III. LEGISLATION

A. In General

In order to regulate the life of a society, general and legal rules are set down in written form by the highest legislative authority of a country. The Constitution designates such highest legislative authority and possibly authorities subordinate to the highest authority may also lay down subordinate written rules.

Acts of legislation are generally called a code, law or statute and are enacted to give a satisfactory answer, by means of a general rule, to the needs and requirements of society.

B. Legislation in the Turkish Legal System[6]

The 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 Turkish Grand National Assembly. This power shall not be delegated.' The Grand National Assembly can only delegate the power of legislation to the Council of Ministers under certain terms.

C. The Main Characteristics of Legislation

Legislation permits both making new laws and abrogating old ones and is an essential instrument for the regulation of modern social life and the carrying out of reforms. It should be remembered that the reforms of *Atatürk* were introduced and realized through legislation. Ideally, legislation is passed only after extensive consideration and examination by experts and long parliamentary debate and therefore should be superior in quality to unwritten customary rules.

Legislation usually consists of rules of general application to many situations and cases and may be easily referred to. Being explicit and general, legislation can in theory be more easily understood than customary law even by laymen, justifying the proper enforcement of the principle that 'ignorance of penal laws is no excuse' (*Kanunu bilmemek mazeret sayılmaz, ignorantia legis neminem excusat*, Article 4 of the Penal Code).

D. The Hierarchy of Enacted or Written Laws

Written laws or rules may be classified into six categories of descending authority and importance. These categories, and some of their characteristics, are as follows.

1. The Constitution (*Anayasa*)[7]

In the hierarchy of enacted laws the Constitution occupies the first place. The Constitution is a kind of code defining the form and ideology of the state, the principle organs of government, the rights and duties of the individual and of the state to the individual citizen and of the legal relationship between the individual and the state. It contains the most general and abstract legal rules of the country. As it is the supreme law of the country, no law can be contrary to it.

The supremacy of the Constitution is expressed clearly in Article 11 of the Turkish Constitution which states that 'laws shall not be in conflict with the Constitution. The provisions of the Constitution shall be fundamental legal principles binding the legislative, executive and judicial organs, administrative authorities and individuals.' The Turkish Constitution of 1961 introduced the judicial control of legislative acts under the Constitution and a special Constitutional Court has been created to perform this function. The same principle was included in the Constitution of 1982 (Articles 146–153).

2. Codes and Statutes (*Kanunlar*)

Different codes and statutes, many of which are the subject of extensive discussion in this book, have different scopes and applications. The Civil Code and the Penal Code are applied in all parts of Turkey and all Turkish citizens and residents are subject to them. On the other hand, the labour law is drafted to regulate the economic relations of only certain classes of people, namely employers and employees. In a rare case, a law may apply only to a certain citizen. The surname *Atatürk* was given to the first president of Turkey by a special act of Parliament. Similarly, laws passed after an earthquake or other disasters to relieve the stricken population are exceptional, as they do not exhibit the main characteristics of written laws, namely generality and abstractness.

A law is applied until it is abrogated or changed by a new law. But there are some laws which are applied for a certain period of time. For example, budget laws are valid only for one year (Constitution (Cons.), Article 161).

3. International Treaties (*Milletlerarası Andlaşmalar*)

International treaties to which Turkey is a party are approved by the Turkish Grand National Assembly by enactment of a law. Technically, therefore, treaties are statutes, which like all other statutes become enforceable after their publication in the *Official Gazette* (*Resmi Gazete*). However, the constitutionality of treaties, unlike other statutes, may not be challenged. This is so that the other parties to the treaties may rely on their validity once they are passed into law (Cons., Article 90, paragraph 5).

Some treaties become binding without the official approval of the Turkish Parliament. According to the Turkish Constitution, 'treaties which regulate economic, commercial, 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* provided they do not entail a financial commitment of the state and provided they do not infringe upon the status of individuals or upon the right of ownership of Turkish citizens in foreign lands.' But such treaties are to be brought to the attention of the Turkish Parliament within two months following their promulgation. Similarly, economic, commercial and technical treaties concluded pursuant to the authority of parliamentary acts are not subject to the approval of the Grand National Assembly. However, such commercial and economic treaties or treaties affecting the rights of individuals shall not be put into effect unless promulgated.

International treaties ratified in the form of an enactment by the Grand National Assembly enjoy all the qualities of a law. 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 the subsequently issued statute will prevail over the earlier one and a particular rule will prevail over the general rule, the assumed intention of the Grand National Assembly being taken into consideration. Exceptionally, under a new amendment brought to the Constitution, those treaties involving basic rights and freedoms shall prevail against internal statutes (Cons., Article 90, as it is amended on 7 May 2004). According to this amendment, 'In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.'

4. Statutory Decrees (*Kanun Hükmünde Kararnameler*)

The Turkish Grand National Assembly can authorize the Council of Ministers, by special statute, to issue statutory decrees (decrees having the effect of law) on certain topics. In these special statutes the scope, principles and duration of the power to issue statutory decrees are clearly stated. Statutory decrees become enforceable on the day of their publication in the *Official Gazette*, and they are submitted for review and approval of the Grand National Assembly on the day of

their publication.[8] The Council of Ministers cannot issue statutory decrees concerning the fundamental liberties and political rights of individuals. 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 the other statutes.[9] However, in cases of emergency and martial law, the Council of Ministers meeting under the chairmanship of the President of the Republic has the power to issue statutory decrees (Cons., Article 91). The constitutionality of statutory decrees issued in cases of emergency and martial law cannot be controlled and annulled by the Constitutional Court. However, these statutory decrees should be submitted to the Grand National Assembly on the day of their publication for approval.

5. Regulations (*Tüzükler = Nizamnameler*)[10]

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. According to the Turkish Constitution, such regulations must have been examined by the Council of State,[11] signed by the President of the Republic, and promulgated in the same manner as statutes.[12]

Every valid regulation is dependent upon a statute. Since they are issued to govern the enforcement and application of statutes, they can only be issued if there is a clear reference in the statute to the promulgation of regulations.

Regulations cannot contain provisions contrary to statutes. In the hierarchy of laws, therefore, regulations come after statutes and contain more concrete and specific rules than statutes.[13]

Regulations containing provisions contrary to statutes will not be enforced by the courts. A suit of annulment against such regulations may be brought before the Council of State.[14] If the meaning of a regulation or one of its articles is not clear, it is to be interpreted by the courts or administrative authorities.

6. By-Laws (*Yönetmelikler = Talimatnameler*)

Article 124 of the Turkish Constitution provides that 'the Prime Ministry, the ministries and public corporate bodies may issue by-laws with the purpose of ensuring the enforcement of statutes and regulations related to their particular fields of operation and in conformity with such statutes and regulations. By-laws indicated by the special law shall be published in the *Official Gazette*' (*see* Law No. 3011, dated 1 June 1984).

The Prime Ministry, ministries, and other public organizations such as universities and municipalities may issue by-laws in conformity with statutes and regulations, in order to regulate their internal business or their relations with individuals. However, if this is provided for by statute, a by-law may be issued by the Council of Ministers.[15] By-laws may not contain provisions contrary to statutes or regulations.

If a by-law is issued by a ministry and applied throughout the country, the Council of State is empowered to declare it or any of its provisions null and void if it is contrary to a statute or regulation. By-laws issued by other corporate bodies not applied throughout the country might be invalidated by lower administrative courts.[16]

Retroactivity of Laws (*Kanunların Geçmişe Yürümesi*)

In the Turkish legal system, as in other legal systems, the non-retroactivity of laws is accepted as a general principle. If a statute can change rules applicable to past events, the confidence of the citizen in law can be shaken, as no one can know the content of laws which will be passed in the future. The principle of non-retroactivity is a safeguard of democracy and personal freedom against the arbitrary interference of the state. In the past, *ex post facto* laws were condemned both by the Greeks and Romans. The *corpus juris civilis* strongly rejected the retroactive application of laws. Later, retroactive legislation was forbidden by the Declaration of Human Rights and by Constitutions put into force in the eighteenth century.

In the Turkish Constitution the non-retroactivity of criminal codes is clearly expressed. 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.' The same principle is also stated in Article 7 of the Turkish Penal Code.[22] Moreover, in the Statute Regulating the Application of the Turkish Civil Code the non-retroactivity of the Civil Code is also stressed. A similar provision was introduced in the first Article of the Statute Concerning the Application of the Turkish Commercial Code of 1957.

However, the non-retroactivity of laws is not an absolute principle applicable to all cases. Certain types of retroactive laws are favoured, or at least tolerated, by the Turkish system of law. Thus, the principle of non-retroactivity is usually not applied to laws of a procedural character, whether civil or criminal, in the belief that the subsequent procedural rules will govern the case better than the previous rules.