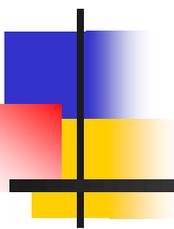


Fundamentals Of Law(2)

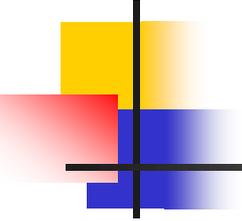
"Sources of Law"

Asst.Prof.Dr. Zeynep Şişli

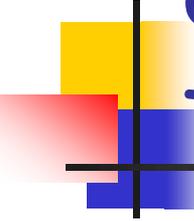


The Term "sources of law"

refers to the compilation of contemporary legal rules; the positive law on which a judge bases his decision



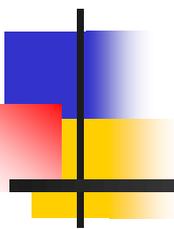
Positive law consists of written and unwritten law as sources of law.



The first source is the written set of laws, rules or regulations and the judicial decisions.

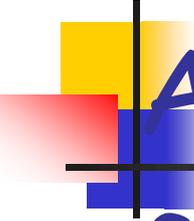
These may be listed as follows;

- The Constitution
- Codes, Statutes, Acts of Parliament
- International Treaties
- Decrees with the Effect of Law
(Statutory-Governmental Decrees)
- Regulations
- By-laws (Law Orders)
- Judicial Decisions



Legislation is the name of the process used for making laws,

in order to regulate the life of living society, general and legal rules are set down in written form by the highest legislative authority of a country.



Acts of Legislation are usually
called code, law or statute

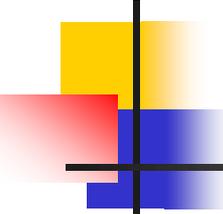
and are enacted to provide a
satisfactory answer by means of
general rule to the needs and
requirements of society.

Turkish Constitution provides that the Grand National Assembly has sole authority to enact laws for application throughout Turkey

Article 7 of the Turkish Constitution states that;

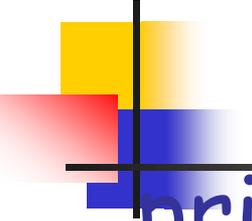
“Legislative power is vested, in the name of the Turkish nation, in the Turkish National Assembly.

This power can not be delegated”



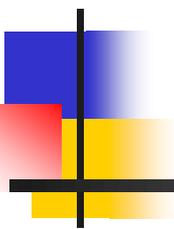
Legislation;

- permits both making new laws and abrogating old ones and is an essential instrument for the regulation of modern social life and carrying out reforms.
- is passed only after extensive consideration, examination by experts and long parliamentary debate and should be superior in quality to unwritten customary rules.
- usually consists of rules of general application to various situations and cases and may easily be referred to.
- being explicit and general, can, in theory, be more easily understood than customary law even by laymen, justifying the proper enforcement of the principle, *ignorance of law is no excuse*.



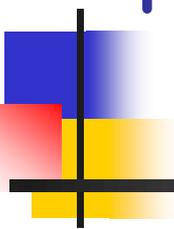
The Constitution is a kind of principal code defining the form and ideology of the state, main organs of government, and legal relationship between the individual and the state comprises basic (fundamental) rights and freedoms of the individual and duties of the state to the individual citizen and of the citizen to public.

Turkish Constitution, Second Paragraph of Article 11;



"Laws shall not be in conflict
(contrary to) with the
constitution."

Codes, Statutes, Acts of Parliament



are written forms of legal rules, having different scopes and applications; such as Civil Code, Code of Obligations, Labor Code, Commercial Code and Criminal Code

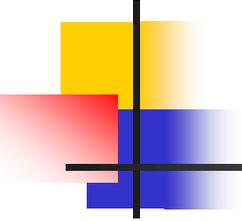


A law is in force or applicable

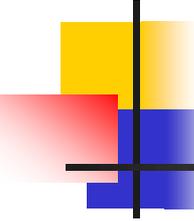
until it is abrogated or changed by a new law.

There are some laws which are applied for a certain period of time.

Budget laws are valid only for one year.

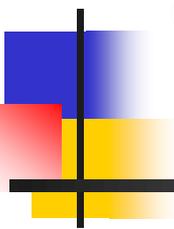


Laws are published in the
Official Gazette after their
promulgation by the
President of the Republic.

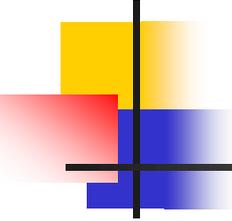


The effective date of a law is specified in itself, by some phrases such as "this statute becomes effective on the date of its publication in the Official Gazette" or "this statute becomes effective a specified time(for instance three months) after its publication date". If there is no provision in the statute itself governing the date of validity, it becomes effective 45 days after its publication in the Official Gazette, according to law.

In the Turkish legal system, as in other legal systems the non retroactivity of laws is accepted as a general principle.



The principle of non retroactivity is a safeguard of democracy and personal freedom against arbitrary interference of the state.



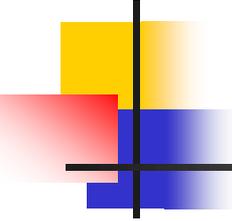
Turkish Constitution, Article 38 says that;

"No person shall be punishable for an act which is not considered an offence under the law in force at the time the act was committed"

Same principle is also stated in the second article of Turkish Penal Code.

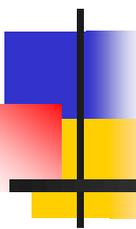
The non-retroactivity of the Civil Code is stressed in the statute about the application of it.

The non retroactivity rule is not applied;



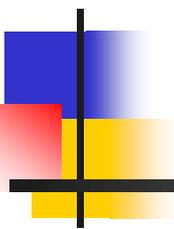
- in expected rights, in considerations of public policy and in criminal offences which differentiate or change the provision positive than before.
- in laws of procedural law.

Decrees with the Effect of Law (Statutory-Governmental Decrees)



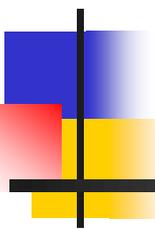
Article 91 of the Constitution authorizes the Council of Ministers to issue decrees with the effect of statutes on condition that be based on a special code gives authority to do it.

After promulgated in the Official Gazette, they are forwarded to the attention of the Turkish Grand Assembly.



However, provisions concerning fundamental rights, individual rights and duties and political rights and duties can not be regulated by decrees; in case of martial law and extraordinary circumstances the above rule doesn't apply.

The Constitutional Court is empowered to exercise judicial control over the constitutionality of statutory decrees, just as it is authorized to consider the constitutionality of other statutes regulated by parliament.



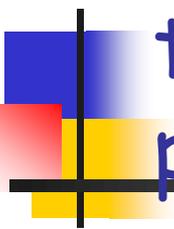
International Treaties are approved by the Turkish Grand National Assembly by enactment of a law and become enforceable after their publication in the Official Gazette like all other statutes.

The constitutionality of treaties, unlike other statutes may not be challenged.

(The Principle of "Pacta Sunt Servanda")

Some treaties which only regulate economic and technical relations and which are not effective for a period longer than one year,

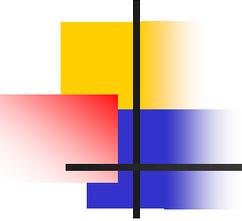
may be put into effect through promulgation in the Official Gazette but must be brought to the attention of the Turkish Parliament within two months following their promulgation.



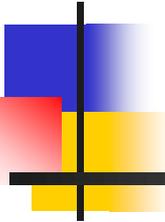
In cases where a contradiction arises between a provision of an existing statute and a statute ratifying an international treaty, the judge shall solve the conflict according to the general principles of law.

In such cases subsequently issued statute will prevail over the earlier one and particular rule will prevail over the general rule.

This is the general rule to apply when two statutes are in conflict about a case.

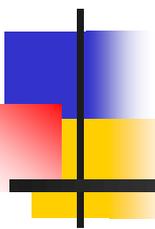


Exceptionally, treaties
involving basic rights and
freedoms shall prevail over
internal statutes
in any case according to the
Article 90 of Constitution.



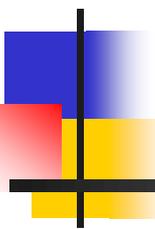
Regulations

According to the Article 115 of the Constitution, regulations governing the mode of enforcement of statutes, provided that they do not conflict with existing legislation, may be issued by the Council of Ministers, and must have been examined by the Council of State, signed by the President of Republic and promulgated in the Official Gazette for being valid.



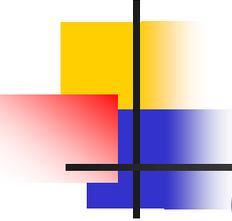
Every valid regulation is dependant upon a statute.

A regulation can only be issued if there is a clear reference in the statute to the promulgation of a regulation.

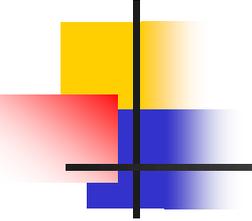


By-Laws

Article 124 of Constitution provides that; "The Prime Ministry, ministries and public corporate bodies may issue by-laws with the purpose of assuring the enforcement of statutes and regulations related to their particular field of operation in accordance with such statutes and regulations. The rules about publication of by-laws in the Official Gazette shall be regulated by the statute"



Council of State is empowered to declare that a regulation or a by-law or any of their provisions null and void, if there is a conflict with statutes or regulations only for by-laws when a suit of annulment is brought before it.

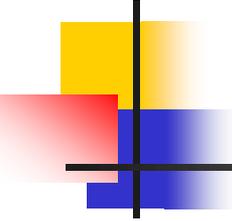


Turkish courts are bound to make their decisions in accordance with the statutory law, the function of the judiciary is being only to interpret and apply the law.

Where no statutory law fits a civil law case before a judge, she/he is also authorized to decide according to the customary law and if there is no applicable customary rule, then the Turkish judge should act as a law-maker and lay down a new rule within the framework of the general principles of law, benefiting from precedent and doctrine, i.e. books of authority.

Case Law/Judicial Precedents

- The decisions of the Constitutional Court which are officially published are binding.
- Not all decisions, but as a principle the decisions of "*the General Assembly of all Chambers of the Court of Cassation*" are binding means enjoy the prestige and authority of a precedent. The general Assembly on the Unification of Judgments makes a unified decision which binds all other courts and the Court of Cassation itself. The other decisions of the Court of Cassation, including the decisions made by the Assembly of the Civil or Criminal Chambers are not made legally binding upon the inferior courts (first level decision courts), yet they generally pay attention to them.
- Similarly; **Unified Decisions made by the General Assembly of the Council of State** bind all administrative courts and itself, same as other higher courts.



Customary Law (Unwritten Law)

The conditions for accepting a custom as a customary law rule;

- Antiquity
- Continuity
- Popular belief in the quality of a custom (opinio necessitatis)
- State sanction
- Agreement with Statutory Law

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