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The meaning of law in the changing world

(Değişen dünyada hukukun anlamı)[1]

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ÖZET

Bugün içinde bulunduğumuz geçiş dönemini uygarlık tarihinin tüm diğer geçiş dönemlerinden ayıran gerekçe evrensel ekonomik patlama, sanatta yeniden doğuş, evrensel yaşam tarzları ve kültürel milliyetçiliğin sağladığı geniş bakış açısı, toplumsal refahın yükselmesi, kadının toplum içindeki rolünün artması, biyolojik olanakların sonuna kadar kullanılması, üçüncü bin yıldaki dinsel yeniden doğuş ve tüm bunların toplamı olarak bireyin zaferi ve yükselişidir.

Diğer yandan insanın insan olmakla sahip bulunduğu hak ve özgürlüklerin güvence altına alınması sadece devlet tekeli altında olmaktan kurtarılmış, çeşitli uluslararası denetleme mekanizmaları bu hak ve özgürlüklerin güvenceleri haline gelmiştir. Bir devletin hukuk devleti olması yolundaki klasik beklentilere ek olarak, devlet yetkilerini sınırlandırıcı gelişmeler yaygınlaşmaktadır.

SUMMARY

The main reasons which separate the present transition term from the other transition terms of history of civilization are the universal economical outbreak, renaissance in art, a wide point of view which was provided by universal life-styles and culturel nationalism, the increasing of social welfare and role of women in society, the using of biological posibilities sufficiently, the religious renaissance in third millennium and finally the victory of the individual and rising their values.

On the other hand, fundamental rights and liberties which human has innate are no more only under the guarantee of the states. These rights at the present are also protected by the control mechanisms of various international institutions. In addition to the expectation of that a state will

have rule of law, developments related to restriction of state authorities have been becoming common.

ANAHTAR KELİMELER

Siyasal, eknomik ve sosyal reformlar - ekonomik gelişme - hukuksal değişim - fütürist yaklaşımlar - uzmanlaşma - bürokratik değişim - hukukun uygulanması

KEY WORDS

Political, economical and social reforms - economical development - legal transformation - futuristical approches - specialization - burocratical transformation - application of law

I- INTRODUCTION

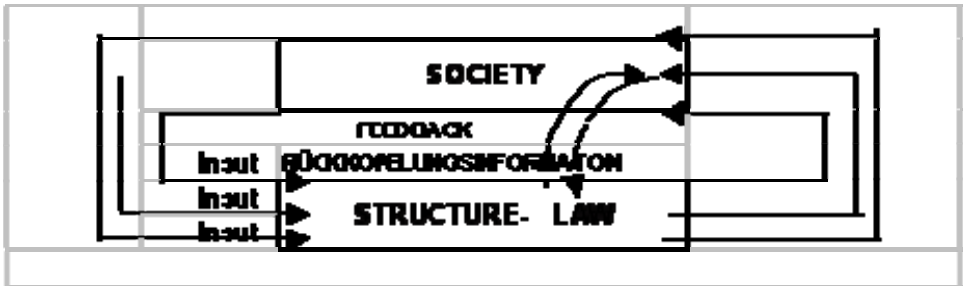
If the concept of legal sources is accepted as making-law (Gesetzgebung), it is perceived as a daily political function of some institutions. But this appearence is deceptive; making-law is not a easily accessible field; it is a very complex activity. It is very difficult to produce new norms respecting the coherences of big pile of legal rules which include many legal sources. Accordingly, contemporary states must go into the activity of codification in order to separate the legal rules and attain a general point of view. How this codification is to be realized without closing the developing roads of law is a continous problem. This is not a problem of logics and gaining knowledge, but also a problem of organization and authority[2].

The form which social structure will take, as depending on being deterministic of customary or positive laws, affects closely the concept of the sources of law. On the other hand, both understandings agreed with that the jurists and application are the real factors in shaping of a society and determining of justice. In another word, the belief of that social value judgement can be changed and law can be used a means of social structure is dominant[3]. In this context, the democratic view of world does not only accept the formal contribution as revealing will and voting of people in elections as a sufficient road, but also it sees compulsory a discussion on problems of society and law. Democratic society does not only expect from jurisprudence the revealing of its judgement on social realities and legal relations in society[4]. At the same time, it expect from jurisprudence an analyze related to that what is "de lege ferenda", namely what ought to be law? This analyze will, without doubt, be in a framework of rational discussion of value about the source of law[5].

The function of law in social life seems to us as a rule-maker system (Regelungssystem). From this standpoint, law can be taken as "a total structure". In this structure the form, which law takes, and our judgements and perception about this form constitute the postulate of doctrine of making-law.

Law in social life is in a vision of rule-maker system (Regelungssystem) and main means of the order.

Law is departure point for social structure because of that it was main form or constituted the main foundation of society. We see that law is fed, with respect to inputs, from social structure in terms of the functions of order, social necessity and justice. On the other hand, with this functions it enters as outputs to social life. This interaction can be showed as below[6]:



This interaction caused the searching of contemporary society to be appeared in different forms in legal area. We can articulate these tendencies as below:

- Firstly, attaining density of the rationalization tendencies generally.
- Unification tendencies in law
- Socialization tendencies in law
- Development tendencies of subject matter of law
- Scientification of law

II– CONTEMPORARY DEVELOPMENT TENDENCIES IN LAW

1- Rationalization tendencies of law

a) Transition from charismatic law concept to experimental law concept.

When the social life is divided into phases of institutional development, the legal and Jurisdictional methods begin with the explanation of charismatic law. We see that producing a functional law order rests on experiments which extracted from life is followed by the tendencies directed to the law which is suitable to idendity of the society.

The best example of this seems in radical reforms stem from the progressive efforts of charismatic leaders. In our country the legal revolution which was realized by Atatürk revealed itself in the adaptation of new law to structure of the society. In this process new rules were also integrated with costumary legal principles and internalized. Max Weber, in his famous book Wirtshaft und Geselschaft, stresses on tendencies of increasingly rationalization of law. "When the institutional development divides into its phases, the general development of law and jurisdiction patterns progress from the explanation of charismatic law-maker to the tendencies of finding law which rests on jurisdictional and amprical law creation belief of specialist jurists[7]. Rationalization of law is an evolution, which passes through the phases of non-rationalized approaches in primitive methods of jurisdiction, directed to specialized juristness rests on increasingly teleological rationality. This conclusion is a tendency to rationalization of procedures of jurisdiction.

b) Efforts to transform the law to a total system which does not contain any gap.

In a solution of a legal case the compulsory resorting to concrete legal rules, not appeal to emotional or political values, leads us to this developing. When concrete legal rules are mentioned,

we generally understand these as the written legal rules. If there is any gap in positive legal textures, according to Turkish Civil Code, the judge who is in charge must solve the problem according to the directives of the law. These directives are explained in article of 1; The law is in force verbally and spritually in all relevant cases with which it contacted. In the cases about which there is not any legal rules the judge resorts to customs, if there is not any customs in relevant case he sets up his judgement according to that if he were a law-maker, which rule he would make. It is possible to learn the technique which was produced by specialist jurists in order to create a rational law. At the present, the value of a legal regulation is measured with respect to its demonstrated utility, not to its formal qualificalions; namely its value measured in terms of qualifications accessible to social ends[8].

The examples of efforts directed to transform the law to a structure which doesn't contain any gap are the works directed to write the customary law. These works caused law to be internalized and to be most suitable to social structure. These also provide new solutions relating to application and filling the gaps. But, in such works it must be taken into account that, on the one hand, the codification of customary law may be beneficial, on the other hand it may cause law to be hardened, this drawback forces new customary rules to be emerged and requires reviewing of the laws. We are seeing the gab-filler function of the customary law in the international field, especially in international maritime and commercial law[9].

The development of technique and its new results have been conducing to the nearness of the present societies and to intensification of their relations. This development causes the unification of law and this unification is realized with respect to local, personal and material perspectives.

The unification of legal rules, with standpoint of validity in terms of place, has been realized in both the present national legal system and out of this legal system. The unification indicates itself, in the legal system, in strengthening of monopoly of state-law and in unificating the function of law-making with legal protection.

The main claim of monopoly of state-law is to attach the reason of validity of all laws to the state and assign the function of direct forcing of legal rules only to state. The law of union (for example, law of association, ecclesiastical law, law of wage) emerges out of the legislation of state. But, at the present, not in the past, the legal nature of these laws stems from the approval of the state for law creation of these unions in the certain fields.Thus, the authority of supervision of state courts has been possible, in the limited field, about law of unions and functions of jurisdiction of union jurisdictional organs. This supervision prevents legal system from dividing into two different autonomous area.

Especially after world war II. , the recognition of federal state systems caused to divide legal sources into different sources, in a written legal system, in proportion of authority of each state. Meanwhile, the constitutional changes, which give wider legislative authority to the union in some area, have been made. This tendency will maintain its existence in future. In a situations that the legislative authority belongs to state, these are unificated *via* agreements. Legal searchings which include new developments and technology, emerged in some fields, will be good examples for the efforts directed to transform law to a total system which does not contain any gap.

In this context the fall of Soviet Union and its transformation into the union of Independent States are important. When they left central planning which had been mantained for over fourty years and when they decided to transform their system to market mechanism, they faced up a huge issue. This is the socialist system in which everything was being planned and the firms can not compete with non-socialist world in fields of trade and labor sector.

The most important fact is that individuals, in a planning network like a huge tree, were trying to maintain their position by mutual political relations and trying to be away from the system[10]. Although Hungary and Poland entered a reform process since 1960's, they could not prevent the

fall of the system. In the end of 1980's the countries of east Europe tried to change radically their structures which were being fell increasingly.

More difficult and determinant reforms, like realization of stability and liberalization in short and middle term and like establishing legal infrastructures in the long term, have been required to be realized[11]. Thus, new investigations of system reflected themselves in finding radical solutions in the field of law as a result of economical structure and contemporary tendencies. The new legal system will provide to remove problems if it leaves its mosaic view and transform itself to a total system.

Necessities compel unification of law also in field out of national legal orders. In some countries, in order to be transformed to a contemporary technological society, the legal system of a foreign country is quoted wholly or partially. At the same time, it is tried to unificate or accomodate different legal systems *via* international agreements. It is the most important duty of Turkey to unificate its legal system with European Union in order to be successful to enter European Union. At the same time, unification of legal protection is also a compulsory issue which maintains its importance.

A wider right to appeal to supreme court against legal decisions helps not only to remove false judgements, but it also conduces to unification of legal protection.

c) With Respect to Differentiation of Status Law and Contractual Law.

Another tendency in unification of law reflects itself in terms of personal validity of legal rules. This is set up especially on the separation of status law and contractual law. Law provides opportunities for individuals, not because of their positions in certain status but of their equal memberships of a society, to form them and their social relations independently. But, if this tendency is taken further, it emerges as a freedoom of better-off. So, this tendency should also be put under control.

d) Determination of the Material Validity Area of Law.

The unification of law, from another point of view, is important in terms of the determination of the material validity area of law. The formation of new law was definited as a process of generalization and unification of factual events and transformation of these into legal issues. This process especially takes place in formation of new contract kinds and in developing of general list of conditions. Contracts of leasing, factoring or joint venture etc., beside the contracts written in codes, have been formed through and as results of liberty of contract and generalisation of contractual relations.

Total economical relations force daily life transanctions to be rationalized and standardized

2- Socialization Tendencies of Law

a) Increasing the role of state in legal protection

In liberal legal systems, autonomy of will which is given to citizens equally (if it is unlimited as in a liberal state) has been leading to increasing of factual unequalities through law. Because, liberty of contract in real application of law is a different opportunity with respect to better-off and worse-off. Only one side who has something can discuss the conditions of contract. Intervention

tendency against free flow of social development in law has led to transition from individual law to social law. Many fields of legal order mean the protection of human being by state. In a legal order this tendency of creation of social state aims at transformation of formal equality to material equality. Thus, law attains a function of social security through the determination of dynamic expectations. This distinction of law in terms of its social function is also valid for corporatist society. In corporatist society, although the status can rarely be changed because of that it was not innate and not earned freely, a bigger social mobility has been maintained in a society rested upon production. Social law tries to provide security for a person by creating legal status in terms of social perspectives in social hierarchy.

Socialization of law, on the one hand, leads to development of field of state authority, on the other hand it leads to increasing of its intervention. As for relating this contemporary tendency with the concept of minimizing state.

b) The Tendencies of Legal Socialization and Their Relations to the Minimizing Role of State.

Retirement of state from field of production and services by privatizations does not contradict with tendency of legal socialization. Because, massive and clumsy structure of state mechanism can not meet urgent necessities in some sectors. The most important reason of this is slowness of transanctions which was caused by bureaucratization. Populist policies which induce over-employing is also one of the most important reasons. A state which increas its control and authority in protection of individuals against consumption society will not be away from tendency of socialization because of minimizing its role in economy.

3- Development Tendencies of the Subject Matter of Law.

The positions which was formed and secured by state emerge in proportion of transition from hard-liberalism to social law-state. When the social life was differentiated, these functions of state must be increased. This tendency related to development of legal subject matter is a result of the increasing role of state. Because, in a law-state the intervention of state to society is realized through law. In a state of laissez faire, the functions of state are limited with the issues of tax and security, whereas in a social state it deals with all dimensions of life.

Efforts directed to secure conditions of working and provide minimum standarts of social security causes to form new legal fields like enviromental law. In every where social state exists, each calling for to law-maker is also a calling for much more law. The subject matters formerly left out of legal field and left to free motion of forces are being included to legal field.

4- Tendencies of Specialization and Bureaucratization of The Legal Institutions.

a) Emerging of Tendencies Related to Development of Legal Subject Matter.

Legal institutions had to be rationalized paralleling to the development of legal subject matter; namely it had to be regularized as possible as properly to realities. First of all, the occupations of state had been certainly separated from each other and differentiated widely in terms of its institutions. At the present, we divide the power of state into four as legislation, jurisdiction,

governing and administration. These four forces have not been separated entirely from each other in democracies of West. However, these forces must control and refrain each other in favour of individual liberties. Furthermore, the separation of powers requires this.

Separation of legal rules have caused to professionalization. The application of law and its imposition have been a main profession on which the specialists have been living. In terms of different working fields, various legal profession branches which can develop different working techinques have emerged. The specialization in particular professional branches has been realized because of that it is not possible to cope with variety of legal subject matter. At the same time this situation is seen in legal institutions, especially in courts and administrative field. In ordinary jurisdiction we do not only separate criminal jurisdiction from civil and free jurisdiction, but also we separate offices or special commissions from each other.

b) The Bureaucratization Which Stems From Specialization.

Necessity of specialization of legal subject matter naturally requires bureaucratization. Such a sophisticated application can maintain its functioning if it is organized and controlled. With respect to supervision, the cases must be determined and widely formed according to demonstrations.

This opportunity of supervision is compulsory with respect to correctness of jurisdiction and a good example of state legal application.

5- Tendencies of Scientification of Law.

a) Determination of the Relation of Law to The Other Social Conduct Rules and Determining Its Scope.

Developments related to determination of legal limits resulted in meta-juridic field and in the clarification field of law. At the same time this leads to other conduct rules which regularize the social life. We count these rules as moral, customary rules etc. Close relation of law to the other conduct rules and definition of these conduce to determination of real field of law. In separation of different kinds of rules from each other, legal rule and moral rule separation is very important. Ideal of good to which moral rule directed and ideal of just as the idea of law are in the same context. But, the importance of determination of both moral and legal rules, in terms of individual right and liberty, is from that the moral rules are "categoric imperatives" for individuals. Whereas moral rules are expected to be obeyed certainly by individual choice, there is an uncertain obligation in application of legal rules. Therefore, law is understood as "minimum ethic" in modern society. Law which intervene the least in moral field of individual means as the most desirable law.

As to customs, they can be related to law as long as they facilitate legal relations. Intensive relation between law and custom, with respect to filling legal gap, and legal application plays very important role in social internalization of law. Determination of this internalized law in preparation of laws is very important. Furthermore, it requires using of scientific methods of legal sociology.

It will be sufficient, for example, to glimpse the changes of marital and criminal law. The validity condition of a legal regulation no longer rests on divine explanation. It rests on social compulsion and scientific data.

b) In Terms of The Legislation, Jurisdiction and Using of the Sovereignty

The separation of legislation, jurisdiction and administration from each other, with respect to application of state force, and their mutual controls is a result of the principle of separation of powers. Determination of each field of powers forms an important part of rethoric studies of legal fields. This differentiation, like the separation of public law from civil law, conduce to specialization and introduction of subject matters to scientific field.

c) With Respect to Introduction of Concrete Case to Legal Area and Its Analysis

Using of contemporary technical opportunities in jurisdiction of conrete cases, as the determination of case in terms of criminology and resorting to expertise, caused science to enter legal area with respect to another view. But, entering of cybernetics and the method of electronical evaluation to legal field have been reacted with doubt in terms of individual liberty. But, if these methods are used only to conceal some information or to program administrative issues, they facilitate some transanctions. Regulation of legal transanction by computer provides accession to official documents and legal statistical information. This is a datum for scientific study. At the same time it facilitate required determination in making law or in changing law.

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[2] Weinberger O., p. 172

[3] Weinberger, p. 184

[4] Weinberger, p. 173

[5] Weinberger, p. 174

[6] for the scheme see Weinberger, p. 176

[7] Weber, M., p. 145

[8] Rehbinder, p. 3

[9] see Işıktaç, p. 96

[10] Özel, S. p. 76-78

[11] Güne, N., p. 54