct 'the person suffers from a mental disease or defect that destroys that peson's capacity to control to appreciate the unlawfullness or nature of his or her conduct, or capacity to control his/her conduct to conform to the requirements of law.

According to the TPC, anyone who due to a mental disease is incapable of appreciating the legal meaning and consequences of his conduct or whose ability to control his/her behaviour with respect to the conduct was substantially diminished, shall not be punishment. Yet, security measures shall be imposed for such persons. This concept inherently builds on the assumption that a "normal" person has some freedom of will that enables that person to refrain from doing wrong[81]. It should be noted that a perpetrator who committed a criminal offense in a state of insanity without being convicted of the crime, can be committed to a psychiatric hospital as a measure of rehabilitation and security[82].

Diminished responsibility means that the perpetrator's mental state at the time of the crime (or at the time of sentencing) may be taken into consideration even though the legal standard of insanity was not reached. According to the TPC, anyone whose ability to control his/her behaviour with regard to his/her conduct is diminished, albeit the diminishment does not reach the level of insanity, the penalty may be reduced.

Infancy

Under the law, an infant/child is a person who has not yet reached the age of majority – that is 18 in the Turkish law system-. Generally, with some exceptions, infants are not able to enter into contracts, vote. They also have no criminal responsibility for their own behaviours. A crime is not committed if the mind of the person doing the act is incapable of forming a culpable act; therefore, an infant is exempt from criminal responsibility for his or her acts if sufficient mental capacity is lacking. Infancy, in this case, means only that the child does not have the capacity to determine right and wrong; and the age of infancy is set by case law or statute[83].

In general, there is an age under which a child is believed to be incapable of forming a criminal intent. Children under the age of twelve can not be criminally liable. There is also an age range where the presumption of incompetence is rebuttable, that is, the state may show (by clear and convincing evidence) that the child knows right from wrong and can understand the proceedings. In these cases, the child may be held responsible for their actions. Where a child is older than twelve, but younger than fifteen at the time of an offense, and he is either incapable of appreciating the legal meaning and consequences of his act or his capability to control his behavior is underdeveloped, then he shall be exempt from criminal liability. The age selected by the jurisdiction as the minimum age for a child's criminal responsibility creates a conclusive presumption that a child under that age lacks the capacity to commit a crime. As the presumption is conclusive, evidence to the contrary may not be presented. People over a certain age are inferred to be capable of formulating the necessary mental frame of mind to commit a crime. Evidence showing otherwise, however, can be used to show incapacity. Moreover, such children may be prosecuted in juvenile courts, rather than adult courts[84]. This means, if a child is aged 12 or over but under 15, there used to be a presumption that they could not form mens rea. In other words, this presumption is rebuttable by way of proving that the child has the capability to compherend the legal meaning, consequences of the act and to control his behaviours in respective of his act. By the presentation of evidence showing that the child has the mental capacity and frame of mind, the child shall be responsible for consequences of his criminal behaviour. Where a child is older than fifteen but younger than eighteen years at the time of the offense, has a criminal responsibility. In this case the penalty to be imposed shall be reduced.

Intoxication

In principle, intoxication does not excuse the perpetrator, however, if the perpetrator who is under the thumb of involuntary consumption of alcohol or drugs at the time of committing a crime, is assumed that he/she is unable to compherend the legal meaning and consequences of the act or perpetrator's ability to control his/her behaviour regarding such act was significant diminished, shall not be subject to a penalty. The influence of alcohol or drugs on the perpetrator's mind can be so strong as to be classified as a temporary mental disease, thus permitting a finding of insanity. Under the TPC, only involuntary intoxication may, under certain circumstances as aforementioned, preclude the perpetrator's criminal responsibility. A person who commits an offense under the influence of alcohol and drugs consumed willfully has full criminal liability.

Coercion (Duress)

Criminal liability of an actor can only be discussed if he/she acted of his/her own free will. The defense of constraint, sometimes known as duress, applies when the defendant had no choice but to commit the offense. This traditional defense of duress covers situations where the defendant has been forced by another to break the law under a direct threat of death or serious personal injury to himself/herself or someone else[85].

The perpetrator who acted under the influence of a force or a constraint that he/she could not resist does not have criminal liability. The defense

of duress will be available only if there has been a threat of death or serious personal harm. Also, the defendant must have had no opportunity to avoid threat except by complying with it. A person who forces another to commit a crime can be charged and convicted of the crime committed in addition to other offenses. In the case of coercion, a person who forces another to commit a murder could be charged and convicted of murder[86]. For example, a woman who commits a crime under the pressure of her husband, in other words, if she is threatened by her husband, and the coercion or violation is intolerable or inevitable or serious menace or gross, her husband involved in the use of force shall be deemed to be the perpetrator. It is not necessary for her to show that the threats were related to death or serious injury; any threat will be sufficient as long as it compelled her to commit the crime. It must be shown that the pressure was such that she was 'forced unwillingly to participate'[87].

Provocation

Any person who commits a crime in a state of anger or severe distress caused by an unjust act shall be sentenced to a shorter term of imprisonment. In criminal law, punishment of an offender who committed a crime as a result of an unjustified act of another shall be reduced. There are three conditions that have to be met in provocation cases. First, the offender must have acted as a result of aggressiveness and anger which he/she cannot control any longer. Second, the provocation act must be unjustified. Third, there must be a causal link between the unjustified act and the reaction against this act. The TPC contains provisions regarding provocation cases which reduce the punishment of the offender both in the general and special part. In general terms, there are two conditions for the application of the provocation provision in the Turkish criminal law. The first condition is concerned with the provocation act, which has to be unlawful, and the second condition is related to the psychological situation of the offender, which is called the psychological element of provocation. In order to fulfill the psychological element, the offender must have been entered in a state of intense affection and heat. The determination of these conditions varies according to the system chosen in a given legislation. The Turkish definition of provocation lists the conditions of affection and heat disjunctively. As regards common law and the U.S. law, the central term is anger, while in Italian and German law it is heat and anger, respectively. In Austrian and Swiss laws, the conditions of provocation are an asthenic or sthenic affection and this affection must be excusable.

In the Turkish criminal law, if the case meets the conditions of Article 29, the punishment of the perpetrator shall be reduced. First, there must be an unjustified act against the provoked perpetrator himself/herself or another, and this provocation must have led the perpetrator to heat or affection. The most important element of a provocation within the meaning of Article 29 of the TPC is the unjustified nature of provocation. The provocation must have caused by the provoked perpetrator himself. There is no clarity in Article 29 of the TPC as to whom the provocation act must have been directed. The unjustified act may have been directed at the relatives, close ones and other persons. The offense committed as a consequence of the unjustified provocation, however, must be committed against the provoker himself. The attack may target the body or property of the provoker. Furthermore, the offense may be committed against a person who is in a position to prevent the unjustified act. According to this view, a provocation may be in line with the definition of Article 29 of the TPC if the perpetrator has committed the crime against the provoker himself/herself or against a victim who has not prevented or approved the unjustified act. In the Turkish criminal law, the time condition of the provocation evaluated is a criterion according to which the perpetrator must commit the crime under the influence of heat or affection. There must be a causal link between the crime and the act of provocation. The fact that the crime committed under the influence of provocation must be clearly evidenced. The TPC sets out no proportionality test. Having said that, there must be a reasonable link between the provocation and the crime committed, if not a proportionate relationship. The court must in such cases consider the social environment and upbringing of the perpetrator as well as his power to resist. If the perpetrator's reaction is exceedingly disproportionate to the provocative act it cannot be said that there is a proportionate relationship between the (unjustified) act and the reaction (crime).

Summary

LO 1 Will be able to explain the basic functions of criminal rules in a society

Criminal law plays a distinctive role in society. This role includes the following functions: to deter people from doing acts that harm others or society; to set out the conditions under which people who have performed such acts will be punished; and to provide guidance on the kinds of behaviours which are considered as acceptable by society.

The governing principles, which lie at the core of modern criminal law are as follows:

- The principle of welfare and upholding the common good,
- The principle of prevention of harm to others,
- The principle of minimal intervention: Law should not criminalize too much behaviour,
- The principle of social responsibility: Society requires a certain level of cooperation between citizens,
- The principle of proportionate response: The response of criminal law should be reasonably in proportion to the harm committed or threatened to be committed,
- The non-retroactivity principle: A person should not be convicted or punished except in accordance with a previously declared offense,
- The thin-ice principle: Those who skate on thin ice can hardly expect to find a sign denoting the precise spot where they will fall in,
- The principle of maximum certainty: People should have sufficiently certain and clear warnings about the forbidden conducts,
- The principle of fair labelling: Offenses should be labelled in a manner to reflect the seriousness of the law violated,
- The principle of strict construction: Ambiguities in criminal law should be construed in favour of the defendant,

The purpose of criminal law is thus to protect society, so that its members can be reasonably secure in carrying out constructive activities. Only behaviors that are detrimental to the welfare of society should be made criminal. A balance is always to be achieved between the rights of the individual and the protection of society. In the social contract, a concept originating with Thomas Hobbes and John Locke, individuals give up certain liberties in return for being protected by society. We give up the "right" to steal what we want in return for society's protection against being victimized by others. We also give up other liberties as members of a lawful society, however, society must, in return, impose only laws that have a purpose consistent with the protection of and minimally intrusive on our individual liberties.

LO 2 Will be able to differentiate among various excuses

There are several ways in which accused persons may try to reduce the level of liability for the alleged offense, or lower the level of punishment if convicted. These are called excuses. Even though excuses do not abolish the existence of the offense, they reduce the level of or remove liability of the perpetrator. Necessity, Mistake, Insanity are good examples for excuses. Necessity is almost always in the form of a defense to address the cases, where the perpetrator commits a crime in order to save himself or others from a danger which may derive from a natural force or, as in the case of duress by threats, from a human agent. A threat as such must be against life and limb, excluding those against other interests such as freedom of property. The threat must also be imminent. In case of duress, which emanates from a natural force, the threat must have resulted from circumstances beyond the actor's control, which means that a self-induced necessity shall not suffice. If a threat meets the prescribed criteria, the act must be objectively necessary and reasonable and the actor must not have intended to cause a greater harm than the one sought to be avoided. In case of necessity, the unlawfulness of the perpetrator's act does not negate but only provides ground for negating the perpetrator's criminal responsibility.

As regards mistakes, there are two types of mistakes—mistake about the legality of an action ("I did not know it was against the law.") and mistake about an essential fact ("I did not know the goods were stolen.") Whoever, at the time of the commission of an act, is unaware of a fact that is a definitional element of an offense shall be deemed not to have acted intentionally. Any liability for negligent commissions, however, remains unaffected. If the perpetrator lacks the awareness that he is acting unlawfully on the ground of an unavoidable mistake, he shall not be punished.

LO 3 Will be able to juxtapose different liability requirements

In view of the criminal liability, criminal law is established on a three-legged stool. The first leg consists of objective and subjective elements that are related to the question of whether a person has fulfilled each element of the statutory description of an offense. The second leg is concerned with the question of whether the person's behaviour was unlawful, and the third leg is related to the individual accountability of the person for the wrongdoing. The two main elements required for a crime to have been committed are guilty act and guilty mind, which are derived from the Latin phrase, 'Actus non facit reum nişi mens sit rea', meaning 'a man is not liable for his action alone, unless he acts with a guilty mind.'

Test Yourself

1 Which of the following would a crime **not** be?

A. An act
B. An exception
C. An omission
D. A state of affairs
E. A misconduct

2 Which of the following is **not** frequently cited as a justification for punishment?

A. Retribution
B. Incapacitation
C. Rehabilitation
D. Deterrence
E. Revenge

3 What is an omission?

A. Where a duty to act is present, the defendant failed to act and the prohibited result ensued
B. Where the defendant failed to act, but no duty was necessary
C. Where the defendant acted, but not in the correct a manner
D. A principle which can be committed in all offenses
E. Omission is an act which the defendant acted voluntary.

4 Which of the following **cannot** give rise to criminal liability for an omission to act?

A. A duty arising out of contract
B. A duty arising out of a relationship
C. A duty arising out of a sense of religious obligation
D. A duty arising from the assumption of care for another
E. A duty arising from the obligation of law

5 Which of the following is the correct definition of causation?

A. Where an accused is charged with a result crime, it is necessary for the defendant to prove that his acts or omissions did not cause the prohibited consequence
B. Where an accused is charged with a conduct crime, it is necessary for the defendant to prove that his acts or omissions did not cause the prohibied consequence
C. Where an accused is charged with a conduct crime, it is necessary for the prosecution to prove that his acts or omissions caused the prohibited consequence
D. Where an accused is charged with a result crime, it is not necessary for the prosecution to prove that his acts or omissions caused the prohibited consequence
E. Where an accused is charged with a result crime, it is necessary for the prosecution to prove that his acts or omissions caused the prohibited consequence

6 What is '*mens rea*?

A. A process used by the courts to establish guilt
B. A state of mind which may give rise to criminal liability
C. The phrase is used when a defendant is found guilty of an offense
D. A phrase which means 'innocent person'
E. The external/physical element of a criminal act

7 What is direct intention?

A. Where the consequence was what the defendant was aiming at
B. Where the consequence was not what the defendant was aiming at, but occurred anyway
C. Where the defendant had no intention to create a certain consequence
D. Where the defendant didn't know what he was aiming at
E. Where the consequence was what the defendant was not aiming at but foresaw

8 Which Article of the ECHR upholds the principle of 'innocent until proven guilty'?

A. Article 2(2)
B. Article 4(2)
C. Article 6(2)
D. Article 8(2)
E. Article 10 (2)

9 Children under a certain age cannot be held criminally liable. Which one of following denotes this age?

A. 8
B. 10
C. 12
D. 14
E. 18

10 What is the defense of insanity concerned with?

A. The accused's clinical history of mental conditions
B. The accused's mental state at the time the defendant was arrested
C. The accused's mental state before the time the offense was committed
D. The accused's family history of mental conditions
E. The accused's mental state at the time when the alleged offense was committed

Answer Key for "Test Yourself"

1. B	If your answer is wrong, please review the "Defining Crime and Criminal Law" section.
2. E	If your answer is wrong, please review the "Defining Crime and Criminal Law" section.
3. A	If your answer is wrong, please review the "Liability Requirements" section.
4. C	If your answer is wrong, please review the "Liability Requirements" section.
5. E	If your answer is wrong, please review the "Causation" section.
6. B	If your answer is wrong, please review the "Subjective Element – Mens Rea" section.
7. A	If your answer is wrong, please review the "Intention" section.
8. C	If your answer is wrong, please review the "Criminal Law and Human Rights – The Function of the ECHR" section.
9. C	If your answer is wrong, please review the "Infancy" section.
10. E	If your answer is wrong, please review the "Insanity and Diminished Responsibility" section.

Please describe briefly what are the principles of criminal law (ECHR 6 and 7).

your turn 1

As the core of the rule of law in criminal law, a set of principles can be found in the ECHR and national criminal codes. In relation to principles the ECHR regulates 'no punishment without law'; certainty in Article 7; 'presumption of innocence' in Article 6.

Legality principle means that an act may only be punished if criminal liability had been established by law before the act was committed. In view of the wide-ranging forms of the legality principle, it is preferred to divide it into four distinct principles.

Punishability requires a written act of parliament and cannot be based on custom. (No Punishment without Law)

Criminal prohibitions must determine the prohibited conduct, they must be definite (the principle of certainty)

Acts cannot be punished retroactively.(the principle of non retroactivity) The penalty and any ancillary measures shall be determined by the law which is in force at the time of the act. If the penalty is amended during the commission of the act, the law in force at the time the act is completed shall be applied. If the law in force at the time of the completion of the act is amended before judgment, the most lenient law shall be applied. A law intended to be in force only for a determinate time shall be continued to be applied to acts committed while it was in force even after it ceases to be in force, unless otherwise provided by law .

The statutory prohibition cannot be extended by analogy to conduct not covered by the ordinary meaning of the words used. (the principle of the interdiction of analogy) . As a fundamental principle, 'No Punishment Without Law' is regulated under the most state constitution Criminal Codes and supranational Treaties including ECHR.

As another aspect of the legality principle, the principle of non-retrospectivity of criminal law is also required by the ECHR. The meaning of the principle is that the state cannot punish a person for an offense unless it is accepted as a crime at the time when an act was committed. The people must be able to find out what the law is and the law must prevent catching people by surprise. The essence of the principle is that a person should never be convicted or punished except in accordance with a previously declared offense governing the conduct in question.

With a simple definition, no one is accused until proven guilty. The burden is on the prosecution to prove the case. The principle burdens the proof of the commission of offense to prosecution. A person, however clear the evidence seems to be, is innocent until proved guilty. It is enshrined in Article 6/2 of the ECHR as: '***Everyone charged with a criminal offense shall be presumed innocent until proved guilty according to law***'. However, the European Court suggested that placing a burden of proof on the defendant may be permissible, but the state would need to demonstrate that to do so is necessary given the gravity of the issues involved.

Suggested answers for "Your turn"

your turn 2

What are the objective and subjective elements of crime?

The objective element, which describes a voluntary act or omission, refers to the part of the definition of the offense in the statutory law which relates to the actions of the perpetrator and their consequences. The movements are willed by the conscious mind of the defendant. Otherwise, the conducts are regarded as involuntary, with the defendant not having performed the actus reus. The actus reus of a crime must reflect the free will and autonomy of a person and, therefore, performance must be voluntary. Although in some cases, the act can be involuntary, the person can be held liable if he/she omits to take precautions against harming others in an unconscious state. Although a voluntary act is required in most cases for criminal liability, both civil and common law consist of several offense definitions that do not require an act while giving rise to criminal liability, which is referred to as acts of omission or failure to act. According to the TPC, gross negligence in failing to perform one's duties may be attached criminal liability if there is a death or serious injury.

The subjective element in crime is one of the most significant concepts of substantive criminal law. In general terms, an accused is held liable only if he/she has mens rea. Mens rea is the state of mind or, in the case of negligence, the failure to attain a certain standart of behaviour which the offense definition requires before the accused can be convicted. The Latin for 'guilty mind', 'mens rea' refers to the notion according to which a court should not find a person guilty of a crime unless he/she has a blameworthy state of mind. The philosophical foundation for mens rea is that the accused can control his conducts, including whether to engage in the conducts breaking criminal law. Most criminal offenses require the accused to have intented or foresaw the consequences of their actions. In criminal law, actus reus is divided into two sublevels, namely intention and negligence. Intent is the will of realizing all objective elements of a crime defined in criminal code, with the knowledge that these elements exist. Intention embodies two elements: will and knowledge. A crime cannot be essentially punishable if the offender does not act with intention. However, negligence is specified as a sufficient fault element for certain crimes. A person acts "negligently" only if he/she is to foresee the harmful consequences of his/her conduct while being unaware of the substantial risk that follows the conduct.

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Chapter 6 Introduction to Civil Law

Learning Outcomes

After completing this chapter, you will be able to:

1. Develop the ability to think analytically regarding the concepts and different fields of civil law
2. Develop the ability to explain the main concepts of law of obligations

Chapter Outline

Introduction
Concept of Civil Law
Law of Persons
Family Law
Law of Obligations

Key Terms

Civil Law
Person
Personality
Real Person
Legal Person
Capacity
Family
Engagement
Marriage
Marital Rights And Duties
Marital Agreement
Matrimonial Property Systems
Divorce
Obligation
Contract
Tort
Unjust Enrichment
Performance of Obligations
Default of the Debtor
Termination and Discharge of Obligations

INTRODUCTION

In this chapter the concept of civil law is going to be examined. The meaning of civil law, the sub-branches of civil law and the main provisions of the Civil Code shall be discussed. Starting with the concept of person, first law of persons shall be dealt with in detail.

Secondly, the basic unit of the society which is the family shall be our concern. Formation of the family, marriage, matrimonial property systems and divorce are the main topics to cover.

Lastly, another important branch of civil law, namely the law of obligations shall be explained in detail. The sources of obligation, especially contracts as a source of obligation, are going to be examined.

The main aim of this chapter is to give the students the insight about the most important concepts of civil law, which is one of the most important branches of law and which is the only branch that is taught in all four years of law education.

CONCEPT OF CIVIL LAW

Actually the concept of "civil law" has mainly two different meanings. One of them is broader and the other one is a narrower meaning, and in this chapter we shall deal with the narrower meaning. According to its first meaning "civil law" is one of the predominant systems of law in the world, together with the Anglo-Saxon law or in other words common law. In that context, civil law is also named as the continental law. In general, the Anglo-Saxon law draws abstract rules from specific cases; on the other hand, civil law uses abstract rules that are already laid down by the law-maker. In civil law, codification is important. Civil law has its roots mainly in Roman law. Besides the differences in codification, the methodology is also quite different between these two law systems. Turkey is also a civil law, in other words continental law country and the main sources of law are the written sources, that is to say codification is very important in Turkish law.

In its second meaning of the term, "civil law" refers to a branch of private law. Civil law mainly governs the relationship between individuals. Civil law covers all aspects of the life of an individual from birth till death. Even after death, all the issues are regulated by civil law.

In Turkey two important codes regulate the field of civil law. One of them is the Civil Code and the other one is the Code of Obligations. After the foundation of the Turkish Republic a very important legal reform was made in the new Republic. It was decided to modernize the legal system of the country. Legal reform was regarded as a very important tool in the modernization of the young Republic. In order to achieve this result the method of reception was chosen. The main method towards this aim was codification. Since the most important daily legal relations are the relations regarding the law of persons, family, property, succession and the law of obligations, first there was the need to fill the legal gap in these areas. It was decided to adopt the Codes of Switzerland.

Actually in those years there were three main codes in the related field of law. One of them was the French Code Napoleon, the other German BGB (Bundesgesetzbuch) and the last one Swiss Civil Code and Code of Obligations. After long discussions Swiss law was adapted, as being the latest one of them all and due to the social and political nature of Switzerland. Switzerland is a cantonal country and there are many different types of persons, views and ideas in the country. As a result, in 1926 Civil Code and the Code of Obligations had been enacted. In the doctrine many authors believe that it was a success, since Turkey and Turkish people accepted these two codes easily.

The Civil Code was effective till 1 January 2002, and the Code of Obligations was effective till 1 July 2012. Then they have been replaced by the new Civil Code and the new Code of Obligations consecutively, but the new versions are also following the nearly the same modernisation pattern of the Swiss laws, therefore they are also no different from the existing Swiss originals mainly. The new Civil Code entered into force in 1 January 2002 and the new Code of Obligations entered into force in 1 July 2012. Now it could easily be stated that the area of civil law is governed by these two main Codes.

There are five main sub branches of civil law. These are:

1. Law of persons
2. Family law
3. Law of succession

4. Law of property
5. Law of obligations

Civil Code governs the first four sub-branches and the Code of Obligations governs the last sub-branch. As can be seen the concept of civil law is very wide. In this chapter mainly law of persons, family law and law of obligations shall be explained. Though law of succession and law of property are also very important, considering the concept of the book, it shall be too detailed to explain these fields as well. The sub-branches that shall be explained shall also be very briefly explained and only the most important concepts shall be covered. Therefore, first, a short summary of all these sub-branches are given below.

Law of persons is the field of law that deals with the concept of person, types of persons, real persons, legal persons, beginning of personality and end of personality, concept of personality, protection of personality, capacity, types of capacity, different categories according to their capacity to act, domicile, kinship, associations (societies) and foundations.

Family law's main concern is the family, therefore engagement, marriage, divorce, parental authority are the most important topics. Also guardianship and adaption are other important areas.

Law of succession is a field of law, which every real person shall be a part of, some time in their life, the latest when they die. Since all real persons shall die, this field is related to all of us. Legal heirs, reserved portion (statutory entitlement), testamentary disposition, deprivation of statutory entitlement, legacy, contract of succession, abatement and commencement of succession are some of the subjects.

The law of property's main subject is the real rights. Real rights are the rights built on a property that give their owner the right to assert against all persons this right. Ownership, hypothec, usufruct are some examples of the real rights. Real rights enjoy the principle of publicity. The tools of publicity are possession for moveable property and land registry for immoveable property. Therefore the concept of law of property covers possession, land registry and real rights.

Law of obligations is the field of law that mainly deals with obligations. Obligation is a legal bond that ties two persons in such a way that one of them, the creditor, is entitled to demand from the other, the debtor, a certain performance. There are three main sources of obligations in Turkish legal system; contracts, torts and unjust enrichment. In the general part law of obligations deals with these sources, formation of an obligation, performance, non-performance and some modalities related with an obligation such as penalty clause, condition, joint liability and discharge of obligations. In the special part, specific types of contracts are the main focus point, like sales contract, surety ship contract, rental contract and construction contract.

Law of Persons

This is a branch of civil law that generally deals with persons and the modalities attached to persons. In this part we shall mainly deal with the meaning of "person", the types of persons and the capacity of persons.

Concept of Person

The word "person" refers to human beings in general usage. But in the legal sense it has a wider meaning. Besides human beings, legally this term includes, companies, associations, foundations, syndicates, even the state. Therefore, person is a being that is subject to rights and obligations that are imposed to it by law. In other words person is the object of legal rights. As a rule to be regarded as a person, the law has to recognise as a person, otherwise this being shall not be considered as a person.

attention

In the modern legal systems there are two types of persons: Real persons (natural persons) and legal person (juristic persons).

Real Persons

As stated above, real persons are actually human beings. They are also named as "natural persons" since they are accepted as a person naturally by law. Though in the modern legal systems all human beings are naturally recognised as a person by law, in the legal history the case was not always the

same. For example, in the Roman law period the slaves were not regarded as persons, therefore they did not have any rights and they did not have any personality.

The personality of a real person begins with birth. According to article 28 of the Civil Code: "Personality right begins on the birth of the living child..." From this provision, it is understood that there are two requirements for the beginning of personality. 1. Alive birth 2. Whole birth. From the concept "whole birth" it should be understood that the child is completely separated from the mother's body and from the concept "alive birth" it should be understood that after separation from the mother's body the baby breaths at least once on its own. At that point it is stated that the child is regarded as a person.

The normal way to end the personality is death. This point is also regulated in article 28 of the Civil Code: "Personality..... end on death". Legally, for a person to have considered as dead, the corpse of this person should be found. When there is no corpse, this situation is not regarded as death. At this point, there are two important presumptions under which legally the person is also considered to be dead though there is no corpse present.

Before explaining these two situations, first of all the concept of presumption should be explained. It is a concept that is highly used not only in civil law, but also in the whole private and public law fields. A presumption is a legal inference as to the existence or truth of a fact not certainly known that is drawn from the known or proved existence of some other fact.

There are two types of presumptions, namely rebuttable presumption and irrebuttable presumption. Rebuttable presumption is a presumption, the contrary of which may be proved with any kind of proof. If examples are given to rebuttable presumption the most important presumptions are presumption of innocence (in criminal law), presumption of ownership (in law of property) and presumption of good faith (in private law in general). Irrebuttable presumption is a presumption, the contrary of which may not be proved. For example, because of the principle of publicity, everybody knows the entries in the land registry. Therefore, nobody may allege that he/she has no idea about an entry in the land registry.

The two important presumptions which death is presumed are presumption of death and presumption of absence. Presumption of death is regulated in article 31. According to this provision, the death of a person is deemed proven, even if no one has seen the corpse, if that person has disappeared in circumstances in which his death may be considered certain. A plane crash is an example of death presumption. If a person was on the plane and a crash had occurred, even if the corpse could not be found this person is presumed to have died. The result of death presumption is just like normal death. There is no need for a special court decision.

In declaration of absence there are two different situations. In the first case, it is highly probable that a person is dead because he or she has disappeared in extremely life-threatening circumstances. In that case the next of kin (the next of kin may be any person deriving rights from his or her death) has to wait for one year and then apply to the court. When there is a severe earthquake and this person is known to be in that region, for example, at a hotel that has totally collapsed, this process applies. Another example may be that a journalist, taking war photographs, has been in the war area and she has been lost.

In the second case, a person has been missing for a lengthy period of time without any sign of life. This is a situation in which a person has disappeared without any reason. In that case, five years should be waited since the last sign of life before the application to the court.

In both cases the court must, by suitable public means, call on any person who may provide information about the missing person to come forward within a specified period. This period may not be less than six months following the first public notice. If no news is received during the set period, the missing person is declared absent (presumed dead) and rights derived from the fact of his or her death may be enforced as if death were proven. His or her succession may be distributed but the heirs have to give a guarantee in the first case for five years and in the second case for fifteen years. If the absentee has been married the marriage does not automatically dissolve with the court decision, the spouse has to ask for the dissolution of the marriage.

your turn 1

CASE STUDY

Ahmet is a fisherman in a small fishing village. On a windy day, like the other fishermen, Ahmet starts his boat and goes to fishing. Then a very heavy storm breaks and the other fishermen return to the village, all with great difficulty, but not Ahmet. They search for him for days, but neither his body nor the boat is found.

QUESTION

Discuss how and when Ahmet's personality ends.

Legal Persons

Legal persons are corporate and independent bodies with a specific propose that acquire legal personality according to the special provisions by which they are regulated. The legal persons having an aim against the law and morality may not acquire legal personality.

Legal persons are mainly regulated in the Civil Code. Apart from these general natured provisions, two of the legal persons are also regulated, namely associations (societies) and foundations. Apart from that, the public law legal persons, like the state, public corporate bodies, municipalities are the subject of administrative and constitutional law. As one of the most important groups of the private law legal persons, the business associations is regulated by the Commercial Code. There are six types of business associations. They include general partnership, limited partnership, corporation (joint stock company), limited liability company, limited partnership in which the capital is divided into shares and cooperatives.

Legal persons have all the rights and duties other than those which presuppose intrinsically human attributes, such as gender, age or kinship. Legal persons have capacity to act once the governing bodies required by law and their articles of association have been appointed. The legal persons are represented by their organs. The organs express the will of the legal person. The legal person is bound with transactions and activities of its organs. The seat of the legal person is located where its administration is carried out, unless its articles of association provide otherwise.

Capacity

The capacity of real persons and that of legal persons are regulated differently. The general provisions about the capacity of legal persons are explained very briefly above. Apart from that, the capacity of every legal person may have some differences according to the law that regulates it and its articles of association.

In this section, the capacity of real persons is explained. The Civil Code makes a distinction between the capacity to have rights and duties and the capacity to act.

Capacity to Have Rights and Duties

Every person has capacity to have rights and duties. It is a passive capacity and just being a real person is enough to have this capacity. In legal history, there were people such as slaves, who were not the subject of legal rights, or whose rights were limited. In the modern legal system, the principle of equality is governing the capacity to have rights and duties.

Capacity to have rights and duties is also under the guarantee of the Turkish Constitution as well. According to article 12 of the Constitution, "every individual possesses inherent fundamental rights and freedoms which are inviolable and inalienable". Article 10 of the Constitution brings the principle of equality.

In article 8 of the Civil Code, it is stated that within the limits of law, every person has the same capacity to have rights and duties.

Normally, this capacity starts when a child is born. But according to article 28 of the Civil Code, even an unborn child has capacity to have rights and duties provided that it survives birth. This is especially important for succession.

Capacity to Act

Capacity to act is, on the contrary, an active capacity. A person who has capacity to act has the capacity to acquire rights and incur obligations through his/her own actions. This capacity includes both the capacity to enter into legal transactions

and the capacity to be liable for torts, tortuous liability. Since it is an active capacity, it does not enjoy the principle of equality and there are four groups of persons according to their capacity to act. They are persons of full capacity, limited capacity, limited incapacity and full incapacity.

In order to have full capacity, a person should have attained majority, should be capable of making fair judgements and should not be restricted. Therefore, there are three requirements of capacity.

1. The concept of majority: According to the Civil Code, a person attains majority with the completion of 18 years of age. In two exceptional situations, persons may acquire majority before the completion of 18 years of age. First of all, marriage confers majority. In Turkish law the normal marriage age is the completion of 17 years of age, with the consent of the parents, and the extraordinary marriage age is the completion of 16 years of age, with the court decision. If a person gets married before the completion of 18 years of age in the mentioned circumstances, this would acquire majority. The second way is the court decision. A minor who has completed his/her 15 years of age, may upon his/her application and with the consent of his/her parents, be declared by the court to be of full age. But to grant this decision, there should be a valid ground for this application.
2. The capacity to make fair judgements (Discretion): Persons who have discretion are able to make fair judgements, so that they can act rationally. According to article 13 of the Civil Code, a person is capable of making fair judgements if he or she does not lack the capacity to act rationally by virtue of being under age or because of a mental disability, mental disorder, intoxication or similar circumstances. As can be seen, Civil Code does not define the concept of discretion or in other words the capacity to make fair judgements. On the contrary gives some examples in which as a rule person shall not have discretion. But this does not necessarily mean that in these circumstances the person shall never have discretion. For example, in every mental disorder case, the persons cannot be regarded as having no discretion. Therefore this is a relative concept.
3. Not to be interdicted: There are some grounds in which a person may be interdicted. They are named in CC art. 404-408 as mental disability, mental disorder, habitual drunkenness, habitual gambling, one year or more imprisonment. In these situations a person is interdicted.

If a person has all three of these requirements, then this person has full capacity, that is to say, may enter into any kind of transaction and may be liable from all her tortuous acts.

A person of limited capacity also has all of these three requirements, but only for certain legal transactions her capacity is limited. In other words, capacity is the rule and incapacity is the exception that is only limited to specific transactions. These are the persons, who married and to whom a quasi guardian is appointed. Curator and legal representative are the types of quasi guardian. Curator represents the person of limited capacity only for the transactions for which he is appointed and the person of limited liability should get the advice of the legal representative only for the transactions to which he is appointed, but performs them by himself. Though there are some discussions in the doctrine, mostly it is accepted that married persons are also of limited capacity for two reasons. One is the concept of family domicile (Civil Code art 194) and the other is surety ship contracts (Code of Obligations art 584). If a married person owns the family domicile, which is the place where the family as a rule resides, this person may not transfer the ownership or create another limited real right without the written consent of the other spouse. If the family domicile is a rental place, the spouse who has concluded the rental contract may not withdraw the contract without the written consent of the other spouse. And if the other spouse wishes so, he or she also may become a party to the rental contract only by his or her wish. A married person, with some exceptions like merchants acting on behalf of their commercial enterprise, may not become a surety without the written consent of his or her spouse. Therefore, only for these transactions their liability is limited.

Persons of limited incapacity are the persons having discretion, but they are either not of full age or interdicted. In other words interdicted persons and minor who are able to make fair judgements are in this group. As a rule, persons of this group, act through their statutory representatives. They are under parental authority or guardianship. Persons of limited incapacity do not have the capacity to enter into legal transactions. Their parent or guardian act on behalf of them. But there are some exceptions to this rule. First of all they may enter into legal transactions with the consent of their statutory representative. For example a parent may give some money to his/her child who is 16 years old and let him/her to buy a bicycle. They may also enter into transactions, by which they merely benefit without incurring obligations. Donation (gift) contract is a good example to that. They can be a "donee" in a donation contract and accept the gift. They may also enjoy strictly personal rights by themselves and for example they may get engaged.

When a person of limited incapacity enters into a legal transaction without obtaining the consent of his/her statutory representative, this transaction shall be a voidable transaction. The other party has to inform the statutory representative and wait for a suitable period of time. During this period he/she shall be bound with the transaction but the person of limited incapacity shall not be bound with it. If the statutory representative ratifies the transaction it shall become binding for both of the parties, if not the transaction shall be invalid.

Persons of limited incapacity have discretion, therefore, they have full tortuous liability, and in other words they are responsible from their tortuous acts.

The last group is persons of full incapacity. They are the ones who do not have discretion, who are not able to make fair judgements. They should be either under parental authority or guardianship. Their statutory representative represents them in their legal transactions. These persons cannot create legal effect by their actions, if they enter into a transaction, this transaction shall be null and void. Since they do not have discretion they are also not liable because of their tortuous acts. But there are some exceptions of this principle. For example because of "equity", they may have to compensate the damages they have given. This is regulated in article 65 of the Code of Obligations. According to the mentioned article, "On grounds of equity, the court may also order a person who lacks capacity to consent to provide total or partial compensation for the loss or damage he/she has caused". A very rich person who does not have discretion commits a tort and a very poor person suffers damage because of this tort, then the rich person has to compensate though he/she is a person of full incapacity.

FAMILY LAW

Family is the basic unit in the society; therefore, not only with the Civil Code but also in the Constitution, great emphasis is granted to the family and to the protection of the family. Therefore Turkish Constitution also brings some provisions that regulate the family in a general way. According to these provisions, the State has a duty to protect the family. Article 10 of the Constitution regulates the equality principle. But even this principle was not found sufficient enough to emphasize the equality of man and woman within the family. For that reason, on 07.05.2004 a new paragraph is added to this provision: "*Women and men have equal rights. State has a duty to provide this equality in reality*".

It should be stated that the main regulation regarding the family issues is the second book of the Turkish Civil Code. As mentioned above, in Turkey the Civil Code has been completely changed in 01 January 2002. The most important and major changes are in the family law part. Before, the previous Civil Code actually did not have equality within the family. The husband was regarded as the head (chief) of the family. Compared to the Civil Code of 1926, the new Civil Code of 2002 has especially significant changes towards gender equality within the family. Individual freedom and gender equality in family law were actually the main concern of the law-maker.

Before the enactment of the new Civil Code, there were also some important major amendments and a very important decision was rendered by the Constitutional Court. According to the previous article 159, the married women could only work with the permission of the husband. This article was declared null and void by the Constitutional Court in 1997. The previous Article 153, mandating that the woman take her husband's family name, was amended so that the

woman could use her maiden name before her husband's family. But of course a revolutionary change was introduced in 2002 and the idea of the concept of family has been changed with a new perspective that includes equality.

According to Turkish Civil Code, only "engagement" and "marriage" are the sole legally accepted unions. Engagement is not a registered relationship, whereas marriage is a registered relationship. Since these are limited in number (*numerous clauses),* the parties do not have any discretion to freely create new types of legal unions which have not been set forth in the Civil Code or apply the consequences of marriage to other civil unions by analogy.

Engagement

Engagement is the first step towards marriage. In Turkish Law, engagement is a very simple process without any formal requirements. According to article 118 of the Civil Code, when two persons of different sexes promise each other to get married, engagement is concluded. In other words ,engagement is a mutual promise to marry.

Engagement is also regarded as a contract, but it is a family law contract. Therefore, it is not possible to enforce. This important point is specially emphasized in The Civil Code by saying that, engagement does not give rise to any actionable obligation to get married.

As a normal outcome of the engagement, the marriage is expected. But it is possible that there may be a "breach of engagement". There are certain legal consequences attributed to the breach of engagement. First of there should be reciprocal return of the extraordinary gifts. In article 122, it is stated that if the engagement is ended, the engaged parties, their parents and the ones who were acting as their parents may demand the return of gifts made to each other, with the exception of the usual occasional gifts. Where such gifts are no longer at hand, restitution is subject to the provisions governing unjust enrichment.

The second result is the material and moral damages resulting from the breach of the engagement should be compensated. The one who reaches the engagement is responsible from these damages against the innocent other party. If one of the engaged couple has in good faith incurred expense in anticipation of the marriage ceremony, and the engagement is then ended, the party may claim a reasonable contribution from the other. If the party also suffers moral damage, he/she may claim a suitable amount of money as moral damage. Claims arising from the engagement are subject to a time limit of one year from the ending of the engagement.

Marriage

Capacity to Marry and the Celebration of Marriage

The status of husband and wife begin with the enactment of the marriage contract. This is a contract with lots of celebration formalities. In order to get married first of all, a person should have the capacity to marry. This means that a person to marry should first of all have discretion. Secondly, should be of a required age. The normal age of majority is the conclusion of 18 years of age, but the marriage age is 17. A person of 17 could get married with the permission of the parents. On the condition that there is an extraordinary situation and an important ground, the judge may give permission to a person who has completed his/her 16 years of age to get married.

Marriage between close relatives is prohibited. Adoption is also a bar to marriage. Monogamy is one of the essential principles of marriage. A person wishing to remarry must prove that any previous marriage has been annulled or dissolved. Mental illness is also a bar to marriage. Mentally ill persons may not get married unless it is proven by a medical report that they may get married.

There is another relative impediment only for women. A woman whose previous marriage has come to an end for whatever reason has to wait for 300 days before she gets remarried. This is named as a period of gestation. The reason for it is the presumption of paternity. Because when a child is born in wedlock, the father of this child is presumed to be the husband if the child is born during wedlock or in 300 days after the wedlock. When the woman gives birth to a child, the period of gestation comes to an end. Or if the woman proves that she is not pregnant medically, the judge may lift the period of gestation.

In order to get married, either the woman or the man should apply to the authorized marriage office in the place where either one of them is domiciled. The authorization is granted to the mayor in places where there is a municipality and in places where there is no municipality that is to say in the villages to the reeve. The mayor may authorize one or more of his/her officials.

Only civil marriages performed by authorized marriage officers are allowed in Turkey. The procedures of a wedding ceremony are regulated by the Turkish Civil Code between articles 140-142. According to these provisions, there is a strict requirement of form, which is the oral form, and the parties (man and woman) who wish to marry should express their will in front of an official authorized (civil registrar) to certify the wedding. As required in any legal transaction, the declaration of the intentions of the parties is the essential element. In a wedding, the presence of the official and the completion of the official formalities are added to that. Therefore, in our legal system non-presence of the authorized official has the same effect with the non-declaration of the intention of the parties.

In other words, the presence of the authorized official is not only a "requirement of formality". The presence of the official person is a prerequisite for the validity of a marriage contract, together with the declaration of intentions. As stated above, the requirement of form in a marriage contract is the oral declaration of intentions. If one does not observe the oral form, the marriage shall be null and void; but if there are no intentions declared orally or no official is present, and then there will be no marriage at all.

Additionally, there is a need of two witnesses and after they all have to sign the marriage registry, but these requirements are only regarded as requirements of proof.

After the wedding ceremony, the civil registrar gives the newly married couple the certificate of marriage. Without presenting the certificate of marriage, it is not possible to celebrate a religious ceremony.

Marital Rights and Duties

The wedding ceremony binds the spouses in marital union. The main principle in the family is the equality principle. The spouses have an equal say within the family and equal rights and duties. Before the new Civil Code entered into force in 01.01.2002, there was the concept of the "head (chief) of the family" and this person was the husband. But since equality principle is dominating in the new Civil Code, there is no difference between the spouses with regard to their gender.

They mutually undertake to strive to safeguard the interests of the marital union and to care jointly for the children and to educate them. The spouses owe each other loyalty and support.

As a rule, the spouses have a duty of cohabitation. They choose their domicile together. Unless there is valid ground they live together in this domicile.

The spouses jointly provide for the proper maintenance of the family, each according to his or her ability. They both have a right to represent the family with regard to the day-to-day needs of the family. A spouse may represent the marital union with regard to the other needs of the family only if, he or she is authorized so to do by the other spouse or by the order of the judge, or the interests of the marital union can bear no delay and the other spouse is unable to consent due to illness, absence or other similar reasons.

In choosing a career or education, spouses do not need to get the consent of the other spouse. But in the choice and pursuit of their career or business, each spouse must have due regard to the other and to the welfare of the marital union.

A woman acquires the surname of her husband with marriage. However, she can add her surname before that. This provision is the only provision that still creates inequality. But with the recent court decisions woman's right to continue carrying only her surnames started to be recognized.

Matrimonial Property System

In 1926 three new property regimes were introduced in Turkey with the reception of the Civil Code from Switzerland. They were namely the separation of property, common property and join property. On the contrary to the Swiss system, the separation of property was chosen as the legal matrimonial property regime. Actually, the spouses are free to choose one of these matrimonial property regimes, but the important rule is every

couple should have one matrimonial property regime. When they fail to choose the law-maker actually makes sure that every couple has a property regime. Therefore, a legal regime is regulated. This was the separation of property. During the period the new Civil Code was being discussed, especially the NGO's acted for the benefit of the women and they claimed that the separation of property had not been a good regime in the favour of women. The reason for that was claimed to be the situation that most of the immovable property was owned by men and when a divorce took place men had the immovable property and mostly, women were left with nothing.

As a result of the efforts in the society not only about the property regime but also about the other matters relating especially with family law, the need to bring equality has arisen. The new Turkish Civil Code accepted "the regime of participation in acquired property" as the legal matrimonial property regime. According to article 202, spouses are subject to the provisions governing participation in acquired property provided they have not agreed otherwise in a marital agreement and provided no extraordinary marital property regime has come into effect.

Together with this regime there are three more regimes. These are separation of property, shared separation of property and common property (community of property). By concluding a marital agreement, the spouses are free to choose either one of these regimes. But in Turkey, marital agreements to choose a matrimonial property system are not very common. Therefore, if the spouses do not make a choice, they will automatically be subject to the legal matrimonial property system, which is participation in the acquired property.

In this legal regime, unless the spouses agree upon a different regime, the acquired property that each spouse acquires during the marriage is shared equally when the marriage comes to an end with whatever reason. The concept of acquired property is important. According to article 219, acquired property comprises those assets which a spouse has required for valuable consideration during the matrimonial property regime. In particular, the acquired property of a spouse comprises:

1. The proceeds from his or her employment,
2. Benefits received from social security, social welfare institutions and staff welfare schemes,
3. Compensation obtained for inability to work,
4. Income derived from his or her own individual property,
5. Property acquired to replace acquired property.

On the other hand, a spouse's individual property comprises:

1. Personal items used exclusively by that spouse,
2. Assets belonging to one spouse at the beginning of the matrimonial property regime or acquired later at no cost by inheritance or otherwise (for example, donation),
3. Immaterial (moral) compensation,
4. Acquisitions that replace individual property.

During marriage, the spouses administer and enjoy the benefits of their individual and acquired property freely and without the exception of family domicile, they have the right to dispose of their property. As mentioned before, free from the type of the matrimonial property system, for the sake of the family welfare, the family domicile is protected and the written consent of the other spouse is needed when making dispositions over the family domicile. Again during marriage, each spouse is liable for his or her debts with all his or her property.

In the matrimonial property system, participation in the acquired property is dissolved on the death of a spouse or implementation of a different regime. The spouses have a right to change their matrimonial property regime by making a marital agreement any time during their marriage, but this change shall be effective after the agreement is concluded and shall not have retroactive effect. In case of divorce, separation and annulment of the marriage, the dissolution of the participation in the acquired property regime takes retroactive effect as of the date on which the application was filed.

When the marriage comes to an end with whatever reason (e.g. divorce, death, annulment) the acquired property regime should be dissolved. First of all, each spouse shall take back any of his

or her property that is in the other's possession. Then the property acquired during marriage and the individual properties of each spouse are separated according to their value at the time of the dissolution of the matrimonial property regime. The individual properties directly belong to the spouse who owns them. In this process, the aim is to find out the remaining total value of the acquired property. The remaining total value of the acquired property, including the assets added in and claims for compensation, and after deduction of the debts encumbering the acquired property, constitutes the surplus. As a result, each spouse is entitled to the one-half surplus of the other spouse. The claims are set off.

While making this calculation and finding out the surplus, the principle of equality is dominant. From this aspect, this regime is quite good in protecting the rights of both of the spouses. But one of the failure points of this matrimonial property regime is the difficulty in the calculation.

Divorce

The normal way a marriage comes to an end is the death of one of the spouses. But also it is possible that due to several reasons, the judge may also declare the annulment of a marriage. For example, if one of the souses was already married at the time of the marriage, if one of the spouses did not have discretion (was not able to make fair judgments), if marriage was prohibited due to kinship, the judge shall annul the marriage. An action for annulment is brought ex officio by the public prosecutor; in addition, any interested party is entitled to bring such action.

Divorce is another way to terminate the marriage by court decision. Of course no marriage is celebrated thinking that in the mean time there may be a divorce, but if the couple is no longer able to continue the marriage, then divorce can be found as a solution. In Turkey, the divorce rates are increasing and especially in big cities nearly one out of four marriages ends with divorce.

In Turkish legal system, only the judge is entitled to grant a divorce decision and in order to bring an action for divorce the spouse should have a ground for divorce, that is counted in a limited number in the Civil Code. But if both spouses want the divorce and if they may agree on all aspects related with divorce there is a simpler way of divorce, named as "uncontested divorce (agreed divorce)", in which again the decision of the judge is a necessity.

The grounds for divorce are mainly two types: Specific grounds and general ground.

Specific Grounds for Divorce

According to the Civil Code, there are five specific grounds for divorce.

1. Adultery: It is voluntary sexual intercourse by a married person with someone other than his/her own spouse. It is regarded as a breach of the duty of loyalty and fidelity. If one of the spouses commits adultery, the other spouse may bring an action for divorce. This action should be brought within 6 months period learning from the ground for divorce and in five years starting from the time the adultery actually took place. If the spouse forgives the one who has committed adultery, then this spouse shall not have a right to bring an action for divorce.
2. Plots against life, grave assaults and insults: A plot against life is attempt by one spouse to murder the other spouse. Grave assaults are threats or attempts to do bodily harm to the other spouse, by force or violence. Grave insults are actions of humiliation by one spouse to the other spouse. If one of the spouses commits these kinds of acts, the other spouse may again bring an action for divorce in six months time he/she learns about this act and in five years this act is committed. If the spouse forgives the one who has committed such an act, then this spouse shall not have a right to bring an action for divorce.
3. Crime and dishonorable life: The conviction of a spouse for a humiliating crime or the dishonorable conducts of one of the spouses, like habitual drunkenness or habitual gambling, are grounds for divorce. But to bring an action for divorce, it should not be expected for the other spouse to continue living with this spouse any more.
4. Desertion: If one of the spouses leaves the marital domicile in order not to fulfill his/

her marital duties or does not return to the marital domicile without a just ground and if this period at least six months, the remaining spouse may bring an action for divorce. During this six month period, the remaining spouse should ask either the judge or the notary to draw a notice and invite his/her spouse back home and remind him/her about the results of his/her not returning. After drawing this notice, the remaining spouse should wait for two months for the return of the other spouse. The notice cannot be drawn before a four month of period have expires from the spouse's leaving the matrimonial domicile and the action for divorce cannot be brought before a two month period have expired after drawing the notice.

5. Mental illness: If one of the spouses becomes mentally ill and life becomes for this reason unbearable to the other spouse, the healthy spouse may bring an action for divorce, on the condition that this illness is proved to be incurable by a medical report.

In a divorce action filed depending on one of these grounds, the judge has to find out if this ground has really been realized and if the judge is sure about the validity of the ground he/she grants a divorce decision.

General Ground for Divorce and Uncontested Divorce

The general ground for divorce is regulated in article 166 of the Civil Code. It is named as the irretrievable breakdown of the marriage. When the marital life becomes unbearable and it no longer could be expected from the spouses to continue their marital life together, this action could be brought by one of the spouses. If the plaintiff have grave fault compared to the other the spouse, the defendant may object the action; but if this objection is against honesty principle and there is no benefit left for the defendant and the children in the continuation of the marriage, the judge may grant a divorce decision.

Generally, a divorce case takes quite a long time and especially if one of the spouses wants the divorce and the other one does not want the divorce, they both try to prove their arguments and it takes longer and longer. Because of that reason, the uncontested divorce, in other words the agreed divorce, was introduced into our legal system.

In order to file an uncontested divorce, first of all both spouse should want to divorce. They should either apply together or one of them should have accepted the other ones action. The marriage should have lasted for at least one year. Before applying to the court, the spouses should have reached to a comprehensive agreement on all the consequences of divorce including the custody of the children, the financial matters, sharing the property, etc. They should prepare a protocol showing this agreement and submit this protocol to the court. After the action for divorce is brought, a trial date shall be given to the spouses. Even if they are represented by an attorney at law, they should be present in person by themselves as well before the court on that trial date. The judge shall hear both of them and if the judge makes sure that they are present before the court by their own will, and that they really want to divorce and they have agreed on all the consequences of divorce, than the judge grants the divorce decision. Generally only with one trial the divorce is granted. But if the judge thinks that the matters both spouses have agreed are especially against the benefits of the children or there are some points against the benefits of the spouses than the judge makes some changes in the protocol. If the parties also agree on these changes, again the divorce is granted. This is a very short and easy way of divorce.

LAW OF OBLIGATIONS

Law of obligations is the branch of civil law particularly concerned with the relations that create obligations. These relations are actually very important for everyone and even in our daily lives every day we enter into these kinds of relations, mostly without recognizing the legal meaning and significance. The main source of law of obligations is the Code of Obligations.

The Code of Obligations is composed of two parts. The first part is called "General Provisions" and the second part is called "Specific Types of Contracts". General provisions part is concerned with the formation, the effects and the discharge of obligations, obligations with special modalities, the assignment of claims and the assumption of obligations. Specific types of contracts part contain provisions affecting various types of contracts, such as sale, loan, rental, service, surety, etc.

The Concept of Obligation, the Elements and the Sources of an Obligation

As stated above, the law of obligations deal with the relations that create obligations. The term 'obligation' comes from the Latin *obligare* and means 'to bind'. Though in our daily lives mostly we use the term obligation in a narrow sense, just meaning a money debt legally it has a wider meaning. Obligation refers to *any* kind of relation between the creditor and the debtor. Obligation is a legal tie between two persons, namely the creditor and the debtor, which binds one of them to do or to forbear from something in the benefit of the other.

It can be derived that an obligation has three elements:

1. Creditor: Creditor is the party who is entitled to request the consideration. In a donation contract, the parties are named as the donor and the donee. Donee is the creditor. Whereas in a sales contract, the parties are named as the seller and the buyer and both of them are creditors, since sales contract is a contract in which both of the parties are under a burden of a consideration. The "seller" is under the liability of delivering the sold goods to buyer, the "buyer" is liable to pay agreed price to seller, in return.
2. Debtor: Debtor is the party who is bound to perform a certain act given as consideration. In a donation contract, the donor is the debtor, whereas in a sales contract both the seller and buyer are debtors.
3. Consideration: Consideration is an act, which the debtor is obliged to perform as the content of her obligation. It may be an act of giving something, like in sales contract, giving the good and giving the payment in return. It may be an act of doing something, like in employment contract-employees cleaning the building, or it may be an act of refraining from doing something, like in an agreement of restraint of trade.

According to Turkish Code of Obligations, there are three sources of obligations. These are:

1. Contracts
2. Torts
3. Unjust Enrichment

It should be mentioned that these sources are not limited in number. These are the sources that very frequently create an obligation, but besides them, there are other sources as well. For example, an obligation may be created directly from the law itself.

Contracts

As the first source of obligations, contracts are regulated in the Code of Obligations. But actually it is obvious that the Code does not only refer to the contracts. The legal transactions are generally referred to, but since contracts form most of the legal transactions, only contracts are named.

A legal transaction is a declaration of intention to which the legal order binds legal effects. Legal transactions may be classified into several groups; according to a classification made with regard to the intention declared, there are three types of legal transactions:

1. Unilateral legal transactions: In unilateral legal transactions there is only one intention declared. The legal rules recognise binding effect only to this single declaration of intention. The best example to that is a will. A Will is the last wishes of a person. Some other examples are recognition of a child, withdrawal from a contract, resignation, establishment of a foundation.
2. Bilateral legal transactions: If at least two intentions are declared mutually, there are bilateral legal transactions. All contracts are bilateral legal transactions.
3. Decisions: There are several declarations of intentions that are declared in the same direction. As an example, a resolution in the general assembly of an association can be given.

As mentioned above, among the whole group of legal transactions contracts forms the largest and most important group.

Formation of a Contract: Offer and Acceptance

A contract is a legal transaction concluded by a mutual exchange of assents of two or more persons. Therefore, for the formation of a contract there is a need of two mutually declared intentions. From these intentions the first one declared is named as an "offer" and the second one declared is named as an "acceptance". According to the first article of the Code of Obligations, the conclusion of a contract requires a mutual expression of intent by the parties.

Offer; An offer is a declaration of intention by one party, known as the offeror, whereby he expresses his willingness to enter into a contract. There are some requirements for a valid offer:

1. First of all, an offer must be definite and certain. It must with no doubt include all the essential terms of the contract. In article 2 it is stated that, where the parties have agreed on all the essential terms, it is presumed that the contract shall be binding notwithstanding any reservation or secondary terms. Therefore, in order to conclude a contract, the offer should very clearly include all the essential terms of the aimed contract.
2. Secondly, the offer must be communicated to the offeree. But it should be mentioned that it is not necessarily be communicated to a particular person. It can also be communicated to the general public as well. The display of goods with a price quotation in a shop window is considered to be an offer. In that case the offer is made to the public.
3. Lastly, the offer must be seriously made. In other words, an offer must be made with real intention of the offeror. The offeror should have the aim to be bound with the offer. The offeror should have the intention to create a legal relation.

When a declaration of intention has these three requisites, it is considered ad an offer. But if a person declares an intention without having the purpose of being bound with it, or if the declaration does not include all the requisites, it is named as an "invitation to an offer". For example, if Mr. X enters into a stationary and asks for a blue pen. Since this declaration does not include all the essential element of the sales contract it shall be considered as an invitation to an offer.

An offer, until it is terminated, gives the offeree a continuing power to create a contract by declaring an acceptance. The important question here is when an offer is terminated or in other words how long shall the offeror be bound with his/her offer. First of all, it should be mentioned that the offeror may set a time limit for his offer. A person who offers to enter into a contract with another person and sets a time limit for acceptance is bound by his offer until the limit expires. He/she is no longer bound if no acceptance has reached him on expiry, of the time limit. If an acceptance is sent after the expiry of the time limit, it shall no longer be considered as an acceptance, but a "new offer".

The offeror does not have to set a time limit, if no time limit is set, then the Code of Obligations makes a distinction between the parties who are present and who are absent. Where an offer is made in the offeree's presence and no time limit for acceptance is set, it is no longer binding on the offeror unless the offeree accepts it immediately. Offers declared by telephone, computer and such communication devices, on the condition that the parties may understand and respond simultaneously, are considered to be made in the offeree's presence. For example during simultaneous chat on the computer, the parties are present, but if the offeror writes an e-mail, it shall not be considered as the presence of the offeree, since it is not at the same time.

Where an offer is made in the offeree's absence, and no time limit for acceptance is set, it remains binding on the offeror until such time as he/she might expect a reply sent dully and promptly to reach him/her. The offeror may assume that his/her offer has been promptly received.

As a rule, it is not possible for the offeror to withdraw his offer. If the offer is declared in the presence of the offeree, it is certain that the offeror shall not be able to withdraw his/her offer. But if the parties are absent, according to the Code of Obligations there is a possibility to withdraw the offer. An offer is deemed not to have been made, if its withdrawal reaches the offeree before or at the same time as the offer itself or, where it arrives

subsequently, if it is communicated to the offeree before he/she becomes aware of the offer.

The offer is terminated, if the offeree rejects the offer. In Turkish legal system, "keeping silent (silence)" means as a rule a rejection. Unless the nature of the transaction or the circumstances or the law regulates the contrary, it shall be regarded as a rejection. Therefore as a rule, if the offeree keeps silent it shall mean a rejection and the offer shall be terminated.

Death or loss of capacity of the offeror as a rule does not terminate the offer, unless the consideration is a personal consideration. A personal consideration is a consideration, which is performed by using the physical power, mental talent or experience of the debtor.

Acceptance; An acceptance is a declaration of intention to agree to the terms of the offer. Offeree is the party who declares the acceptance. An acceptance must exactly comply with the requirements of the offer. In other words it should be the mirror image of the offer.

A declaration of intention that requests a change or addition to the terms of the offer shall be regarded as an acceptance, but a "counter-offer". A counter-offer is considered to be a new offer.

The offeree as a rule is bound by his/her acceptance; however, the rules concerning the withdrawal of an offer also apply to the withdrawal of the acceptance.

It is important to know the exact time when a contract is concluded. As a rule, provided that all of its elements are complete, a contract starts to take effect at the moment it is concluded. The benefit and risks, as a rule, start from this date. The interest rates are also effective from this date.

The time a contract is concluded and this contract starts to take effect is the same if the parties are present. But if the parties are absent, a contract starts to take before on the condition that it is concluded. According to article 11 of the Code of Obligations, a contract concluded in the parties' absence takes effect from the time the acceptance is sent by the offeree to the offeror. This contract is concluded at the moment the acceptance reaches to the offeror.

Form of a Contract

Form is the appearance of the intention declared through a certain medium. In Turkish law the principle is "freedom of form". This freedom is clearly expressed in article 12; the validity of a contract is not subject to compliance with any particular form unless a particular form is prescribed by law.

According to the principle of freedom of form, the parties are free choose any type of form they want in concluding their contract. In that sense in terms of its appearance there are three types of form:

1. Oral form: This is the easiest type of form and especially in the contracts that are daily concluded, parties mostly choose this form.
2. Written form: This type of form consists of two elements: the text part and the signature part. The text can be written by any kind of device. But the signature should be either handwritten or it should be signed by way of secured electronic signature. All persons on whom the contract imposes obligations should sign the contract.

   As stated above signature must be appended by hand by the parties to the contract. Secured electronic signature has the same effect as the signature written by hand. A signature reproduced by mechanical means is recognized as sufficient only where such reproduction is customarily permitted, and in particular in the case of signature on large number of issued securities.
3. Official form: The official persons who may give an official form are notaries, land registrars and peace court judges, though the latter does not serve this purpose any more, unless it is a necessity. The notaries may give the official form in two different ways. In the first one, the parties conclude a written contract, and then take it to the notary and they sign the contract in front of the notary. By that way, the signatures of the parties are authenticated by the notary. In the second way, the parties go to the notary and explain what they want to conclude, the contract is drawn up by the notary himself/

herself. Here the notary acts ex-officio. The land registrar only acts ex-officio, but the contracts that can be concluded by the land registrar are limited only to the contracts on the real rights of immovable property.

As mentioned before, the rule in Turkish legal system is the freedom of form. But for some types of contracts the law-maker has prescribed a particular form. At this point this form is regarded as a "form required for validity (form of validity)". In that case, the contract shall be valid only if this particular form is followed by the parties and the contract is concluded by using this form. For example, marriage is a family law contract and it should be concluded in oral form. Assignment of claims contract should be concluded in written form. Contract for sales of an immovable property should be concluded in official form only by the land registrar. Therefore, if there is a form of validity prescribed by law, the parties have to follow this form, if not their, contract shall be null and void.

Apart from the form of validity brought by the law, the parties may also according to their choice prescribe a form by themselves as well. According to article 17, where the parties agree to make a contract subject to form requirements not prescribed by law but by them, it is presumed that the parties do not wish to assume obligations until such time as those requirements are satisfied.

Lastly, "form as means of proof" should be mentioned. This form is prescribed by the Civil Procedural Code in order to prove an enacted contract. According to the Civil Procedural Code, legal transactions to establish, transfer, convert, renew, satisfy or release a right must be proved by a written document, namely a "deed", if at the time of transaction , the value involved exceeds 2590 TL. Unless the transaction exceeding the stated value is made in a written form, in case of dispute it may not proved. But this does not affect the validity of the transaction.

Contractual Freedom

The main principle of the law of obligations is the free discretion of the parties in a legal relation. Free discretion means the freedom to act according to her wishes of a person. One of the most important results of free discretion is "contractual freedom". This freedom finds its roots in article 26 of the Code of Obligations which states that the terms of a contract may be freely determined within the limits of law.

Contractual freedom may be summarized as five different types of sub-freedoms:

1. Freedom to enter into a contract
2. Freedom to choose the other party of a contract
3. Freedom of form
4. Freedom to withdraw a contract
5. Freedom to choose the type and subject-matter of a contract.

However, this principle, namely contractual freedom, does not have an absolute meaning. There are some restrictions to this freedom prescribed in the article 27 of the Code of Obligations. According to it, a contract is void if its terms are impossible, unlawful or immoral. However, where the defect pertains only to certain terms of the contract, those terms alone are void unless there is a cause to assume that the contract would not have been concluded without them.

Torts

Every person has freedom of activity within the limits of law. Law restricts this freedom by the rights of the other persons. When a person acts beyond the restrictions of law, the acts become wrongful and such wrongful acts are named as "torts". Torts are actually civil wrongs and most of the torts also give rise to criminal liability as well.

According to article 49 of the Code of Obligations, any person who unlawfully causes loss or damage to another, whether willfully or negligently, is obliged to provide compensation. This liability is named as tortuous liability. For a person to have tortuous liability, the following requisites should be met:

1. Act: First of all, there must be an act. It may be a positive act (for example, to stab another person) or an act of omission (for example, a night nurse sleeping and not giving the medicine and care to the patients). An act of omission can only be a basis for liability if there is duty to act.

2. Unlawfulness: Unlawfulness is the avoidance of the compulsory legal rules that safeguard a person in her person and/or property. A person who willfully causes loss or damage to another in an immoral manner is likewise obliged to provide compensation.
3. Fault (culpa): Fault is either a willful act or a negligent act. A person cannot have fault, as a rule, unless he/she has the ability to make fait judgments. A willful act is an act in which the person committing the act knows the results of the act and actually wants to achieve these results. A negligent act is an act, and the person committing it knows or could have known the results if she was careful enough, but actually does not want the result, however does not take care to prevent it.
4. Damage: It is the loss either given to a person or to his property or both. A person claiming damages must prove the loss he/she is suffering from. There are two main types of damages; material damage and immaterial (moral) damage.
5. Proximate causal relation: There must be a proximate causal relation between the unlawful act and the damages. In other words, the damage should be result of the unlawful act.

When all these requisites are fulfilled, the person who has committed the unlawful act has to compensate the damages of the injured person. The court determines the form and extent of the compensation provided for loss or damage incurred, with due regard to the circumstances and the degree of culpability.

A claim for damages becomes time-barred two years from the date on which the injured party becomes aware of the loss or damage and of the identity of the person liable for it, but in any event ten years after the date on which the loss or damage was caused. This is named as the statute of limitations.

your turn 2

CASE STUDY

Selim is bringing computers from abroad and selling them to small stationary shops. On 10 August, he sends a letter to Ahmet and tells him that he has five new model computers from 2000 TL each also sends a picture and all the technical details of the computers. Selim states that he shall be bound with this letter for three days. Ahmet receives the letter next day and writes and sends back his answer on 12 August, this answer reaches Selim on 13 August. But before he receives the answer, Selim finds another buyer who is ready to pay more for the computers. So, he sells the computers to him.

QUESTIONS

1. Is the contract between Selim and Ahmet concluded?
2. If so, when is it concluded? When does it start to take effect?
3. What do you advise Ahmet to do?

Unjust Enrichment

Unjust enrichment is a gain acquired in an unjustifiable manner out of the property of another person. According to article 77 of the Code of Obligations, a person who has enriched himself without just cause at the expense of another is obliged to make restitution. In Turkish legal system unjust enrichment is considered as a secondary source of obligation. If the claim can be based on a contract, there shall be no basis for an action of unjust enrichment.

For example, if a person transfers an amount of money to an account of third person by mistake, instead of the counterpart of the contract he made with; third person is under a liability to pay it back.

There are four conditions for unjust enrichment to exist:

1. There must be enrichment in the property of a person.
2. There must be a decrease in the value of property of another person.

3. The enrichment must be without a just cause
4. There must be a causal relation between the enrichment and the decrease in the value of property.

As a rule the enriched person has to return the enrichment. A claim for restitution for unjust enrichment becomes time-barred two years from the date on which the injured party learned of his/her claim and in any event ten years after the date on which the claim first arouse.

Performance of an Obligation

Performance is the fulfillment of the obligation. The main aim of all obligations is performance and normally an obligation is discharged by performance. The subject-matter of the performance should be the same as the consideration which obligates the debtor.

The subject of the performance of the obligation is the exact execution of the consideration stipulated in the contract or by law with regard to the proper place, the proper time, the proper kind, the proper quality, and the proper value. An obligor who fails to perform an obligation at all or as required must make amends for the resulting loss or damage unless he/she can prove that he/she was not at fault.

As a rule an obligor is not obliged to discharge his/her obligation in person unless so required by the obligee. A creditor may refuse partial payment where the total debt is established and due. But if the creditor accepts the partial performance, the debt shall be discharged in the amount of partial performance.

The parties are free to determine the place of performance. But if they fail to do so, the Code of Obligations brings a complementary provision to fill the gap. According to article 89:

- Pecuniary debts must be paid at the place where the creditor is resident, at the time of performance,
- Where a specific object is owed, it must be delivered at the place where it was located when the contract was entered into,
- Other obligations must be discharged at the place where the obligor was resident at the time they arose.

Again the parties are free to determine the time of performance. According to article 90, where no time of performance is stated in the contract by the parties or evident from the nature of the legal relationship, the obligation may be discharged or called in immediately.

Where the time of performance or the last day of a time limit falls on a day officially recognized as a public holiday, the time of performance or the last day of a time limit is deemed to be the next working day.

A bilateral contract is a contract, in which both of the parties are under the burden of a consideration to fulfill, that is to say both of them are at the same time debtor and creditor. In bilateral contracts a party to this contract may not demand performance until he/she has discharged or offered to discharge his/her own obligation, unless the terms or nature of the contract allow him/her to do so at a later date.

Default of the Debtor

Default of the debtor is a form of failure to perform of an obligation, where the performance is still actually possible. A debtor is in default when he delays the performance of an obligation, which is already due. Therefore, when an obligation is due, the creditor may put the debtor in default by demanding the performance. For the debtor to be in default, there are two conditions to be fulfilled:

1. The obligation should be due
2. The creditor has to draw a notice (formal reminder)

The debtor shall be in default as soon as he receives the notice from the creditor. But where a deadline for performance of the obligation has been set by agreement or as a result of a duly exercised right, there is no need to draw a notice, the debtor shall fall into default automatically. It should be mentioned that for the default of the debtor "fault" is not a requirement, it is only important for some of the results of default.

There are certain results of default; general results and specific results. The first general result is even if the debtor is in default; he/she still has to perform the delayed performance. Together with the delayed performance unless the debtor proves

that he/she does not have any fault in being in default, the debtor has to compensate the damages of the creditor because of late performance.

The second general result is liability from accidental situations. A debtor in default is liable even from an accidental loss and damages unless he/she proves that his default has occurred through no fault of his/her own or the object of performance would still have suffered the loss or damage to the detriment of the creditor even if performance had taken place promptly.

There are two specific results of the default of the debtor. The first one is in monetary (pecuniary) debts and the second one is in bilateral contracts.

In monetary debts, the most important result is to pay an interest. The debtor in default definitely has to pay interest even if he/she does not have fault being in default and the other party is not suffering from any loss due to late performance. This is named as the default interest. If the creditor suffers more damage that cannot be covered with the default, interest and if the debtor has fault being in default this time the debtor has to pay the additional damages as well.

In bilateral contracts, when the debtor is in default, the creditor is entitled to set an appropriate time limit for subsequent performance or to ask the court to set such time limit. There is no need to set a time limit:

- where it is evident from the conduct of the debtor that a time limit would serve no purpose,
- where performance has become pointless to the creditor as a result of the debtor's default,
- where in the contract it was made clear that the parties intended the performance to take place at a precise point in time.

If performance has not been rendered by the end of the time limit or if there is no need to set a time limit, the creditor has three options that he/she can choose:

- delayed performance and compensation for default,
- non-performance and damages because of non-performance (positive damages),
- withdraw the contract and damages resulting from the withdrawal of the contract (negative damages).

For the payment of compensation or damages, the debtor should have faulted, otherwise fault is not necessary.

Discharge of Obligations

Discharge of an obligation means that this obligation has come to an end. The normal way o discharge an obligation is performance. Apart from performance, there are some other ways to discharge an obligation regulated in the Code of Obligations.

1. Discharge (extinction) by Agreement: The parties to a contract may agree to discharge an obligation. No particular form is required for the discharge of an obligation by agreement even if the obligation itself could not be assumed without satisfying a certain form requirement.
2. Novation: It constitutes a new obligation in the place of an old one. The pre-existing obligation is discharged and a new obligation is created. The parties should conclude an agreement and in this agreement the intention of novation should be clearly stated.
3. Merger: The obligation is deemed to be discharged by merger where the capacities of creditor and debtor are united. In other words, the creditor and the debtor become identical.
4. Impossibility: Impossibility means it is no longer possible to perform the obligation. An obligation is deemed to be discharged where its performance is made impossible by circumstances not attributed to the debtor, in other words the debtor should not be faulty in the obligation's becoming impossible. If the debtor has fault, then the obligation is nor discharged but turned to a compensation payment.
5. Set-off: Where two persons owe each other sums of money or performance of identical obligations, and provided that both claims have fallen due, each party may set-off his/her debt against his/her claim. A set-off takes place only if the debtor notifies the creditor of his/her intention to exercise his/her right of set-off.

LO 1 Develop the ability to think analytically regarding the concepts and different fields of civil law

There are five main sub branches of civil law. These are:

1. Law of persons
2. Family law
3. Law of succession
4. Law of property
5. Law of obligations

Civil Code governs the first four sub branches and the Code of Obligations governs the last sub branch. As can be seen the concept of civil law is very wide. In this chapter, mainly law of persons, family law and law of obligations shall be explained. Though law of succession and law of property are also very important, considering the concept of the book, it shall be too detailed to explain these fields as well. The sub-branches that shall be explained shall also be very briefly explained and only the most important concepts shall be covered. Therefore, first a short summary of all these sub branches are given below.

Law of persons is the field of law that deals with the concept of person, types of persons, real persons, legal persons, beginning of personality and end of personality, concept of personality, protection of personality, capacity, types of capacity, different categories according to their capacity to act, domicile, kinship, associations (societies) and foundations.

Family law's main concern is the family, therefore, engagement, marriage, divorce, parental authority are the most important topics. Also guardianship and adaption are other important areas.

Law of succession is a field of law in which every real person shall be a part of in some time in their life, the latest when they die. Since all real persons shall die, this field is related to all of us. Legal heirs, reserved portion (statutory entitlement), testamentary disposition, deprivation of statutory entitlement, legacy, contract of succession, abatement and commencement of succession are some of the subjects.

Law of property's main subject is the real rights. Real rights are the rights built on a property that give their owner the right to assert against all persons this right. Ownership, hypothec, usufruct are some examples of the real rights. Real rights enjoy the principle of publicity. The tools of publicity are possession for moveable property and land registry for immoveable property. Therefore, the concept of law of property covers possession, land registry and real rights.

LO 2 Develop the ability to explain the main concepts of law of obligations

Law of obligations is the field of law that mainly deals with obligations. Obligation is a legal bond that ties two persons in such a way that one of them, the creditor, is entitled to demand from the other, the debtor, a certain performance. There are three main sources of obligations in Turkish legal system; contracts, torts and unjust enrichment. In the general part, law of obligations deals with these sources, formation of an obligation, performance, non-performance and some modalities related with an obligation such as penalty clause, condition, joint liability and discharge of obligations. In the special part, specific types of contracts are the main focus point, like sales contract, surety ship contract, rental contract and construction contract.

A contract is a legal transaction concluded by a mutual exchange of assents of two or more persons. Therefore, for the formation of a contract there is a need of two mutually declared intentions. From these intentions, the first one declared is named as an "offer" and the second one declared is named as an "acceptance". According to the first article of the Code of Obligations, the conclusion of a contract requires a mutual expression of intent by the parties.

An offer is a declaration of intention by one party, known as the offeror, whereby he expresses his willingness to enter into a contract. There are some requirements for a valid offer:

1. First of all, an offer must be definite and certain. It must with no doubt include all the essential terms of the contract. In article 2 it is stated that, where the parties have agreed on all the essential terms, it is presumed that the contract shall be binding notwithstanding any reservation or secondary terms. Therefore, in order to conclude a contract, the offer should very clearly include all the essential terms of the aimed contract.

LO 2 Develop the ability to explain the main concepts of law of obligations

Summary

2. Secondly, the offer must be communicated to the offeree. But it should be mentioned that it is not necessarily be communicated to a particular person. It can also be communicated to the general public as well. The display of goods with a price quotation in a shop window is considered to be an offer. In that case, the offer is made to the public.
3. Lastly, the offer must be seriously made. In other words, an offer must be made with real intention of the offeror. The offeror should have the aim to be bound with the offer. The offeror should have the intention to create a legal relation.

An acceptance is a declaration of intention to agree to the terms of the offer. Offeree is the party who declares the acceptance. An acceptance must exactly comply with the requirements of the offer. In other words, it should be the mirror image of the offer.

A declaration of intention that requests a change or addition to the terms of the offer shall be regarded as an acceptance, but a "counter-offer". A counter-offer is considered to be a new offer.

The offeree as a rule is bound by his/her acceptance; however, the rules concerning the withdrawal of an offer also apply to the withdrawal of the acceptance.

It is important to know the exact time when a contract is concluded. As a rule, provided that all of its elements are complete, a contract starts to take effect at the moment it is concluded. The benefit and risks as a rule start arising from this date. The interest rates are also effective from this date.

When a person acts beyond the restrictions of law, the acts become wrongful and such wrongful acts are named as "torts". Torts are actually civil wrongs and most of the torts also give rise to criminal liability as well.

According to article 49 of the Code of Obligations, any person who unlawfully causes loss or damage to another, whether willfully or negligently, is obliged to provide compensation. This liability is named as tortuous liability. For a person to have tortuous liability, the following requisites should be met:

1. Act: First of all there must be an act. It may be a positive act (for example to stab a knife to another person) or an act of omission (for example, a night nurse sleeping and not giving the medicine and care to the patients). An act of omission can only be a basis for liability if there is duty to act.
2. Unlawfulness: Unlawfulness is the avoidance of the compulsory legal rules that safeguard a person in his/her person and/or property. A person who willfully causes loss or damage to another in an immoral manner is likewise obliged to provide compensation.
3. Fault (culpa): Fault is either a willful act or a negligent act. A person cannot have fault, as a rule, unless he/she has the ability to make fait judgments. A willful act is an act in which the person committing the act knows the results of the act and actually wants to achieve these results. A negligent act is an act the person committing it knows or could have known the results if she/he was careful enough, but actually does not want the result, however does not take care to prevent it.
4. Damage: It is the loss either given to a person or to his property or both. A person claiming damages must prove the loss he/she is suffering from. There are two main types of damages; material damage and immaterial (moral) damage.
5. Proximate causal relation: There must be a proximate causal relation between the unlawful act and the damages. In other words, the damage should be result of the unlawful act.

Unjust enrichment is a gain acquired in an unjustifiable manner out of the property of another person. According to article 77 of the Code of Obligations, a person who has enriched himself without just cause at the expense of another is obliged to make restitution. In Turkish legal system unjust enrichment is considered as a secondary source of obligation. If the claim can be based on a contract, there shall be no basis for an action of unjust enrichment.

For example, if a person transfers an amount of money to an account of third person by mistake, instead of the counterpart of the contract he made with; third person is under a liability to pay it back.

There are four conditions for unjust enrichment to exist:

1. There must be enrichment in the property of a person
2. There must be a decrease in the value of property of another person
3. The enrichment must be without a just cause
4. There must be a causal relation between the enrichment and the decrease in the value of property.

1 Which of the following is a general ground for divorce?

A. Desertion
B. Irretrievable breakdown of marriage
C. Mental illness
D. Adultery
E. Plots against life

2 Which of the following does not operate to discharge an obligation?

A. Merger
B. Set-off
C. Novation
D. Statute of limitations
E. Discharge by agreement

3 Which of the following statements is true?

A. Capacity to act has the same meaning with the capacity to have rights and duties.
B. In order to be able to inherit, one should have the capacity to act.
C. Capacity to act does not cover the capacity to enter into transactions.
D. A person who has capacity to act may acquire rights and incur obligations by his own acts.
E. Capacity to act is a passive capacity.

4 Which of the following is an irrebuttable presumption?

A. Presumption of knowledge about a certain entry in the land registry.
B. Ownership presumption
C. Presumption of death
D. Presumption of innocence
E. Presumption of paternity

5 Which of the following is a unilateral legal transaction?

A. Donation
B. Sales contract
C. Surety ship contract
D. Assignment of claims
E. Will

6 (A) offers to sell his television to (B) for 3000 liras. (B) accepts this offer in principle, but declares his intention to pay only 2500 liras. Which of the following statements is **not true** for the declaration of (B)?

A. It is considered as rejection of the offer.
B. It terminates the original offer.
C. It is a conditional acceptance.
D. It is a new offer.
E. It is a counter-offer

7 Which of the following is not a condition for unjust enrichment to exist?

A. There must be enrichment in the property of a person.
B. There must be a decrease in the value of property of another person.
C. The enrichment must result from a contract.
D. The enrichment must be without a valid ground.
E. There must be a causal relation between the enrichment and the decrease in the value of property.

8 Where the creditor and the debtor become identical, the obligation is discharged by.....

A. Merger
B. Novation
C. Performance
D. Set-off
E. Impossibility

9 Which one is the correct legal meaning of (A)'s statement when he enters into a shop and asks for a green t-shirt?

A. Acceptance
B. Offer
C. New offer
D. Counter-offer
E. Invitation to an offer

10 Which of the following one is the sub-branch of civil law that deals mainly with real rights?

A. Law of obligations
B. Law of property
C. Family law
D. Law of succession
E. Law of persons

Suggested answers for "Your turn" Answer Key for "Test Yourself"

1. B	If your answer is wrong, please review the "Divorce" section.	6. C	If your answer is wrong, please review the "Offer" and "Acceptance" sections.
2. D	If your answer is wrong, please review the "Discharge of Obligations" section.	7. C	If your answer is wrong, please review the "Unjust Enrichment" section.
3. D	If your answer is wrong, please review the "Capacity" section.	8. A	If your answer is wrong, please review the "Discharge of Obligations" section.
4. A	If your answer is wrong, please review the "Real Persons" section.	9. E	If your answer is wrong, please review the "Offer" and "Acceptance" sections.
5. E	If your answer is wrong, please review the "Contracts" section.	10. B	If your answer is wrong, please review the "Concept of Civil Law" section.

Case Study: Ahmet is a fisherman in a small fishing village. On a windy day like the other fishermen, Ahmet starts his boat and goes to fishing. Then a very heavy storm breaks and the other fishermen return the village all with great difficulty, but not Ahmet. They search for him for days, but neither his body nor the boat is found.

Question: Discuss how and when Ahmet's personality ends.

your turn 1

In this case, the death of Ahmet is not certain; therefore, it is not possible to apply rules about the death or the death presumption. This is a case of declaration of absence. It is highly probable that Ahmet has died, therefore, his successors has to wait for a year and then apply to court for a declaration of absence decision. By that way, Ahmet's personality ends.

Case Study: Selim is bringing computers from abroad and selling them to small stationary shops. On 10 August, he sends a letter to Ahmet and tells him that he has five new model computers from 2000 TL each also sends a picture and all the technical details of the computers. Selim states that he shall be bound with this letter for three days. Ahmet receives the letter next day and writes and sends back his answer on 12 August, this answer reaches Selim on 13 August. But before he receives the answer, Selim finds another buyer who is ready to pay more for the computers. So, he sells the computers to him.

Question:

1. Is the contract between Selim and Ahmet concluded?
2. If so, when is it concluded? When does it start to take effect?
3. What do you advise Ahmet to do?

your turn 2

Answer of Question 1: The contract between them is concluded. Because an offer and an acceptance should be mutually declared, for the conclusion of an agreement. Selim makes an offer and sets a time limit. Within this time limit Ahmet accepts the offer.

Answer of Question 2: The parties are absent while concluding the contract. Therefore, the time of conclusion and the time this contract starts to take effect is different. The contract starts to take effect on the day (12 August) the acceptance was sent to the other party and the contract is concluded on the day (13 August) the acceptance reaches to Selim.

Answer of Question 3: Selim is in default, because though he sold the computers to another person, he may find from the kind of computers and perform his obligation. Ahmet should draw a notice, because the parties have not specified a certain date of performance, the debt should be performed immediately on the date it is concluded. To put Selim in default, Ahmet should draw a notice and since this a bilateral contract Ahmet should set an appropriate time. If in this time period Selim still does not perform, Ahmet has three options, he may choose either one. These are:

-delayed performance and compensation for default,

-non-performance and damages because of non-performance (positive damages),

-withdraw the contract and damages resulting from the withdrawal of the contract (negative damages).

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Chapter 7 Law of Civil Procedure, Compulsory Enforcement and Bankruptcy

After completing this chapter, you will be able to:

Learning Outcomes

1. Will be able to explain the types of courts
2. Will be able to explain arbitration

Chapter Outline

Introduction
Civil Procedure: Civil Dispute Resolution in General
Sources of Civil Procedure, Courts and Principles to be Followed
Time Requirements and Judicial Service
Parties
Types and Commencement of Actions
Preliminary Examination and Trial
The Law of Evidence
Court Decisions and Judgment
Simplified Procedure
Judicial Costs and Judicial Aid
Provisional Legal Relief
Appellate Remedies
Arbitration (Tahkim)
Alternative Dispute Resolution (ADR)
Compulsory Enforcement and Bankruptcy
Enforcement Procedure for Attachment Without a Judgment
Attachment (Haciz)
Sale of Attached Assets
Payment or Apportionment and Insolvency Certificate (Borç Ödemeden Aciz Belgesi)
Provisional Attachment
Enforcement Procedure Based on Judgment
Liquidation of Pledges and Mortgage
Bankruptcy
Composition Agreements (Konkordato)
Restructuring of Corporations and Cooperatives Via Reconciliation

Key Terms

Litigation
Court
Judge
Lawyer
Dispute
Legal Action
Hearing
Evidence
Judgment
Appeal
Credit-Debt
Bankruptcy
Liquidation
Attachment
Mediation
Arbitration

INTRODUCTION

Legal disputes are inevitable in modern societies. When a legal dispute arises, it must be resolved swiftly and justly. If the dispute is based on a right provided by any branch of private law, such as civil law or commercial law, then the role of civil procedural law begins. Parties of the dispute may resolve the dispute with negotiation, seek help from a neutral and independent third party via conciliation or mediation, or resort to litigation in courts or through arbitration. Civil procedural law governs all aspects of civil dispute resolution, but mainly litigation. If the litigation route is chosen, the State, through courts, must resolve the dispute effectively and justly according to the Constitution.

Civil procedure is a formal discipline. This is due to the fact that courts must regard every single subject of law as equal in litigation. If the courts do not follow strict procedures, the right to fair trial cannot be ensured. Therefore, the Code of Civil Procedure is a detailed recipe for dispute resolution through every stage of the dispute; from just after the inception of the dispute, until the legal means are exhausted.

Even though the civil procedure deals with the litigation aspect of the dispute, the State's responsibilities do not end there. Since no one may use force or any other illegal means to collect what they are owed, the State must also provide effective protection to her subjects regarding the enforcement of rights. This protection extends from simple monetary credits to return of a child to her custodian. This protection is realized through compulsory enforcement law. This discipline is even stricter than the civil procedural law, since it involves use of force and deprivation of ownership or possession of property.

Another circumstance that must be eliminated from the society is insolvency. If a person, or more importantly a company becomes insolvent, this may generate many unwanted consequences along the way. Collective enforcement deals with this problem. There are numerous ways to resolve the state of insolvency. If no reconstructive way is applicable, the insolvency must be eliminated via liquidation.

CIVIL PROCEDURE: CIVIL DISPUTE RESOLUTION IN GENERAL

In order to understand the basics of civil procedure, one must firstly understand the nature of legal disputes. All kinds of disputes may arise in a society. These disputes may arise between people, between people and the State or even between governmental organizations. These differences between the natures of such disputes give rise to different branches of the Judiciary. For instance, if the constitutionality of a statute passed by the Legislation needs to be challenged, one must refer to the Constitutional Court which operates in constitutional judiciary branch. Similarly, if the nature of the dispute is criminal or administrative, respective branches of the judiciary must be utilized.

But what is a civil dispute? If a legally recognized right of a member of the society is harmed or not fulfilled by another member of the society, this constitutes a disagreement. If the said disagreement is expressed in any way, a dispute is born. However, in order for a legal dispute to be qualified as a civil dispute, the underlying right must be based on any branch of private law, e.g. law of obligations, commercial law or consumer protection law. Since a legal dispute must be resolved in order for the society to function properly, the need for dispute resolution arises. There are four broad types of (or ways for) civil dispute resolution:

(1) The parties of the dispute may resolve the dispute among themselves. This may be carried out completely out of the legal system or within legal boundaries with an agreement called settlement.

(2) The parties may refer to an independent and neutral third party and utilize her services, which is called an alternative dispute resolution.

(3) Parties may choose to resolve their dispute not before the court but before an independent and impartial third party. However, in this type of resolution, the third party in question is called arbitrator and the resolution itself is called arbitration. This recourse is similar to litigation in court; however, unlike the judiciary, the parties are free to choose the arbitrator and the procedure to be followed.

(4) Of course the final and by far the most popular method to resolve disputes is litigation. Litigation is the ultimate method in dispute resolution and according to article 36 of the Turkish Constitution, everyone has the right to assert claims and defenses, and a fair trial, as a plaintiff or defendant before judicial tribunals through utilizing legal means and proceedings; no court may abstain from trying an action for which it is competent with regard to subject-matter jurisdiction and venue.

attention

Civil procedural law is the legal discipline that organizes the relationship between the subjects of any civil litigation and determines the rules to be carried out by civil courts in resolution of disputes.

SOURCES OF CIVIL PROCEDURE, COURTS AND PRINCIPLES TO BE FOLLOWED

Sources of Civil Procedure

The essential source of the civil procedure in Turkey is the *Hukuk Muhakemeleri Kanunu* (Code of Civil Procedure –CoCP-). It is a relatively recent statute, which was passed by the Parliament in early 2011 and entered into effect in late 2011. It is generally accepted as a natural evolution of the previous civil procedural code. The previous Code of Civil Procedure was dated 1927 and it was largely adopted from the then civil procedural code of Canton of Neuchâtel in Switzerland, with some minor and some major modifications. It had been amended many times and various replacements had been drafted and offered during its course of application.

The statutory sources of civil procedure are not limited to the Code of Civil Procedure. There are many other statutes and regulations directly related to procedure, such as the Code of International Arbitration, the Law of Lawyers, the Law of Judges and Public Prosecutors, the Law on Service and the Law regarding Establishment, Jurisdiction and Powers of Civil and Criminal Courts of First Instance and Circuit Courts of Appeals. There are also some substantive law statutes that include procedural provisions; such as the Labor Code and the Turkish Civil Code. Regulation Regarding Administrative Operation of Circuit Courts of Appeals, Courts of General Jurisdiction and Public Prosecutors' Offices issued by the Ministry of Justice covers the less essential and operational aspects of the procedure to be carried out by the courts and their administrative offices.

The second source of Turkish civil procedure is the Court of Cassation (CoC) opinions. Since Turkey does not have a case-law legal system, the source value of the CoC opinions is mainly ancillary to the statutes, with the exception of "consolidation of opinions", possessing the power of a statute, which is very rarely issued by the CoC.

Third source of Turkish civil procedure is the legal literature. Value of the literature in civil procedure is also defined by statute: the judge must consider the legal literature while evaluating the evidence and rendering a judgment according to the very first article of the Turkish Civil Code.

your turn [1]

Please identify the sources of the Law of Civil Procedure in Turkey.

Courts

According to article 9 of the Constitution, the judicial power shall be utilized by independent courts in the name of the Turkish Nation. There are three levels of courts in civil judiciary:

On top sits the Court of Cassation (*Yargıtay*). It is the highest court of the civil judiciary. Its chambers and other decision-making bodies carry out the appellate review of the final decisions rendered by the circuit courts of appeal. It is also the court of first instance for a limited number of disputes (for instance, actions for damages against the State regarding the exercise of jurisdiction by the judge). The CoC, with respect to civil disputes, consists of civil chambers, the Civil General Assembly and the Grand General Assembly as judicial bodies.

Circuit courts of appeals (*bölge adliye mahkemeleri*) are the intermediate level courts in Turkish civil judiciary. These courts had been established in 2004 and became operational in 2016. There are 15 circuit courts of appeals, of which seven are operational as of 2017. These courts are currently situated in Ankara, Antalya, Erzurum, Gaziantep, İstanbul, İzmir and Samsun. The most essential duty carried out by the circuit courts of appeals is the intermediate appellate review of final decisions rendered by the courts of first instance in their respective jurisdictional areas. They also possess a very limited subject-matter jurisdiction as a court of first instance regarding some civil disputes.

Civil courts of first instance, which are the courts that resolve disputes initially, are established as either general jurisdiction courts or specialized courts. General jurisdiction courts are established with the Law regarding Establishment, Jurisdiction and Powers of Civil and Criminal Courts of First Instance and Circuit Courts of Appeals (no. 5235), and they are comprised of civil courts of general jurisdiction (*asliye hukuk mahkemeleri*) and civil courts of peace (*sulh hukuk mahkemeleri*). These courts may have different chambers within, and a workload division between these chambers based on subject matter may be determined to some extent. All courts have an administrative office supervised by a court clerk, with court stenographers, a bailiff, and other civil servants where necessary.

Specialized courts are the courts established by various statutes and they have jurisdiction in actions with the specific subject matter they are established for. There are seven specialized courts in civil judiciary:

(1) Cadastral courts
(2) Labor courts
(3) Compulsory enforcement courts
(4) Consumer courts
(5) Civil Courts of Intellectual and industrial property rights
(6) Family courts
(7) Commercial courts

These courts only operate regarding the subject matter determined by the relevant statutes. All specialized courts in civil judiciary are established at the level of civil courts of general jurisdiction. If the subject matter of an action falls under the jurisdiction of a specialized court and if that is not established at the venue of the dispute, the dispute must be resolved by the civil court of general jurisdiction at that venue.

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Each court may operate only within its respective jurisdictional (geographical) area. Courts may not gather evidence or enforce the execution in another jurisdictional area. If such a need arises, the court must seek the judicial assistance (istinabe) of the proper court in the relevant jurisdictional area.

Judge

Judges utilize the judicial power of the State in the name of the Turkish Nation. In order to sit as a judge in a court of any branch of Turkish judiciary, one has to be a judge by profession. In order to become a judge, one must be a Turkish citizen, graduate from a faculty of law, pass the written and oral examinations and complete the necessary training. According to articles 138, 139 and 140 of the Constitution, judges are judicially independent; no one may order or compel the judges in the execution of their duties; everyone shall obey the decisions of the judiciary; the judges may not be dismissed, retired early or deprived of any employment rights.

Civil liability of judges is regulated by the CoCP. According to the Statute, filing an action for damages against a judge regarding the exercise of jurisdiction is not permitted. If someone suffers damage from the actions of a judge regarding the duty she carries out, for example, if the judge consistently refrains from determining a hearing date, the sufferer may file an action for damages against the State. Action for damages against the State is filed in and resolved as a court of first instance by the Court of Cassation's relevant civil chamber for actions and decisions of the judges sitting in courts of first instance and circuit court of appeals; and by Court of Cassation's Fourth Civil Chamber for actions and decisions of the President and members of the Court of Cassation and other officials who are considered in the same status according to the Statute (art. 47). If the plaintiff prevails in the action and the State ends

up paying damages, the State must then pursue recourse against the responsible judge for the damages paid (art. 46/3). Action for recourse is also tried by the court that has resolved the action for damages.

In the course of an action, if the impartiality of the judge sitting is questioned, she may be recused or disqualified according to the grounds. These grounds are determined by the Statute. In such circumstances the judge may also recuse herself even if the parties stay silent.

Lawyer (Attorney)

According to the Law of Lawyers, lawyer is the person carrying out an institutional duty as an establishing element of the judiciary for the independent defense in the service of the organization of legal relationships, resolution of legal matters and disputes, in accordance with justice and fairness and accurate application of legal provisions (art. 1). Only lawyers may be appointed as attorneys in litigation and in other dispute resolution methods and only lawyers are permitted to provide legal advice.

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In order to become a practicing lawyer, one must graduate from a law faculty, complete the required one-year apprenticeship and register in a bar association.

Representation by a lawyer in civil litigation, in principle, is not a requisite. However, there are some exceptions to this rule; for instance, according to article 80 of the CoCP, if the judge perceives that a party lacks the competency to personally manage her action, the judge may impose on the party to manage her action through an attorney.

Civil Servants (Non-Judge Staff) Employed in Administrative Offices of Courts

The administrative office of the court (*yazı işleri müdürlüğü*) carries out the administrative procedures required in the operation of a court, such as serving documents, keeping and organizing the case file or receiving petitions. The supervisor of the administrative office is the court clerk. The court clerk has various duties and powers, such as approving copies of documents regarding actions pending in the court in which she is employed.

Another very important officer at the administrative office is the court stenographer (*zabıt katibi*). Court stenographers are mentioned in numerous provisions of the CoCP, since they carry out a very important duty in litigation. According to articles 154, 155 and 157, the court stenographer prepares and signs the record and she must be employed in all proceedings to be carried out before the judge. Since court stenographers have a very important role in litigation and said role is very closely related to the judicial power. Disqualification and recusal grounds set by the Statute regarding the judges are applied to court stenographers as well.

The bailiff (*mübaşir*) assists the judge regarding the order of the hearing, summons persons waiting outside to the courtroom and carries out other duties given by the judge, such as serving documents.

Other civil servants may also be employed by the court, with regard to different types of courts. For instance, all family courts must employ a full time psychologist, a pedagogue and a social work specialist to assist the court.

Principles to be Followed in Civil Procedure

Since the Statutes cannot foresee every possibility that may arise in litigation, courts and other subjects of the judiciary also rely on ground principles. There are two types of principles: Firstly, there are principles that are essential and absolute, which arise mostly from the Constitution and international conventions such as the Convention for the Protection of Human Rights and Fundamental Freedoms, e.g. the right to a fair trial or the judicial economy principle. These principles must be strictly followed. Secondly, there are defining principles that guide the court in making decisions such as principles of disposition and party presentation or principle of consolidation. Most of the principles to be followed in civil procedure are categorized and explained in the CoCP (articles 24 through 33).

According to the disposition principle and the principle of party presentation, the judge, without the request of a party, may neither examine nor resolve an action on her own initiative (ex officio); the parties may terminate the dispute with a settlement, waiver or acknowledgment of the claim or even just the proceedings with either withdrawal of the claim or through leaving the action unattended; the judge may not consider matters and facts that are not asserted by a party and act in a way that may even remind said matters and facts (art. 25) and is bound by the scope of the demands of the parties; she may not make a ruling for more than the demand or for a different remedy (art. 26). However, if the action concerns public policy (e.g. paternity actions), the principle of ex officio investigation supersedes the principle of party presentation.

The procedure in litigation is administered and governed by the judge. Unlike arbitration, the parties do not have much say in the shape of the proceedings. The proceeding must be carried out in Turkish, and translators are provided should a need arise.

Probably, the most important principles regarding civil procedure are the right to a fair trial and the right to be duly heard. These principles are set by the Constitution, as well as the European Convention on Human Rights.

The hearings in the court are open to everyone. Partial or complete execution of the hearings close to the public (in-camera hearings) may be decided only in circumstances that public policy or public security absolutely necessitates. In-camera execution of hearings, partially or as a whole, may be decided by the court upon the request of a party or ex officio, only if public morality or public security absolutely necessitates.

Another very important principle to be followed is the judicial economy principle. There are three aspects of said principle: simplicity, speediness, and inexpensiveness. According to the CoCP, the judge is responsible for the execution of proceedings in reasonable time and in orderly fashion and the prevention of unnecessary expenditures (art. 30).

TIME REQUIREMENTS AND JUDICIAL SERVICE

Time Requirements and Yearly Judicial Recess

According to the CoCP, time requirements are either designated by the statute or determined by the judge. The judge shall not extend or shorten time requirements designated by the Statute, barring the exceptions stated in the Statute (art. 90). The judge may extend or shorten time requirements determined by her on account of justifiable reasons and she may hear the parties before deciding on the matter if she sees it necessary to do so. Time requirements designated by the statute are definitive (art. 94). The judge may also determine any time requirement allowed by her as definitive. Otherwise, the party that missed the time allowed may request another time allowance. Second time allowed in this manner is definitive and further time may not be allowed. If a party proceeding must be carried out within definitive time and the party fails to do so, the right to carry out that particular party proceeding expires (preclusive time requirement).

Time requirements start from the date of service to the parties, or from the date of pronouncement in circumstances stipulated by the Statute (art. 91). If time requirements are determined in terms of days, the day of service or pronouncement is not included in computation of the time and time expires at the end of last workday. If time requirement is determined in terms of weeks, months or years, time expires at the end of the workday of the corresponding day of the last week, the last month or the last year to the day the time has started. If a corresponding day does not exist in the month that the time requirement expires, it expires at the end of the last workday of that month. Time limits regarding proceedings carried out electronically expire at the end of the actual day (art. 445/4).

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Weekends and official holidays are included in time requirements. However, if the last day of the time requirement corresponds to an official holiday (or the weekend), time expires at the end of first workday following the holiday (art. 93).

Examples for computation of time:

- 10-day time started on 10.05.2017 ends on 20.05.2017
- One-month time started on 10.05.2017 ends on 10.06.2017
- However, since this date corresponds to a Saturday, it automatically extends to 12.06.2017
- One-month time started on 31.01.2017 ends on 28.02.2017
- 30-day time started on 31.01.2017 ends on 02.03.2017
- One-year time started on 10.05.2017 ends on 10.05.2018

There is also a yearly judicial recess that begins on July 20th and ends on August 31st of each year. In actions and proceedings within the scope of the judicial recess, if time requirements set by the Statute expire on a date within the recess, it is assumed that these time requirements have been extended for one week from the last day of the recess, without any requirement for a decision on the matter (art. 104). Actions and proceedings that are urgent in nature and designated by the Statute are exempt from the judicial recess.

If a person, on account of causes beyond her control, fails to carry out a proceeding within the time designated by the Statute or determined by the judge as definitive, that person may request restitution (art. 95). However, it must to be noted that, restitution procedure is only applicable to procedural time requirements. If a party fails to comply with a time requirement that is set by a substantive law provision (e.g. statute of limitations), restitution provisions of the CoCP may not be applied. Restitution must be requested within two weeks from the date on which the impediment that prevented the proceeding from being carried out in due time has disappeared (art. 96).

Judicial Service (*Adli Tebligat*)

All judicial documents related to litigation must be served to the parties by the court. Service is similar to mail or notice; however, it is stricter. There are two reasons behind service: to prove that someone is notified of something and to determine the date of the notice in question. Most time limitations as we explained above, start form the date of service.

All service proceedings are regulated by a Statute (the Law on Service -LoS) and a Regulation (the Regulation of the Law on Service). According to the Law on Service, service proceedings are carried out by the Turkish Postal Services (LoS art. 1). However, under some special circumstances, which are also determined by the statutes, the authority serving the document (e.g. the court) may also opt to serve the document (or summons) with a law enforcement officer or an employee of the court (e.g. the bailiff) instead of the postal service (LoS art. 2). Judicial service may also be carried out in the administrative office of the court or in the courtroom during the hearing (direct service), without the need for actual dispatching (LoS art. 36). Attorneys may also serve each other with documents regarding the action at hand directly against a receipt, without the requirement of service papers (LoS art. 38).

Service must be directed to the relevant person. If the party is represented by an attorney, the attorney must be served. If the party is served when the service should have been directed to the attorney, the result is null service; it is assumed that the service was never made.

According to the Law on Service, under certain circumstances, service is not required to be actually delivered to the person it is directed to. Service must be carried out in the lattermost known address of the person who is being served (LoS art. 10). If the person could not be found at the address, service documents must be delivered to persons living in the same apartment or house with the addressee. If no one is found at the address, documents must be delivered to the public officials designated by the Statute and a note must be attached to an appropriate place at the address, so that the person can see (LoS art. 21).

If the address of the person cannot be determined and no entry exists in the centralized address database or no previous service was carried out to that person in litigation, then service is carried out by publication in a newspaper in accordance with the requirements set out by the Law on Service (LoS art. 28).

Service may also be carried out electronically, via registered email. Service to corporations, limited

companies and limited partnerships with divided shares may be carried out electronically in any case; however, in order to serve persons other than said companies, the person concerned must have previously consented to be served electronically (LoS art. 7a).

If service is not carried out in accordance with the rules and requirements set by the Law on Service, it is reckoned as undue service. However, an undue service is also valid, provided that the person who was served has learned about the service in any fashion (LoS art. 32). The date of service in this circumstance is the day that the person concerned has learned about the service.

PARTIES

Parties in General

As the general theory of litigation stipulates, every action must involve two parties. This number is constant; it cannot be decreased or increased. Even though the number of the parties is fixed, a party may comprise multiple persons. The party applying for legal protection or asserting the claim is called "*davacı*" (the plaintiff) and the party against whom a remedy is sought or asserting a defense is called "*davalı*" (the defendant). The role of the plaintiff and the defendant may not merge. In such case, the action cannot continue. Parties of the action are always equal and must be approached by the court as such even if one of the parties is legally protected under substantive law (e.g. consumers).

The opposing party must be indicated in the complaint pleading while filing an action; otherwise, the pleading shall not be accepted by the court; investigating and finding the identity of the defendant is neither a duty of nor a permitted action by the court.

In civil procedure, there are five aspects to be examined regarding the parties:

Capacity to be a Party (*Taraf Ehliyeti*)

Article 50 of the CoCP defines the capacity to be a party and makes referral to the Turkish Civil Code. According to the provision, any person who has the capacity to possess civil rights, also has the capacity to be a party in an action. According to articles 8 and 28 of the Turkish Civil Code, every person has the right to possess civil rights; the personality begins with full birth and ends with death. However, the capacity of the child begins with conception, on condition that full birth is achieved. If an unborn baby is a party in litigation, a curator (*kayyım*) must be appointed for the protection of its rights. Legal entities (both private and public law) also have the capacity to be a party upon acquiring their legal personalities. Since joint ownership of an estate and ordinary (simple) partnerships lack legal personality and therefore do not have the capacity to be a party, the party role must be assumed by the heirs or the partners collectively.

If the plaintiff lacks the capacity to be a party in the commencement of the action, the action must be dismissed on procedural grounds. If the defendant lacks the capacity to be a party, a substitution or an expansion is permitted. If the defendant dies during the action, the action may be continued against her inheritors if the action concerns her estate, provided that the estate is not renounced by the inheritors.

Capacity to Conduct Civil Proceedings (*Dava Ehliyeti*) and Legal Representation

Article 51 of the CoCP links the capacity to conduct civil proceedings to the capacity to act on civil rights. According to article 10 of the Turkish Civil Code, every person who is not a minor has the capacity to act on civil rights, provided that she possesses judgment capacity. Legal entities acquire the capacity to act on civil rights upon establishing their bodies required by the Statute and their by-laws.

Persons who possess limited capacity to act on civil rights are not permitted to file actions and an action may not be filed against them. However, there are three exceptions to this rule: (1) Minors and persons under legal guardianship may conduct civil proceedings in actions regarding their personal rights; (2) if the person under legal guardianship is permitted to perform a vocation or an artisanship, she has the capacity to conduct civil proceedings regarding her vocation or artisanship and (3) minors and persons under legal guardianship have the capacity to conduct civil proceedings in actions regarding the property on which they are permitted to dispose.

According to article 52 of the CoCP, in judicial proceedings, persons who do not have the capacity to act on civil rights must be represented by their legal representatives; and legal entities by their authorized bodies.

Capacity to Litigate (*Dava Takip Yetkisi*)

According to article 53, capacity to litigate is the capability to secure a judgment about the relief that is demanded. This power is determined by the power of disposal in civil law, barring the exceptional circumstances stated by the statute. In principle, the person who is the real party in interest with respect to a certain right also has the capacity to litigate with respect to said right. However, legal provisions sometimes take this power from the real party and charge another person or an authority with this capacity. The most common example of this shift in the said capacity is set out by the Code of Compulsory Enforcement and Bankruptcy. In case of bankruptcy, the person whose bankruptcy has been opened loses neither her capacity to be a party nor her capacity to conduct civil proceedings. However, according to the Statute, the capacity to litigate an action regarding the rights and obligations constituting the bankruptcy estate belongs to the board of trustees.

Real Party in Interest (*Taraf Sıfatı*)

Being a real party in interest is the possession of the substantive right associated with the claim. Since the right to litigate is an inseparable aspect of the substantive right itself, only the real parties in interest must be the parties in litigation. If a party in an action is not the real party in interest, the action must be terminated. However, this aspect differs from the other aspects regarding the parties by being a substantive matter, not procedural. Therefore, the termination must be by rendering a ruling on the merits (i.e. judgment).

Party Representation (*Vekalet*)

Any person having the capacity to conduct civil proceedings may file an action and manage it personally or through an attorney whom she appoints (art. 71). Power of attorney covers the power to carry out all kinds of party proceedings in order to manage the action, enforce the judgment, collect judicial costs and issue receipts regarding this collection, and the power to be the receiver of such proceedings until the judgment becomes unappealable (art. 73). However, some proceedings, which are very important and extraordinary by nature such as termination of an action, settlement etc., require special empowerment of the attorney (art. 74).

The attorney is required to present the original power of attorney or the true copy of the original certified by her to be put in the case file of the action or the compulsory enforcement procedure in all actions and proceedings that she files or manages (art. 76).

Joinder of Parties (*Dava Arkadaşlığı*)

Even though the number of parties is set to two in any action, each party may be comprised of multiple persons. This joinder may result from either procedural or substantive reasons. According to the CoCP, joinder of parties is categorized into two groups, which are permissive joinder of parties and necessary joinder of parties:

According to article 57 of the CoCP, multiple persons may jointly file an action or an action may be filed jointly against multiple persons if the right or the obligation that is the subject matter of the action between the plaintiffs or defendants is shared upon a reason other than joint ownership, a right is created collectively in favor of all of those persons as the result of a joint transaction or if they have undertaken an obligation in this manner or the facts and legal reasons that constitute the basis of the actions are same or similar. In permissive joinder of parties, the actions are independent of each other (art. 58). In fact, it is assumed that, there are the same number of actions as the number of persons in the joinder.

Joinder of parties may also be mandatory. If a right must be exercised jointly by multiple persons or if it must be claimed jointly against multiple persons and if rendition of a single judgment regarding all of those persons is required due to substantive law, joinder of parties is necessary (art. 59). All persons in this type of joinder must also act collectively during litigation. Joinder of parties may also be mandatory due to a procedural reason; however, other than filing of the case, provisions regarding permissive joinder of parties are applied to this type of joinder.

Third Party Intervention (*Müdahale*)

There are two instances that a third party may intervene in a pending action. If a third party who stakes a claim on the right or the thing that is the subject matter of litigation partially or as a whole, this third party may file an action in the same court against the parties of the action until the rendition of judgment, asserting this claim (art. 65). This is called third party intervention through filing action (*asli müdahale*). By resolving the matter in the initial action, need for other possible actions may be eliminated.

A third party may also participate in the action as supportive intervener on the side of the party whose prevailing in the action bears legal interest for her (art. 66). This is called the supportive third party intervention (*feri müdahale*). The intervener may assert means of claims and defenses that are in favor of the party whom she intervened in support of; and carry out all kinds of party proceedings not contrary to the actions and statements of said party (art. 68).

TYPES AND COMMENCEMENT OF ACTIONS

Types of Actions According To The Legal Remedy Sought

Action (*dava*) is a legal remedy sought from the court by the person of a right that is claimed to be harmed, against the person who is claimed to have harmed the mentioned right. Actions are remedies that are final in nature as opposed to provisional remedies, which are temporary in nature. The CoCP defines various types of actions. Actions are often categorized according to two different criteria: legal remedy sought and the quantity (or features) of the demand. There are three types of actions according to the legal remedy sought:

(1) Actions for performance (*eda davaları*)

(2) Declaratory actions (*tespit davaları*)

(3) Constructive actions (*inşai davalar*)

Any claim to be filed as action in the court must fall under one of these three categories.

Actions for Performance

Action for performance is an action in which the court is requested to sentence the defendant to give or perform, or avoid from doing something (art. 105). Most common examples of this type of action are actions for damages and actions for debt recovery. If the plaintiff prevails in the action, the court renders a judgment demanding performance. The execution copy of this judgment may be the subject matter of a compulsory enforcement procedure exclusive to execution copy of judgments. If the subject matter of the claim is divisible by nature (e.g. money), only a part of it may also be claimed through litigation (art. 109).

Actions for performance may also be filed as indefinite debt action (*belirsiz alacak davası*). According to article 107 of the CoCP, the creditor, in circumstances that she could not be expected to determine the exact amount or value of the credit at the time of filing the action or it is impossible to do so, may file an action claiming an indefinite credit by stating the legal relationship and a minimum amount or value. At the time when the exact determination of the amount or value of the debt becomes possible as the result of the information provided by the opposing party or the trial proceedings, the plaintiff may increase her initial demand, exempted from the prohibition of claim expansion.

Declaratory Actions

With declaratory action, the court is requested to determine the existence or nonexistence of a right or a legal relationship, or whether a document is forged or not (art. 106). Therefore, declaratory actions are generally categorized as affirmative declaratory actions and negative declaratory actions. The judgment to be rendered in a declaratory action is, in any case, a declaratory judgment. Even though it is a judgment, this type of judgment cannot be the subject matter of a compulsory enforcement procedure exclusive to judgments. Declaratory judgments also constitute res judicata; therefore, the losing party may not file another action against the same party based on the same facts with the same claim.

Constructive Actions

With constructive action, the court is requested to create a new legal status, or modify the substance of an existing legal status or terminate it. (art. 108). Constructive action may be filed when

a constructive right must be exercised through litigation, such as divorce. If the plaintiff wins the action, the court renders a constructive judgment. Constructive judgments are not required to and cannot be enforced; they generate the desired legal consequence automatically once they become unappealable.

Other Types of Actions in the Code of Civil Procedure

Even though every claim in civil actions filed in Turkish courts must fall into one of the three types of actions explained above, they may also have particular features according to their subject matters. Some of these actions are also determined by the CoCP:

The plaintiff may jointly assert multiple independent principal claims against the (same) defendant in the same complaint. In order to do so, all claims must be subject to civil judiciary and there must be a court of shared venue regarding all claims. This is called the "accumulation of claims" (*davaların yığılması* - art. 110).

An "action with gradual demands" (*terditli dava*) is an action, through which the plaintiff asserts multiple demands against the defendant in the same complaint, by identifying them as principle or ancillary (art. 111). In order to do so, a legal or an economic connection between the demands must exist. The court may not examine and resolve the ancillary demand unless it denies the principle demand of the plaintiff on the merits. In this type of action, there is only one claim; however, the demand differs. For instance, an inheritor may file an action and designate the annulment of a testamentary disposition as the principle demand and a diminution in the testamentary disposition as the ancillary demand. Unless the court rejects the first demand on the merits, it may not examine and resolve the ancillary demand.

If the debtor or a third party who has the right to choose regarding an alternative obligation refrains from exercising the right, the creditor may file an "action with alternative demands" (*seçimlik dava* - art. 112). In an action with alternative demands, if the court decides that the claim is justified, it renders a judgment imposing alternative obligation.

Associations and other legal entities, in accordance with the framework of their statuses and with the purpose of protecting the interests of their members or the persons they represent, may file an action in their own capacity, in order for the rights of the persons concerned to be declared or the unlawful situation to be ceased or the violation of future rights of the persons concerned to be prevented (art. 113). These are called group actions (*topluluk davaları*).

Procedural Requirements

Procedural requirements are requisites that must be present throughout the litigation process. The court shall examine the existence of procedural requirements during all stages of the action ex officio (art. 115). Parties may also raise an objection regarding the absence of a procedural requirement at any time. If the court determines the absence of a procedural requirement, it shall dismiss the action on procedural grounds. However, if it is possible to rectify the absence of the procedural requirement, the court must allow a definitive time for this rectification. If the absence of the procedural requirement is not rectified within this time, the court must dismiss the action on procedural grounds on account of the absence of a procedural requirement. If the absence of a procedural requirement was overlooked before the examination of the action on the merits has begun and not raised by the parties, but rectified at the time of rendition of the judgment, the action may not be dismissed on procedural grounds on account of the initial absence of a procedural requirement.

The procedural requirements stated in article 114 of the CoCP are the universal requirements; i.e. they must exist in all kinds of civil actions. There are also other special requirements set by various statutes regarding the kinds of actions that they set out. Procedural requirements stated in the CoCP are:

1. Turkish courts must have judicial power on the matter.
2. The court must have jurisdiction with respect to branch of judiciary.
3. The court must have subject-matter jurisdiction.

4. The court must have venue in circumstances that venue is definitive.
5. The parties must have capacity to be a party and capacity to conduct civil proceedings; the representative must have required qualifications in circumstances that legal representation is present.
6. Capacity to litigate must be held.
7. The attorney must have power to represent the client and a power of attorney issued in accordance with law in circumstances that party representation is present.
8. The advance for judicial costs that the plaintiff is required to deposit must be deposited.
9. Decision of the court demanding security to be given must be fulfilled.
10. The plaintiff must have a legal interest to file the action.
11. An identical action must not be previously filed and still pending.
12. An identical action must not have been previously resolved with an unappealable judgment.

Subject-Matter Jurisdiction of the Court (*Görev*)

Rules of subject-matter jurisdiction are the rules to follow in determining the proper court at a particular venue and determine which type of court is the proper court to resolve a claim. Very first article of the CoCP states that the subject-matter jurisdiction of the courts shall be governed only by statute. Rules regarding subject-matter jurisdiction appertain to public policy.

The principle court in civil judiciary is the civil court of general jurisdiction. If no other court is determined by a statute as the proper court regarding a matter, the subject-matter jurisdiction falls under the scope of the civil court of general jurisdiction. Civil court of general jurisdiction may also be specifically determined by a statute as the proper court regarding a matter.

According to the CoCP, unless otherwise stated by the statute, civil court of general jurisdiction is the proper court in actions regarding property rights regardless of the value or amount of the subject matter, as well as actions regarding personality rights (art. 2). Unless otherwise stated by the CoCP or another statute, civil court of general jurisdiction also has subject-matter jurisdiction with respect to other actions and proceedings.

Matters for which the civil court of peace is the proper court are enumerated in the CoCP (art. 4). Civil court of peace is also the proper court with respect to subject-matter jurisdiction in proceedings of non-contentious jurisdiction, unless otherwise stipulated by the Statute (art. 383).

Rules of subject-matter jurisdiction appertain to public policy, and subject-matter jurisdiction of the court is one of the procedural requirements. Therefore, the court is prohibited from resolving the action if it lacks subject-matter jurisdiction; it has to dismiss the action on procedural grounds. The parties may not determine the subject-matter jurisdiction of the court or make an agreement beforehand regarding the matter. The court must inquire the existence of subject-matter jurisdiction ex officio; also the parties may raise an objection at any stage of the action.

Venue (*Yetki*)

As we have previously mentioned, courts are established in accordance with geographical boundaries and they cannot operate outside of these boundaries. Therefore, the proper court with regards to venue must also be determined.

According to the CoCP, venue of courts, barring the provisions regarding venue in other statutes, is subject to the provisions of the CoCP (art. 5). Court of principle venue is the court in the domicile of the natural person or the legal entity that is the defendant, at the time the action is filed (art. 6). Domicile is determined according to the Turkish Civil Code. According to article 19 of the Turkish Civil Code, every person may hold a single domicile. Even though it is usually the same with that person's residence, they are not necessarily the same; unlike residence, the intent to remain in that place must be present in case of domicile. If there are multiple defendants, the action may be filed in the court of each defendant's domicile (art. 7). However, if a court of shared venue for all defendants is designated by the statute with respect to the cause of the action, the action must be resolved in that court.

If a special venue rule designated by the Statute is not definitive (e.g. place of tort, place of contract etc.), the court of principle venue remains to be proper, along with the special venue court. Therefore, the action may be filed either at the special venue designated by the Statute or at the principle venue. However, if a definitive venue is designated by the Statute (e.g. place of real property, life insurances etc.), the court of principle venue ceases to be the proper court and the action must be filed at the venue that is specially determined by the Statute.

The parties may also define the proper court with respect to venue provided that no definitive venue rules exist. However, venue agreements are limited to merchants and public legal entities; otherwise they are not valid.

If the court lacks venue and a definitive venue rule is set by the Statute regarding the matter in dispute, the defendant may raise an objection at any stage of the action (art. 19); and the judge (or court) may also examine the matter ex officio, as it is the case with subject-matter jurisdiction. However, if no definitive venue rule is set by the statute regarding the matter in dispute, the defendant must raise the venue objection along with the other preliminary objections in her answer pleading. If the defendant fails to do so, the objection may not be raised later in the action and the court becomes proper with respect to venue, since the court may not inquire whether it has venue or not ex officio in this circumstance.

Commencement of Action

There are two types of procedure sets in civil procedure: written procedure and simplified procedure. The written procedure is the principle procedure. This procedure will be explained throughout this chapter; however, the simplified procedure will be also briefly examined later in the chapter.

In written procedure, there are five separate stages of action. The court is not permitted to commence a stage before completing the previous one. The stages of the action in civil procedure are:

(1) Pleadings
(2) Preliminary examination
(3) Trial
(4) Oral arguments
(5) The judgment

The first stage comprises of four pleadings in total: the complaint and the response to answer, which are to be submitted by the plaintiff; the answer, and the second answer, which are to be submitted by the defendant.

The action must be filed with a complaint pleading. The scope of the complaint is determined by the CoCP in detail (art. 119). While submitting the pleading, the plaintiff must deposit court fees and the amount to be determined according to the tariff on advance for expenditures that is issued annually by the Ministry of Justice, to the clerk's office (art. 120). The complaint must be delivered to the relevant court or the office charged with this duty in the courthouse. Plaintiff or her attorney may also file the action online through UYAP (National Judiciary Informatics System) signed with secure electronic signature. Copies of the documents that are stated in the complaint and that are in the possession of the plaintiff must be attached to the complaint, according to the number of the defendants, and presented to the court together with or without the originals, exempted from any fee or tax requirements; and information regarding documents that must be brought from elsewhere must also be stated in the complaint so that they could be requested (art. 121). The complaint is then served to the defendant by the court (art. 122). It shall be stated on the service document that the defendant may submit an answer to the claim within two weeks. Once the action is commenced, until the judgment becomes unappealable, the plaintiff may withdraw her action only upon express consent of the defendant (art 123).

Upon the commencement of an action, the statute of limitations is interrupted with respect to the amount claimed and some personal rights transform into property rights.

Answer (Defense)

Answer pleading is the response of the defendant to the complaint, and in general, to the case made by the plaintiff. The answer must be submitted to the court where the action is filed (art. 126). The answer must be submitted within two weeks from the date of the service of the complaint to the defendant (art. 127). However, as regards to the circumstances, if it is too difficult or impossible to prepare an answer within specified time, upon the request of the defendant made within the same time

requirement, a one-time-only extension, which may not exceed one month, may be granted by the court.

If the defendant fails to submit an answer within the specified time limit, it is assumed that she denies all facts asserted by the plaintiff in the complaint. The defendant may assert her defenses later, with the exception of preliminary objections. Main legal consequence of submitting the answer pleading (or failing to do so) is the exhaustion of the right to raise preliminary objections.

Substantive law defenses are defenses arising from substantive law (e.g. the Turkish Code of Obligations) that the parties may use in order to be released from the obligation. There are two kinds of substantive law defenses, which are objections (*itiraz*) and affirmative defenses (*defi*).

Objection is a fact that prevents the birth of a right or results in the termination of the right, e.g. termination of an obligation on account of performance. Objections may be examined by the court ex officio, provided that they are determinable in the case file. Affirmative defenses, on the other hand, do not terminate the obligation; however, they grant a right to the party in debt to refrain from performing the obligation. The most common example of affirmative defenses is the statute of limitations (*zamanaşımı*). Affirmative defenses must be asserted and proved by the parties; the judge is not permitted to examine them ex officio even if it is evident in the case file; and she must even refrain from any behavior that may remind the existence of an affirmative defense to the parties.

Unlike substantive law defenses, procedural law defenses, as the title implies, arise from civil procedural law. There are three kinds of procedural defenses: objections regarding lack of procedural requirements, preliminary objections (*ilk itiraz*) and counter-action (*karşı dava*). The procedure regarding objections for lack of procedural requirements is very simple: If a procedural requirement is absent, the opposing party (defendant) may raise an objection until the end of litigation. If the court upholds the objection, the action must be dismissed on procedural grounds. Preliminary objections, on the other hand, are relatively less important procedural objections that must be raised in the very beginning of the action with the answer pleading (art. 117). There are two preliminary objections that may be raised (art. 116): venue objection and arbitration objection (i.e. the dispute must be resolved by arbitration). All preliminary objections must be raised concurrently in the answer pleading; otherwise, they are not heard.

In order for a counter-action to be filed, the principle action must be pending and there must be either a setoff relationship between the counter-claim and the claim asserted in the principle action or a connection between two actions. If a counter-action is filed without these conditions being met, the court, upon request or ex officio, must decide to sever the counter-action from the principle action and where necessary, refer the case file to the competent court (art. 132). Counter-action may be filed with the answer or with a separate pleading within the time requirement for the answer (art. 133).

Secondary Pleadings and Prohibition of Expansion and Change of Claim and Defense

Along with the complaint and the answer, there are two more pleadings that may be submitted in written procedure. According to article 136 of the CoCP, the plaintiff, within two weeks from the date that she is served with the answer, may submit a "response to answer" pleading and the defendant may submit a "second answer" pleading within two weeks from the date that she is served with the response of the plaintiff. Provisions regarding complaint and answer pleadings are applied to the response to answer pleading to be submitted by the plaintiff and the second answer pleading to be submitted by the defendant by analogy, as long as they are in accordance with the nature of secondary pleadings.

Upon the submittal of the second answer pleading, or the expiration of the time requirement to submit it, the pleadings stage is completed. The legal consequence of submitting these pleadings (or failing to do so) is the commencement of the prohibition of expansion and change of claim and defense. From this point on, the parties are not permitted to expand or change their claims and defenses, with the exception of other party's express consent or the amendment procedure. The scope of the prohibition includes both the material facts that constitute the reason of the action or the defense and the demands brought forth by the parties.

According to article 141 of the CoCP, parties may expand or change their claims or defenses freely with the response to answer and second answer

pleadings; and only upon express consent of the opposing party at the pre-trial examination stage. If a party fails to attend the pre-trial hearing, the attending party may expand or change her claim or defense without the requirement for consent of the absent party. The claim or defense may not be expanded or changed after the pre-trial examination stage is concluded. However, provisions regarding amendment and express consent of the opposing party are reserved in the matter of expansion or change of claim and defense. Therefore, according to the Statute, exceptions to this prohibition are (1) the express consent of the opposing party, (2) the amendment procedure and (3) the circumstance in which a party fails to attend the pre-trial hearing.

PRELIMINARY EXAMINATION AND TRIAL

Preliminary Examination (*Ön İnceleme*)

According to article 137, preliminary examination must be carried out upon the conclusion of the exchange of pleadings. The court, in preliminary examination, must:

(1) Examine procedural requirements and preliminary objections

(2) Determine the boundaries of the dispute

(3) Carry out preparatory proceedings and proceedings necessary for the parties to present evidence and for the discovery of evidence

(4) Encourage the parties for settlement or mediation in actions on which they may freely act.

Trial may not be commenced and a hearing date may not be determined before the preliminary examination is complete and necessary decisions are rendered. The court must decide on procedural requirements and preliminary objections initially by examining the case file; it may hear the parties regarding the matter on preliminary hearing before rendering a decision, where necessary (art. 138).

The preliminary examination stage also includes a hearing. This hearing differs from the hearings held in the trial stage as the court may not examine evidence in preliminary hearings. The consequence of failing to attend to a preliminary hearing also differs from trial hearings.

At the preliminary hearing, the judge must hear the parties if she sees it necessary in order to decide on procedural requirements and preliminary objections; afterwards, she must determine matters in dispute and matters in agreement within the scope of the claims and defenses of the parties individually. Upon determining and designating the matters in dispute, the judge must encourage the parties for settlement or mediation; and set a date for another hearing, limited to once, if she is convinced that a result may be achieved on the matter.

Preliminary examination must be completed with holding a single hearing. In necessitating circumstances, a date for another hearing may be set, limited to once. At the preliminary hearing, the parties must be allowed a definitive two-week time, in order to present the evidence that they have offered in their pleadings but yet to present and also to make necessary explanations regarding documents that must be brought from elsewhere. If these points are not fully addressed within the definitive time allowed, it must be assumed that the party has withdrawn the offer of that evidence.

Trial in General (*Tahkikat*)

If an examination on the merits is required in an action, this examination is carried out at the trial stage with holding hearings. Hearings are highly formal in civil procedure and must be carried out according to the Statute; otherwise, the final decision of the court may be removed or reversed in the appellate remedy if the non-compliance is found to be effective on the final decision. These formal requirements are essential with regard to the right to a fair trial as well.

Courts operate during official workdays and hours. However, under necessitating or urgent circumstances, it may be decided that proceedings such as inspection by judge, preliminary discovery of evidence and proceedings written on the daily hearings list may (and sometimes must) be carried out during official holidays or outside of official operating hours (art. 148).

Presence of a court stenographer is mandatory in all proceedings to be carried out before the judge within or outside the court (art. 157). If the court stenographer is unable to carry out her duties on account of legal or factual impediments, and if there is danger in delay, another person, after she is

given an oath in accordance with the duty, may be appointed as the court stenographer.

The parties, upon the completion of the preliminary examination stage, are summoned to a hearing for trial (art. 147). In the summons that is to be served to the parties, they must be warned that should they fail to appear in the court at the determined date and time without an acceptable excuse, the hearing is to be continued in their absence and they may not object to proceedings carried out in their absence. If the parties, after being duly summoned, fail to attend the hearing or if one of them attends and states that, she does not wish to continue, it must be concluded by the court that, the case file is removed from the proceedings (art. 150). An action, whose case file has been removed from proceedings, may be renewed within three months from the date of removal, upon the request of a party made with a petition (art. 150). It is assumed that, action that is not renewed within three months from the date in which its case file was removed from proceedings, was not filed as of the date in which the time has expired and the record is closed upon the decision rendered by the court ex officio. The CoCP stipulates that an action whose case file is removed from proceedings and later renewed may not be left unattended more than once after first renewal; therefore, an action may be renewed twice in written procedure.

According to article 153, no photographs may be taken nor may any kind of audio-visual recording be made during the hearing. However, in circumstances that the proceedings necessitate, on condition that they are kept in the case file, the court may perform filming and/or recording. These films and recordings, as well as any sort of document or record kept inside the case file of actions concerning personal rights, may not be published anywhere without the express permission of the court and the persons concerned.

According to article 157 of the CoCP, presence of a court stenographer is mandatory in all proceedings to be carried out before the judge within or outside the court. The court record is to be immediately signed by the judge and the court stenographer. Partial or entire copies of court records are issued to the parties or the supportive intervener upon their request (art. 158).

Amendment Procedure (*Islah*)

Because of the prohibition of expansion and change of claim and defense, the CoCP sets out a very detailed amendment procedure. The amendment procedure is an essential tool, since it is the only way for the parties to correct their mistakes unilaterally. According to the CoCP, each party may amend the party proceedings she has previously carried out partially or as a whole (art. 176). The parties may resort to amendment only once in the same action.

Amendment may be carried out until the end of the trial stage; it is not permitted during intermediate appeal or appeal procedure. Amendment may be carried out orally or in written form. If the opposing party is not present at the hearing or the amendment request is made outside of the hearing, this written request or the copy of the court record is sent to the opposing party for information purposes (art. 177).

Amendment produces the assumption that any proceeding carried out before the point in time specified by the amending party is not carried out (art. 179). However, admissions of facts, witness statements, reports and statements of experts, records of inspection by judge and questioning of parties; acceptance, return or rejection of an oath that is carried out or yet to be carried out but stated to be carried out by the opposing party before the amendment may not be invalidated by amendment.

Resorting to amendment procedure is not required for correcting every mistake made by the parties. According to the CoCP, clear spelling and computation errors made by the parties or the court in documents in the case file may be corrected until the final decision is rendered (art. 183). If the action is delayed on account of the correction of an error by a party, this matter must also be taken into consideration by the court while allocating the judicial costs.

Hearing Parties and Questioning of Parties

The statements of parties, whether by simple hearing or as a result of the questioning procedure, are not regarded as evidence by the CoCP. The parties may not be examined as witnesses, as it

is clearly stated by the CoCP (art. 240/1). Their statements in favor of their cases are simply regarded as claims, and their statements against their cases (i.e. admission) are regarded not as evidence, but as an instrument that renders the fact non-contentious. Hearing the parties may mean one of two things within the scope of the CoCP:

First type of hearing is set out by article 144; according to this, the court, in the course of the trial stage, may duly summon and hear both parties regarding the facts asserted in the action.

The second type of hearing is a special kind, with the specific intent to achieve an admission, which is the procedure called questioning (*isticvap*). The CoCP stipulates that, the court may decide to question each party upon request or ex officio. Questioning is carried out regarding facts that constitute the basis of the action and other matters in connection (art. 169). The biggest difference between this type of party hearing procedure and the ordinary procedure is the existence of the sanction set forth by the CoCP for questioning. If the summoned party fails to appear without an acceptable excuse or refuses to answer the questions asked, it must be assumed by the court that she has admitted the facts constituting the subject of the questioning (art. 171). Therefore, if the party makes an admission, fails to attend the hearing without an acceptable excuse, or even keeps silent regarding the question, the fact on which she was to be questioned becomes non-contentious and it must be left out of the matters to be proved.

Questioning must be carried out personally, not through attorneys. On behalf of legal entities, persons who have power to represent the legal entity must be questioned. Regarding a transaction carried out on behalf of a minor or a person placed under legal guardianship, legal representative of that person is questioned.

Conclusion of Trial and Oral Arguments Stage

Upon conclusion of the trial, the court must summon the parties to ensure their attendance to the court at the date and time determined by the court for oral arguments and judgment (art. 186). In the summons to be served to the parties, they must be notified that, should they fail to appear in court at the determined date and time, judgment will be rendered in their absence. In oral arguments stage, the court must ask the final words of the parties and after hearing them, render its judgment.

THE LAW OF EVIDENCE

In General and Admission of Facts (*İkrar*)

The scope of proof in civil procedure is comprised of contentious facts that are material for the resolution of the dispute, on which the parties disagree. Evidence must be offered by the parties to prove such facts (art. 187). Facts subject to common knowledge (judicial notice) and admitted facts are not considered contentious.

Facts admitted by the parties or their attorneys before the court cease to be contentious and they are not required to be proved (art. 188). In order to generate legal consequences, admission must be made before a court; however, that court is not required to be the court that is trying the action. The parties are not bound by admissions made during settlement negotiations or any of the ADR methods recognized by the Statute. An admission may not be recanted unless it is based on a factual error (art. 188); it may not be invalidated with the amendment procedure (art. 179).

Burden Of Proof (*İspat Yükü*)

Although the right to prove is an essential aspect of the right to be duly heard, it is also set out by the CoCP in a separate provision, along with its boundaries. According to article 189, the parties have the right to prove in accordance with time limitations and procedure stipulated by the statute. Illegally obtained evidence may not be evaluated by the court regarding the proof of a fact. Matters that must be proved with certain types of evidence according to the statute may not be proved with other types of evidence. The admissibility of the evidence offered to prove a fact must be determined by the court ex officio.

Burden of proof determines which party carries the duty to prove matters in an action. Both parties may present evidence of course, but if the matters in the action remain not proved at the end of the trial,

one side must lose the action in any case. This side is the side that carries the burden of proof. Burden of proof is defined by the article 190 of the CoCP stating that unless there is a special provision in the Statute stipulating otherwise, the burden of proof lies with the party that infers a right for herself from the legal consequence adherent to the fact claimed (art. 190). The opposing party may also present evidence in order to disprove the claim of the party with whom the burden of proof lies. The party that presents evidence for counter proof may not be considered to have undertaken the burden of proof (art. 191).

Producing Evidence

According to article 194, the parties must concretize the facts they assert, as suitable for proof. In order to do so, the parties must enunciate the evidence that they rely on as well as specifying the particular evidence that will be used to prove each fact. With the exception of actions to which ex officio investigation is applied, all evidence, in principle, must be offered by the parties. There are two exceptions to this rule: expert examination and inspection by judge.

According to the CoCP, the parties may not offer evidence after the duration stipulated in the Statute (art. 145). However, if the late offering of a piece of evidence is not aimed to delay the trial or not caused by the fault of the party, the court may permit the late offer of that specific piece of evidence. Burden of concretization is not limited to the facts alone; evidence is also subject to this obligation. The party who has offered certain evidence may not withdraw that evidence, without the express consent of the opposing party (art. 196).

Article 121 and 129 stipulate that copies of the documents that are stated in the complaint and the answer must be attached to the complaint and presented to the court together with or without the originals; and information regarding documents that must be brought from elsewhere must also be stated so that they could be requested. To complement this rule, according to the fifth paragraph of article 140, at the preliminary hearing, a definitive two-week time must be allowed to the parties in order to present the evidence that they have offered in their pleadings but yet to present and also to make necessary explanations about the documents that must be brought from elsewhere. If these points are not fully addressed within the allowed definitive time, the court must assume that the party has withdrawn the offer of that evidence.

Examination and Evaluation of Evidence

According to the CoCP, barring the circumstances stated in the Statute, evidence must be examined before the court trying the case, collectively and at the same hearing as far as possible (art. 197). In necessitating circumstances, examination of certain evidence may be postponed to another hearing. Certain evidence that is located elsewhere and cannot be brought to the court may be gathered in their location by means of judicial assistance. During the examination of evidence or testimonies, the parties may be present in the court that is providing judicial assistance and exercise their right to make explanations regarding the evidence. In order to ensure this, the parties must be notified of the date and place of examination to be carried out. Upon this notification, even if the parties fail to appear in the court providing judicial assistance, evidence or testimonies must be examined.

According to article 198 of the CoCP, the judge evaluates the evidence on her own discretion, barring the statutory exceptions. Two major exceptions to this rule are the rules of documentary proof and the concept of definitive evidence. However, if the action concerns public policy (e.g. paternity actions), the discretionary power of the judge on evaluating evidence is virtually unlimited.

Evidence in General and Types of Evidence

According to article 192, in circumstances where the Statute does not stipulate proof with certain types of evidence, evidence not identified by the Statute may also be offered. Therefore, as long as an instrument is suitable to prove a fact, it is admissible as evidence; provided that it possesses other requisites determined by the Statute.

Types of evidence that are stated by the Statute are: (1) documents (*belge*) and (2) deeds (*senet*), (3) oath (*yemin*), (4) witness (*tanık*), (5) expert

examination (*bilirkişi incelemesi*) and (6) inspection by judge (*keşif*). (7) Res judicata (*kesin hüküm*) is also (definitive) evidence, yet it is not directly stated as such by the statute. There is also another instrument called the "specialist opinion" (*uzman görüşü*); however, it is generally not regarded as evidence.

In civil procedure, types of evidence are divided into two categories according to their evidentiary weight: definitive evidence and discretionary evidence. The definitive feature of a type of evidence may only be determined by the Statute. In civil procedure, there are three types of evidence that are definite: Deed, oath and res judicata. Res judicata is also determined as a procedural requirement by the Statute if all three aspects of it are present. If two of the three aspects of res judicata are present on the other hand; namely, if the parties and the factual reasons of the actions are same, but the subject matter is different, res judicata is regarded as definitive evidence in the latter action. For instance, if a declaratory action is filed and a judgment is rendered in favor of the plaintiff, it may be offered as definitive evidence in the succeeding action for performance to be filed by the same plaintiff against the same defendant, based on same factual reasons after it becomes unappealable.

Any type of evidence that is not stipulated by the Statute as definitive is discretionary evidence.

Documents, Deeds and Rules of Documentary Proof

The CoCP provides a definition for the term document: Data suitable for proving the facts of the dispute such as written or published texts, deeds, drawings, plans, outlines, photographs, films, visual or audio recordings as well as data stored in electronic media and similar data storage devices shall be considered as documents within the scope of the CoCP (art. 199). This is a very inclusive definition. The wording of the provision is not restrictive; therefore, any kind of device that can somehow store data and is suitable for proving a fact is a document.

According to article 222 of the CoCP, the court may order presentation of commercial books in commercial actions ex officio or upon the request of a party. In order for the commercial books to be admissible as evidence in commercial actions, they must be kept thoroughly and in due form, their opening and closing approvals must be complete and the records on the books must be in corroboration.

Deeds are written documents representing a legal transaction or a legal incident that are either approved by an official authority or signed by the person against whom they are asserted as evidence. A deed is required to have three features: It must be physical, and the writing must be readily comprehensible; it must include a declaration of intention; and it must be signed with actual handwriting. Deeds may be either official or unofficial. A deed is considered as unofficial if no official authority has participated in the creation or approval of said deed. If such participation or approval has occurred, it becomes an official deed. Even though there are some differences between the two types of deeds, both are definitive evidence; therefore, the judge is bound by both.

If a party denies the writing or signature on a document that is claimed to have been prepared by her, she must claim forgery; otherwise, the document is evaluated as evidence against her (art. 208).

There are two rules within the rules of documentary proof. First of these rules is the requirement of proving with deed. According to this requirement, if the amount or value of a legal transaction made with the intention of establishing, releasing, transferring, changing, renewing, postponing, admitting or executing a right exceeds a certain amount at the time it was made, it must be proved with deed, even if the amount or value of such a legal transaction has decreased to less than the specified amount due to performance or release from debt, or any other reason (art. 200). It must be noted that, the monetary limit stipulated by the CoCP does not refer to the amount or value of the action (claim), but the amount or value of the legal transaction that is asserted by either party; amount or value of the action, claim or demand has nothing to do with this requirement.

Second rule is the prohibition of disproving deed with witness. A legal transaction asserted against any deed-based claim, which may eliminate

or reduce the legal consequences and evidentiary weight of said deed, may not be proved with witness, even if the transaction amounts to less than the amount specified by the CoCP (art. 201).

As their definitions suggest, these rules are applied only to legal transactions. Legal acts or incidents and the exceptions defined by the Statute may be proved with all types of evidence. The parties may by-pass these rules by making an evidence agreement as well.

Oath

Oath is a tool of last resort for the party, with whom the burden of proof lies. Even though oath is not limited to actions that are subject to the rules of documentary proof, its significance is mostly appreciated in these types of actions. In such actions, if the party with whom the burden of proof lies is unable to present a deed and the opposing party does not consent to the submissions of other types of evidence, she is left with a single option, offering oath. Oath is also available for actions in which discretionary evidence may be used, as long as it is not an action to which ex officio investigation is applied. If ex officio investigation is applied, oath cannot be used, since the judge is not bound by any type of evidence, and the essence of oath lies in the concept of being bound.

Oath is a proceeding in which a party swears on her honor, pride and all the belief and values that she regards as holy that she will truthfully answer the questions she is asked and she will not withhold anything. If a party takes the oath, she consequently and immediately prevails in the action, for oath is definitive evidence.

If a party (e.g. the plaintiff) offers oath to the opposing party (e.g. the defendant) and the opposing party (e.g. the defendant) takes it, the offering party (e.g. the plaintiff) loses the action, which she would have lost anyway. However, if the opposing party (e.g. the defendant) refuses to take oath or returns it and the offering party (e.g. the plaintiff) takes the oath, then the offering party (e.g. the plaintiff) prevails in the action and the anticipated consequence of the oath is therefore generated.

Oath is personal in nature; therefore, only parties personally may take, refuse or return an oath. The judge may not offer oath and the attorneys may offer oath only if they are granted that particular power by their clients.

Witness

Witnesses are third persons who have first-hand (and in exceptional cases indirect) information on the matters of dispute. The party offering witness must present a list to the court showing the fact on which the witnesses will be examined and names of the witnesses to be examined. Persons who are not shown on this list may not be examined as witnesses and a second list may not be presented.

Witnesses are invited to the court with summonses (art. 243). Being examined as witness is an obligation for everyone, regardless of being connected to the action or not. According to the CoCP, every person who is summoned as a witness must appear, barring the provisions stipulated in the Statute (art. 245). The person who fails to appear as witness without stating en excuse despite being duly summoned must be brought by force and sentenced to pay the expenditures she has caused by failing to appear and also a disciplinary fine.

Before the testimony, the witness is asked her name, date of birth, occupation, address, whether she has a kinship or any other kind of relationship with the parties and whether there are any circumstances that may affect the reliability of her testimony (art. 254). If there are any reasons raising doubt over the reliability of the testimony of the witness, such as having an interest in the action, each party may claim and prove that reason (art. 255). Before the testimony, the witness must be informed regarding the importance of telling the truth, that she will be punished for perjury should she not tell the truth, that she will take oath on telling the truth, and that she is not permitted to leave the courtroom without express permission of the judge, and that she may be confronted with other witnesses where necessary (art. 256).

The person who is summoned as a witness may refuse to testify under circumstances that are expressly stated by the Statute (art. 247). Reasons for refusal to testify are divided into three categories, which are personal reasons, confidentiality and danger of harm to one's interests. Fiancée of either party, spouse of either party even if the marriage was

dissolved, lineal ascendants or lineal descendants of herself or of her spouse, persons sharing a bond of adoption with either party, relatives by blood or by marriage up to and including third degree, even if the marriage causing the relation was dissolved, foster parents and their children and the child in foster care may refuse to testify on personal grounds (art. 248).

Expert Examination

The expert has two distinct identities in procedure: Firstly, it is evidence, and secondly, it (she) is an assistant to the judge. According to article 266 of the CoCP, upon the request of a party or ex officio, the court may decide to take view and opinion of an expert on matters that require special and technical knowledge, with the exception of legal matters. An expert may not be consulted in matters that are possible to solve with the general and legal knowledge required in the profession of the judge. Experts are selected by the courts from persons registered as experts. The details of this registry process are determined by the Law of Expert Witnesses (no. 6754).

Unlike witness duty, expert duty is not mandatory; however some persons and organizations are required to accept the expert duty. Expert duty comprises complying with the summons and appearing before the court at the determined date and time, taking oath and providing the court with her view and opinion regarding the matter on which the expert is consulted (art. 269). Rules regarding the disqualification and recusal of judges apply also to the experts (art. 272).

The expert is obliged to perform the duty given by the court personally and may not delegate the execution of the duty to another person partially or as a whole (art. 276). The expert is obliged to keep confidential about the secrets she has come to know on account of her duty and avoid from using said secrets for her profit or the profit of others (art. 277). The expert performs her duty under the supervision and management of the court (art. 278).

The expert, should she feel the need, may ask information from the parties, provided that the court approves such procedure. The expert may not hear a party, unless the other party is present. If the inspection of something is needed in order for the expert to declare her view and opinion, she may perform the necessary inspection upon the court's decision. The parties may be present during the execution of this proceeding.

According to the CoCP, the court must decide whether the expert should deliver her view and opinion in writing or orally (art. 279). According to this provision, the expert may not make any legal assessments in her report or oral statements (art. 279/4).

Expert reports are discretionary evidence; therefore, the judge evaluates the view and opinion (which is essentially the report) of the expert on her own discretion along with other evidence (art. 282).

Inspection by Judge

Inspection by judge is, as its title suggests, an inspection of the subject matter of the action by the judge. According to article 288, the judge, with the intention of gathering knowledge, may decide to carry out an examination on the subject matter of the dispute personally with her senses on location or in the court. The judge may also employ the assistance of an expert where necessary. The court may decide for inspection upon the request of a party or ex officio until the oral arguments stage.

The parties and third parties are obliged to comply with the result of the decision for inspection and avoid obstructive behavior and conduct (art. 291). If a party resists to an inspection, it must be assumed that she has withdrawn that evidence if the burden of proof lies with her; and admitted the fact that was asserted if she is the other party. Insofar, the judge may not apply this provision, according to the circumstances and the reason behind resistance. Inspection must be carried out at a time convenient for the third party. Time and place of the inspection must be declared to the third party.

COURT DECISIONS AND JUDGMENT

In General

Court decisions are usually categorized as interlocutory decisions (*ara karar*) and final decisions (*nihai karar*). This distinction is made mainly to determine the appealability of

a decision. Interlocutory decisions, which are decisions made in order to resume the action as opposed to terminating it, are not appealable in principle as opposed to final decisions. In principle, the court may reverse its interlocutory decision at any time.

Final decisions of the court are generally categorized into three categories, which are (1) procedural final decisions (or dismissal of the action on procedural grounds), (2) the judgment (*hüküm*) (ruling on the merits) and (3) decisions declaring that the subject matter of the action has perished (therefore there is no need to render a judgment). Procedural final decisions are the dismissal of the action on account of procedural errors. These decisions do not resolve the dispute; therefore, a new action may be filed again. Judgments, on the other hand, resolve the dispute and therefore constitute res judicata, upon which they become unappealable. If a party files another action identical to the previous one, the court must dismiss the action on account of a res judicata on the matter.

According to the CoCP, the court must conclude the action with a final procedural decision, or a ruling on the merits (art. 294). The Statute also provides a definition for judgment: The final decision on the merits of the dispute rendered at the conclusion of litigation is the judgment. The judgment must be rendered and pronounced at the hearing in which trying of the action is concluded. Judgment must be rendered after confidential deliberation and pronounced in public (art. 295). In the conclusion part of the judgment, without repeating any word regarding the reasons, judgment regarding each claim, and obligations imposed on and rights bestowed upon the parties must be indicated with enumeration, in a clear way without raising any doubt or hesitation.

In order for an unappealable judgment rendered in an action to be considered as res judicata in another action, (1) the parties of the actions, (2) the factual reasons in the actions, and (3) the conclusion of the judgment in the previous action and the demand in the latter action must be identical (art. 303). A judgment constitutes res judicata only for the claims that were ruled on among the claims asserted in the action or the counter-action.

Party Proceedings that Terminate Action

Waiver and Acknowledgement of Claim

Both waiver and acknowledgment are defined by the CoCP. According to articles 307 and 308 of the CoCP, waiver (*feragat*) is the plaintiff's partial or complete abandonment of the demand that she has claimed, while acknowledgement (*kabul*) is the defendant's partial or complete consent to the demand of the plaintiff. Unlike waiver, acknowledgment produces legal consequences only in actions on which the parties may freely act. Waiver and acknowledgment may be carried out at any time until the judgment becomes unappealable (art. 310).

Waiver and acknowledgment may be carried out with a petition or orally during the trial (art. 309). Legal consequence of waiver and acknowledgment is not dependent on the consent of the other party or the court. In the event of partial waiver and acknowledgment, part that is waived or acknowledged must be clearly indicated in the petition or on the court record. Waiver and acknowledgment must be unconditional and without reserve.

A waiver or an acknowledgment by either party produces legal consequence of res judicata. If the waiver or acknowledgment is grounded on defective intention (*irade fesadı*), an annulment may be requested from the court (art. 311). The party carrying out the waiver or acknowledgment must be sentenced to pay judicial costs as if a judgment were rendered against her. If waiver and acknowledgement is concerning a part of the demand that was claimed, the allocation of judicial costs must be determined accordingly (art. 312).

Settlement

Settlement (*sulh*) is an agreement made before the court between the parties to resolve the dispute partially or entirely in the course of a pending action (art. 313). Like acknowledgment, the parties may settle only actions regarding disputes on which they may freely act. Matters outside the subject matter of the action may also be included in the scope of the settlement. Unlike waiver and

acknowledgement, settlement may be contingent. Settlement may be made at any time until the judgment becomes unappealable (art. 314).

Settlement terminates the action it is relevant to, and produces legal consequence of res judicata (art. 315). If the parties make settlement, it means that the action is terminated. There are two possibilities after this as per the parties' request. The parties may make a request to the court in order for the court to render and enter a judgment according to the settlement. If they do not make such a request, the court must render a final decision indicating that a ruling is unnecessary. If the settlement is grounded on defective intention or lesion, annulment may be requested.

SIMPLIFIED PROCEDURE

Along with written procedure, there is a secondary procedure specified by the CoCP and other statutes, applied in matters that are mostly less important and/or more urgent.

Similar to the written procedure, filing an action, as well as answer, must be carried out by submitting a pleading (art. 317). Time requirement for submitting the answer is two weeks from the date of service of the complaint to the defendant. However, as regards to circumstances and conditions, if it is too difficult or impossible to prepare an answer within this time, upon the request of the defendant also within this time, a one-time-only extension, which may not exceed two weeks, may be granted. The parties must be immediately notified of the decision regarding the extension request.

There are only two pleadings (one for each party) in this procedure; the parties may not submit response to answer or second answer pleadings. Complaint and answer pleadings may also be submitted with filling out the form designated in the Regulation.

The parties must expressly indicate all evidence that they offer in their pleadings by stating that which evidence is to be used to prove each fact, attach the evidence in their possession to their pleadings and provide information in their pleadings regarding documents that must be brought from elsewhere (art. 318). Prohibition of expansion or change of claim begins with the commencement of the action; prohibition of expansion or change of defense begins with the submittal of answer to the court (art. 319).

The court must complete hearing the parties, examining the evidence and executing trial proceedings over two hearings (plus one preliminary hearing). Recess between the hearings may not exceed one month. However, in necessitating circumstances, such as delay in expert's examination or execution of trial proceedings by way of judicial assistance, upon stating the reason, the judge may disregard these rules. Regarding actions that simplified procedure is applied, if the action whose case file is removed from proceedings is left unattended once more after its renewal, it is assumed that the action was not filed.

Since the simplified procedure is the exception and not every aspect of it is set out by the CoCP, provisions regarding written procedure must be applied in the absence of provisions regarding simplified procedure in the CoCP or another statute (art. 322).

JUDICIAL COSTS AND JUDICIAL AID

Scope of Judicial Costs

Judicial costs are comprised of two categories: court fees (*yargılama harçları*) and judicial expenditures. Court fees are charges collected from the parties as a contribution for litigation services rendered by the State. The court fees are determined by the Law of Charges numbered 492 in detail, most important of which is the fee for decision and the execution copy of the judgment. If the subject matter of the action is material, this fee is determined proportionally to the value or amount of the subject matter.

Second aspect of the judicial costs is the expenditures made during litigation. These expenditures also include any expenses made before the commencement of the action for the resolution of the dispute, such as the expenses for provisional legal relief, protest, third party notification, written warning and preparation of power of attorney.

According to the CoCP, barring the circumstances stated by the Statute, judicial costs must be imposed on the party against whom the judgment is rendered (art. 326). If both parties partially prevail in the action, the court must divide the judicial costs according to the proportion of their rightfulness. If the judgment is rendered

against multiple persons, the court may divide costs between those persons or decide that they should be jointly responsible for the costs.

Judicial Aid

Judicial aid is a necessary and indispensable institution owing to the welfare state principle. According to the Turkish Constitution, the Republic of Turkey is a "welfare state governed by the rule of law". According to article 334 of the CoCP, persons who do not have the means to pay the judicial and compulsory enforcement costs partially or completely without causing a substantial predicament on their and their families' livelihood are eligible for judicial aid regarding their claims and defenses, requests for provisional legal relief and compulsory enforcement procedures, provided that their claims are not clearly without merit. Associations and foundations working for the benefit of public are eligible for judicial aid if they seem rightful in their claims and defenses and if they are not in a condition to be able to pay the necessary costs partially or completely without running into financial trouble. Eligibility of foreign persons (natural or legal) for judicial aid is, in addition, dependent on reciprocity condition.

Grant for judicial aid provides temporary exemption from all judicial and compulsory enforcement procedure costs and exemption from paying security for judicial and compulsory enforcement procedure costs (art. 335). All expenditures necessary during the action and compulsory enforcement procedure are made by the State as advance payment. The court also provides an attorney whose fee to be paid for later on, if the action necessitates party representation. These aspects do not have to be granted as a whole, the court may grant one or some of them instead.

All judicial costs postponed and advances paid by the State because of judicial aid must be collected from the person who is decided to be wrongful at the conclusion of the action or the compulsory enforcement procedure. If the person who was granted judicial aid is concluded to be wrongful, a decision may be rendered allowing the judicial costs to be paid in monthly installments in the course of one year at the most, if it is deemed appropriate (art. 339). If it is clearly perceived by the court that collection of the judicial costs paid by the State or upon which an exemption is granted on account of judicial aid would cause unjust suffering on the person who was granted judicial aid, the court may decide, concurrently with the judgment, to exempt the person from partial or complete payment. The fee of the attorney who was commissioned by the bar association upon the request of the court for the person who was granted judicial aid is paid by the State Treasury as a judicial cost (art. 340).

PROVISIONAL LEGAL RELIEF

In General

Provisional legal relief is any kind of temporary relief, which may be granted by the court before or during the litigation or the proceedings, regarding the subject matter of the dispute. There are various types of provisional legal reliefs in civil procedure, set out by various statutes. Three types of provisional legal reliefs are more common than others. They are; provisional remedy, provisional attachment and preliminary discovery of evidence. Provisional remedy is the general provision to be resorted to when a provisional relief is needed and no other type of temporary relief is designated by any statutory provision regarding the matter. Provisional attachment will also be examined later in the chapter.

Provisional Remedy (*İhtiyati Tedbir*)

Provisional remedy is the prototype provisional relief; if no other relief is determined or a power is granted to the judge by a statute, provisions regarding provisional remedy must be applied. According to the CoCP, in the event of a concern that the retrieval of the right can become extremely difficult or impossible on account of a possible change in the current state, or an inconvenience or serious damages may occur because of delay, a provisional remedy regarding the subject matter of the dispute may be granted (art. 389). Provisional remedy may be granted to serve one of three purposes: performance (e.g. provisional alimony), protection (e.g. surrendering the subject matter to a trustee) or a temporary constructive measure

(e.g. granting the custody of a child to a parent in divorce actions).

Unlike some other instances of provisional legal relief, like the power granted to family court judges, provisional remedy must be requested by the relevant party, it may not be granted ex officio. Provisional remedy must be requested from the court that is competent to try the principle action with respect to subject-matter jurisdiction and venue before the commencement of the action; and exclusively from the court that is trying the principle action if the action is already filed (art. 390). The judge may grant provisional remedy before hearing the opposing party if it is necessary for immediate protection of the rights of the requesting party. The party requesting the remedy must clearly state the grounds and type of the remedy in her petition and prima facie (*ilk görünüşte*) prove her rightfulness on the merits of the principle action.

Grant of the remedy is not enough on its own; its execution must also be requested by the relevant party from the proper authority. The execution must be requested within one week from the decision granting the remedy; otherwise, even if the principle action is filed within statutory time limit, the remedy is automatically removed (art. 393).

If the provisional remedy is granted before the commencement of the principle action, the person who has requested the provisional remedy must file the principle action, present the document showing the filing of the action to the officer who has executed the remedy, ensure that the document is filed within the case file, and collect a receipt in return within two weeks from the date of the request for execution of the remedy. Otherwise, the remedy is automatically removed (art. 397). The effect of the provisional remedy decision continues until the judgment becomes unappealable, unless otherwise stated.

APPELLATE REMEDIES

In General

Since the court of first instance may err, a means of review must be present in order to comply with the right to a fair trial. The two most important appellate remedies in Turkish civil litigation are *istinaf* and *temyiz*. *İstinaf* (intermediate appeal) is the appellate remedy to be applied against the decisions of the first instance courts, while *temyiz* (appeal) is the remedy to be applied against the decisions of the circuit courts of appeals.

Appellate remedies are generally divided into two categories: ordinary appellate remedies and extra-ordinary appellate remedies. Ordinary appellate remedies are the remedies to be exhausted before a decision becomes unappealable. Intermediate appeal and appeal are the ordinary appellate remedies. Extra-ordinary appellate remedies, on the other hand, are the remedies that may be applied after the decision becomes unappealable; therefore, they remove res judicata. There is only one real extra-ordinary appellate remedy in civil litigation: the renewal of proceedings (*yargılamanın iadesi*).

Intermediate Appeal

In intermediate appeal remedy, unlike the appeal, the higher court reviews the decision in question not only with regard to matters of law, but also with regard to matters of fact. Apart from the exceptions determined by the CoCP, the court reviews the judgment as if it were a court of first instance. However, it must be stated that, the intermediate appeal is not a complete renewal of the proceedings; it is carried out within the boundaries of the petitions of the parties regarding intermediate appeal.

According to the CoCP, intermediate appeal is applicable against final decisions, decisions denying provisional remedy and provisional attachment requests and decisions rendered upon objection against such requests by the courts of first instance (art. 341). Decisions regarding actions concerning property rights in which the value or amount of the subject matter does not exceed a certain amount are unappealable.

Application for intermediate appeal remedy must be made with a petition (art. 342). Along with other mandatory points, grounds for intermediate appeal and the demand must be included in the petition. Article 355 states that, the review must be limited to the grounds stated in the petition for intermediate appeal; however, if the circuit court of appeals observes an aspect against public policy, it must take it into consideration ex officio.

Time limit for application to intermediate appeal is two weeks. This time begins with the due service of the execution copy of the judgment to

each party (art. 345). The petition for intermediate appeal must be served to the opposing party by the court that rendered the decision in question (art. 347). The opposing party may submit a response petition within two weeks from the date of service to any court. After the petitions are submitted or the deadline for submittal has passed, the court sends the case file to the relevant circuit court of appeals.

Application to intermediate appeal does not stay the enforcement of the judgment. However, the provision in article 36 of the Code of Compulsory Enforcement and Bankruptcy regarding the stay of enforcement is reserved by the CoCP. Therefore, if the necessary conditions set by the Code of Compulsory Enforcement and Bankruptcy are met; a stay on enforcement of the judgment may be secured. Enforcement of rulings granting alimony or child support, on the other hand, may not be stayed (art. 350). Rulings regarding the law of persons, family law or property rights that concern real property may not be enforced until they become unappealable.

Since the intermediate appeal review is carried out on matters of fact along with matters of law, it is very similar to the procedure carried out by the courts first instance. Therefore, the CoCP states that, apart from the provisions specifically set out for the intermediate appeal, the procedure applied in the courts of first instance are also to be applied in the circuit court of appeals (art. 360). Accordingly, the final decision (judgment) of the circuit court of appeals must be rendered and announced (by pronunciation or service) in accordance with the provisions regarding judgment.

Appeal

Appeal is the remedy to be applied against the decisions rendered by the circuit courts of appeals; it is carried out limited to matters of law. Final decisions rendered by the civil chambers of the circuit court of appeals that are not specified by the Statute as unappealable and decisions by the civil chambers of the circuit court of appeals regarding requests for invalidation of arbitration awards are eligible for appeal.

Time limit for appeal is one month from the date of service of the final decision in question (art. 361). The prevailing party may also apply for appeal remedy, provided that she has legal interest in doing so. Since appeal is the third (ultimate) instance, some final decisions are excluded from appellate review by the Statute.

Application for appeal remedy must also be made with a petition (art. 364). Since, unlike intermediate appeal, the scope of the appellate review is not limited to the grounds stated on the petitions of the parties, even if the petition for appeal lacks the necessary points set out by the CoCP, it may not be rejected and the appellate review must be carried out, as long as the petition contains the identity and signature of the applicant and sufficient information to determine the decision that is appealed. Within the review, the CoC may reverse the decision in question for any reason that it may deem as against the law.

There are three types of decisions that the CoC may render. It may (1) affirm the decision, (2) affirm the decision after making necessary corrections or (3) reverse the decision. If the CoC reverses the decision it refers the case back to the first instance or the circuit court. The initial court may either obey to this reversal and renders a new final decision accordingly, or insists on the reversed decision. If it insists and said decision is appealed, the CoC examines the matter again; however this time its decision becomes final.

Because the appeal remedy is not only aimed at implementing justice in the dispute at hand, but also to secure the uniform application of the law throughout the country, another and unique type of appeal called the "appeal for the benefit of the Statute" exists. According to article 363 of the CoCP, an application for appeal for the benefit of the statute must be made by the Ministry of Justice or the Office of the Chief Public Prosecutor of the CoC against decisions rendered as unappealable by the courts of first instance or the civil chambers of the circuit courts of appeals and decisions that have become unappealable without an intermediate appeal or appellate review, with the claim that the decision is against the applicable law. If the CoC finds the application justified, it must reverse the decision in review for the benefit of the Statute. The most important aspect of this type of appeal is that, reversal decisions rendered in this type of appeal do not remove the legal consequences of the original final decision that has since become unappealable; therefore, the parties of the judgment are not affected by the reversal. A copy of the reversal decision is sent to the Ministry of

Justice and published in the Official Gazette by the Ministry in order to ensure that the error in question is not repeated by another court.

Renewal of Proceedings

Renewal of proceedings is an extra-ordinary appellate remedy, granted on account of a substantial procedural error made during the proceedings. If one of the circumstances determined by the CoCP has occurred during an action which was since terminated with a final decision and the said decision has become unappealable, the renewal of proceedings is applicable, provided that the application is made in due time.

The petition containing the request for renewal of the proceedings must be examined by the court that has rendered the decision (art. 378). The court may order the requesting party to give sufficient security to cover the damages of the opposing party, according to the nature of the reason asserted.

Upon the request for renewal, the court carries out a preliminary examination after inviting and hearing the parties. The court checks whether the request is made within the statutory time limit, the judgment whose vacation is requested by way of renewal of proceedings was rendered as or has become unappealable, and the reason asserted for renewal of the proceedings is stated as a reason for the renewal of proceedings in the Statute (art. 379). If any of these conditions is absent, the judge must dismiss the action before the examination on the merits commence.

If the court, at the conclusion of the examination, determines that the reason asserted for the renewal of proceedings is justified, a new trial must be carried out. According to the result of the trial, the judgment that was previously rendered must either be approved or amended partially or completely (art. 380). However, if the action was tried and resolved before persons who were not attorneys or legal representatives without express or implied consent of the relevant party, or a conflicting judgment was rendered and became unappealable in an action with the same parties, subject matter and factual reasons after the judgment rendered in the previous action have become unappealable, as well as the matter in which the third parties may request the procedure, the judgment must be vacated without any further examination.

ARBITRATION (*TAHKİM*)

Arbitration is a dispute resolution method in which the parties choose the arbitrator (or the arbitrators) and the procedure to be followed. Otherwise, arbitration is similar to litigation in courts as both methods determine which party is right and both render binding final decisions.

The scope of the rules of arbitration in the CoCP are limited to disputes that do not involve any foreign element as defined by the Code of International Arbitration, for which the seat of arbitration is determined as Turkey (art. 407). Disputes arising from rights attached to real property and matters on which the parties may not freely act are not eligible for arbitration (art. 408). Most of the provisions regarding arbitration are not mandatory. However, there are some mandatory provisions regarding which the parties may not agree otherwise. For instance, according to article 423, the parties share equal rights and powers in arbitration proceedings. This principle must be applied by the arbitrator or the arbitral tribunal regardless of how the parties approach the matter. It also needs to be noted that, provisions of the CoCP other than the ones regarding arbitration are not applicable in arbitration proceedings, unless otherwise stated by the Statute (art. 444).

The CoCP provides a definition for the arbitration agreement. According to this definition, an arbitration agreement is a contract in which the parties agree on the resolution of a part of or all present or possible future disputes arising from a contractual or non-contractual legal relationship by an arbitrator or an arbitral tribunal (art. 412). Arbitration agreement may be made as a clause of a contract between the parties or as a stand-alone contract.

If an action is filed in the court regarding a dispute that constitutes the subject of an arbitration agreement, the opposing party may raise a preliminary objection. In this case, if the arbitration agreement is not void, ineffective or impossible to apply, the court must uphold the objection and dismiss the action on procedural grounds (art. 413). Raising an arbitration objection in the court does not stay or prevent arbitration proceedings. The objection regarding arbitration agreement is a preliminary objection; therefore, it must be raised within the answer pleading; otherwise, it must be disregarded by the court.

The parties may determine the selection procedure of the arbitrator or the arbitrators freely (art. 416). The CoCP also provides a default procedure to be followed in case the parties have not agreed on one. The parties may determine the number of arbitrators; however, it must be an odd number (art. 415). If the number of arbitrators is not determined by the parties, three arbitrators must be selected.

The parties, without prejudice to the mandatory provisions in the Statute, may freely agree on the rules regarding the procedure to be carried out by the arbitrator or the arbitral tribunal, or determine the rules by making a referral to any arbitration rules (art. 424). If such an agreement does not exist between the parties, the arbitrator or the arbitral tribunal carries out the arbitration proceedings in a way it deems appropriate with taking the arbitration provisions of the CoCP into consideration.

The arbitrator or the arbitral tribunal may hold hearings for any reason such as presentation of evidence, examination of oral statements or request for expert examination; or limit the proceedings to an examination on the case file (art. 429). Unless otherwise agreed by the parties, the arbitrator or the arbitral tribunal must hold a hearing at an appropriate stage of the proceedings, upon the request of a party.

Sole ordinary appellate remedy against the arbitration award is an action for invalidation (art. 439). Action for invalidation must be filed in the court at the place of the arbitration proceedings, and it must be resolved by the court with priority and as soon as possible. Action for invalidation must be filed within one month. Decisions rendered regarding an action for invalidation may be appealed. Appellate review must be carried out with priority and as soon as possible, limited to the grounds for invalidation stated in the CoCP. Appeal does not stay the enforcement of the award.

ALTERNATIVE DISPUTE RESOLUTION (ADR)

In General

Alternative dispute resolution methods are means for the parties of the dispute to resolve the dispute among them rather than resorting to litigation mostly involving a neutral and independent third party. There are a number of institutional ADR methods implemented in civil procedure. ADR methods in currently implemented in Turkey may be divided into two broad categories, which are conciliation (*uzlaştırma*) and mediation (*arabuluculuk*). Conciliation power of the lawyers set out by the Law of Lawyers is the most important example of conciliation; and the Law on Mediation in Civil Disputes numbered 6325 (LMCD) is the Statute that regulates institutional mediation in Turkey.

Apart from the LMCD and the Law of Lawyers, there are referrals made by statutes to mediation and conciliation in a broader sense regarding family law. As we have previously mentioned, family courts must employ psychologists, pedagogues and social work specialists. Article 7 of the Law on Establishment, Duties and Procedure of Family Courts numbered 4787 states that, before the examination on the merits is commenced, family courts must determine the issues that the spouses and the children are facing and encourage their resolution through amicable means through utilizing the assistance of the specialists employed by the court where necessary. Therefore, conciliation and even mediation is possible in family courts, with the supervision of the court. Another interesting provision regarding family law is brought by the Regulation on Family Consultation Centers to be Established by Natural Persons, Civil Legal Entities and Governmental Organizations and Agencies. Article 16 of the Regulation, which determines the duties and powers of family consultants, also includes the duty (and power) to plan and employ mediation services to families before divorce proceedings. Even though the Regulation clearly uses the term mediation, this is simply an ADR method set out by special provisions, not a "mediation" service within the scope of the LMCD. There are instances of mediation and conciliation in the Law of Villages and the Law on Unions and Collective Labor as well.

Conciliation Power Of Lawyers

According to article 35/A of the Law of Lawyers, lawyers, in company with their clients, may invite the opposing party to conciliation

before the commencement of the action or during the proceedings in which the lawyer (attorney) is appointed and on which the parties may act freely.

Regarding the procedure to be followed in conciliation, there are two additional provisions in the Regulation of Law of Lawyers. According to article 16 of the Regulation, the attorneys must inform the parties regarding their legal standings, bring resolution proposals and encourage the parties for conciliation. Even though the provision of the Statute does not impose an impartiality obligation on the attorneys during conciliation negotiations, provisions of the Regulation do so. The obligation to keep confidential regarding conciliation negotiations is also set by the regulation, even though it is omitted from the statutory provision.

Conciliation, according to the Law of Lawyers, can be terminated with a signed binding agreement. Article 35/A states that, if the opposing party accepts the invitation and an agreement is reached at the end of the conciliation negotiations, a record containing the subject matter, place and date of the agreement as well as the obligations of the parties may be prepared. If such a document is prepared and signed by the parties as well as their attorneys (which is mandatory), it carries the power of an execution copy of the judgment within the scope of the article 38 of the Code of Compulsory Enforcement and Bankruptcy. Therefore, it may be the subject matter of an enforcement procedure exclusive to judgments.

The agreement document is enforceable on its own merits; it does not have to be approved by another authority, such as the court. Since the Statute only grants the features of an execution copy of the judgment to this agreement, it does not constitute res judicata.

Mediation In Civil Disputes

The term mediation is used in different provisions of various statutes; however, institutional mediation is regulated by the Law on Mediation in Civil Disputes. Therefore, with the exceptions set by other statutes, such as the ones that we have mentioned above, mediation services must be conducted in accordance with the LMCP. The statute provides definitions for the terms “mediation” and “mediator”. According to the Statute, mediation is the dispute resolution method that is carried out voluntarily with the involvement of a neutral and independent third person who has received a specialty training, brings the parties together in order to discuss and negotiate, and enables the communication process between the parties to ensure that the parties understand each other and thus create their own solutions with resorting to systematic techniques; and mediator is the natural person providing the service of mediation and enlisted in the registry of mediators managed by the Ministry (art. 2).

attention

Main two features of mediation according to the Statute are the principles of voluntariness and equality.

According to article 3, the parties are free to consult to the mediator and continue, finalize or abandon the mediation process. In addition, the parties have equal rights in the matter of consulting to the mediator, as well as during the entire process.

According to the first provision of the Statute, the Statute may be applied only regarding the resolution of civil disputes arising from matters and transactions on which the parties may freely act, including the ones that involve a foreign element.

As the LMCP defines, mediator is the natural person who is providing the service of mediation and enlisted in the registry of mediators managed by the Ministry. According to the Statute, only jurists (i.e. graduates of Law Faculties) with five-year experience may be mediators. Mediators must also complete their mandatory mediation training and pass the necessary exams.

Since mediation is voluntary according to the Statute, the process commences with the application of the parties to the mediator. The mediator or the mediators are selected by the parties; however, this rule is not mandatory, the parties may give this power to a third party (art. 14). Since according to the Statute, the duration between the commencement and the termination of mediation process is not taken into account in the computation of statute of limitations and preclusive time requirements, time of commencement of the process is very important and therefore determined by the Statute. According

to article 16 of the Statute, if mediation is sought before the commencement of litigation, mediation process commences at the date in which a record documenting the agreement between the parties and the mediator to resume the process is prepared and upon the invitation to the initial meeting is delivered to the parties.

Furthermore, if there is a pending action and the parties collectively state that they wish to consult to mediator after the commencement of the action, the proceedings must be stayed by the court for a period not exceeding three months (art. 15/5). This period may be extended up to three months if the parties request collectively.

As with all ADR methods, statements made and documents presented during the mediation process are inadmissible as evidence in litigation. Disclosure of the said information may not be requested by the court, arbitrator or any administrative authority. These statements and documents may not be evaluated as evidence even if they were presented as evidence contrary to the provision.

If the desired result of mediation is achieved at the end of the process, an agreement document is prepared by the mediator and the parties. The scope of this agreement is determined by the parties and the document is signed by the parties and the mediator (art. 18). The parties must request and obtain an annotation regarding the enforceability of the agreement document from the court should they wish to enforce it. If the mediation was sought before the commencement of litigation, the request must be made to the proper court regarding the subject matter of the principle dispute with respect to subject-matter jurisdiction and venue. If mediation was sought during litigation, the request for annotation regarding the enforceability of the agreement must be made to the court that is trying the action. The agreement bearing this annotation is considered as a document that carries the attributes of an execution copy of the judgment.

your turn 2

Identify the Alternative Dispute Resolution methods.

COMPULSORY ENFORCEMENT AND BANKRUPTCY

Fundamentals of Compulsory Enforcement And Bankruptcy

What are Compulsory Enforcement, Individual Enforcement and Collective Enforcement?

Compulsory enforcement law in general comprises of two major parts. While first part of the discipline deals with individual debt recovery and is called individual enforcement, the latter deals with the creditors and assets of a debtor as a whole and is appropriately called collective enforcement. If a debtor fails to perform her debt, the creditor must refer to the State to retrieve what she is owed, since one cannot use force or any other illegal means to retrieve a credit personally. The State, in return, must comply with this request, since it is its duty according to the Constitution, and compel the debtor to perform, hence the name compulsory enforcement.

This help comes in many shapes and forms. If the obligation is simply a monetary one, the creditor may choose to pursue enforcement for attachment without a judgment; or file an action and wait for the judgment. In more complex obligations however, the latter option becomes necessary. There are many means of enforcement tailored for obligations such as money, vacation of real property, even children in custody matters.

The second part of the discipline, collective enforcement, is somewhat different and more complex. It may as well begin with an individual debt recovery request, but the procedure is dissimilar. If a debtor becomes insolvent, this insolvency must be resolved for better or worse. Therefore, there are different courses that may be pursued or utilized according to the attributions of the debtor or the debts. Debts may be restructured, bankruptcy may be postponed, or if all else fails, the assets of the debtor may be liquidated and her creditors get to be compensated. These methods constitute collective enforcement.

Another important difference between individual and collective enforcement is that,

public debts such as taxes, are not subject to the Code of Compulsory Enforcement and Bankruptcy, but to another Statute (Statute no. 6183). This Statute provides a different procedure for such debts. However, should the State want to pursue bankruptcy or a similar collective procedure, this must be pursued in accordance with the Code of Compulsory Enforcement and Bankruptcy since it is the only set of rules for collective enforcement.

Sources of Compulsory Enforcement Law and Principles to be Followed

The most important source of compulsory enforcement law is the Code of Compulsory Enforcement and Bankruptcy numbered 2004 (CCEB), which was enacted in 1932. This Statute was amended several times, some of which of these amendments are extensive. Apart from the CCEB, the Regulation of the Code of Compulsory Enforcement and Bankruptcy and many other Statutes and regulations are fundamental for the discipline as well. Since the law of compulsory enforcement is a procedural and highly formal discipline; these rules and regulations must be followed to the letter.

Compulsory enforcement is a hybrid discipline since it deals with civil matters yet involves compulsion. Therefore, even though the roots of the law lie within civil law, many aspects of it appertain to public policy. When a creditor is dissatisfied, the means to apply and the procedure to be followed must be determined by the Statute. The collection agencies or other bodies cannot act on their own or create new methods for debt recovery.

Since the enforcement law is an extension of the law of civil procedure, many of the principles followed therein, such as principles of disposition or principle of judicial economy, are applied to enforcement law as well. Apart from said principles, there are some principles unique to the enforcement law. For instance, according to a principle, monetary and other types of credits must be distinguished. If the debtor owes money, according to the liquidation principle, her assets must be seized (attachment), sold, and the creditor must be paid in money; i.e. assets cannot be delivered to the creditor.

Parties and Bodies of Compulsory Enforcement

As it is the case with litigation, individual enforcement procedures must involve two parties. The party seeking the State's assistance is called the creditor (*alacaklı*), while the party against whom the procedure is started is called the debtor (*borçlu*). These terms are procedural and formal terms, i.e. even if the debtor is not really in debt to the creditor, for the sake of the pending procedure, she is still referred to as the debtor.

Both parties must possess capacity required by the Statute in order to commence and defend enforcement procedures. Issues regarding capacity of the parties must be audited by the enforcement agencies ex officio. Any party may also be represented by an attorney (lawyer) in the procedure.

There are numerous agencies and bodies functioning in compulsory enforcement procedures. In individual enforcement, principle bodies are the compulsory enforcement agencies (*icra dairesi*). These agencies are public organizations that are established where a civil court of general jurisdiction is present. Individual enforcement procedures start and end in these agencies. These agencies have civil servants that carry out the proceedings set by the Statute. The clerk of the agency may use force where necessary in order to carry out the proceedings. In collective enforcement, on the other hand, bodies differ according to the procedure or the stage of any procedure. These bodies will be examined later in the chapter.

Compulsory Enforcement Courts (*İcra Mahkemesi*)

Compulsory enforcement courts are the courts established by the CCEB to function in matters within the scope of said Statute. Even though it is not the only court to function in enforcement law, most of the matters regarding individual and to a lesser extent collective enforcement are resolved in this court. Compulsory enforcement courts resolve matters both civil and criminal in nature, as long as they are related to compulsory enforcement.

Although these courts are proper courts by all means, some of their decisions are not final. The reason behind this is that these courts generally must act and decide expeditiously; therefore, sometimes they do not follow the same evidentiary

rules as ordinary courts. However this is not absolute and some decisions of the compulsory enforcement courts are final and resolve disputes. Decisions of compulsory enforcement courts are subject to appellate review and matters regarding this are determined by the CCEB.

Complaint Procedure (*Şikayet*)

All agencies and bodies functioning in compulsory enforcement are subject to complaint procedure. This is more apparent with compulsory enforcement agencies as every single agency is paired with a compulsory enforcement court and subject to its audit. If the action or proceeding of an agency or an body does not comply with the law or the facts of the procedure, or a refrainment from executing a right, or an abeyance exists, the person affected from said wrongdoing may apply to the compulsory enforcement court for the complaint procedure.

Even though the time limit for complaint procedure is set by the Statute as 7 days starting with cognition; in some instances, there is no time limit for application. If the wrongdoing is based on refrainment from executing a right, or an abeyance, or the wrongdoing appertains to public policy, the affected person may apply for complaint at any time.

If the court agrees with the requester, it either voids or alters the decision of the agency or the body; or mandates something to be carried out by the agency or the body, since the court cannot carry out the proceeding itself. While voidance is proactive, alteration is retroactive.

ENFORCEMENT PROCEDURE FOR ATTACHMENT WITHOUT A JUDGMENT

Ordinary Enforcement Procedure for Attachment

Scope and Basics

The ordinary procedure for attachment is the principle procedure under the CCEB. The Statute provides rules regarding this procedure in detail while making referrals to said rules with regard to the other procedures. In order for the ordinary procedure for attachment to be pursued, either the credit must be monetary, or the debtor must be obliged to give a collateral security (art. 42). Furthermore, the credit should not be guaranteed with a pledge. The credit may be owed under foreign currency; however, as per the CCEB, the creditor must initiate the procedure with Turkish currency (art.58/I/3). Regarding anything other than actual monetary (and collateral security) credits, this procedure cannot be pursued, even if the credit is something with commodity value such as gold.

Ordinary procedure for attachment is initiated with the request of the creditor (*takip talebi*) from the proper compulsory enforcement agency. The procedure cannot be started from any compulsory enforcement agency with regard to venue. However, this is not checked by the agency, the debtor must raise an objection regarding venue. The venue is determined according to the Code of Civil Procedure; therefore, principle venue is the domicile of the debtor. The CCEB provides an additional venue rule with regard to credits arisen from contracts, which also authorizes the agency where the contract was made (art. 50/I).

Payment Order

Upon receiving the request, without examining any aspect of the claim, the agency serves the debtor with a payment order (*ödeme emri*) if all required aspects of the request is present (art. 60/I). A payment order is an order to the debtor, demanding the payment of the credit being enforced, and an official warning to remind her that, should she fail to pay the credit, the procedure is going to be continued.

Since the payment order is an official document, it must be served accordingly.

After the payment order is served, the debtor has 7 days to respond. There are three broad possibilities that can happen before the deadline: The debtor may object to the order, pay the credit, or do neither. If she chooses the second way and pays, the procedure concludes. If she chooses the third way, she must declare her assets and the procedure continues. If the debtor raises an objection, on the other hand, the procedure stays.

Objection against the Claim and Set Aside Thereof

Upon being served with the payment order, the debtor may raise an objection against the order. Firstly it may be based on substantive law, such as objections or affirmative defenses. Regarding substantive law objections, the CCEB makes a distinction between denying a signature on the deed and any other objections made against the debt itself which are simply categorized as "objection to debt". If the debtor wishes to deny the signature on an unofficial deed, she must do so explicitly and separately from any objection to debt (art. 62/V). If the debtor fails to do so, it is assumed that she has admitted that the signature on the deed is hers regarding that specific procedure.

All other objections are treated as objections to debt. The grounds of this objection are binding in the removal of objection proceedings (but not in the invalidation of objection proceedings) (art. 63). Apart from the grounds of objection to debt that are determinable on the deed, the debtor cannot raise any new grounds for objection during the removal of objection proceedings in the compulsory enforcement court. This limitation does not exist in the invalidation of objection proceedings in the proper court.

The debtor may also raise a partial objection to the order. If the debtor admits that she has an obligation but claims that it is less than the request, she must do so with raising a partial objection. The debtor must indicate the exact amount of the part that she objects; otherwise it is assumed that no objection was raised (art. 62/IV).

Time limit for objection is 7 days from the date of service (art. 62/I). However, if the debtor misses the deadline on account of reasons beyond her control, she may apply to the compulsory enforcement court for a late objection in three days after the impediment is lifted until the liquidation of her assets are completed (art. 65).

The objection raised by the debtor (or the late objection if it is granted by the court) automatically stays the proceedings. If the objection is partial, it only stays the contested part of the claim. Upon this stay, the creditor has two options: She may either (1) apply to the compulsory enforcement court and request the removal of the objection (*itirazın kaldırılması*) within six months or (2) file an action in the proper court for the invalidation of the objection (*itirazın iptali davası*) within one year.

Invalidation of objection is a proper action filed in the proper court determined by the Code of Civil Procedure (or any other Statute). If the creditor does not have any of the documents determined as proof for the removal procedure, she must file an invalidation of objection action in order to set aside the objection. If the creditor had already made a request for removal from the compulsory enforcement court but she was denied, she may file an invalidation of objection later on, since the removal procedure does not generate res judicata.

The time limit to file this action is one year from the date the creditor is served with the objection of the debtor (art. 67/I). However, this time limit only affects the enforcement procedure at hand but not the obligation itself; therefore, if the time expires, even though the creditor cannot pursue the original procedure, she may file a proper action for performance in the court. However, in this case, the debtor cannot be sentenced to pay compulsory enforcement compensation if the creditor prevails in the action. Compulsory enforcement compensation is a special type of compensation set by the CCEB to be imposed upon the party that is found wrongful at the end of the removal or invalidation of objection proceedings. The requirements for the compensations differ according to the type of proceedings. If the prevailing party demands the said compensation, the court sentences the losing party to pay compensation in the amount of no less than twenty percent of the scope of the judgment.

If the debtor had raised an objection only by denying the signature on the deed, the creditor may only request provisional removal of objection from the compulsory enforcement court. Apart from said instance, instead of requesting the invalidation of objection, the creditor may request conclusive removal of the objection within six months from the date she is served with the objection. This time limit is a preclusive time requirement with respect to the enforcement procedure without judgment (art. 68/I). Therefore, if the creditor makes the request after the deadline, the court must deny the request on procedural grounds, even if the opposing party had not raised any objection against the request.

Unlike the invalidation procedure, removal of objection is not a proper action. Since it is not

a proper action, it is resolved according to the special rules set by the CCEB, but not the general procedures in the Code of Civil Procedure. Most essential feature of this procedure is with respect to proof. In the procedure, use of evidence is limited to the documents determined by the CCEB, and other types of evidence, such as witness or oath, are not admissible.

If the debtor had raised an objection only by denying the signature on the unofficial deed, the creditor must request the provisional removal of objection from the compulsory enforcement court, or file an action for invalidation of the objection. If the compulsory enforcement court concludes that the signature is the debtor's, it temporarily removes the objection and sentences the debtor to pay the compulsory enforcement procedure if the creditor had demanded. Once again, the losing party may file an action later on, since this is not a proper action. The essential difference between this type of removal and the conclusive removal involves the legal consequences of the respective removal decisions. Unlike conclusive removal, the creditor cannot request regular attachment, but a temporary one. After the temporary attachment, the creditor cannot request liquidation of the seized assets. The debtor, on the other hand, must declare her assets within three days (art. 75) and must file an action for recovery from debt (*borçtan kurtulma davası*). If the debtor fails to file said action within 7 days, temporary removal decision becomes conclusive and if temporary attachment was carried out, it transforms into conclusive attachment (art. 69).

Negative Declaratory Action and Action for Restitution

The debtor may also file a proper negative declaratory action (*menfi tespit davası*) before or during the enforcement procedure (art. 72/I). The criterion to distinguish the filing of this action from the action that we are going to discuss next, the action for restitution (*istirdat davası*), is whether the obligation is performed; regardless it was directly paid or paid with the liquidation of the attached assets of the debtor. In first case, a negative declaratory action, and in second case an action for restitution must be filed by the debtor.

If the credit is paid, the debtor must file an action for restitution in order to retrieve it. In addition, if the payment was made during the negative declaratory action, said action automatically transforms into an action for restitution (art. 72/VI). Unlike the negative declaratory action, the action for restitution is an action of performance; the debtor (now the plaintiff) demands the return unlawfully and unnecessarily paid money to the creditor on account of the compulsory enforcement procedure. In order to file an action for restitution, a monetary performance must have been made during a compulsory enforcement procedure under the intimidation of the said procedure. Since the existence of intimidation through compulsory enforcement is a requisite, if the debtor had made the payment before the payment order became conclusive (e.g. during the seven-day period after the payment order), she cannot file this action; the only remedy for her to recover the loss is to file an action for unjust enrichment (*sebepsiz zenginleşme davası*) according to the general provisions of the Turkish Code of Obligations.

Enforcement Procedure for Attachment Based On Commercial Bills (Negotiable Instruments)

If the credit is bound to a commercial bill (*kambiyo senedi*), instead of making a request for the ordinary procedure for attachment, the creditor may initiate a procedure purposed for commercial bills. Many aspects of this procedure are same as the ordinary procedure. The most essential difference between the two is the existence of a commercial bill. Unlike the ordinary procedure, in order to initiate the procedure, the creditor must attach the commercial bill to the request (art. 167/II).

The CCEB also determines the boundaries of the term commercial bills and limits them to checks, promissory notes and bills of exchange within the scope of the Turkish Commercial Code. If the creditor holds any of these instruments, she may initiate the exclusive procedure, even if there is a charge on a property on behalf of the credit in question, unlike the ordinary procedure (art. 167/I).

The procedure commences with the request of the creditor from the compulsory enforcement agency. The creditor must attach the bill (and the protest if it is required) to the request. Unlike the ordinary procedure, the agency must examine two

aspects of the credit in this procedure: whether the bill attached to the request is a commercial bill in the scope of the CCEB, and whether the credit is due (art. 168/I).

Unlike the ordinary procedure, the objection does not stay the proceedings, apart from liquidation of the attached assets (art. 169, 170/I). Therefore, it must be made directly to the compulsory enforcement court so that the court can immediately resolve the objection; however, the court may also grant a stay before making a final decision (art. 169/a/II, 170/II). In addition, if the creditor thinks that the deed in question is not a commercial bill within the scope of the CCEB, she must apply for the complaint procedure. Deadlines also differ from the ordinary procedure, complaint and/or objection must be raised within 5 days, while the payment must be made within 10 days. Consequently, if the debtor misses the deadline for complaint and objection, it means that she still has five more days to make the payment. The creditor must await the expiration of this period to make a request for the attachment proceedings.

Upon the examination, the court may accept the objection and the procedure consequently ends; or it may reject the objection and the procedure resumes, if, of course, the court had initially stayed it. Next stages of the procedure, namely attachment, liquidation and payment, are same as the ordinary procedure for attachment.

ATTACHMENT (*HACİZ*)

After the payment order becomes conclusive, either with failing to raise an objection or upon the final decision of the court resolving the objection, the creditor may request attachment from the agency. Attachment is the legal seizure of the assets and rights belonging to the debtor to be liquidated in a compulsory enforcement procedure, whose proceeds are then paid to the creditor. Since it is not a matter of collective enforcement, the attachment must be limited to assets and rights sufficient for the credit claimed. The creditor must request attachment within one year after the payment order becomes conclusive (art. 78/II); however, if she misses this time requirement, the conclusiveness of the payment order remains, she is required only to repay the enforcement fees and renew the request.

Attachment may be carried out on weekends, official holidays and in some circumstances at night (art. 51). The creditor, in principle, does not get served for the attachment proceeding. If the creditor is in the premises during the process, it is carried out before her; but her attendance is not required. The officer carrying out the attachment process may use force if necessary (art. 80); even law enforcement officers must assist her upon request (art. 81). The attachment officer assesses the findings in the premises and makes a record containing the things seized and values thereof (art. 102). For assessment, the officer may also employ the assistance of an expert (art. 87). Attachment may also be carried out through judicial assistance (art. 79/II).

Movable properties may be attached with actual seizure or in some instances only on record (to be delivered on demand); however, valuable articles, such as money, gold or commercial bills, must be actually seized, and preserved by the enforcement agency (art. 85, 86, 88). If a real property of the creditor is attached, an annotation must be made accordingly on the land register of the attached real property (art. 91). Once the attachment is made, whether on paper or actually, the debtor's right to dispose on the property is removed. The debtor cannot deliver the property to another person in any capacity.

The assets and rights of the debtor in the possession of third parties (e.g. banks) may also be seized. The CCEB stipulates detailed proceedings to be carried out with respect to these assets and rights (art. 89). The third person claimed to possess a right or a property of the debtor is served with two notices consecutively. If the said person does not raise an objection to these notices, a third and final one is sent to inform her to deliver the assets or money to the agency. Should the third person fail, the agency seizes her assets as if she were the debtor. If she raises an objection, on the other hand, the creditor may apply to the compulsory enforcement court to disprove the objection.

Some assets and rights cannot be attached. This prohibition may be partial or complete. For instance wages of the debtor may be seized to some degree, which is usually twenty-five percent. Some other properties (e.g. public assets, modest residence of the debtor, student loans, household appliances, pets etc.) cannot be attached as a

whole. These limitations are determined by either the CCEB (art. 82 through 84) or provisions of other special statutes (e.g. the Labor Code art. 35).

When the properties of the debtor are seized by the agency, a third person may claim ownership (or another right on property) on the property; or if the agency determines that a property of the debtor is possessed by a third party it may seize said property under the contest of the third party. In such cases, the return of property (*istihkak*) procedure is applied. This procedure differs according to the person possessing the asset in question during the attachment proceeding. The Statute designates different processes if the asset in question was in the possession of the debtor or if it was in the possession of the person claiming the right.

In the first instance, if a third person (or the debtor on behalf of a third person) claims ownership or another property right on the attached property, the director of the agency gives three days to the creditor (or the debtor) to raise an objection (art. 96/II). If no objection is made, the claim of the third person remains. Therefore, if the third person had claimed ownership, the property cannot be liquidated and must be returned to the third person; if she had claimed another property right, the property is liquidated with said right attached.

If the creditor or the debtor raises an objection, on the other hand, the compulsory enforcement court makes a preliminary examination and decides whether to stay the liquidation proceeding of the property in question or not ex office (art. 97/I). Upon the decision of the court, the third person must file an action for the return of property in the same court within 7 days; otherwise it is assumed that she has abandoned her claim (art. 97/VI).

If the attached property was in the possession of the third person, on the other hand, the director of the agency gives 7 days to the creditor to file an action for return of property (art. 99). In this case, the creditor becomes the plaintiff; and the third person, the defendant. In any case, if the third person prevails in the action, the property is excluded from the enforcement procedure if she had claimed ownership, or is liquidated with the claimed right attached if another property right was claimed; if the creditor (or the debtor) prevails, the property is liquidated as any other property of the debtor.

If the debtor does not have sufficient property and have more than one creditor; a creditor may want to benefit from a previous attachment requested by another creditor. This is called the participation (*iştirak*) procedure and the CCEB provides detailed means for such requests. This procedure is allowed only if the credit of the participating creditor has precedence or priority over the credit of the creditor who is the beneficiary of the attachment at hand. Wages, on the other hand, are exempt from this procedure and "first-come, first-served" rule is applied here.

SALE OF ATTACHED ASSETS

Liquidation of the seized assets is also determined by the CCEB in every detail. Any asset other than money must be liquidated in order for the creditor to be paid with the proceeds.

In this stage, the debtor is provided one last chance to finance her debt after the attachment and before the liquidation request of the creditor. In order to benefit from this opportunity, the debtor must perform some requirements. Firstly, the attachment process should be completed and the creditor should not have requested liquidation. Secondly, the debtor must pledge to pay the credit in maximum of four installments with a maximum period of one month in between each installment. And finally, the first installment must have been immediately paid. If all these requirements are met, the legal consequences of the payment plan automatically arise, as the Statute does not provide the creditor a saying in the matter. If the debtor defaults, the enforcement proceedings resume (art. 111). If any of the conditions above is not present, re-financing the credit is then up to an agreement between the parties.

After the attachment proceeding is completed, the enforcement agency cannot make the sale on its own initiative, unless the circumstances necessitate (e.g. rapid deterioration of an attached property). Both the creditor and the debtor may request liquidation (art. 106/I, 113). The time limit for this request is six months for the movable assets and one year for the real properties. If the creditor does not make the request in due time, the attachment is automatically removed. In this case, even though the procedure stays pending, the creditor must re-initiate the attachment procedure (art. 110/I).

Liquidation, in principle, is carried out in form of public auctions. However, under circumstances determined by the CCEB, movable assets may be liquidated without an auction being held, via bargaining (art. 119). After drafting a terms of condition for auction (also a list of charges on the property for real properties) regarding the items to be auctioned, the enforcement agency must issue a notice of auction to inform the public (art. 114, 124-128). Electronic bidding begins 10 days (20 days for real properties) before the first public auction. In order for the item to be sold, the highest bid must amount to 50% of the estimated value (art. 115, 129). In addition, if other credits that have priority over the credit being enforced are secured with the property being auctioned, the bid must also cover the entire amount of said credits and the costs for the liquidation process. If no bids meeting these requirements are received, a second auction is held at a later date. The requirements for the second auction are identical to the first one. If the second auction also fails, the request for liquidation is removed; therefore, the entire liquidation process must start over upon the renewed request.

The CCEB also provides a procedure to invalidate the auction (*ihalenin feshi*), should an aspect of it was carried out as against the provisions of the Statute (art. 134). The persons who may apply to the compulsory enforcement agency for the invalidation of the auction are limited to the creditor who had requested the liquidation, the debtor, persons whose interests on the matter can be determined from the land register and the actual bidders (art. 134/II). The time limit for the request is 7 days from the public auction; however, under some circumstances, such as a later cognizance to a fraud in the auction, the time limit begins with the date of cognizance. If the court invalidates the auction, the ownership of the property in question reverts back to the debtor.

PAYMENT OR APPORTIONMENT AND INSOLVENCY CERTIFICATE (*BORÇ ÖDEMEDEN ACİZ BELGESİ*)

If the seized money or proceeds from the liquidation process is sufficient to cover the credit or the credits being enforced, creditor or the creditors are paid and the enforcement procedure ends. If the proceeds from the liquidation process is not enough to cover all the credits that are being enforced, the agency must make additional attachments and liquidate the attached assets without the need for a request from the creditor, until all the credits are covered (art. 139). If, following additional attachments and after therefore the exhausting of the attachable assets of the debtor, the proceedings fall short of the amount of the credits, the need for an apportionment among the creditors arise (art. 140).

To make an apportionment among the creditors, the agency must draft a document entitled rank order schedule (*sıra cetveli*). With this schedule, the agency determines the rank among the creditors and subsequently the amount to be received by each creditor. The rank is determined by the provision of article 206 of the CCEB. The provision determines four tiers of credits, first tier having the most priority and fourth having none. All types of credits within a tier are treated equally and a lower tier cannot be paid before all the credits in a higher tier are paid (art. 207/II). First three tiers are more or less preferred credits, usually arising from employment or familial relationships. Last (fourth) tier, on the other hand, comprises all types of credit without any priority.

There are two separate remedies against the rank order schedule, depending on the grounds of the request. If a creditor wishes to raise an objection against another creditor or the rank of said creditor, she must file an action in the proper court at the venue of the enforcement procedure (art. 142/I). This action is called an action for objection against the rank order schedule (*sıra cetveline itiraz davası*). Time limit for this action is 7 days from the date of service of the schedule. If the plaintiff creditor prevails in the action, only she, but not the other creditors benefits from the legal results of the action. Apart from the circumstance to file this action, any creditor who wishes to raise an objection against the schedule (such as objecting to her own rank), she must apply for the complaint remedy against the rank order schedule procedure in the compulsory enforcement court (art. 142/III). Unlike the action mentioned above, the result of the complaint procedure affects all creditors.

If all the attachable assets of the debtor were exhausted, yet the creditor or the creditors are not

fully paid, the agency must issue an insolvency certificate to the unsatisfied creditor or the creditors (art. 143). The agency must issue this document immediately and on its own initiative. The most important content of this certificate is the amount of the claim that remains unpaid. This certificate has both procedural and substantive legal consequences. If the creditor initiates a new enforcement procedure within one year, the agency does not serve the debtor with a payment order; the creditor may immediately request attachment (art. 143/III). In addition, even if the creditor initiates the procedure after one year, this certificate acts as an official document containing an admission of debt; therefore, if the debtor raises an objection against the payment order, the creditor may set the objection aside in the compulsory enforcement court with this document (art. 143/II). The certificate also extends the statute of limitations period to 20 years (art. 143/VI); however, the creditor cannot claim interest from the debtor for the amount written in the certificate (art. 143/IV).

PROVISIONAL ATTACHMENT

Provisional attachment is a special type of provisional relief set by the CCEB. It is very similar to the provisional remedy designated by the Code of Civil Procedure. The essential difference between the two is their subject-matters. If a creditor is owed a due monetary credit that is not secured with a pledge, she may apply to the court for provisional attachment (art. 257). Even if the credit is not due, if the creditor proves in the court that the debtor does not have a determinate domicile or that she is arranging the concealment or smuggling of her assets or her own get away, or had gotten away with a purpose to evade her commitments; or committed fraudulent acts that violate the rights of the creditor with the said purpose, she may secure a provisional attachment. Since this is a special provision, the creditor in question cannot apply for provisional remedy instead.

The creditor requesting the relief must prima facie prove her credit and the grounds for her request to the court. The person requesting provisional remedy must give security to cover possible damages of the opposing party and third parties in case the requesting party is found to be wrongful at the end of the action or the enforcement procedure. Grant of the relief is not enough on its own; its execution must also be requested from the relevant compulsory enforcement agency within 10 days from the decision of the court; otherwise, the provisional attachment is automatically removed (art. 261/I).

If the provisional attachment is granted before the commencement of the principle action, the creditor must either initiate an enforcement procedure or file the principle action within 7 days following the execution; otherwise, the remedy is automatically removed (art. 261/I). If the creditor chooses the first option and the debtor raises an objection against the payment order, she must also request either the removal or the invalidation of objection within 7 days in order to sustain the relief. The essential difference between the provisional attachment and the conclusive attachment is that, unlike the latter, the creditor cannot request liquidation in provisional attachment, as it is the case with temporary attachment, which we have examined above.

ENFORCEMENT PROCEDURE BASED ON JUDGMENT

Scope and Initiation of Proceedings

As we have explained above, if the creditor is owed a monetary credit, she is not required to file an action and secure a judgment on the credit owed; she may simply initiate an enforcement procedure for attachment. However, this possibility does not impair the right to file an action in order to secure a judgment. But if the credit is anything other than money, taking the litigation route is the only option. Therefore, the subject-matter of an enforcement proceeding based on judgment may be everything that is allowed by the law to be a credit. Even a child is regarded as a subject-matter by the law in a custody dispute. For instance, should the court grant the custody of the child to the mother in a divorce case but the child is currently with the father, the mother must initiate an enforcement proceeding in order to recover the child.

Even though the name of the procedure involves the term judgment, various other documents are also eligible for this type of procedure. First of all, the term judgment includes all types of court

judgments involving a performance, judicial costs parts of any other judgments, arbitration decisions and recognized foreign judgments. And the other documents that are given the same power include settlements and acknowledgments before the court, some agreements made before notary and the agreements made after conciliation and mediation (after the annotation by the court) proceedings as we have mentioned above. If the creditor possesses any of the documents above, she may, and according to the Court of Cassation decision must, initiate an enforcement procedure based on judgment.

Unlike the procedure above, this type of proceeding may be initiated in any compulsory enforcement agency, regardless of the venue (art. 38). The judgment need not become unappealable in principle to initiate such procedure. If the debtor wants to refrain from performing the order, she must bring security and request postponement from the circuit court of appeals or the Court of Cassation (art. 36). However, there are some exceptions to this rule (e.g. judgment regarding the ownership of real estate).

Once the proceeding is initiated by a request, the agency then checks whether the document is within the scope of this proceeding and if so, serves the debtor with an execution order (*icra emri*). Unlike the procedure without judgment, the debtor cannot raise an objection to this order. However, if she had paid the subject-matter after the judgment and before the proceeding, or the judgment or document has lapsed under the statute of limitations (which is generally 10 years), she may apply to the compulsory enforcement court to void the procedure (art. 33, 33/a). If the judgment is reversed or vacated in appellate procedures, the agency reverses the enforcement proceedings.

Execution of Judgment

If the subject-matter is money, the procedure is same as the one without judgment. Should the debtor fail to pay, the agency seizes the assets, sells them and pays the creditor. However if the subject-matter is something other than money, the agency must follow the detailed rules set out by the CCEB tailored for any subject-matter.

The CCEB provides different rules and procedures for the surrender of movables and real estate, vacation of premises, surrender of child, establishment of personal interaction with child and performance or prohibition of an act. The CCEB also designates criminal provisions regarding such performances.

LIQUIDATION OF PLEDGES AND MORTGAGES

Pledges (*rehin*) and mortgages (*ipotek*) are credit devices that secure a payment by binding a credit to movable or real property. Since they are the most important and secure way of guaranteeing the payment of a credit, the CCEB governs many principles and procedures regarding credits with such securities.

Firstly, if the credit is secured with a pledge or a mortgage, the creditor is not allowed to initiate an enforcement proceeding without a judgment. She, however, may initiate an enforcement procedure for attachment based on commercial bills since the CCEB provides this right to choose (art. 167). Provisional attachment is also not available for these types of credits, since they are already secured.

Furthermore, the CCEB provides different methods of enforcement based on pledges and mortgages. If the pledge or the mortgage or the credit they are attached to is also subject to a judgment, the creditor may initiate an enforcement procedure based on judgments. This right exists in some circumstances designated by the CCEB even if there is no judgment. If no such judgment or exception exists, on the other hand, the procedure is carried out similar to the attachment procedure without a judgment but with a major difference: the lack of attachment. Since the whole purpose of this procedure is to liquidate the property with the pledge or the mortgage, other assets of the debtor is spared.

After the sale of the subject-matter of the proceeding, which is carried out according to the provisions of the CCEB, the agency then issues a document to the creditor should the sale fail to cover the entirety of the credit. The creditor may initiate a regular enforcement proceeding for the remainder of her credit upon obtaining this document.

BANKRUPTCY

Terminology and Fundamentals

Even though the term bankruptcy (*iflas*) is sometimes used to encompass entire collective enforcement, it is but a single procedure within. Bankruptcy is the most important and basic type of collective enforcement measures. Bankruptcy means the complete exhaustion of assets and therefore represents liquidation as a whole. It is by far the most detailed collective enforcement procedure in the CCEB. All other methods may be available depending on the debtor as well, but bankruptcy is mostly the final resort.

As we have previously mentioned, bankruptcy is one of the procedures designated by the CCEB, others being the composition agreements (*konkordato*), composition by way of abandonment, postponement of bankruptcy and restructuring of corporations and cooperatives via reconciliation. Apart from the composition agreements, all procedures available under the CCEB are dependent on some conditions regarding the debtor (e.g. being a merchant etc.). Bankruptcy itself is also only available for merchants as well, at least in principle. Only a person recognized as merchant by the Commercial Code is eligible for bankruptcy. Since commercial partnerships are merchants in nature, they are eligible for bankruptcy. Simple partnerships lack legal personality; therefore, they cannot be subjected to bankruptcy, but the partners may. Under some circumstances, partners of general partnerships (*kollektif şirket*) and limited partnerships (*komandit şirket*) may also be eligible for bankruptcy.

Bankruptcy as an Enforcement Procedure and Direct Bankruptcy

Even though bankruptcy should be the ultimate resort, the CCEB allows for a creditor to carry out special enforcement proceedings against a debtor that is eligible for bankruptcy. If the credit in question is monetary, the creditor may choose this procedure instead of attachment. This procedure also starts in the compulsory enforcement agency with a request from the creditor. The agency serves the debtor with an order to pay and should the debtor fail to pay in 7 days, the procedure stay regardless of any objections. This is due the replacement of attachment proceedings with bankruptcy proceedings. Since only the commercial court in the venue of the debtor's business can try and resolve bankruptcy cases, after the passage of time allowed to the debtor, the creditor must file an action for bankruptcy whether the debtor had raised an objection to the payment order or not.

The court first examines whether the creditor is really owed money (the scope of this examination varies depending on objections), and if it establishes the credit, it then calls for all creditors via an announcement. The purpose of this call is to allow the creditors opportunity for any possible objections to bankruptcy. After this procedure, the court gives the debtor one last chance to pay the debt and the costs to avoid bankruptcy (*depo kararı*). If the debtor fails to pay once again, the court must rule for bankruptcy.

Once the court rules for bankruptcy, the time and date of the ruling is noted and from this time and date, some powers of the debtor, who is now dubbed bankrupt, is restricted. Also, all previous compulsory enforcement procedures, save for the ones that are secured with pledge or mortgage, are stayed and no new one may be initiated.

Bankruptcy may also be as a result of a direct bankruptcy action. The circumstances in which direct bankruptcy action may be filed are designated by the Statute. If any of these circumstances occurs, any creditor, or even the debtor may file for bankruptcy. Under some circumstances, the debtor must file bankruptcy; otherwise she may be liable for not doing so. Bankruptcy action to be tried under these circumstances are very similar to the one we explained above; but the major difference is that in the latter kind, the court does not allow for a last chance to pay, since the action is not based on a previous enforcement procedure.

Postponement of Bankruptcy

One of the circumstances that call for direct bankruptcy is insolvency, i.e. a negative asymmetry between the assets and debts of the debtor. In such cases, if the debtor is a commercial company (not a partnership) or a cooperative, the debtor (or one of the creditors) may apply to the court for postponement (art. 179). Application must be

detailed and feasible in order for the court to rule for postponement.

The importance of postponement is the protection of the debtor from any possible enforcement proceedings. Duration of postponement may not exceed a total of two years (including extensions). During this time, all previous proceedings stay and no new proceedings may be initiated against the debtor (art. 179/b). If the project fails, the court immediately rules for bankruptcy without any further examination.

Liquidation and Closure

Liquidation starts in a bankruptcy agency (*iflas dairesi*), which is a public agency similar to compulsory enforcement agencies. In fact, usually one of the compulsory enforcement agencies in a venue acts as the bankruptcy agency. Bankruptcy agency begins the liquidation proceedings by cataloguing the assets of the debtor and calling for the creditors to make their claims. During this time if the agency determines that assets are insufficient to even cover the costs of the liquidation, it continues the procedure and carries out the liquidation procedure. Otherwise, the regular procedure is applied.

In regular procedure, the liquidation is carried out by the participation of the creditors. The creditors hold a meeting and determine the candidate for the board of trustees (*iflas idaresi*). The compulsory enforcement court then appoints three persons from the candidates as the board of trustees. The board represents the estate of bankruptcy and carries out the liquidation process according to the CCEB and the decisions made by the creditors.

The board records and examines the claims of the creditors, finds and sells the assets of the debtor, collects any debt owed to the debtor and prepares a rank order schedule (*sıra cetveli*) similar to the one in attachment procedure. The rank is similarly determined by the provision of article 206 of the CCEB. There are two separate remedies against the rank order schedule, depending on the grounds of the request. If a creditor wishes to raise an objection against another creditor or the rank of said creditor, she must file an action in the proper court at the venue of the enforcement procedure (art. 235). The action is called an action for objection against the rank order schedule in the commercial court. If the plaintiff creditor prevails in the action, only she, but not the other creditors benefits from the legal results of the action. Any creditor who wishes to raise an objection against the schedule (such as objecting to her own rank), she must apply for the complaint remedy against the rank order schedule procedure in the compulsory enforcement court. Unlike the action mentioned above, the result of the complaint procedure affects all creditors. Even though the procedure for sale of assets is similar to the attachment procedure, major difference here is that if the creditors agree, they may determine the procedure independent of the procedure set out by the CCEB.

After the liquidation is complete and the rank order schedule is final, the board makes the payments to the creditors and finalizes the accounts. If a creditor was not paid completely, the board must issue an insolvency certificate to the unsatisfied creditors. Even though this is very similar to the one issued by the agency in the attachment procedure, there are some differences due to differences between attachment and bankruptcy procedures. For instance, the creditor may not initiate a new enforcement proceeding if the debtor has not acquired new assets (art. 251). Once the procedure is completed, the commercial court closes the bankruptcy proceedings.

COMPOSITION AGREEMENTS (*KONKORDATO*)

If a debtor becomes insolvent, in order to avoid or escape bankruptcy, she may resort to composition agreements. Even if the debtor is not eligible for bankruptcy, she may resort to composition agreement. Composition agreements are debt restructuring agreements between the debtor and her creditors. However in order for these agreements to bear legal consequences, they must be approved by the court.

Composition agreements may involve either extension of time or rebate from the debts, or both. There are three types of composition agreements:

(1) Simple composition agreement

(2) Composition in bankruptcy

(3) Composition by way of abandonment

Simple composition starts with the proposal and request of the debtor from the compulsory enforcement court. Upon examination, if the court determines the potential success of the proposal, it grants the debtor three-month time (may be extended for two more months) in which she is protected from any enforcement proceeding. The court also appoints a composition commissioner with varying duties and powers.

During this time, the commissioner summons the creditors of the debtor via announcement and notes their votes. If the majority sought by the CCEB is reached, the agreement is deemed accepted by the creditors. After this vote, the case file is the presented to the commercial court. If the agreement meets the conditions set out by the CCEB, the court approves the agreement. This approval makes the agreement binding, even for the creditors against the agreement, apart from secured and some other priority creditors.

If the debtor fails to make payments to any creditor or breaches the agreement in any way, the agreement may be annulled by the court, and creditors then initiate enforcement proceedings for the full amount they were previously owed. Upon annulment, the court may also rule for bankruptcy.

Composition may also be agreed upon during bankruptcy. In such case, no protective time is needed; the duties of the commissioner are carried out by the board of trustees and the creditors immediately vote for the proposal. Should the agreement is agreed upon, the commercial court examines it. If the court approves the agreement, the bankruptcy state must also be removed by the court.

Third type of composition, composition by way of abandonment is a relatively new and under-utilized procedure. In this procedure, if the agreement is reached and the court approves the composition, the debtor surrenders her power to dispose on her attachable assets to the creditors and creditors liquidate the assets of the debtor as they see fit. The major difference between this procedure and bankruptcy liquidation, unlike the latter, the debtor comes out free of her debts at the end of composition procedure.

RESTRUCTURING OF CORPORATIONS AND COOPERATIVES VIA RECONCILIATION

This procedure is very similar to the composition agreements albeit with some major differences. Firstly, as the title suggests, this procedure is only available for corporations (excluding banks and insurance companies) and cooperations. Similar to the composition agreements and the postponement of bankruptcy, the debtor presents a proposal to the court. However unlike the composition agreements, the debtor can choose which creditors are to be affected by this restructuring and even create different groups of creditors with different outcome levels. If the court approves the restructuring, creditors unaffected by the procedure may freely initiate enforcement proceedings since they are deemed out of the bounds of the restructuring.

Summary

LO 1 Will be able to explain the types of courts

According to article 9 of the Constitution, the judicial power shall be utilized by independent courts in the name of the Turkish Nation. There are three levels of courts in civil judiciary:

On top sits the Court of Cassation (Yargıtay). It is the highest court of the civil judiciary. Its chambers and other decision-making bodies carry out the appellate review of the final decisions rendered by the circuit courts of appeal. It is also the court of first instance for a limited number of disputes (for instance, actions for damages against the State regarding the exercise of jurisdiction by the judge). The CoC, with respect to civil disputes, consists of civil chambers, the Civil General Assembly and the Grand General Assembly as judicial bodies.

Circuit courts of appeals (bölge adliye mahkemeleri) are the intermediate level courts in Turkish civil judiciary. These courts had been established in 2004 and became operational in 2016. There are 15 circuit courts of appeals, seven of which are operational as of 2017. These courts are currently situated in Ankara, Antalya, Erzurum, Gaziantep, İstanbul, İzmir and Samsun. The most essential duty carried out by the circuit courts of appeals is the intermediate appellate review of final decisions rendered by the courts of first instance in their respective jurisdictional areas. They also possess a very limited subject-matter jurisdiction as a court of first instance regarding some civil disputes.

Civil courts of first instance, which are the courts that resolve disputes initially, are established as either general jurisdiction courts or specialized courts. General jurisdiction courts are established with the Law regarding Establishment, Jurisdiction and Powers of Civil and Criminal Courts of First Instance and Circuit Courts of Appeals (no. 5235), and they are comprised of civil courts of general jurisdiction (asliye hukuk mahkemeleri) and civil courts of peace (sulh hukuk mahkemeleri). These courts may have different chambers within, and a workload division between these chambers based on subject matter may be determined to some extent. All courts have an administrative office supervised by a court clerk, with court stenographers, a bailiff, and other civil servants where necessary.

Specialized courts are the courts established by various statutes and they have jurisdiction in actions with the specific subject matter they are established for. There are seven specialized courts in civil judiciary:

(1) Cadastral courts
(2) Labor courts
(3) Compulsory enforcement courts
(4) Consumer courts
(5) Civil Court of Intellectual and industrial property rights
(6) Family courts
(7) Commercial courts

LO 2 Will be able to explain arbitration

Summary

Arbitration is a dispute resolution method in which the parties choose the arbitrator (or the arbitrators) and the procedure to be followed. Otherwise, arbitration is similar to litigation in courts as both methods determine which party is right and both render binding final decisions. The scope of the rules of arbitration in the CoCP is limited to disputes that do not involve any foreign element as defined by the Code of International Arbitration, for which the seat of arbitration is determined as Turkey (art. 407). Disputes arising from rights attached to real property and matters on which the parties may not freely act are not eligible for arbitration (art. 408). Most of the provisions regarding arbitration are not mandatory. However, there are some mandatory provisions regarding which the parties may not agree otherwise. For instance, according to article 423, the parties share equal rights and powers in arbitration proceedings. This principle must be applied by the arbitrator or the arbitral tribunal regardless of how the parties approach the matter. It also needs to be noted that, provisions of the CoCP other than the ones regarding arbitration are not applicable in arbitration proceedings, unless otherwise stated by the Statute (art. 444). The CoCP provides a definition for the arbitration agreement. According to this definition, an arbitration agreement is a contract in which the parties agree on the resolution of a part of or all present or possible future disputes arising from a contractual or non-contractual legal relationship by an arbitrator or an arbitral tribunal (art. 412). An arbitration agreement may be made as a clause of a contract between the parties or as a stand-alone contract.

Test Yourself

1 Which of the below is not a specialized court in civil judiciary?

A. Labor court
B. Family court
C. Cadastral court
D. Consumer court
E. Maritime court

2 Which court is the highest court in civil judiciary?

A. Court of Cassation
B. Circuit Court of Appeal
C. Council of State
D. Constitutional Court
E. Court of Jurisdictional Disputes

3 Which principle forbids the judge to initiate an action on her own?

A. Right to a fair trial
B. Disposition principle
C. Judicial economy principle
D. Principle of immediacy
E. Right to be duly heard

4 Which of the below represents the party's capability to secure a judgment about the relief demanded according to the Code of Civil Procedure?

A. Capacity to be a party
B. Capacity to conduct civil proceedings
C. Capacity to litigate
D. Real party in interest
E. Capacity to represent

5 Which of the below is not a procedural requirement?

A. Subject-matter jurisdiction
B. Statute of limitations
C. Capacity to litigate
D. Legal interest
E. Judicial costs deposit

6 Which of the below is not done during preliminary examination according to the Code of Civil Procedure?

A. Examination of procedural requirements
B. Determination of the boundaries of the dispute
C. Preparatory proceedings for discovery of evidence
D. Encouragement of parties to settlement or mediation
E. Hearing evidence on the merits of the claim

7 Which of the below is an extra-ordinary appellate remedy?

A. Appeal
B. Intermediate appeal
C. Objection
D. Renewal of proceedings
E. Reversal of judgment

8 Which action must be filed by the debtor in seven days if the compulsory enforcement court decides for provisional removal of objection in ordinary attachment procedure?

A. Negative declaratory action
B. Action for restitution
C. Action for invalidation of objection
D. Action for recovery from debt
E. Action with gradual demands

9 Which of the below cannot request the invalidation of auction according to the Code of Compulsory Enforcement and Bankruptcy?

A. The creditor who had requested the liquidation
B. The debtor
C. Persons whose interests on the matter can be determined from the land register
D. Actual bidders
E. Compulsory enforcement agency

10 Which body represents the bankruptcy estate in ordinary liquidation?

A. Compulsory enforcement agency
B. Bankruptcy agency
C. Board of trustees
D. Composition commissioner
E. Meeting of creditors

1. E	If your answer is wrong, please review the "Courts" section.
2. A	If your answer is wrong, please review the "Courts" section.
3. B	If your answer is wrong, please review the "Principles to be Followed in Civil Procedure" section.
4. C	If your answer is wrong, please review the "Parties" section.
5. B	If your answer is wrong, please review the "Procedural Requirements" section.
6. E	If your answer is wrong, please review the "Preliminary Examination and Trial" section.
7. D	If your answer is wrong, please review the "Appellate Remedies" section.
8. D	If your answer is wrong, please review the "Objection against the Claim and Set Aside Thereof" section.
9. E	If your answer is wrong, please review the "Sale of Attached Assets" section.
10. C	If your answer is wrong, please review the "Parties" section.

Please identify the sources of the Law of Civil Procedure in Turkey.

your turn 1

The essential source of civil procedure in Turkey is the Hukuk Muhakemeleri Kanunu (Code of Civil Procedure –CoCP-). It is a relatively recent statute, which entered into effect in late 2011.

The statutory sources of civil procedure are not limited to the Code of Civil Procedure. There are many other statutes and regulations directly related to procedure, such as the Code of International Arbitration, the Law of Lawyers, the Law of Judges and Public Prosecutors, the Law on Service and the Law regarding Establishment, Jurisdiction and Powers of Civil and Criminal Courts of First Instance and Circuit Courts of Appeals. There are also some substantive law statutes that include procedural provisions; such as the Labor Code and the Turkish Civil Code.

Second source of Turkish civil procedure is the Court of Cassation (CoC) opinions. Since Turkey does not have a case-law legal system, the source value of the CoC opinions is mainly ancillary to the statutes, with the exception of "consolidation of opinions", possessing the power of a statute, which is very rarely issued by the CoC.

Third source of Turkish civil procedure is the legal literature. Value of the literature in civil procedure is also defined by statute: the judge must consider legal literature while evaluating the evidence and rendering a judgment according to the very first article of the Turkish Civil Code.

Suggested answers for "Your turn"

Identify the Alternative Dispute Resolution methods.

your turn 2

ADR methods in currently implemented in Turkey may be divided into two broad categories, which are conciliation (uzlaştırma) and mediation (arabuluculuk). According to article 35/A of the Law of Lawyers, lawyers, in company with their clients, may invite the opposing party to conciliation before the commencement of the action or during the proceedings in which the lawyer (attorney) is appointed and on which the parties may act freely.

Regarding the procedure to be followed in conciliation, there are two additional provisions in the Regulation of Law of Lawyers. According to article 16 of the Regulation, the attorneys must inform the parties regarding their legal standings, bring resolution proposals and encourage the parties for conciliation. Even though the provision of the Statute does not impose an impartiality obligation on the attorneys during conciliation negotiations, provisions of the Regulation do so. The obligation to keep confidential regarding conciliation negotiations is also set by the regulation, even though it is omitted from the statutory provision. Conciliation according to the Law of Lawyers can be terminated with a signed binding agreement. Article 35/A states that, if the opposing party accepts the invitation and an agreement is reached at the end of the conciliation negotiations, a record containing the subject matter, place and date of the agreement as well as the obligations of the parties may be prepared. If such a document is prepared and signed by the parties as well as their attorneys (which is mandatory), it carries the power of an execution copy of the judgment within the scope of the article 38.

Institutional mediation is regulated by the Law on Mediation in Civil Disputes. Therefore, with the exceptions set by other statutes, such as the ones that we have mentioned above, mediation services must be conducted in accordance with the LMCP. The statute provides definitions for the terms "mediation" and "mediator". According to the Statute, mediation is the dispute resolution method that is carried out voluntarily with the involvement of a neutral and independent third person. This independent third person has received a special training and brings the parties together in order to discuss and negotiate. The third party enables the communication process between the parties to ensure that the parties understand each other and thus create their own solutions by resorting to systematic techniques; and a mediator is the natural person providing the service of mediation and enlisted in the registry of mediators managed by the Ministry.

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Chapter 8

Commercial Law in Turkey with Specific Reference to Rules Related to Competition in Turkish Legal System

After completing this chapter, you will be able to:

Learning Outcomes

1. Explain the basic terms of Turkish Commercial Law
2. Explain Unfair Competition.

Chapter Outline

Introduction
General Overview of Turkish Commercial Law
Rules Related to Competition in Turkish Legal System

Key Terms

Turkish Commercial Law
Turkish Commercial Code
Commercial Enterprise
Shareholders
Statutory Auditors
Unfair Competition
Competition Law
Abuse of Dominant Position

INTRODUCTION

Commercial law[1] generally focuses on commercial transactions. The scope and extent of commercial law is vast. In some jurisdictions commercial law is partly considered within the scope of **law and economics.** Nevertheless, commercial law is based on freedom of contract whereas in law of economics, the state, based on public interest arguments may interfere with commercial, industrial or financial relations[2]. Commercial law and business law have many overlapping issues. Divergent set of rules in commercial law all of which regulate one aspect of commercial business life is also accompanied with other specific rules and regulations such as norms in the Code of Obligations, Capital Markets Law; Code of Execution and Bankruptcy; Banking Law etc.

GENERAL OVERVIEW OF TURKISH COMMERCIAL LAW

Turkish Commercial Law provides set of rules by which commercial, financial and capital markets are bound. The new Turkish Commercial Code[3] ("TCC") which came into effect in 2012[4] aims to provide a modern and contemporary legal environment for the commercial life in Turkey.

TCC is composed of six books each of which regulate specific areas in the law :

- Book 1 : (Articles 1 – 123) on Commercial Enterprise
- Book 2 : (Articles 124 – 644) on Commercial Entities
- Book 3: (Articles 645 – 849) on Valuable Papers (Negotiable Instruments)
- Book 4 : (Articles 850 – 930) on Transport (Carriage) Operations
- Book 5 : (Articles 931 – 1400) on Maritime Law
- Book 6 : (Articles 1401 – 1520) on Insurance Law

Within the purposes of this Chapter, not all but only certain aspects of commercial business is summarized below. The new TCC has introduced significant new issues to commercial business such as **corporate governance** regarding good management and internal and independent audit that are to be applied to all capital stock companies; **creation of web sites, information society services and access rights of information**; **and single share holder (one-man) joint stock company and single member limited liability company.**

Article 1 of the TCC sets forth the scope of the Law and states that the provisions set forth in the TCC are commercial norms. Provisions in other legislation can also be considered as a **commercial norm** if they are related to transactions or acts of a commercial enterprise.

attention

Pursuant to Article 3 of TCC, all matters regulated in the law are considered as **commercial business** and all matters (businesses and acts) concerning a commercial enterprise are considered as commercial.

In this regard rendering goods and services for the commercial enterprise; making a lease agreement; concluding contracts with employees in a commercial enterprise, engaging with a maintantainance company for the work premises, signing a power of attorney for the representation of the commercial enterprise are all examples of commercial business.

Commercial Enterprise is defined in Article 11/1 of the TCC. Pursuant to the definition, the following are the key elements that should be sought for a commercial enterprise:

i) The will/purpose of the enterprise to generate income above a certain treshold (above the level of a craftsman enterprise)

ii) Continuity

iii) Independence

The first book of TCC regulates matters related to commercial business such as consequences and liabilities of a commercial enterprise, types of merchants and acting merchants, bankruptcy, trade registry, interest in commercial business, transfer of commercial enterprise, commercial litigation, consequences and liabilities of being a merchant; trademark and trade name usage, commercial books and unfair competition/trading.

The second book of TCC regulates commercial companies where types of companies and rules regulating companies from establishment to dissolution rate regulated and the liabilities and operation of different type of companies are set forth.

A company is a business association formed by two or more parties who bring together their labor and/or capital to achieve common purposes of making profit and sharing profit.

The parties (shareholders/partners) establishing the company enter into a contract titled **"Articles of Association (AoA)".**

Articles of Association of a company must be in a written form and should bear the signatures of all the shareholders, authenticated by notary public.

The following should be stated in the Articles of Association:

- Headquarters and corporate title of the company
- The objectives of the company
- Capital, nominal value of shares, number of shares and the terms of payment
- In case of capital commitment in kind (rather than or together with cash), the value appraised for the in kind capital
- Special privileges if any, for the shareholders, directors or other persons
- Provisions concerning the election of the members of Board of Directors and statutory auditors; their rights and duties and the persons authorized to represent the company
- Rules of general assembly meetings (quorum etc)
- The duration of the company
- The form of announcements of the company
- Portion of the capital each shareholder has undertaken

Further to the above requirements, within the boundaries of the law, the shareholders are free to include any other provisions in the articles of association of the company. Additionally, it is also possible for the shareholders to seperately sign and execute another agreement between themselves named a **'Shareholders Agreement**'.

TCC provides an exhaustive list of type of companies. The types of companies listed in the TCC may be grouped as corporate and non-corporate forms of companies.

a. Corporate forms of companies
   - Joint Stock Company
   - Limited Liability Company
   - Cooperative Company (Cooperatives)

b. Non-corporate forms of companies
   - Collective Company
   - Commandite Company

From this exhaustive list, the types **joint stock corporation** and **limited liability company** are the most common types preferred in business life in Turkey.

A joint stock corporation must have the following three organs to function:

i. Shareholders General Assembly : General Assembly is the decision making organ of a joint stock company where each shareholder has the right and duty to participate and vote either personally or through a proxy. The general assembly meets regularly at least once a year (ordinary general assembly meeting/annual meeting) and where necessary extraordinarily.

ii. Board of Directors : The Board of Directors is the representing organ of the joint stock company composed of one or more persons as Directors assigned by the Articles of Association. Board of Directors is the organ to whom the general assembly may delegate partially or fully the authority of management of the company. The members of the Board of directors must be individuals and should be shareholders of the company. Those who represent the company can carry out all transactions on behalf of the company. Unless otherwise agreed in the Articles of Association, pursuant to the law, the board of directors meets with simple majority and decides with the majority of those directors who are present in that meeting.

iii. Statutory Auditors: The auditing of the joint stock companies shall be carried out both internally and externally. For internal auditing, in addition to the Board of Auditors, the auditing shall

be carried out by independent auditing companies (sworn financial accountants such as the big four auditing companies) or alternatively, medium and small size companies may use the services of sworn financial advisors or public accountants. Such auditing requirement, however, is applicable only to some corporations, which are to be determined and announced by relevant authorities. External audit is performed primarily by the Ministry of Customs and Trade. In additian to these, tax offices also have authority to audit the company accounts.

A limited liability company is formed by two or maximum fifty individuals or legal entities with having a corporate title and a predetermined (fixed) capital and with a liability limited to the corporate assets.

TCC requires two organs for the management and representation which are Shareholders **General Assembly** and the **Directors.** The shareholders general assembly of a limited liability company is similar but less formal compared to the shareholders assembly of a joint stock company. Ordinary shareholdings assembly meets once a year, within three months following the end of the fiscal year and extraordinary meeting is to be held when necessary.

Limited liability can be managed by one or more directors. The Director(s) may be individual(s) or legal entities. If there is more than one manager in a company, one of them should be appointed as the Chairman of the Board of Directors. All the authorities of the shareholders related to the management of a limited liability company may be granted to a General Manager to be appointed or alternatively to one of the shareholders. The Law requires that statutory auditors shall be appointed where the number of shareholders are more than twenty in a limited liability company.

Despite the fact that both of the above stated companies are corporate companies, there are some financial threshold (i.e., **minimum capital**) requirements. The liability of shareholders of in both joint stock and limited liability company is limited to the amount of their capital undertaken.

The types of general assembly and board of execution meetings of joint stock corporations and limited liability companies where a government representative is required to be present, is to be determined by the Ministry of Customs and Trade.

RULES RELATED TO COMPETITION IN TURKISH LEGAL SYSTEM

Despite more than twenty years left behind following the enactment of Law No.4054 on the Protection of Competition *("Competition Law" or Law No.4054)* related core concepts such as market, competition, fair trading, anticompetitive pricing can be misinterpreted. One of the reasons for that may be the fact that the same terminology **"competition"** exists in all of these areas and this may still cause some degree of confusion in the understanding and sometimes enforcement of competition related rules.

attention

Competition is generally defined as a contest where economic decisions can be taken freely by the undertakings in the markets for goods and services.

In this regard competition can be referred to as a contest or play where in the playground (**market**), for all the players (**competitors**) and the stakeholders the play should be competitive and fair. This requirement sets forth certain duties not only for the players but also for the regulators.

Unfair and restrictive trade practices in the broadest sense include unfair competition, non compete clauses and restrictive trade practices. Depending on the purpose, scope and function of these practices, there are different sets of rules (laws) in legal systems, namely unfair trade rules, contractual non compete clauses and competition laws all directed to protect the competition in the markets.

This section aims at providing a general overview of competition related rules in the Turkish legal system in order to provide an overview for undergraduate students, young lawyers and business people for whom competition law is fairly a new concept.

"Competition" in Turkish Constitution

In addition to Article 167 of the Constitution[5] which specifically regulates competition law related duties of the State, there are also other articles which can be considered as in relation to competition related topics.

In Article 5 of the Turkish Constitution, to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law is stated as fundemental aims and duties of the State.

Article 5 *The fundamental aims and duties of the State are to safeguard the independence and integrity of the Turkish Nation, the indivisibility of the country, the Republic and democracy, to ensure the welfare, peace, and happiness of the individual and society; to strive for the removal of political, economic, and social obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence."*

In this Article, welfare of the individual and the society, removal of economic obstacles and principle of social state which are all relevant to the philosphy of protection of consumer welfare are explicitly referred among the fundamental aims and duties of the State.

Article 48 of the Constitution protects freedom of work and contract.

Article 48 *"Everyone has the freedom to work and conclude contracts in the field of his/her choice. Establishment of private enterprises is free. The State shall take measures to ensure that private enterprises operate in accordance with national economic requirements and social objectives and in security and stability"*[6].

Article 65 of the Constitution[7] sets forth the limits of the social and economic duties of the State. Accordingly, the State shall fulfil its duties as laid down in the Constitution in the social and economic fields within the capacity of its financial resources, taking into consideration the priorities appropriate with the aims of these duties.

Pursuant to Article 167 the State shall take measures to ensure and promote the sound and orderly functioning of the markets and prevent the formation of monopolies and cartels emerging in practice or by agreements in the markets.

"II. Supervision of Markets and Regulation of Foreign Trade

Article 167; *The State shall take measures to ensure and promote the sound, orderly functioning of the money, credit, capital, goods and services markets; and shall prevent the formation, in practice or by agreement, of monopolies and cartels in the markets.*

In order to regulate foreign trade for the benefit of the economy of the country, the President may be empowered by the law to introduce or lift additional financial impositions on imports, exports and other foreign transactions in addition to tax and similar impositions."

The legal basis of supervision of markets and regulation of foreign trade is regulated in the same article which also forms the constitutional rationale of Competition Law.

In order to regulate foreign trade for the interests of the country's economy the President may be empowered by law to introduce or remove additional financial duties other than taxes and similar duties on imports exports and other foreign trade transactions.

In Article 171 the State is given the duty to take measures, in line with national economic interests, to ensure the development of cooperativism, which shall primarily aim at increasing production and protection of consumers[8].

Article 172 is a specific provision for the protection of consumers that sets forth the duty of the State to take measures to protect and inform consumers and encourage the initiatives to protect themselves.

Article 173 sets forth the duty of the State on measures to protect and support craftsmen and artisans.

Unfair Competition/Trade (Haksız Rekabet) Rules in Turkish Law

Unfair competition in trade relations is mainly regulated in the TCC. There are also further general and specific provisions in some other legislation. These are regulated in Turkish Code of Obligations and in some specific laws such as intellectual and industrial property laws and in consumer protection law.

Unfair Competition in Code of Obligations[9]

Unfair Competition in Commercial Code

Unfair Competition in Intellectual Property Law (Copyright Law No. 5846 amended by Laws No.5101 and No.4630)

Industrial Property Law No.6769[10]

Unfair Competition in Consumer Protection Law No.6502[11]

In Article 2 of the Turkish Civil Code, "*everyone is bound to comply with the principle of honesty in exercising their rights and performing obligations".* The misuse of a right which constitutes an offending/ damaging act to others is not protected by law. Article 2 of the Turkish Civil Code requires that everyone shall comply with the rules of good faith when exercising rights and performing obligations. The misuse of a right which constitutes an offending/damaging act to others is not protected by law.

Article 57 of TCO regulates unfair competition as a special type of tortious activity for non-commercial relations. It is based on the idea and general principle of protection of freedom to act in the economic area in order to protect the economic personality stated in Article 24 of the Turkish Civil Code.

Article 57 of the TCO reflects this general provision specifically for debt relations and sets forth that *"... any person whose business goodwill is damaged or decreased by false publications or other schemes which are contrary to good faith, may claim an injunction to restrain the continuation of such acts and in case of fault claim damages. For unfair trading in commercial business the provisions of TCC is reserved…"*

Despite an explicit reference to unfair trading in commercial business in Article 57 of TCO, due to lack of a limitation in the TCC on the scope and coverage of unfair competition rules, there are arguments in literature on the scope of the two legislation in some areas.

TCC sets forth a specific provision for the principle of honesty in trade relations where unfair competition is described as *"... misuse of economic competition in any manner by means of deceitful behavior or other acts incompatible with good faith.."*

Article 54 sets forth an objective and broad criterion and unlike the earlier version of the Law also makes clear that unfair competition may not be only between two rivals. TCC examples a variety of trade practices unfair either to competitors or to consumers. These include passing off one's products as though they were made by someone else, using a trade name confusingly similar to that of another, stealing trade secrets, and various forms of misrepresentation.

Those who suffer damages from unfair trading/ competition can seek far-reaching remedies against the commiters. The courts can issue cease and desist orders and has other sanctions to wield as well.

The principle stated in Article 2 of the Turkish Civil Code is also reflected in Article 57 of the Code of Obligations which stipulates that *"... any person whose business goodwill is damaged or decreased by false publications or other schemes which are contrary to good faith, may claim an injunction to restrain the continuation of such acts and in case of fault claim damages …".*

Unfair competition among merchants is regulated under a separate section in the Turkish Commercial Code[12] ("TCC") in Articles 54-63. There are also specific provisions dealing with unfair competition regarding intellectual property law such as unfair trading in trademarks, trade names and other intellectual properties usages.

Yet the criteria given in Article 54 are rather vague, if public interest is damaged due to misleading acts, this also constitutes unfair competition. In Article 55, some types of acts are listed as a non exhaustive list of acts which might be considered as acts contrary to good faith.

Under the wording of Article 54 of the TCC any misuse of economic competition by acts contrary to principle of honesty/good faith is deemed unfair competition. Both goods and services are considered within the scope of this provision.

Following a general description of unfair trading/competition, a non-exhaustive list of certain acts is given in Article 55 comprising examples of unfair competition:

Within the scope of this provision, it is unlawful *"to discredit others or their merchandise, products, works, activities or business transactions by wrong, misleading, unnecessarily offending statements".*

Article 55 states different examples of unfair competition. Accordingly the following acts constitutes unfair competition:

- Advertisement and sales methods, which violate the rule of good faith and other illegal acts,
- Inducement breach or termination of contract,
- Unauthorized utilization of others' business products.
- Revealing production and business secrets unlawfully,
- Not complying with general business conditions,
- Using general business terms and conditions, which violate the rule of good faith.

For example, acts or statements aiming to distort a competitor's commercial reputation or lodging an unjustified lawsuit only to offend him may be considered unfair competition[13]. On the other hand, predatory exploitation of another's services or achievements is a typical form of unfair competition.

As to Article 55 it is contrary to priciple of honesty and therefore constitutes unfair competition *" … to give untrue information about another person's character or financial status … "*. In this regard, to give untrue information about another person's character, moral values or financial status is unfair competition irrespective of any *"rival relationship"* between the person who commits such an act and the merchant.

Incorrect or misleading statements made in favor of oneself or of third persons to put them in a more favorable position with regard to their competitors are also considered to be unfair competition. Comparative advertising about products, works, business activities or transactions which refer to a competitor's standing, business, merchandise, prices, etc. may also constitute unfair competition where it is declared misleading.

To misuse free economic competition by trying to create an impression of having exceptional capabilities, as by acting as if in possession of a degree, certificate or prize, is unfair competition. For example, if someone who is not entitled to use the title "authorized dealer" uses such a title, this may constitute unfair competition.

Trade names, trademarks are protected under unfair competition law when copyrights are violated or those names and marks are imitated and so caused confusion. Within the meaning of this provision imitating someone else's trade mark or trade name or packaging style may constitute unfair competition. Where certain products can only be produced under a patent it is only those enterprises who has the patent or the patent license that can produce and sell those products. Therefore, if someone produces or sells a patented product without a patent license, such an activity also constitutes unfair competition.

your turn [1]

Please give some examples of Unfair Competition.

It is contrary to principle of honesty to procure, or to promise associates of third persons, interest to which they have no right in return for their violation of their contractual obligations, especially by abnormal rewards, monetary or otherwise, direct or indirect. Economic interests herein need not be financial. What is necessary is that these interests should be of a nature to cause persons to violate their obligations by an abnormal commercial reward. To provide certain advantages to persuade the competitor's employees to breach their business obligations is considered to be unfair competition.

It is furthermore unfair competition to misuse economic competition by causing persons to divulge trade or production secrets. If confidential lists of addresses, agents, customers, suppliers, credit risks and similar lists are deemed "trade secrets", it is unfair competition to obtain these lists in a manner contrary to good faith and to benefit unjustly from them or to divulge them.

Issuing incorrect or untrue certificates which may deceive persons with good faith is also unfair competition.

Further, it is unfair competition if a merchant does not comply with commercial standards found in laws, regulations, and contractual terms or by established professional or local customs which are also applicable to all other competitors.

Who may Bring a Legal Action

Article 56 explicitly lists those who are entitled to bring a court action in cases of unfair competition. Accordingly the following can take the following legal actions:

i. Persons whose economic interest are damaged or jeopardized: Any person whose economic interests are damaged or endangered by unfair competition is entitled to claim remedies against unfair competition. Every competitor who has suffered damages is entitled to take a legal action.

ii. Customers whose economic interests are infringed: Customers have the standing to sue only where their economic interests are injured. For customers to have a cause of action there must be actual damages. Prospective damages is not sufficient.

iii. Professional or economic associations: Professional and economic associations such as chambers of commerce, unions, consumer associations etc. established to safeguard the economic interests of their members are only entitled to bring actions for declaratory relief, prohibition, and termination of unfair competition.

Types of Legal Actions

Article 56 also sets forth the types of legal actions that might be brought before the court in cases of unfair competition:

i. Action for declaratory relief: A person who is injured or is in danger of suffering damages can ask for a declaratory judgement on the "unfairness" of the act. The unfairness of competition and existence of damages - if any - are to be proved by the claimant under the general rules of tort and law of civil litigation procedure.

The purpose of the action is generally to ascertain a legal ground for a future action for damages, indirectly to prevent damage from acts of unfair competition or to stop the running of the statue of limitations.

ii. Termination (Injunction): If the act constituting unfair competition is continuous, the court decides on the termination of the so called act/unfair trading. For example the court may decide to put an end to deceptive advertisements, to stop the use of trademark, an enterprise name or trade name, causing confusion, the disclosure or usurpation of business and production secrets, to secure the observance of legal or contractual business conditions. It is an offence to continue the acts of unfair competitions in spite of a final and absolute judgement. A person who does not comply with this judgement is liable for damages and may be imprisoned for not less than six months or/and charged with a heavy fine.

iii. Action for restitution of the unlawful situation: The plaintiff may request from the court to order on the restitution of the position held prior to the act of unfair competition. For example, if certain goods are put on the market with trademarks causing confusion with the original trademark, it is possible to request from the Court that these marks be removed from the goods or, if these trademarks cannot be removed, to request to keep the goods completely off the market and/or to destroy them. Acts of unfair competition through misleading declarations may be restituted by the correction of these declarations.

iv. Action for damages: Damages are recoverable only if there is fault on the part of the person who has committed unfair competition subject to the general rules on tort. Damages may be material and, in exceptional cases, immaterial. Accordingly there must be damage or loss of profits suffered by the plaintiff and an adequate relation of causality between the act and damages (or loss) and in any case the plaintiff claiming compensation has to prove damages.

The kind of civil action allowed for unfair competition depends on the existence of fault by the person committing unfair competition. In cases where there is no fault, one can only bring actions for declaratory relief, prohibitory actions, or for the restitution of an unlawful situation. But if fault exists, in addition to those causes of action already cited, actions to recover material and/or immaterial damages are allowed and the court may order for the claimant "the equivalent of what the defendant may have obtained if there had not been unfair competition".

Intention is not a requisite in the above stated cases What is important is the claimant's actual or imminent suffering of economic loss or damages.

v. Publication of the Judgement: The Court may also decide, upon the request if the plaintiff

whose request has been upheld and, at the expense of the defendant, to publish the judgement once it becomes final. The judge determines the form. The plaintiff has the right to request from the court to publish the judgement at the expense of the defendant, irrespective of the existence of fault.

vi. Precautionary Measures (TCC Article 61) and Civil Procedural Law Article 389-399: Precautionary measures (*ihtiyati tedbirler*) may be requested and granted before or after lodging a case, if delay might be harmful or if such remedies are necessary to prevent serious damages. The grounds for seeking a precautionary remedy include the preservation of the status quo, prohibition of unfair competition, restiution of the claimed unlawful situation and correction of a wrong or misleading declaration.

vii. Liability of Employers and Entities: If the act of unfair competition is committed by workers or employees in the course of their employed term, actions for declaratory relief, removal of the unlawful situation and a prohibitory action can be brought against the empoyee or against the perpetrator.

If there is no dependancy between the principal and the agent or if damages is not caused in the course of employment, the principal at fault is jointly liable with the agent.

Entities are liable for the unlawful acts of their organs committed in the course of their business functions. Officers are solely and personally responsible for their unlawful acts outside the scope of their duties.

viii. Statute of Limitations in Unfair Competition Cases: In unfair competition cases, the claimant must bring a cause of action within three years from the date of the existence of the right and one year from the date when he/she becomes aware of the damages. In cases of criminal offences arising out of unfair competition, statute of limitation is five years, thus action is barred after 5 years.

ix. Liability of the Press: Pursuant to Article 58 of TCC if unfair competition is committed by means of the press, an action may be brought, in principle against the author of the article or the editor. However, actions of unfair competition against press are allowed only where the article or advertisement has been published without the consent or contrary to the will of the author or the editor or for some reason it is not possible to reveal the author or to sue her/him in the Turkish courts. Liability of the press includes the responsible editor or the head of the advertisement department (where unfair competition is committed through advertisement). If either of these persons is not known then the publisher is liable and if the publisher is unknown, then the printing company/ person is liable.

The only types of actions that may be brought against those persons affiliated with the press are actions for declaratory relief, prohibitory actions and actions for restitution. For damages the claimant must show the defendant's fault. Defendants who are at fault are jointly and severally liable.

Law No.6015 on the Surveillance and Supervision of State Aids[14]

In the course of Turkey EU relations following the Customs Union Decision No.1/95 of the Association Council, a system for the control of state aids has been one of the major critisms brought in the regular reports of the EU Commission for several years. Law No.6015 was enacted in 2015 with the purpose to regulate state aids which may affect the functioning of the customs union. Thus Law No.6015 is enacted within the course of Turkey EU relations. Nevertheless the implementing rules referred in the Law which would make it enforceable have not been issued up to date.

Law No. 3577 On the Elimination of Unfair Competition in Imports[15]

Rules regulating state aids and anti-dumping measures are both related to foreign trade and mostly regulated also by international agreements such as WTO agreements and EU agreements.

On the other hand, there are also national legislation enacted to regulate foreign trade. Law No. 3577 on elimination of unfair competition in imports regulate transactions which is executed and the precautions which is taken with the purpose of protecting a production branch from the harm caused by importation which is subject to unfair competition circumstances, dumping and subvansion.

Pursuant to Article 2 of Law No.3577 dumping is exporting of goods to Turkey, under it's normal value in other words under the exporter country's prices. Subvansion is any kind of financial contribution for a product which is provided directly from the producer or the exporter country. Ministry of Economics, General Directorate on Imports is authorized to enforce this law.

Competition Law (Antitrust Law) (Rekabet Hukuku)

Overview

In addition to the concepts related to competition discussed above there is another area of law which is directly related to functioning of the markets and consumer welfare. Competition Law is one of the major sub areas of law and economics which is an emerging area in Turkish legal system.

Law No.4054 on the Protection of Competition[16] (Competition Law) adopted by the Turkish Parliament on December 7, 1994 is the first legislation in Turkey on the protection of competition and regulates anti-competitive behavior of enterprises. The very first and direct concern of competition is not to protect the consumer directly like consumer protection laws, but to maintain a *workable* competition in the markets and avoid those trade practices which restrict competition and thus avoid lessening consumer welfare.

In that respect, the primary goal of competition rules is not to protect the economic interests of individuals but to protect competition in the market as an economic and legal phenomenon.

Competition laws regulate three major areas that may distort competition in the market. These are:

i. prevention of all kinds of agreements, and concerted practices between undertakings and anti-competitive decisions of associations of undertakings,
ii. the prevention of abuse of dominant position and
iii. the control mergers and acquisitions which may distort competition.

As stated above Article 167/2 of the Turkish Constitution prescribes a duty for the state which stands as the constitutional basis of the Law. It is therefore, within the scope of the duties the State to regulate and take measures necessary for the maintenance and protection of competitive behavior in the markets.

From the international law perspective, the Association Agreement between Turkey and the EEC[17], requires that the Contracting Parties should maintain the applicability of the provisions of the Rome Treaty on the harmonization of competition, tax and the law. Moreover, the Additional Protocol also requires that for the purposes of approximation of the economic policies of the Parties, the Association Council, within six years following the effectiveness of the Additional Protocol, should take necessary measures for the implementation of the relevant articles of the Rome Treaty on competition matters, namely, Articles 85-86 on the prohibition of agreements, decisions and concerted practices and the abuse of dominant power which distort competition and Articles 90-92 which refer to state undertakings and state aids[18].

Purpose and Scope

The purpose of Competition Law is set forth in Article 2 as *"…to establish a system in the markets for goods and services by means of regulation, supervision and prevention of abuse of dominant position by undertakings and associations of undertakings and agreements, decisions and concerted practices* which have as their object or effect the prevention, restriction or distortion of competition".

The Law aims to regulate the markets for goods and services in which free trading, free access to markets and the functioning of an effective competition would be ensured. The Law is applicable to the agreements, decisions and to the behavior of undertakings and of associations of undertakings. In that context, the terms "undertaking" and "association of undertakings" are defined[19] broader than the conventional definitions of these concepts in Turkish Law.

In this regard, **"undertaking"** shall mean *"... any natural or legal person who produces, markets or sells goods or services and who forms an economic entity and is capable of acting independently in the market."*

The two critera for the enforcement of the law to any one is:

- existence of economic activity and
- acting independently

Whatever the place of operation or domicile, in other words, no matter where the undertaking concerned operates or is established, either in Turkey or abroad, so long as the agreement, decision or concerted practice or abuse of dominance or merger and acquisition impair competition in the market for goods and services within the territory of Turkey, the undertakings involved in such activities would fall within the scope of the Law.

In addition to the acts of undertakings, the decisions of the **"Association of undertakings"** are also within the scope of the Law. Association of undertakings shall mean *"... any association, whether with or without a legal personality, which is formed by undertakings to carry out certain objectives."* Existence of legal personality is not a requisite for the application of the Law.

Competition Law applies to all agreements, formal or informal, decisions and **concerted practices** that actually or potentially affect competition. In that respect, not only an actual distortion but also a threat to competition, the effect of which may be direct or indirect, would be within the scope of the Law.

In addition to agreements made between Turkish firms, agreements between Turkish firms and foreign firms or agreements even between two foreign firms may be covered by the Law so long as the impact of these agreements is within the territory of Turkey.

There are no exceptions for different sectors or areas of the economy. **Public undertakings** are not excluded from the application of Competition Law. The reasoning of the Law sets forth that public undertakings shall also be subject to competition rules. The decisions of the Competition Board also confirm the view on the application of competition rules to public undertakings.

Restrictive (Prohibited) Practices

Restrictive Agreements and Concerted Practices of Undertakings

Law No.4054 covers formal agreements and decisions which impair competition as well as looser forms of agreements and parallel restrictive actions of the undertakings which are referred to as concerted practices are within the scope of the Law[20].

By taking into consideration the relationship of the parties to an agreement or how they are positioned in the markets, a classification has been developed between horizontal and vertical agreements. **Horizontal agreements** are those which are made by firms that are the same level of trade or industry, such as agreements between retailers or manufacturers or between wholesalers. Unlike horizontal agreements, **vertical agreements** are concluded between the parties who are not at the same level of trade or industry such as agreements between the wholesaler and the retailer or between the licenser and the licensee or between the manufacturer and the seller. A patent licensing agreement or a distributorship agreement are examples of vertical agreements.

It may be concluded that although competition among competitors is always at the horizontal level, a restrictive agreement between parties may either be a horizontal agreement or a vertical agreement. So long as it restricts or distorts competition, such agreements, regardless of their nature as horizontal or vertical agreements, shall be within the scope of the Law.

Article 4/2 of Competition Law provides a non exhaustive list of examples. Directly or indirectly fixing sales or purchase prices or other trading conditions of goods or services, sharing markets or controlling production or distribution or eliminating or preventing newcomers from entering the market, applying dissimilar conditions to equivalent transactions are some examples from the list. Since the list provided is a non exhaustive list, any other type of action which is not stated explicitly in the list, but distorts competition, would also fall within the scope of Article 4 of the Law.

There is a **"presumption of concerted practice"** introduced in Article 4. If there is a lack of sufficient proof of the existence of an agreement, a presumption arises that the undertakings concerned have engaged in a concerted practice if competition is prevented or distorted or limited and there exists a similarity in the market concerned regarding price changes or in the balance of supply and demand or in the activities of the undertakings.

If it is not possible to prove the existence of an agreement which distorts competition, but there is still an indication, explicit or disguised, of an anti-competitive activity in the markets, the competition authorities will be able to take an action against the undertakings who are deemed to have been involved in such activities. In such cases these undertakings must rebut the presumption of concerted practice and prove that they are not in such parallel conduct or, if they are, their conduct was based on proper economic grounds.

In certain circumstances, prohibited practices which fall within the scope of Article 4, may be exempted from the implementation of the prohibition clause. The authority to declare certain agreements exempt from the prohibition of Article 4 is given to the Competition Authority. If the agreement, decision or concerted practice concerned meets certain requirements stated in Article 5 of the Law, then the Competition Board may declare the provisions of Article 4, inapplicable **(individual exemption).**

The conditions for **exemption** are stated in Article 5. There are two negative and two positive conditions[21] to be satisfied for an agreement to be exempted from the application of Article 4.

For an agreement to be exempted, it should:

i. contribute to improving the production or distribution of goods and providing services or promoting technical or economic progress and
ii. allow consumers a fair share of the resulting benefit, and,
iii. should not eliminate competition in a substantial part of the relevant market and
iv. should not induce a restraint on competition that is more than is essential for the attainment of the positive conditions stated above.

An exemption may be an individual one, granted for a specific agreement or decision, or a **block (group) exemption** which exempts a group of agreements or decisions by specifying the conditions for exemption in advance by a declaration of the Competition Authority. A restrictive practice should be justified by virtue of a comparative analysis of its impact on competition and its contribution to the improvement of production or distribution or to progress in the economy and to the consumers' getting a fair share of the resulting benefit.

The Competition Board has issued several communiqués on the group exemption of certain categories of agreements.[22]

Abuse of Dominant Position (Article 6 of Law No.4054)

Article 6 of the Law regulates the **abuse of a dominant position** in the market. Law No. 4054 is not concerned with the mere existence of a monopoly or a dominant position, but it prohibits the abuse of this dominant position[23] and there is no exemption clause in such cases. Any inquiry into the applicability of the abuse of dominant position should start with the definition and delimitation of **relevant market.**

Prior to the analysis of whether or not there is an abuse of the dominant position, the relevant market should be defined from three different aspects. First, market definition is to be made and the boundaries of the market should be drawn as to the products in question. Here, some economic criteria, such as the **interchangeability of the products** concerned, **cross-elasticity of demand and supply side substitutability**, play a significant role in determining whether or not certain products are interchangeable and so belong to the same product market. The result of this economic analysis draws the limits of the product market, which is crucial for the undertaking being accused of having abused its dominant position.

Article 6 of the Law No.4054 on the abuse of dominant position does not provide any specific information on the definition or on the criteria to be used for the determination of the product market. Thus it is inevitable that there would be a case by case approach to be followed for the definition of the relevant product market by taking into account the specific circumstances of each case.

Second, the geographical boundaries of the market should be drawn. Article 6 states that any abuse of dominant power "within the whole territory of Turkey or in a substantial part of it", shall be prohibited. And finally, it is necessary to take into account the temporal quality of the market. Therefore, as well as the product market and the geographical market, the time period[24] in which the undertaking concerned is being observed and considered should also be taken into account while drawing the limits of the market on different grounds.

Neither the above mentioned elements of dominant position nor abuse is defined in Article 6. However the European competition law jurisprudence may form guidelines for Turkish competition law.

The types of behaviors which shall be considered as examples of abuse of dominant power are listed in the sub-paragraphs of Article 6. Directly or indirectly to prevent new competitors or to impede the activities of already existing competitors; to apply dissimilar conditions to equivalent transactions thereby creating a direct or indirect discrimination between the trading parties; to make the conclusion of contracts subject to the acceptance of maintenance or resale conditions; restriction of production, marketing, or technical developments which would cause a disadvantageous position for consumers are some of the examples stated in Article 6.

The abuse of collective dominance which is defined as the dominant position of more then one undertaking in the market held by acting together by means of an agreement or concerted practices where each alone would otherwise not hold a dominant position, is also covered by Article 6 of the Law No.4054.

Mergers and Acquisitions

As to Article 7 of the Law No.4054 mergers and acquisitions which lead to a concentration in the markets are prohibited. The Law empowers the Competition Board to determine and publish the categories of mergers and acquisitions which, to be considered legally valid, require a prior notification to the Board. The Law envisages a notification system for the control of mergers and acquisitions. However, this should not be understood as meaning that all mergers and acquisitions should be notified. As to Article 7 of the Law, the Competition Board determines and publishes with communiqués those categories of mergers and acquisitions which are subject to this notification requirement.[25]

Implementation of the Law

"Competition Authority" is established and authorised for the implementation of the Law[26] which shall be comprised of a Competition Board, a Directorate and Service Departments[27]. The duty of full implementation of the Law lies with Competition Board, that is, the decision-making body of the Competition Authority.

The Competition Board is composed of 7 members who will be appointed by the President from among candidates nominated from the organs stated in the Law[28]. Two candidates to be nominated by the following institutions for each vacant membership:

- 3 members by the Ministry of Customs and Trade,
- 1 member by the Ministry of Development,
- 1 member by Turkish Union of Chambers and Commodity Exchanges,
- 1 member by the Supreme Court of Appeals,
- 1 member by the Council of State

The President appoints the Chairman and the Deputy Chairman from among Board members. The Competition Board is empowered to interfere with any infringement of the Law upon the following:

- a notification
- a complaint
- a whistle blower's application
- its own initiative[29]
- upon the request of the Ministry of Customs and Industry

The authority of the Competition Board can be summaried as follows:

- penalizes undertakings which distort or prevent competition in the market, through examination and investigation processes subject to detailed regulation,

- grants exemption to and prepares secondary regulations for agreements which are in conflict with competition rules but are beneficial for the economy and the consumers,
- prevents monopolization within the market by examining mergers, acquisitions and joint-ventures over a certain threshold,
- in the privatization stage, examines the transfer of public undertakings to the private sector, and through privatization, reduces the effects of the state on the economy while preventing monopolization in the areas the public sector exits,
- ensures the dominance of competitive conditions within the markets by sending opinions on various acts and regulations which would negatively affect or restrict competition in the markets to government institutions and organizations concerned
- where it deems it to be appropriate, issues a negative clearance certificate which confirms that the behavior concerned is not contrary to the competition rules. However the Board, reserves the right to rescind this declaration at any time it deems necessary[30].

To perform its tasks and duties, the Competition Board has been given very extensive examination and **investigative powers.** To that end, the experts authorized by the Competition Board are empowered to examine the books and other records, take copies, ask for written and oral explanations and undertake on the spot investigations regarding the undertaking concerned[31].

Besides its investigative powers, the Competition Board is empowered to impose **fines and periodic penalty payments** to the undertakings where there is a violation of the Law[32].

All its final decisions and decisions on interim measures, fines and periodic penalty payments are subject to judicial review and can be challenged before Ankara Administrative Courts[33].

your turn 2

What are the main duties of the Competition Board?

Civil Law Consequences of the Infringement of Competition Rules

It is explicitly stated in Article 56 of the Law that all the practices which are contrary to the prohibition foreseen in Article 4 shall be void and the parties to such agreements cannot request the performance of their obligations arising from such agreements.

In Article 57 and 58, it is stated that it is posibble to claim compensation from those who had violated the Law by restrictive agreements and caused damages. In cases where damages arise from an agreement or a decision or gross negligence of the parties, the judge, upon the request of the parties, may award compensation of three times the value of substantial damages or three times the amount of the profit, the undertaking that caused damages made or might have made. Here the Law seems to have been influenced from **"treble damages action"** in the U.S. antitrust law.

Based on several different factors, there has not been many compensation claims and court decisions rendered on the basis of civil law consequences of Law No.4054.

Summary

LO 1 Explain the basic terms of Turkish Commercial Law

Article 1 of the TCC sets forth the scope of the Law and states that the provisions set forth in the TCC are commercial norms. Provisions in other legislation can also be considered as a **commercial norm** if they are related to transactions or acts of a commercial enterprise. Pursuant to Article 3 of TCC, all matters regulated in the law are considered as **commercial business** and all matters (businesses and acts) concerning a commercial enterprise are considered as commercial. In this regard rendering goods and services for the commercial enterprise; making a lease agreement; concluding contracts with employees in a commercial enterprise, engaging with a maintantainance company for the work premises, signing a power of attorney for the representation of the commercial enterprise are all examples of commercial business. **Commercial Enterprise** is defined in Article 11/1 of the TCC. Pursuant to the definition, the following are the key elements that should be sought for a commercial enterprise: The will/purpose of the enterprise to generate income above a certain treshold (above the level of a craftsman enterprise); Continuity and finally Independence.

A company is a business association formed by two or more parties who bring together their labor and/or capital to achieve common purposes of making profit and sharing profit. The parties (shareholders/partners) establishing the company enter into a contract titled **"Articles of Association (AoA)".** Articles of Association of a company must be in a written form and should bear the signatures of all the shareholders, authenticated by notary public.

LO 2 Explain Unfair Competition.

In Article 2 of the Turkish Civil Code, "*everyone is bound to comply with the principle of honesty in exercising their rights and performing obligations*". The misuse of a right which constitutes an offending/damaging act to others is not protected by law. Article 2 of the Turkish Civil Code requires that everyone shall comply with the rules of good faith when exercising rights and performing obligations. The misuse of a right which constitutes an offending/damaging act to others is not protected by law. Article 57 of TCO regulates unfair competition as a special type of tortious activity for non-commercial relations. It is based on the idea and general principle of protection of freedom to act in the economic area in order to protect the economic personality stated in Article 24 of the Turkish Civil Code. Article 57 of the TCO reflects this general provision specifically for debt relations and sets forth that *"... any person whose business goodwill is damaged or decreased by false publications or other schemes which are contrary to good faith, may claim an injunction to restrain the continuation of such acts and in case of fault claim damages. For unfair trading in commercial business the provisions of TCC is reserved..."*

TCC sets forth a specific provision for the principle of honesty in trade relations where unfair competition is described as *"... misuse of economic competition in any manner by means of deceitful behavior or other acts incompatible with good faith.."*. Article 54 sets forth an objective and broad criterion and unlike the earlier version of the Law also makes clear that unfair competition may not be only between two rivals. TCC examples a variety of trade practices unfair either to competitors or to consumers. These include passing off one's products as though they were made by someone else, using a trade name confusingly similar to that of another, stealing trade secrets, and various forms of misrepresentation. Those who suffer damages from unfair trading/competition can seek far-reaching remedies against the commiters. The courts can issue cease and desist orders and has other sanctions to wield as well.

Article 55 states different examples of unfair competition. Accordingly the following acts constitutes unfair competition: Advertisement and sales methods, which violate the rule of good faith and other illegal acts; Inducement breach or termination of contract; Unauthorized utilization of others' business product; Revealing production and business secrets unlawfully; Not complying with general business conditions; Using general business terms and conditions, which violate the rule of good faith.

1 Which branch of law generally focuses on commercial transactions?

A. Commercial Law
B. Administrative Law
C. Law of Obligations
D. Private International Law
E. Constitutional Law

2 Which one of the following is not a commercial transaction?

A. Making a lease agreement.
B. Concluding contracts with employees in a commercial enterprise.
C. Engaging with a maintantainance company for the work premises.
D. Signing a power of attorney for the representation of the commercial enterprise.
E. Buying a new car for the weekend leisure activities.

3 Which one of the following is not one those significant new issues TCC has introduced to commercial business?

A. Corporate Governance regarding good management
B. Internal and independent audit that are to be applied to all capital stock companies;
C. Commercial Enterprise
D. Creation of web sites,
E. Single shareholder (one-man) joint stock company.

4 Which one of the following is one of the six books of TCC?

A. Maritime Law
B. Criminal Law
C. Law of Obligations
D. Law of Civil Procedure
E. Administrative Law

5 The following are the key elements that should be sought for a _____: The will/ purpose of the enterprise to generate income above a certain treshold (above the level of a craftsman enterprise); Continuity and independence.

Which one of the following should be in the blanked section of the paragraph above?

A. Shareholders
B. Crime Syndicate
C. Commercial Enterprise
D. Single share holder (one-man) joint stock company
E. Single member limited liability company.

6 The parties (shareholders/partners) establishing the company enter into a contract.

What is the title of this contract?

A. Articles of Association
B. Foundational Contract
C. Contract of Sales
D. Modus Operandi
E. Contract of Employment

7 Competition laws regulate some major areas that may distort competition in the market. Which one of the following is not of those major areas?

A. Prevention of all kinds of anti-competitive agreements
B. Prevention of all kinds concerted practices between undertakings and anti-competitive decisions of associations of undertakings
C. Prevention of abuse of dominant position
D. The control mergers and acquisitions distorting competition.
E. Unlawful Enrichment

Test Yourself

8 Article 6 of the Law regulates the abuse of a dominant position in the market. Law No. 4054 is not concerned with the mere existence of a monopoly or a dominant position, but it prohibits the abuse of this dominant position and there is no exemption clause in such cases. Any inquiry into the applicability of the abuse of dominant position should start with the definition and delimitation of _____ _____.

Which one of the following should be in the blanked section of the paragraph above?

A. Relevant Market
B. Services Market
C. Free Market
D. Black Market
E. Liberal Market

9 This public body penalizes undertakings which distort or prevent competition in the market, through examination and investigation processes subject to detailed regulation. It also grants exemption to and prepares secondary regulations for agreements, which are in conflict with competition rules but are beneficial for the economy and the consumers.

What is the name of this public entity?

A. Competition Authority
B. Competition Board
C. Ministry of Customs and Trade
D. Ministry of Development
E. Turkish Union of Chambers and Commodity Exchanges

10 If there is a lack of sufficient proof of the existence of an agreement, a presumption arises. According to this presumtion, the undertakings concerned have engaged in a concerted practice if competition is prevented or distorted or limited and there exists a similarity in the market concerned regarding price changes or in the balance of supply and demand or in the activities of the undertakings.

A. Presumption of abuse of dominant position
B. Presumption of concerted agreement
C. Presumption of concerted practice
D. Presumption of unlawful enrichment
E. Presumption of innocence

1. A	If your answer is wrong, please review the "Introduction" section.
2. E	If your answer is wrong, please review the "General Overview of Turkish Commercial Law" section.
3. C	If your answer is wrong, please review the "General Overview of Turkish Commercial Law" section.
4. A	If your answer is wrong, please review the "General Overview of Turkish Commercial Law" section.
5. C	If your answer is wrong, please review the "General Overview of Turkish Commercial Law" section.
6. A	If your answer is wrong, please review the "General Overview of Turkish Commercial Law" section.
7. E	If your answer is wrong, please review the "Competition Law (Antitrust Law)" section.
8. A	If your answer is wrong, please review the "Abuse of Dominant Position" section.
9. B	If your answer is wrong, please review the "Implementation of Law" section.
10. C	If your answer is wrong, please review the "Restrictive Agreements and Concerted Practices of Undertakings" section.

Please give some examples of Unfair Competition.

your turn 1

The following acts constitutes unfair competition: Advertisement and sales methods, which violate the rule of good faith and other illegal acts, Inducement breach or termination of contract, Unauthorized utilization of others' business products. Revealing production and business secrets unlawfully, Not complying with general business conditions, Using general business terms and conditions, which violate the rule of good faith.

What are the main duties of the Competition Board?

your turn 2

The authority of the Competition Board ; penalizes undertakings which distort or prevent competition in the market, through examination and investigation processes subject to detailed regulation. It grants exemption to and prepares secondary regulations for agreements which are in conflict with competition rules but are beneficial for the economy and the consumers Further, it prevents monopolization within the market by examining mergers, acquisitions and joint-ventures over a certain threshold, in the privatization stage. Board examines the transfer of public undertakings to the private sector, and through privatization, reduces the effects of the state on the economy while preventing monopolization in the areas the public sector exits, ensures the dominance of competitive conditions within the markets by sending opinions on various acts and regulations which would negatively affect or restrict competition in the markets to government institutions and organizations concerned where it deems it to be appropriate, issues a negative clearance certificate which confirms that the behavior concerned is not contrary to the competition rules. However the Board, reserves the right to rescind this declaration at any time it deems necessary.

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endnotes

1 Please note that some terms are written in bold in order to attract the attention of the reader.

2 Arkan, S.; Ticari İşletme Hukuku, 15.Baskı Banka ve Ticaret Hukuku Araştırma Enstitüsü Yayını Ankara, s.2

3 The new Turkish Commercial Code No. 6102 has come into effect as of 1 July 2012. Amendments (Law 6335) made to the TCC are published in the Official Gazette on 30 June 2012 and became effective on the 1 July 2012.

4 For the historical background of Commercial Law in Turkey, see Arkan, S.; Ticari İşletme Hukuku, 15.Baskı; Banka ve Ticaret Hukuku Araştırma Enstitüsü Yayını, Ankara, p.6-19.

5 For English text of the Constitution refer to https://global.tbmm.gov.tr/docs/constitution_en.pdf

6 The phrase "and privatization" was added by the first Article of Act No. 4446 dated August 13, 1999.

7 The heading of this Article, which was stipulated as "XIII. Limits of social and economic rights", was amended by the twenty second Article of Act No. 4709 dated October 3, 2001.

8 Repealed on July 23, 1995; Act No. 4121.

9 Turkish Code of Obligations No.6098 dated 11.01.2011

10 Published in the OG No. 29944 dated 10 January 2017.

11 Consumer Protection Law No. 6502 dated 7 November 2013.

12 Based on the Swiss Law on Unfair Competition dated 1943 which is repealed now by the new Unfair Competition Law dated March 1, 1988.

13 For further information and examples see Arkan, Ticari İşletme Hukuku, 286-308 (Ankara 1999).

14 Law No.6015 on the Surveillance and Supervision of State Aids published in the OG No. 27738 dated 23.10.2010.

15 Published in the OG No. 23766 dated 25 July 1999.

16 Published in the OG No. 22140, dated 13 December 1994.

17 Association Agreement between Turkey and the EEC, September 12, 1963, OJ 217, 29.12.1964.

18 Additional Protocol, Article 43.

19 Article 3 of the Law.

20 Article 4 of the Law.

21 Article 5, paragraphs a, b, c, and d of the Law.

22 See www.rekabet.gov.tr

23 See Article 6 of the Law.

24 Especially if there are significant seasonal differences in the market power of an undertaking.

25 Article 7 of the Law.

26 Article 20 of the Law.

27 Article 21 of the Law.

28 Article 22 of the Law.

29 Article 40 of the Law.

30 Article 8 of the Law.

31 Article 14 and 15 of the Law.

32 Article 16-19 of the Law.

33 Article 55 of the Law.