

INTRODUCTION TO TURKISH LAW

EDITED BY
T. ANSAY

KLUWER

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and

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PREFACE

«The Introduction to Law course at Middle East Technical University at Ankara is a two semester course given in the English language for the first year students of the Faculty of Administrative Sciences. During the first semester general principles of law, such as justice, equity and sources of law are discussed. The second semester covers some of the fields of Turkish positive law administered by Turkish courts and other agencies.

The main purpose of this book is to serve as a text for the second semester of this course, although it does not in fact include all the subjects which are covered in the semester. However, it is also hoped that this book will be of some use to foreign practising lawyers and scholars as preliminary reference and key to the basic institutions, principles and rules of Turkish law. For this reason some details have been added in footnotes, bibliographies given at the end of Chapters and a selected bibliography of books and articles is annexed to the book.

The articles in this book were written by their authors in the English language and have been edited in varying degrees by Professors Ansay and Wallace, who have also attempted to make the articles consistent with each other. Professor Wallace has also to some extent revised the language of the articles».

In this third edition the Chapters on Administrative Law is prepared by new author. The other Chapters have been brought up to date by the authors who prepared these Chapters for the previous edition. The editors are grateful to all authors who have contributed articles to this book. They would also like to express their thanks to Associate Prof. Dr. Lâle Sirmen, who kindly gave her valuable help during the preparation of the book. They would also like to express their gratitude among many to Peter B. Whitten, Kent R. Stevens and to Associate Prof. Dr. Ahmet Kumrulu.

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ABBREVIATIONS

Art.	Article
C. C.	Civil Code
C. C. Pr.	Code of Civil Procedure
C. Cr. Pr.	Code of Criminal Procedure
C. E. B.	Code of Execution and Bankruptcy
C. O.	Code of Obligations
Comm. C.	Commercial Code
Const.	Constitution
Cr. C.	Criminal Code
T. N. A.	Turkish Nationality Act

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CHAPTER 1

SOURCES OF TURKISH LAW

Prof. Dr. Adnan GÜRİZ *

I. INTRODUCTION :

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

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

II. CUSTOMARY LAW (Örf ve Âdet Hukuku)

A. Custom in Civil Law :

In primitive communities customary observances supported by supernatural sanctions played an immensely important role in re-

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gulating social life. Fishing, hunting, family relations, even the waging of war, were all regulated by customary rules sometimes down to the smallest detail. Custom constituted the generally and strictly observed course of conduct of the society.

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

In the modern world, the legislature may, by statute, deprive a customary rule of its legal status and custom has become a subordinate source of law². This is especially true of Turkish law where legislation is consciously designed to change or restrain trends in the community's behaviour. In Turkey some laws are directly set against existing customs in order to develop and westernize the country according to European patterns.

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

1. *Antiquity* :

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

2. *Continuity* :

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

¹ W. D. Smith, *Handbook of Elementary Law* p. 5 (St. Paul, Minn 1939).

² H.L.A. Hart, *The Concept of Law*, p. 44 (Oxford 1961).

Similarly, in laws passed during the XVth and XVIth centuries in Turkey customary principles were clearly stated to be enforceable if continuously observed³. The condition of continuity is the material and objective factor applied to prove the validity of customary observance.

3. *Popular Belief in the Rightness of a Custom* :

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

4. *State Sanction* :

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

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

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

³ In the Law of Bozok, articles 9 and 10 express the application of custom even in criminal matters. Ömer Lütfi Barkan, *XV ve XVI. Asırlarda Osmanlı İmparatorluğu'nda Zirai Ekonominin Hukuki ve Mali Esasları* p. 125 (İstanbul 1943).

⁴ N. Bilge, *Hukuk Başlangıcı*, p. 43 (Ankara 1986).