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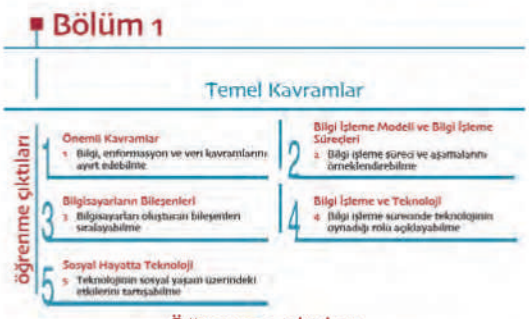

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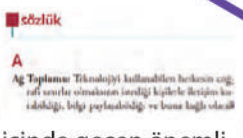

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ANADOLU UNIVERSITY

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

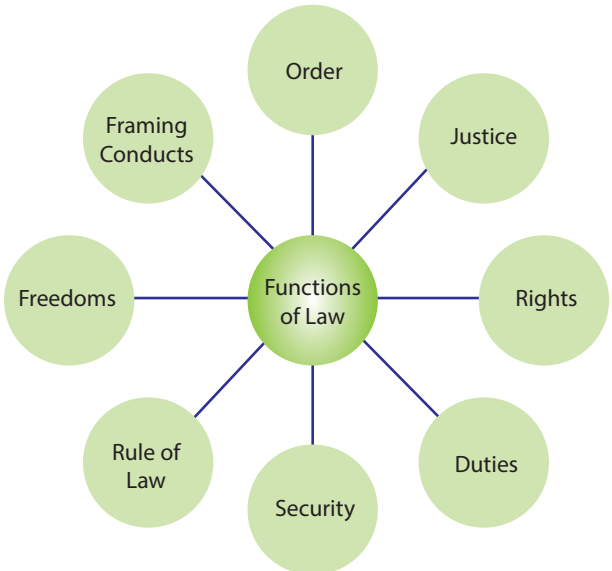


Figure 1.1

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)

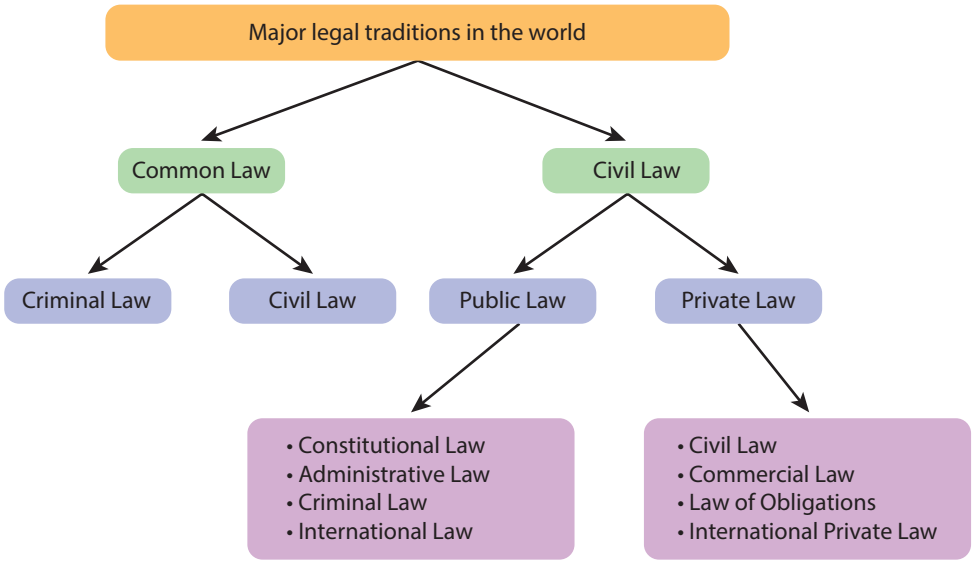
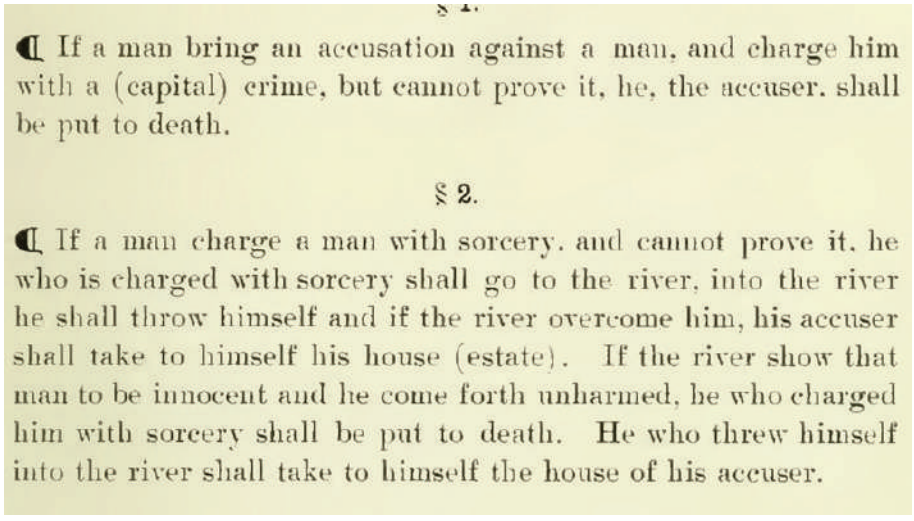


Figure 1.2

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:

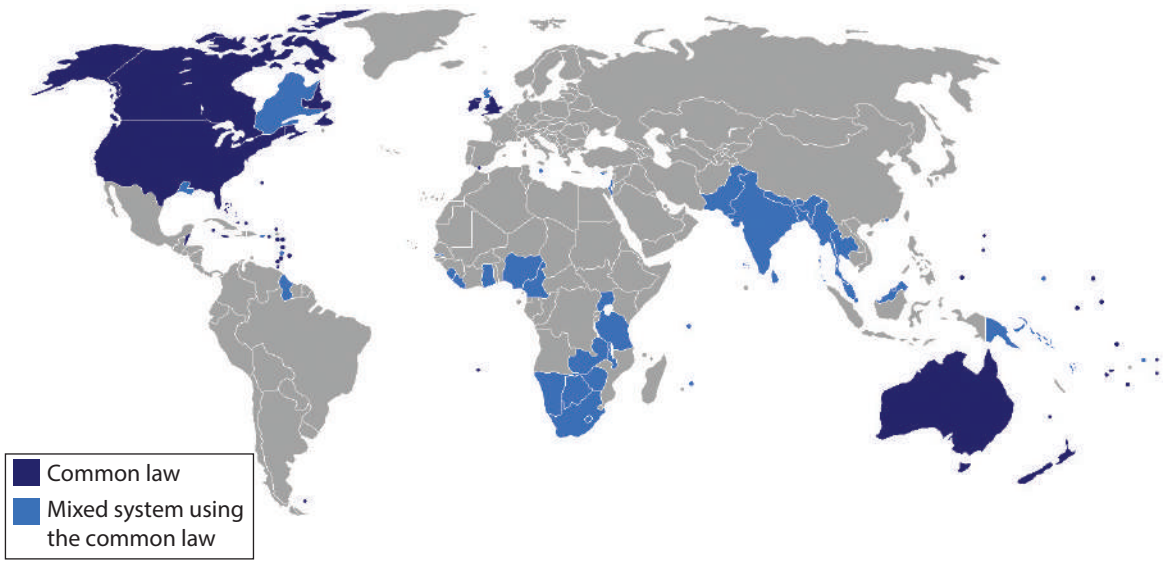
- Law must be accessible and so far as possible intelligible, clear and predictable;
- Questions of legal right and liability should be ordinarily resolved by application of law and not the exercise of discretion;
- Laws of the land should apply equally to all, save to the extent that objective differences 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

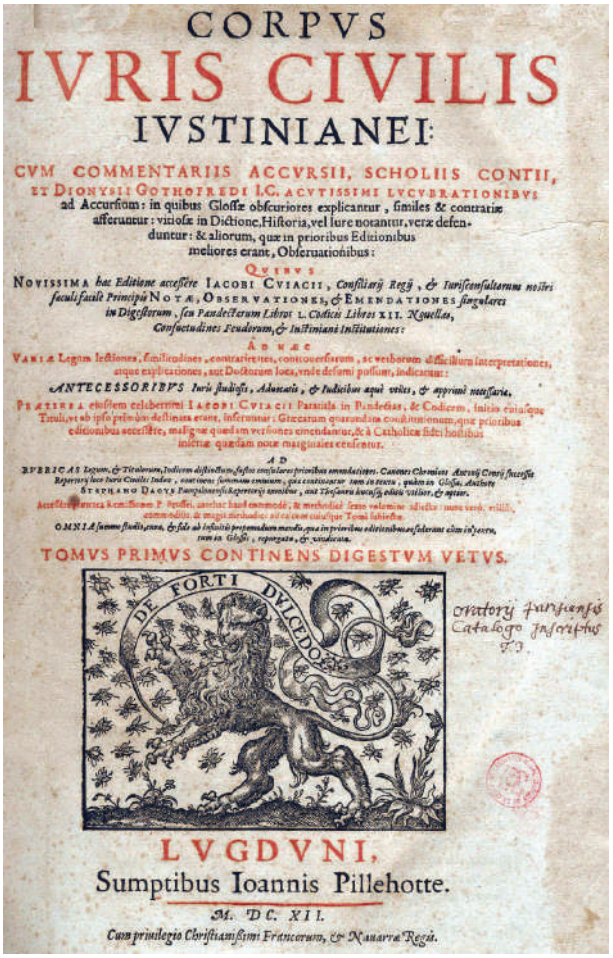
The term civil law derives from the Latin ius civile meaning the law applicable to all Roman citizens. Its origins and basic model are to be found in the compilation and codification of Roman law under Justinian in the sixth century A.D, which in the sixteenth century came to be known as *Corpus iuris 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 defenduntur: & aliorum, quæ in prioribus Editionibus meliores erant, Obseruationibus:
TOMVS PRIMVS CONTINENS DIGESTVM VETVS.
DE FORTI DVCE DOCTO
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, Angela 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 Angela 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.

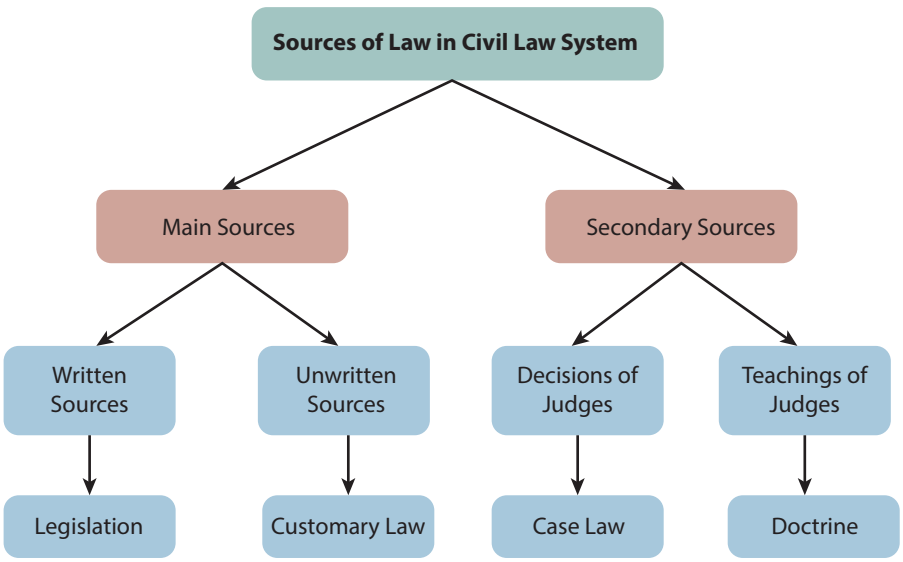


Figure 1.3

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]

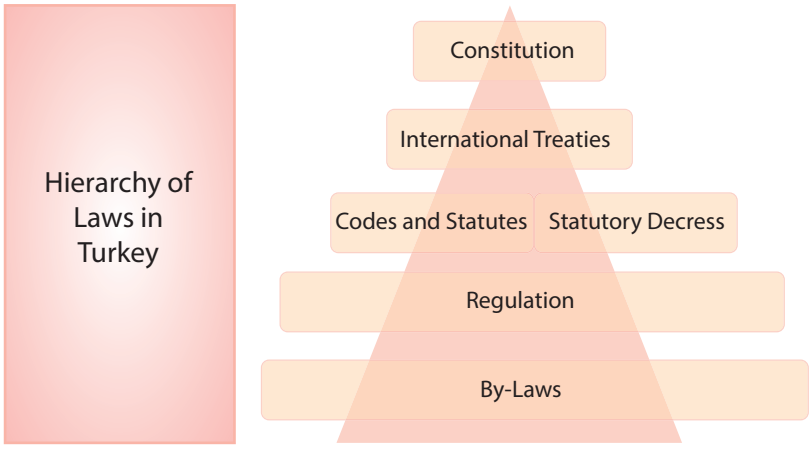


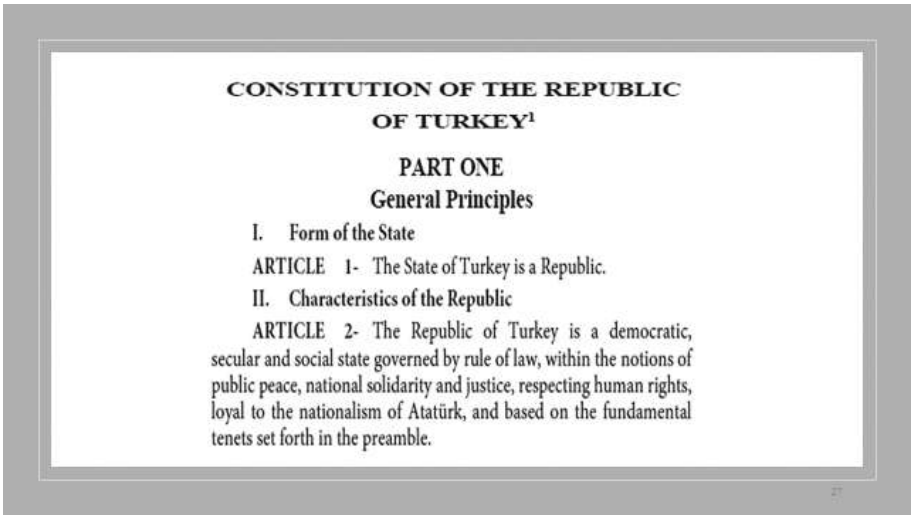
Figure 1.4

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, Grand National Assembly of Turkey can empower to the Council of Ministers to issue a decree which has force of law (Article 91 of the Constitution of Turkey).

As a form of delegated legislation, regulations provide details on the administration of principles in law. Regulations are 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).

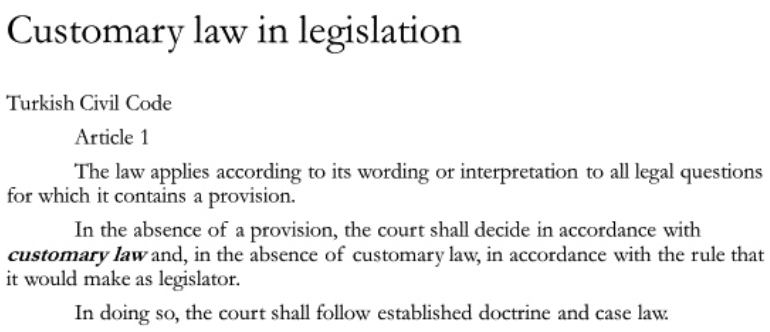
Table 1.6

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

1 Friedrick Schauer, The Force of Law, Harvard University Press (2015), 1.

2 Raymond Wacks, Law: A Very Short Introduction (Oxford University Press, 2008) p. 1.

3 Wacks, p. 3,

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