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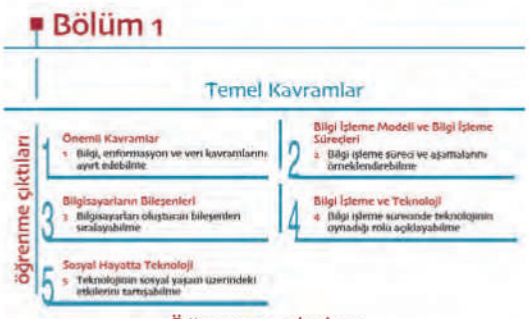

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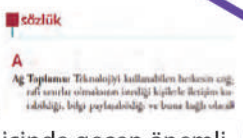

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ANADOLU UNIVERSITY

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 2 Legal Methods

After completing this chapter, you will be able to:

Learning Outcomes

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

Chapter Outline

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

Key Terms

Legal Education
Legal Reasoning
Deduction
Analogy
Interpretation of Statutes

INTRODUCTION

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

FOUNDATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

LEGAL EDUCATİON

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

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

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

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

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

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

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

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

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

LEGAL REASONING

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

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

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

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

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

All men are mortal (major premise)

Socrates is a man (minor premise)

Therefore, Socrates is mortal. (conclusion)

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

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

Since men belong to the class of mortals

Then Socrates, who belongs to the class of men

Also belongs to the class of mortals.[28]

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

Here are some simple examples of judicial syllogism:

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

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

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

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

X is a minor (fact, minor premise)

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

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

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

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

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

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

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

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

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

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

Table 2.2

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

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

Table 2.3

Functions of the Judicial Syllogism
Rationality
Certainty
Justification
Guidance

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

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

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

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

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

(3 A has characteristics s;

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

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

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

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

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

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

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

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

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

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

The other most important argument types related to analogy are:

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

INTERPRETATION OF STATUTES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Table 2.4

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

Table 2.5

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

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

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

(a) Month means calendar month;

(b) Person includes a corporation;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Table 2.6 Maxims of Interpretation

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

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

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

your turn [1]

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

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

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

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

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

THE INTERPRETATION OF CONTRACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

THE ROLE OF CASE LAW AND ITS INTERPRETATION

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

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

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

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

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

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

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

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

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

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

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

your turn 2

What is the doctrine of precedent?

GAPS IN LAW

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

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

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

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

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

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

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

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

CONFLICTS BETWEEN LEGAL NORMS

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

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

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

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

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

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

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

LO 1 To differentiate between different legal reasoning methods

Summary

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

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

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

LO 2 To interpret statutes

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

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

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

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

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

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

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

Test Yourself

1 What is meant by the interpretation of statutes?

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

2 What is the teleological interpretation?

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

3 What is case law?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

your turn 1

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

Rule: Dogs are not allowed in the shop.

Facts: Terrier is a dog.

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

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

What is the doctrine of precedent?

your turn 2

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

Endnotes

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