THE CRISIS OF JURISPRUDENCE IN CONTEMPORARY TURKEY

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ABSTRACT

The Crisis of Jurisprudence in Contemporary Turkey

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This thesis tries to understand the social processes that lead to the current crisis of jurisprudence in Turkey marked by the opening gap between the people's notions of justice and the state administration of justice. This crisis in the field of justice is analysed within the socio-historical context of wider transformations that the society experiences throughout her history. It is possible to divide the social history of the Turkish society into four major periods each having their own unique modalities of morality, ethics, justice and power (political organisation): i) nomadic tribal society; ii) Monotheistic empire; and iii) secular, modern nation-state increasingly integrating into the world capitalistic assemblage, and iv) only a few aspects of the postmodern society will simply be pointed. It is clear that such a past will leave its traces and cause serious difficulties and crises especially in a society like the Turkish one that fell into a whirlwind of a highly fast process of transformation as to experience forces of the two last periods at the same time.

Keywords: morality, ethics, ethical life, justice, jurisprudence, politics, law, state administration of justice, tribal justice, imperial justice, Islamic justice, secular justice, justice in the information society, modes of social relations

ÖZ

Çağdaş Türkiye'de Hukuk Krizi

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Bu tez, son zamanlarda Türkiye'de gündeme gelen ve toplumun adalet fikri ile devletin adalet yönetimi arasındaki açıklığın giderek genişlemesiyle kendisini belli eden hukuk krizine yol açan toplumsal süreçleri anlama ve göstermeye çalışmaktadır. Hukuk alanında ortaya çıkan bu kriz, toplumun sadece bu günü bağlamında değil, daha geniş bir perspektif içinde, Türkiye toplumunun tarihi boyunca geçirdiği dönüşümler çerçevesinde incelenmektedir. Bu açıdan bakıldığında, Türkiye toplumunun tarihi dönüşmesini kabaca herbiri kendi ahlak (adalet de) ve güç (siyasal örgütlenme) kipine sahip dört ana dönem içinde ele almanın mümkün olduğu görülmektedir: i) İslam öncesi göçebe kabile toplumu; ii) yarı-göçebe İslam toplumu, iii) dünya kapitalist yapılanmasıyla giderek daha fazla bütünleşen laik, ulus-devlet toplumu; ve son olarak iv) yeni biçimlenen postmodern dünyaya ilişkin kısa göndermelerde bulunacak. Böylesine bir geçmişin çağdaş Türkiye toplumu üzerinde birtakım izler bırakacağı, ve özellikle son iki yüzyılda iki dönemi birden atlamak gibi çok hızlı bir dönüşüme zorlanan Türkiye'ninki gibi bir toplumda ciddi güçlüklere ve krizlere neden olacağı açıktır.

Anahtar Kelimeler: adalet ve hukuk, siyaset ve yasa, ahlak, devletin adalet yönetimi, kabile adaleti, İslam adaleti, laik adalet, malumat toplumunda adalet

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Needless to say, for all the possible defects and failures that may be found in this study, I have to take the sole responsibility.

PREFACE

I am very well aware of the difficulties and dangers of studying a subject like the title of this work suggests. On the one hand, the subject of jurisprudence itself is huge enough in its dimensions and controversial in its content, and on the other hand, there are so many valuable works that it may seem an arrogant enterprise even to dare to write on the subject as a humble student of society. However, without pretending to be an expert on the legal matters, this work aimed to take a look at the problem of (even formal) justice that has become so acute in our country from a perspective that prefers to emphasise the importance of socio-historical processes.

Now, I can only hope that this work, which is partly a result of my own uneasiness in the face of the jurisprudential crisis in the field of justice as well as being an outcome of a sort of eagerness for 'curiosity driven' research as a 'scholar' (and, naturally, everyone is a human being before being a scholar), may bring a little touch of a colour to the discussions of prevailing injustice. It may well be true that everyone is a child of his own time, and one's interests and problems are formed (form-ulized, in-formed) and put on one's plate by the society (a rather ambiguous term!) of which one is suggested to be a part of. At this point, one cannot help but remember a proverb well-known among the specialists of the field of jurisprudence: "everyone who begins to talk about injustice has a more or less definite opinion of justice in his mind which others not necessarily share."

E. Y.

08.IV.2001, Ankara

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CHAPTER 1

INTRODUCTION

1.0.1 Preliminary

On 26 June 1998 we read a remarkable news story in some of the Turkish daily papers. *Milliyet Gazetesi* gave the story with the ironic header "Bitter Sweet Pastry". Indeed, there was nothing interesting in the crime told by the story. It was nearly a Jean Valjean story about three youngsters who stole some Turkish sweet pastries from a sweets house and ate them! It was surely a crime of theft, and according to the Criminal Law it had to be dully punished for that justice could be fulfilled. The crime was certain, the law demanding punishment in such cases was clear, and the court decision was properly based both on the relevant laws and facts of the case, of course, with the acceptable degree of interpretation on the part of the judges. But, in contrast to all these clear-cut lines of the case and the undeniability of the crime, both the criminals and their families and broader public responded to the verdict of the court as if some *vague* feeling of justice has been injured by the court's harsh decision.

There was nothing unusual in the particulars of the case, but what made it so interesting and remarkable was that both the crime, the trial and the verdict took place at such a time when incredible amounts of (black?) money have easily changed hands, usurped in ways not acceptable according to what is legally prescribed, when people are murdered or incited to be murdered, when certified criminals who fled abroad in order to be able to escape the grasping hand of justice returned home and acquitted

after dubious trials, when the President of the Republic[1], in his Highest Excellency, declared that "it's no harm to break the constitution once", and all without the slightest indication of any threat of legal measures that might have been taken by the legal authorities. It was this socio-historical context surrounding both the crime and the verdict that aroused some measure of public interest in, and (unfortunately) discontent with the case. At this point maybe it would be better to follow the news story (*Milliyet* 1998a):

> One day in Gaziantep four children have stolen some Turkish sweet pastries and everyone's life has been changed. The children were sentenced to prison for a total of 27 years for committing "organised crime". Their families that were already suffering under the burden of poverty are wretched. The journeyman who sued the children is disappeared, protest calls to the shop owner are continuing. Most importantly, the punishments decreed by the court injured the feeling of justice in the society while many criminals go free...
>
> The families of A. A., A. K., L. H. who were sentenced to 6 years of prison each and Metin Subaşı (19) who sentenced to 9 years of prison on the grounds that they crashed the window glass of a sweet pastry shop and stole nuts and sweet pastries, protested against the affirmation of the verdict and said, "In case this verdict has not been changed, our children will grow in the prison just like terrorists."
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> Lawyer of convicted children Hasan Gencer spoke, "I could not visit them for the shame I felt on the part of the society. This decision does not rehabilitate, instead, it increases the feeling of hatred against society."
>
> Milliyet has visited the houses of the children who were sentenced to the highest punishment on the grounds of committing "organised crime". The families of A. K., A. A. and Subaşı reside at the 6. Street at Beydilli Mahallesi, a district in the fringes of Gaziantep. And the mother of L. H. and his five children in Düztepe district.
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> L. H.'s mother Ülger Hamurcu, who has been both mother and father for her six children after her deceased husband, claimed that his patron trusts checks and

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[1] The 8th Turkish president Turgut Özal.

currency worth of billions of lira and cried, "My child was not the sort of children who would do such a thing. But now he has been a child full of fury. I am scared, I am scared of loosing my child."

Servet Subaşı, the father of Metin Subaşı who has been sentenced the longest punishment for he was grown enough, is trying to make a living by transportation with a small truck. Father Subaşı said, "If my son hadn't been in the prison, he would be in the military service by now" and added:

"My son did not injured even a tiny ant until that day. If he had been died I would not grieve this much. I could not afford lawyer's fee, I could not face my neighbours. I put my house for sale, but I could not find a buyer. Everyone can go wrong. But punishment must be in accordance with the wrong done."

A. K.'s father Ahmet Keklik who has been put to compulsory retirement after an occupational accident that invalidated his hand said that he could not even beg anybody for help to save his child. Father Keklik complained:

"I have influential friends. But I could not have said anybody that my son committed theft, and thus requested help to save him. We are poor people and our children suffered the penalty of our poverty by being sentenced to so heavy punishments. If we were rich families our children would not be sentenced to such heavy punishments. When these children are set free from the prison it is impossible that they will be beneficent either for us or for the nation."

The family of A. A. do not speak to anybody after the event. Their neighbours said, "The members of the family are very much ashamed."

'The Children are frustrated'

The families who claimed that the four children, who have no past records of conviction before they went into the prison, and worked regularly at Nur Konfeksiyon (Textile) Workshop, told that now after they went into the prison they have observed a dramatic change in the psychology of the children in comparison to their previous pre-prison state. Families narrated their children's thoughts as follows:

"We have committed a childish act. If we had intended theft, there was cash register there, we would have stole it, and we would have taken along the air-conditioner. But we took and ate just baklava and nuts. Would the penalty for this act that much high? Which punishment are they giving to those who rub the whole country? We are watching on TVs how they let go the rubbers."

On the other hand, lawyer Gencer who took over the defence of the children in

accordance with the court's demand said that theft is not something defendable but the decided punishment and application were wrong. After stating that punishments must be corrective and rehabilitative, Gencer continued:

"The court has sentenced the children with the highest possible penalty. That is, sweet pastry theft was conceived as an act of 'organised crime'. The children have taken that nuts not for selling but for eating. They even had had shown the empty shells. In addition, L. H. did not accept the crime attributed to him and A. A.'s position is doubtful. In such a case it is necessary that the court must evaluate the doubt in favour of A. A. If the court does this, then the case will be no longer a case of 'organised crime'. According to me even the Supreme Court affirmed the decision without investigating the case.

There are lots of inconsistencies in the case and these inconsistencies have the quality that would change the direction of the case. These children will read the news papers when they come out of prison. They will see that the thieves who stole billions are free in the society. And then they will reason, "I stole nuts and went into prison for nine years". Their desire for vengeance against society will grow. The conditions in the prison houses will already feed such emotions. While Edeses, Civans go free, these children could take revenge on society after their release. I have got this impression after my visits to them."

The sentence is legally right, but is it still just?

Lawyer of the children Hakan Gencer said that they have applied to the 6th Criminal Division of the Supreme Court to amend the court decision and added, "our wish is that this time the Supreme Court will investigate the case and taking the inconsistencies into consideration reverse the decision."

Head of the Bar in Gaziantep Bahaettin Bozgeyik, too, claimed that the punishment the children were sentenced was legally right but not just.

After the affirmation of the decision by the Supreme Court A. K. and A. A. who sentenced to 6 years of prison each were send to the Correction House in Elazığ.

Bayram Sarıbaş, who sued the children since the shop owner was not in town in the date of the crime, disappeared. Numerous people who called Sarıbaş protest his action by saying, "You have done what it requires to be done to sentence the children to the highest possible punishment. Do you feel good now?"

At the other hand the shop owner Mahmut Güllü says, "Everybody reproaches us. But our workplace is robbed and we applied to police. We get telephone calls reproaching us. But what else could we do?

Indeed, the handling of the case by the court was legally right, and was such that 'under normal conditions' it left little ground to rise objections. At most, all one can say that the age of the children could be taken into account and the issued punishment might have been lighter than the one decided by the court. However, the phrase 'under normal conditions' is very difficult to apply in the contemporary social, economic and political conditions of the country. And today's extraordinary conditions it turns out to be a very serious and difficult issue to justify such a verdict of the court issued in accordance with the laws in force.

The short article that we have quoted in full successfully touches upon various facets of the socio-political problems underlying the question of justice and the crisis in the administration of it in contemporary Turkey. The crime of theft committed by the children has been described by the court as an act of 'organised crime' that has special meanings and objectives in the Turkish context, and law codes dealing with such crimes mainly refer to actions committed by the Mafia organisations that have successfully articulated themselves to political parties, bureaucracy and national security organisations. Because of such connections these organisations have, it turns out to be very difficult, if not impossible altogether, to arrest and bring the members of such organisations before the court for trial, let alone to condemn them to the punishments proper to their acts. Further, due to the advanced media technology in the country, the lay citizen could easily learn and follow their stories, in spite of the authorities' continuous effort to convince the citizens that the machinery of justice is unbiased and independent from any authority outside the judiciary, day by day it becomes harder and harder for the ordinary citizen to believe in the *just* administration of justice by the state. In our case, the children and their families and the lawyer, being the passive followers of such cases via mass communication media, cannot find any reasonable ground in the relationship between the act committed and punishment sentenced, express their suspicions about the just administration of justice pointing to

the imbalance between their case and the cases of other (Mafia-type) organised crime. The lawyer says: "These children will read the news papers when they come out of prison. They will see that the thieves who stole billions are free in the society. And then they will reason, "I stole nuts and went into prison for nine years". The point these sentences and many others clearly make is that the criminal (in this case the children who ate nuts and sweet pastries) is not convinced that he had committed an act of crime which deserves the punishment that it brought about in the actual case, that being one of the main conditions which has to be met if the juridical system that condemns the criminal for his act could be justified in the eyes of the general society and accepted as a *just* system that deserves to be obeyed, as a juridical system based on the premises of an unbiased rules of 'universal justice'. So, one encounters two questions concerning the general premises of modern jurisprudence here which have to be taken into brackets. One is the supposition of everyone's equality before the law, and the second is the premise of the due proportion of punishment and crime. Further, it seems that in questioning the proportion of the criminal act and the punishment it is condemned, the victims and their families are not alone. Their lawyer, the head of the Bar in Gaziantep, and many ordinary citizens who take the burden of making protest calls, too, believe that the punishment issued by the court is unjust, even though none of them tends to ignore the particulars of the criminal act which they accept as theft. "The sentence is legally right, but is it still just?"

Another important issue related with the question of justice, which the news story points out, is the social class inequality that, although itself is different from politico-social inequality pointed out in the above paragraph, nevertheless brings us back again to the problem of 'equality before the law'. The families of the children, so it seems, are poor ones that were unable to make a show-off of their power originating from their good economic conditions. One of the children's fathers connects the harsh punishment and their poverty by saying, "We are poor people and our children suffered the penalty of

our poverty by being sentenced such heavy punishments". Here it can clearly be seen that this father is not convinced with the justness of the punishment that their children had to suffer, and explains this 'unjust' verdict by referring to their economic condition, giving the impression that poverty, in his mind, is something that deserves additional public punishment. When one connects this sentence with the immediately preceding one, "I have influential friends. But I could not have said anybody that my has son committed theft, and thus requested help to save him". It seems as if he *believes* that if he was *not* ashamed enough as not to draw back himself from requesting help from his 'influential friends', there may be some way to be able to influence the court decision and render the punishment less severe. Here, of course, we do not intend to discuss the reality of whether the courts are free in their decisions from such social, and sometimes political influences, but it will be proper to stress that this is precisely what the subject of the court's decision *believes* in his heart. Putting aside the questions that this situation is apt to rise for the time being, we can conclude on this point by saying that, at least in this case, the subjects (together with others who have no direct personal connection with the case) do tend to believe that the court decisions may be subject to influences emanating from class differences in the society.

The judiciary's harsh attitude towards the children is also questioned by those who are concerned with the case, and this finds its expression in the statement of the children's lawyer: "The court has sentenced the children with the highest possible penalty. That is sweet pastry (baklava) theft was conceived as an act of 'organised crime'. [And after stating that the position of one of the convicts' position in the crime was doubtful, he adds] In such a case it is necessary that the court must evaluate the doubt in favour of A. A. If the court does this, then the case will be no longer a case of 'organised crime'." What the lawyer tries to question here is the severe attitude of the judges who could — if they wish to do so, according to the defence— interpret the action more tenderly than they had done, of course "within the confines of the laws that are related with the case".

The last issue that the news story draws attention is the supposedly rehabilitative and corrective nature of punishment. In this case the actors were children three of whom are under the age of legal liability, and due to their young age generally accepted as correctable people. And both the lawyer and children's families claim that the punishment which will be fulfilled in the correction house will not correct the children, but, in total contrast to the meaning of their name, will turn the children into incorrigible criminals within a couple of years. Moreover, being the crime committed (stealing sweet pastries and eating them) such a trivial crime and punished so severely, they claim, they will turn into vengeful criminals full of hatred against the society that permitted the ruin of their lives just about they would begin their social lives as mature members. In short, on the part of the convicted the trial was an experience full of disillusionment and frustration. But can one say that it was different on the side of the supposedly 'real accuser', that is, the society itself?

What about the apparent, immediate victim of the deed? His shop was robbed (his sweet pastries were eaten and shop windows broken), he used one of his rights of citizenship and applied to police to protect himself from injury that no one denied that it must be handled by the law. The decision of the court leaves him unhappy, too. "Everybody reproaches us. But our workplace was robbed and we applied to police. We get telephone calls reproaching us. But, what else could we do?" In his case we have an accuser, who is condemned by his fellow citizens in their consciences *after* the decision of the court, but still a victim, the party who is injured as a result of the deed under discussion. He does not seem to be satisfied, or released from the injury done either. Unjust administration of justice can satisfy neither of the parties concerned, so it seems.

1.0.2 Introductory

If we can suppose that the economic situation and political conditions may bother most of the citizens in Turkey, it is also increasingly probable that the matters of justice in the country became an additional matter of public concern. True that there has always been a somewhat problematic and tense relationship between the administration of justice at the hands of the State on the one hand, and local-particular notions of justice which have been shaped in the 'public conscience' in Turkey on the other, as could be expected in every state formation.[2]

However, recent decades in Turkey have witnessed an increase in this tension that may rightfully be termed 'qualitative'. A meaningful index of this 'qualitative' change in the tension between the state administration of justice and the moral notion of the 'just' may be the increasing volume of the writings on the jurisprudential (and juridical) problems in contemporary Turkey. In addition to this interest which was primarily the concern of those who have special knowledge in the area, the *Susurluk Accident* in

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[2] In the sphere of the philosophy of law (or jurisprudence, or right, for that matter), there have been many who pointed out the problematic nature of the relationship between the moral notion of justice and administration of justice through a political organisation. For example, among many others, Plato, in his *Republic*; Aristotle, in his *Nicomachean Ethics*; Kant, in his *The Philosophy of Law*, and Hegel, in his *Natural Law* and *Philosophy of Right*, all have pointed out the somewhat problematic nature of this relationship and proposed different solutions to achieve a desired reconciliation (a rebalancing) of the two forces confronting each other at the law-courts. This is also a much discussed theme in the law literature as expressed in terms of the tension between the application of positive law and the principle of equity (derived from a more or less commonsensical notion of justice).

November 1996 has also caused a new and vehement arousal of interest in juridical issues among the wider public. As the saying which has become popular after the accident, 'nothing will be the same after Susurluk' implies, the attitude towards court decisions that previously were held as taboos to a definite degree has changed, and the rightfulness and justness of the court decisions began to be discussed and contested publicly (again, not only by general public, but also, by both journalists and politicians along with the bureaucrats.

Side by side with the suggested re-arrangement of moral values (remember the arguments concerning 'rising values') in general during the early '80s, Turkey began to experience a significant amount of depravity of the values concerning justice, in particular. Living in Turkey, an ordinary citizen can hardly pass a day without finding him/herself feeling a sort of 'uneasiness' regarding the matters of justice. Each passing day brings the news of an 'extraordinary' event by which the citizens of Turkey cannot take ourselves from thinking that the principles of justice have been trampled upon.

As a result, we observe a considerable increase of interest among the public in the proceedings and decisions of the Turkish courts. The news about the crucial trials, court decisions and events (mostly scenes of fighting both in the courtrooms and corridors of the court houses and on the streets outside these buildings) began to occupy headlines of many newspapers and news programs on TVs. Besides, any observer will hardly fail to notice the significant and much-telling increase in the articles and similar written material, concerning the problems of justice in Turkey by both specialists in the field of jurisdiction and the more generally oriented writers such as journalists and politicians who are supposed to represent the general public opinion. Although these authors may differ in their diagnosis regarding the causes of this 'crisis' in the state administration of justice in Turkey, they all seem to agree in identifying the result.

A representative article published in *Milliyet* on 02.07.1998 cries aloud the questions that many in the population worry about: "Whence goes the jurisdiction?" and "What happens to the rule of law?" The article goes on to say, "If you look at the events that continues from the last year to this one, and if you have a sense of justice, if you are respectful to the rule of law you would be startled with terror". The article enumerates the problems of jurisdiction as the dependence of the judiciary on the politicians; insecurity in the courts (indeed, efforts to remove the court trials from public attention); inability or unwillingness to arrest the police officers that are sent to the criminal courts on the grounds of committing criminal acts; prosecution of thought while many other crimes went unpunished either for the committers cannot be caught up or they are acquitted in the courts due to insufficient investigation before the trial; withdrawing judges from the courts in specific cases under the pretext of insecurity; murders by unknown perpetrators; an insurmountable overflow of cases; the question of quality in judiciary; old established patterns of treatment in police stations resisting against the new arrangements in the procedural law; taking over of the some functions of judiciary by Mafia-like organisations; the exceeding power of the expert against the judge in the courts, etc. The article ends by stating that the real cause of all these problems is indeed that the society has not yet internalised the rule of law as an indispensable need.[3]

The final verdict on which everyone seems to agree (including the politicians, too) about the judicial situation in contemporary Turkey is the 'depreciation of the feeling of trust in judiciary process', that is, in the state administration of justice.[4] For example, Yücel

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[3] *http://www.milliyet.com.tr/1998/02/07/haber/hab01.html*

[4] Which means that a sort of belief (or wish) for the sovereignty of jurisprudence is not

(1997: 6) notes "when the wheel of jurisdiction turns slowly and sufferings of the citizens increase due to the conditions in which justice finds itself, everyone is effected from this, and as a result, the feeling of trust in justice shutters".[5] Another common and related view especially in currency among the non-specialists (although there are some among the jurists who 'dare' to subscribe to this view, too) is that the failure in the successful and smooth administration of justice has left some areas of conflict (both personal and social) vacant, to the advantage of other mechanisms of practical jurisdiction which, mostly, are not necessarily in conformity with the principles of the state jurisdiction. From this perspective which, indeed, is connected with the wider political problem of democracy, it may be suggested that while the firm grab of the nation state began to lose its initial strength due to the increasing ability of the rising numbers of the population (some express this, as a phenomenon of population increase and failure in the state response to this increase) in participating public life, the administrative organisation of the state began to face up difficulties in being loyal to its primordial premises regarding the principle of universality.

However, in contrast to this unanimity on the resultant 'effect', we see a great variety of opinions concerning the 'causes' of this increasingly tenser relationship between the administration of justice and the feeling of the just. While experts in the juridical field tend to lay emphasis more on the technical problems encountered in the juridical process such as the shortage of qualified jurists, gaps and inconsistencies in the

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disappeared altogether. It seems that *as if* people prefer to differentiate the juridical that which many believes in jeopardy, from the more abstract notion of jurisprudence whose sovereignty turns to be more and more an utopia hoped to be realised in an unknown distant future.

[5] This is only one mean example, and similar examples arriving at the same conclusion regarding the conditions of jurisdiction in Turkey can easily be multiplied.

existing laws, side by side the nearly acute political problems such as the independence of the juridical apparatus in accordance with the principle of the separation of powers in democratic constitutions; the non-experts, political observers, etc. are, on their side, more apt to suggest the importance of the problematic nature of the relationship between politics and judiciary over the rest.

Be it experts' opinion or non-experts views on the subject, what is common in all these views is the idea that the problems in the judicial apparatus of the state are caused mainly by this dependency of jurisdiction, in the general sense of the term, on politics. But, the senses in which this opinion is expressed are diverse and contradictory. The judiciary, in confessing the effect of political power in jurisdiction in Turkey, suggests that the parliamentary process of legislation is subject to vicious political party struggles, while preferring to understate the role of political intervention in the handling of the cases. Indeed, they are not altogether alone in this view, and supported by the politicians who happen to be in power at the time concerned. However, most lawyers and bars, together with some members of the political opposition and most of the laymen who think and write on the subject, seem to be more inclined to interpret the situation that the current situation is much more the result of the political intervention into the judicial field, although it is not the sole factor. According to this point of view, the clearest indication of this intervention can be observed in the participation of the Minister of Justice and an undersecretary from the same ministry to the Board of Supreme Council of Judges and Public Prosecutors as members. It is suggested that this duo, who hold the organised power of the ministry including the secretarial and other services and power of promoting the jurists, can, sometimes, exercise a

significant amount of political pressure over the decisions of the judiciary.[6]

To sum up, it can be concluded that while there is an unquestionable unanimity on the existence of a 'crisis' in jurisprudential system in contemporary Turkey, there are some differences in emphasis: Some lie the emphasis more on the technical inability of the state machinery in answering the demands of the increasing population (as well as increasing complexity of the social relations) concerning justice, however these may be caused by the political intervention into the judiciary; and, for the other, the crisis is interpreted as the result of the inability of the jurisprudential apparatus in freeing itself from the wider political influences. Despite the fact that we see a point in all these opinions about the crisis and we will try to give the due elaboration to each within the context of this thesis, the main claim of this study is that the roots of the matter lie deeper than what is suggested, and cannot be fully grasped without a penetrating insight into the social modalities of acting and an analysis of the modes of (ethical) justice through which these forms are moulded. What we wish to happen may, sometimes, not coincide with what actually happens. Besides, the widely neglected

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[6] For example, a state attorney at the Istanbul State Security Court, Mete Göktürk declared that he did not believe in the independence of judiciary in Turkey before the public in a TV program in 1996. The reaction of the time's ruling politicians was harsh: He was immediately sent to the criminal court on the grounds of defaming the moral personalities of the Ministry of Justice and The Supreme Council of Judges and Public Prosecutors. In addition, two administrative investigations were initiated against him by Şevket Kazan, the Minister of Justice at the time. Even though he acquitted from the charges at the criminal court, this reaction of the politicians was evaluated as the clear proof of Göktürk's claims regarding the situation of judiciary. For further details regarding the reactions, see the news story published in *Milliyet* on 27.09.1997.

question of newly emerging fields of jurisprudence[7] (such as, that which is posed by the newly innovated technology of digitalised media) has a *deterritorialising* effect on the previously defined and formalised (that is, *territorialised*) field of justice.

The tendency is that these new information technologies will probably be one of the crucial signals of a new type of society that is already begun to be called as *Information society*. It would not be a great hypothesis to suggest that this information society would be the one whose major premises and modalities would be radically different from those of previous society in which we still live in today. While the new information techniques are penetrating deeper and deeper into the recesses of the contemporary society, one can easily 'sense' even now that all the basic premises of contemporary jurisprudence (to which we are wont since 17th and 18th centuries) begin to shatter. New discussions (and even conflicts) about the very concepts of property and property rights[8], of political power and the exercise of it, and lastly but maybe even more

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[7] If not neglected, its influence on the general administration of justice has not been viewed from the perspective of its structural and paradigm-making significance. However, the phenomenon is recognised by most of the jurists, if not by all. But, the general tendency is to see the question under the light of the old paradigm of the philosophy of rights and obligations. As a result, the measures adopted to assimilate the problem into the practice of the administration of justice seems to be restricted to enacting of *ad hoc* law and/or regulations. It is highly probable that the 21st century will witness many judicial problems arising from this issue which cannot be resolved by the existing philosophy of rights and obligations whose premises play a guiding role in the formulation of most of the contemporary laws.

[8] Here, let me make a little reminder on that point that on the main wall of the Turkish court room hangs the inscription: "Justice is the base of property/home/state [*mülkiyet*]".

importantly than all the rest, of the abstract power, all witness to the new situation, that something is in the process of change. Moreover, it seems that, all these new conditions had already began to *force* us to approach to the question emanating from the contemporary structures of legality and justice much more profoundly rather than simply developing *ad hoc* solutions, hypothesis and laws.

The problems relating to the future legal and ethical constitution of a coming society put aside (these are not the concerns of this study which is aimed rather at analysing the processes acting within the current crisis of jurisprudence in Turkey), studying the actualised effects of these newly emerging conditions is important for a proper understanding of the contemporary society whose 'legal forms began to shatter'. In contrast to the difficulty in grasping, at the first sight, the interconnection between the increasingly tense relationship between the state administration of justice and the ethical feeling of the just, and the deterritorialising effect of the new forms of power in the information society, it seems right to suggest that these two do take place in a historical continuum which happens to lie on a societal matrix. But, while asserting this coexistence, one should keep in mind that there are always some regions within a societal space where the vectors of emerging forms cannot reach, and some 'anachronous' or marginal forms of social organisation may remain free (or relatively unaffected) from the deterritorialising effect of the new forms. In other societal zones, these may intermingle with each other: sometimes new forms extinguishing the older ones, sometimes by overcoding them and transforming them, and thus, forcing them to be articulated into the newer forms. By this way, the older forms may continue to exist

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Interestingly enough, the Arabic word *mülk* has these three connotations that are highly relevant in a tribal context while the concepts of polity (the state) and (private) property are clearly differentiated in the Western context.

under new meanings and functions.

Of course, the events from which one gets this overwhelming *feeling* that there is something wrong with the overall jurisprudential system is not altogether new in history.[9] In Turkey's late history, the victims of the Independence Courts, those of the Yassıada Trials after 1960 coup d'état, of the trials after the 1972 military memorandum, and the trials in the State Security Courts (hereafter will be referred as DGMs[10]) after 1980 coup d'état, all point to the injuries done to the feeling of justice for political considerations by those who held power at the times concerned. Besides, we can also mention cases where justice is injured on grounds not directly related with politics, as the opening example of this chapter exemplifies. Turkish history, as the history of any nation (or polity, for that matter) is full of such events. However, we have to observe that there are periods in history when such events with a deteriorating effect on justice both on political and non-political grounds trespass a certain limit causing a *crisis* in jurisdiction connected with the polity or society concerned. This is what we tend to call today as 'legitimacy crisis' and refers to the inability of the governing body to convince the governed that the rule of those who govern is just and well deserved.

In the contemporary Turkey, that is, Turkey from 1980 to the present time (2001), one observes an abundance of events which make one think that justice, in general, and the state administration of justice, in particular, delves into a crisis in which the previous notions of the just and the legitimate degenerate more and more into sheer power relations. In short, Turkey of "90s gives increasingly the picture of a country where the

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[9] It is not also specific to Turkey as a 'developing' country, either.

[10] Initials of the Turkish name of the State Security Courts: *Devlet Güvenlik Mahkemeleri.*

principle of 'might makes right' is applicable in its fullest sense. Just to mention a few examples, which did take place in the last few years, one can count the mysterious fog surrounding the murders by unknown perpetrators, torture cases, cases related with the abuses of restitution as part of export promotion policies, case of Emlak Bank abuse, Metin Göktepe case who died after a severe police beating, cases raised in relation to Susurluk Accident, case of abuse and bribery at the Istanbul State Security Court, cases related with the corruption in the banking system, etc. on the one hand, and on the other, cases of trivial seizure by violence committed mostly by the poor, the Manisa Trial, Sivas Massacre and the like. All these cases, when one considers the procedural methods employed and decisions arrived, and put the pieces side by side, have an hazardous effect on the trust for the 'just' state administration of justice among the ordinary citizen. If one adds to these above mentioned well-known examples the facts that Turkey's judiciary apparatus is far from being sufficient in answering the demand for justice in the country; and the difficulties in claiming that justice *is* fulfilled at least in most of the cases if not all; and, even if it is fulfilled it is too often fulfilled with a considerable delay, then one can hardly conclude that the mechanism which deals with the distribution of justice in Turkey is not on the verge of collapse, and fulfils the demand of citizenry for justice on the part of the increasingly more pauperised masses.

1.0.3 Theme

The main subject of this study is an analysis of the contemporary jurisprudential crisis in Turkey under the light of three major questions: 1) the overcoding by and articulation of the previous modes of justice into the modern mode of jurisprudence; 2) increasingly problematic relationship between the state administration of justice and the ethical feeling of the *just* in the contemporary Turkey; and 3) the deterritorialising effect of the

relatively recent social relations.

The question of justice has always been a hot issue since the formation of the societies with the rulers and the ruled. Each and every party that fell into conflict with some other party in history claimed a certain definition of justice as true. Starting from Plato onwards we have numerous definitions of what justice is. But before entering into a detailed discussion of what people tend to understand from justice, it will be proper to take a look at the dictionary for the sake of the simplicity of a beginning: Justice is defined in dictionaries (Gove, *et al*, 1986) as "the maintenance or administration of what is just: impartial adjustment of conflicting claims". A closer look at the meaning of the 'just' will reveal that it has a double meaning related with each other: 1) having a basis in fact; conforming to fact or reason; not false; being exactly the specified measure, dimension, quantity, or other result of calculation, not approximate but exact; conforming to some standard of correctness; lacking nothing needed for completeness, and 2) righteous before God; acting or being in conformity with what is morally right or good; conforming to or consonant with what is legal or lawful; legally right.[11] From these definitions it becomes clear that, on the one side the 'just' is related with impersonal facts or reason, or a quantitative measure whose proportions would be decided by the calculative reason. On the other side, it is a matter of being morally right whether this morality emanates from a god, conscience capable of having a morality or from whatever and wherever.

When one says such and such act, or statement is just, one wants to convey the idea of their being in conformity with the observable facts and measures, it is suggested.

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[11] All the definitions are taken from Gove, Philip B. *et al* (eds.) *Webster's Third New International Dictionary of the English Language Unabridged*, Merriam-Webster Inc., Springfield, 1986.

Combining this with the moral idea of being morally right, the 'just' acquires the meaning of being in agreement with the moral principles of the good, which, supposedly, is conceived as facts and measures. Since, it is suggested, at least in principle, that the laws and legal precepts are derived originally from the 'moral' principles, it becomes easy to add to the notion of the 'just' another meaning which includes laws and legal precepts which, in their turn, constitute the legal order: being or acting according to the rules of the moral and/or legal order, thus, becomes just!

The term jurisprudence, as explained in the *Webster's* dictionary, refers to a group of meanings all of which are connected to a body of laws in their totality (the *Law*): "knowledge of or skill in law", "a system or body of law", "the science or philosophy of law", and, in a more limited sense, "the course of court decisions as distinguished from legislation and doctrine", and "the collected decisions of a court". Jurisprudence as "a system or body of law" will be more relevant here, because it refers to the totality of the body of law already, which, somehow, covers all the other meanings and gives the term its distinctive tincture. However, in modern times with the emergence of positive school in the field of law one can observe a tendency that sees justice as something relative and prefers to develop a legal theory without establishing the idea of justice in its core for it is not much dependable. In Austin's words who was accepted as the founder of analytical school of law (Austin, 1954: 294) "the science of jurisprudence is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness". By this way the ethical issues of justice, goodness and badness were taken out of the study of jurisprudence as it was defined as a field completely separate from that of ethics. Indeed, this can be considered as an intelligent move on the part of the professional jurist, who does not want to tackle with ethical (thus deeper and problematic) issues and limits himself with the internal problems of the positive law.

Despite these efforts of the positivist school of law emphasising the concept of the

established political order to the disadvantage of 'justice', the notion of jurisprudence is factually unable to severe its ties with morality and ethics. Unfortunately, the road to jurisprudence (and justice as well) seems to be paved by the utopias of the 'good order'. As experience has shown, it was impossible even for the most positivistic member of the positive school to eliminate the idea of justice altogether from the domain of jurisprudence (or jurisdiction). How much indeterminable and vague it may be, or subject to controversies as an ethical idea, a certain definition/understanding of justice forces its way into the matters of law. Still, the dictionaries include in their definitions the special relationship which jurisprudence has with the morality (right/good), politics (action) and the polity (with and within an organisation) as the material place where right action realises itself. Without the existence of a notion of good and a polity as the locus of authority, of organised and organising power, it seems impossible to configure the field of jurisprudence as a system or an (organised) body of the law: Laws must be made within a systematic whole aiming at morally, ethically and politically defined objectives. One should be aware that the field of jurisprudence does not only involve a systematic body of written laws. Rather, it should constitute the field of legal actions with respect to a polity based on the justification of an accepted idea of good, and by this way, define the scope of the sovereignty of that polity before it functions as the filtering mechanism dividing the populace as the rulers and the ruled, and legitimises the rule of the rulers over the ruled. It seems that the idea of justice (as much as order) is indispensable to jurisprudence and jurisdiction.

The positivistic jurisprudence puts itself in a vague contrast with the notion of the 'just', in which case it becomes difficult to find a justificatory basis for jurisprudence which is reduced only to the concerns of the maintenance of *any* order. In contrast to such efforts to "liberate" jurisprudence from the notion of the 'just', the ancients and moderns insist on stressing that the 'just', first of all, is related with the moral principles concerning the good and the 'fair'. Seen under this light, the connection between the

'just' and jurisprudence can be established when the sense of the 'just' is related with the laws and legal prescriptions. But, even here, one may easily observe that the 'just' comes first and 'justness' does not automatically pertains to legality as in the case of Socrates. Thus, there is always a probability of 'unjust laws' emerging from the gap between the prevailing notion of justice and jurisprudential practice. It is this split which causes a governing body to lose its ground of legitimacy with all its laws and legality and fall into a *jurisprudential crisis* which either to be solved somehow or expected to lead to a general crisis in the very constitution of the regime on which that polity itself is built. Unfortunately, this last potentiality of a jurisprudential crisis seems to be the case, functioning as one of the contributing factors to the instability of the political order in Turkey during the last two decades of her history, at a time, when advocating democracy, and democratic principles seem to be at the peak of their popularity.

The impossibility of finding a certain definition of justice that everyone shares in a society both in its present and past is something related with the immaterial character of the concept (and moral character of the notion). However, looking at the social practices may easily reveal that there are certain norms (patters) of the application of developed in certain societal types. So, what is important regarding the question of justice should not be the way it is defined but the way(s) through which it is applied in social practices through ethical codes in a definite society. The fact that the ethical codes are hard to define and subject to change from society and society, or even from a certain social strata to another does not necessarily denies the possibility of a dominant mode of ethics defining (nearly) all the socially acceptable and unacceptable behaviour in a social formation.

The history of the Turkish society, in this context, gives us the clues of three consecutive forms of social organisation that are discernible from each other by the basic principles on which the social organisation rests. It is also possible to call these

three 'stages' as the instances of the Turkish social formation each displaying a different modality of social organisation having, in their turn, different modalities of justice. The three modes of social organisation that the Turkish society passes through are the nomadic tribe, agrarian monotheistic empire and modern (industrial) nation state. In this study we will look at the modalities of justice corresponding to these three modes of social organisation of Turkish society. Contrary to the claims that newly emerging forms of social organisation will swipe out the older forms, new forms do merely overcode the previous ones while articulating them into their own framework with new definitions and functions. Thus, the emergence of a new form of social organisation does not necessarily entails the destruction of the older forms some of which may prove to be highly persistent.

A second question we want to rise is related with the critical relationship between the *state* administration of justice and the social practices of justice defined by the ethical rules prevailing among the populace. For the distance between the ethical feeling (and application) of justice and the state administration of justice is variable one and the current circumstances of Turkish society reflects widening of this gap in the recent 10-15 years. Further, it is unavoidable that the probable effects of recent deterritorialising processes on this widening of the gap to be taken into consideration. The phrase 'recent deterritorialising effects', as they will be discussed later, denotes largely to the dissolution of the coherent nation state as it is expressed in the 18^{th}-19^{th} centuries' ideal under the impacts of newly emerging post-modern society. For the facts that the increasing communication, liquidity and flow of capital and information that overwhelm the national boundaries and powers, etc. puts more and more the validity of a well-packed up nation-state into brackets. This impasse of the nation state forces the social formations adopt new forms of social organisation as it is lately exemplified by the European Union which gives us the pieces of evidence that seem to support the theory of '*Grossraum*' as it was discussed by Carl Schmitt (1990).

CHAPTER 2

THE PROBLEM OF JUSTICE

Everybody seeks justice, everybody wants to be treated justly, and at least in principle, most of us want to treat others and ourselves according to the principles of justice. Yet, it is impossible to give a universal definition of justice upon which everybody would agree regardless of in which society they live and at which moment in their history. It is a *notion* so much sought for but at the same time so much confused and controversial. In the introductory section we have already pointed out that the notion of justice has a relative character in its content and it is this peculiarity of the notion that makes it so difficult to define. Even as early 350 BC Aristotle was aware that the notion of justice was subject to change throughout different groups within the society. In contrast to Socrates and Plato before himself, he was stating (1985: 1094b14-18) that the ultimate good, which constitutes the end of politics in which justice is but a part, does not exist by nature but by human (social) convention.

> Now, fine and just actions, which political science investigates, exhibit much variety and fluctuation, so that they may be thought to exist only by convention, and not by nature. And goods also exhibit a similar fluctuation because they bring harm to many people; for before now men have been undone by reason of their wealth, and others by reason of their courage.

First of all, as Aristotle in the above quotation points out nearly each and every conceptualisation of justice is doomed to be partial. Furthermore, Aristotle explains this partial nature of justice on the basis of the class structure of society. In *Athenian Constitution* he writes (1996a: 1281a9-10) that justice is partial because "all the partisans of different forms of government speak of a part of justice only. It is also worth noting that these partial justices each including in itself some form of injustice are all connected with particular (actual but not ideal) forms of government (expressed as "the

supreme power in the state") in Aristotle. Under democracy the division of the property of the rich among the poor, "because they are more in number" (Aristotle, 1996: 1281a14-16) is clearly unjust. Under aristocracy, it is not just that the good [men] should have the supreme power excluding all the others from the positions of honour in the society (1281a29-30). Under tyranny the unjustness will be still more because more men should be excluded from such positions (1281a32-34). Aristotle also makes his position clear against a universalistic notion of 'rule of law' by asking "but what if the law itself be democratic or oligarchical, how will that help us out of our difficulties?" (1281a37-38). Indeed the Aristotelian conclusion concerning the relationship between these partial justices and "the supreme power in the state" is given earlier: Just before the above mentioned topics in the same book (*Politics*, 1281a13-14) Aristotle declares that "any of these alternatives seems to involve disagreeable consequences" with regard to the completeness of justice. Aristotelian social segments having full rights of citizenship in the ancient Greek society correspond to his three forms of government, which, in their turn, are devised to realise three partial justices. These justices are partial, because it seems that each notion of justice is specifically formulated for a particular social group in the society. And since each tend to deny the possibility of realisation for the other two conceptualisations of justice when they occupy the place of 'supreme power' in the political structure they are doomed to be imperfect and include in themselves 'injustices'.[1] From all this it is possible to derive the idea that one of the reasons for the 'contentless' or 'fluid' nature of justice (or the idea of justice) lays in its close relationship with the social segments, or classes. According to this, any definition

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[1] Such was the real situation according to Aristotle. Of course, when he was criticising the real situation he had the idea of ideal types in his mind corresponding to these three imperfect but real forms of government.

of justice that strives to offer a content for the word should be related (or stained) with the social position of those who make the attempt.

In short, everybody defines justice according to his/her own position within the society and its impossible to think of the idea of justice without this connection: who defines justice for what does matter. That we cannot give a certain definition of justice or offer a content of the concept of it that everyone would readily agree. This fact has also been observed by many others and those who write on justice in modern times cannot make but accept the relative and ambiguous character of the notion (or concept) of justice under the weight of evidence. For example, MacIntyre (1988: 1) emphasises the existence of different and even rivalling notions of justice in different societies,[2] Şeşen devotes a book (1993) to show the changeable and relative character of the concept of justice.[3] There is no need to mention the writers of the modern philosophy of law books

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[2] Indeed, MacIntyre devoted this book to the analysis of different traditions in which some sorts of systematic rationality of justice have been developed, and through which the Western tradition of justice has been shaped. In p. 1 of his book, MacIntyre says:

> "...underlying this wide diversity of judgements upon particular types of issue are a set of conflicting conceptions of justice, conceptions which are strikingly at odds with one another in a number of ways. Some conceptions of justice make the concept of desert central, while others deny it any relevance at all. Some conceptions appeal to inalienable human rights, others to some notion of social contract, and others again to a standard of utility."

In the concluding chapter of this book, writing on the relativity of rivalling conceptions of justice in modern Western societies, MacIntyre also stresses the relativity of the concept of justice (see, pp. 389-403).

[3] Şeşen (1993: 63) says, "That it [the concept of justice] can change its appearance at any time proves that this concept is an empty form and has a relative nature".

who write more or less under the influence of the positivist tradition in jurisprudential theory that seems to try to prove the impossibility of the notion of justice to be the content of modern laws.

Secondly, The concept of or the discourses on justice are not only relative in character, but also seem to be the subject of a most subtle confusion. Indeed, when Aristotle was underlying the relative character of the notion of justice he was underestimating the difficulties pertaining to any understanding of the notion. It is a commonplace observation that those who think and talk about justice are not only talking from their respective social positions, but also on different levels of their comprehension of the existence. Before us we have a series of connected terms that are sometimes used synonymously, sometimes in a variety of meanings. For example, in discussing justice theoretical discourse commonly prefer to use such words like 'the just', 'justness', 'justice', 'fair treatment', 'order' (natural or divine), 'the good', etc. The confusion only increases when these notions are connected with other notions like 'just man', 'just society', 'just law', 'good man', 'good society', 'good state', 'good order of justice', 'just order of justice', 'fair administration of justice', 'fair man', 'fair dealing', 'fair treatment' and so on. It seems that by the way of analogy different occurrences in an individual's life like the justness of a man, social order of justice and the justness of the laws of a body politic are tried to be made resemble each other on a discursive level. Nevertheless, the experiences of such different occurrences resist analogy and insistently maintain their differences. The adjective just does not seem to be enough to equalise them; and all the efforts to embed the subjective notion of justness into the objective practices and occurrences of justice and jurisprudence do fail. As the persistent tensions between the major notions of the just, justice and jurisprudence (as the theory and practice of the state administration of justice) exemplify, the categorical differences of the occurrences (and of the discourses) persist and cannot be made dissolved into each other.

Such confusion in terms seems to be the result of the insistence on applying the same criteria in analysing the reflections of the notion of justice onto different levels of human existence. Generally, it seems that the selection of these criteria depends on the cosmos in which those who attempt to define justice live in and these cosmoses cannot be found always as well articulated, well formulised universes. Moreover, for most of the time such cosmoses can co-exist in the same society at any given time. Thus they do not represent a universe whose boundaries are clearly defined by their carriers, but rather, they seem to be vague universes representing the conscious or unconscious elements that are included in the comprehension (again ambiguous) of those who internalise and construct those universes. That is why the same individual tries to define justice according to various criteria: once according to the premises of one's own inner world, then according to the affairs of everyday social world, and then according to the political objectives or according to one's religious beliefs. And of course utilisation of such different criteria in one's definition of justice gives different results.

Thirdly, the situation gets even worse when one thinks of the usages of this bundle of confused notions. The very forms utilised in the efforts of giving a content to the concept of justice display an unfortunate richness in their variety. This means that one cannot expect to find all complementary or rivalling definitions of justice formulised on the similar levels or by commensurable means of expression. For this reason, we may have highly complex theories of justice in jurisprudence, in philosophy, in politics or less articulated agitating discourses of political movements, dictating clauses of laws as well as in the simple, everyday complaints of the masses. There seems to be no specific platform or level upon which one is right to talk about or demand justice. This creates another difficulty regarding the content of justice and deprives the discourses on justice of their chance of having a specific form in addition to the concept's emptiness. It seems that when we try to talk about justice we have to deal with a mixture of moral, ethical (these two sometimes understood as one and the same thing) and political (or

jurisprudential) philosophy whose key elements still remain on the level of being mere notions rather than theoretical concepts properly related with each other.

Despite all these difficulties in identifying a certain meaning for justice, the idea(l) of it can be seen in every society. The content attributed to the notion may change, the functions of definition or the objectives in demanding certain type of justice may change, the levels that the ideas of justice may be confused but still the concept is there facing us in every society. Whether or not the meaning of justice is relative, it is clear that where and when ever we can talk about a human society, there we can find some notion of justice. Despite the 'contentless' character of the concept of justice, the concept itself endures. This universality (not in the sense that it has a universal, general validity) of the existence of the notion of justice forces one to think on some common denominators that may be found in all expressions of justice in any society.

2.1 Ordering Activity of the Reflective Self

2.1.1 Desire for Order

Above everything else it is possible to find a desire for *order* in every discourse of justice in spite of their partiality and other differences. Everyone who gives a voice to any idea of justice has in his mind an idea regarding how a desirable order (which is just) should be. The mechanisms of this desire for order may vary, but again there seems to be some common features in it. Order, as an idea, implies intelligibility. By putting things into an order we assume to know the things and their relations and this knowledge acquired by ordering things gives us a sense of security, a sense of

belongingness otherwise in a hostile environment.[4]. All human history shows that much effort has been put in producing discourses for constructing a universe where human beings can feel themselves secure, at home. The cosmologies, religious systems, ontological philosophies, and any other belief systems or systems of thought including science and humanity cults as they are crystallised in Renaissance and European Enlightenment, all, try to render the lived universe as a known, knowable, or at least, dependable place. One result of these efforts were the construction of an orderly universe (here, whether it is governed by a transcendental God or gods, or laws of nature does not matter much) where one can feel oneself secure due to the knowledge of the expectability of the outside events.

Plato makes Diotima say in *The Symposium* (1980b: 209b) that the most important kind of wisdom that goes by the names of justice and moderation is that which governs the ordering of society.[5] Only when we were able to put everything in their proper place we feel comfortable and at home among the surrounding things. For him, it was "right for the cobbler by nature to cobble and occupy himself with nothing else, and the carpenter to practice carpentry, and similarly all others" (Plato, 1980c: 443c5-7) for us to feel ourselves comfortable in the universe. It was the durable, stable, or perhaps eternal ordering of things which make us feel secure in a universe where everything behaves according to its predetermined (thus, expectable) nature. A warrior should behave as a

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[4] For the relationship of order, knowledge and sense of security see for example Michel Foucault (1970).

[5] In the *Symposium* (1980b: 209b), narrating a dialogue between Diotima and Socrates, Plato writes: "Now, by far the most important kind of wisdom, she [Diotima] went on, is that which governs the ordering of society, and which goes by the names of justice and moderation."

warrior, a carpenter should occupy himself with carpentry, a sage with wisdom, and an animal should act as an animal: what all these create was a universe in which the action of a thing was predictable. Order increases the ratio of predictability of the actions of things around us. If everything acts according to the predictions (does its proper job, contents with its proper place in the ordered universe) and does not try to trespass the limits set upon it by its very nature (or essence) assigned to it by order, we can see justice prevailing in the beauty of the existing order, under whose rule we can feel unchallenged, secure.

Hobbes once told that in the state of nature (where no social order of things can be found) human beings act according to the precepts of the self-preservation following the dictates of the natural order. In that alleged state of natural order, instinct for self-preservation forced individual man into a bitter rivalry against each other, a state in which everyone warred against everyone turning the *Homo* into a *lupus* for the other *homini*. For man to be able to save himself from this brute situation recourse to reason as Hobbes says, or to wisdom as the ancient Greeks suggests, has to be taken. The resultant effect of this recourse to wisdom/reason is the constitution of the city-state/common-wealth arrived at by the contentment of individuals with their places in the existing order of things in ancient Greece, and by the social contract among individuals in Hobbesian common-wealth. Thus, individuals by being content with their place, or taking the actions of the others under the binding precepts of a contract makes the order in society possible. However this action of contentment or social contract may involve a loss of freedom on the part of the individuals, or rather, this sort of freedom becomes hazardous to their 'ultimate' interests which, clearly, lies upon living a secure life in an orderly universe.

Otherwise, in the state of nature upon which no social (artificial in Hobbesian language) order is imposed, existence seems to be a matter of force. Any entity, any item of

existence has to exercise whatever force it has at its disposal for simply to be. And, by this way it becomes, it exists. In this context, as part of the overall existence, life, meaning being alive of an existing thing, gets its ultimate complexity not only from the totality of the activities of that thing, but also from surrounding activities which directly or indirectly have an effect on that thing. In a sense, the ratio of the predictability of others' acts becomes the chief contributor to one's feeling oneself secure in the presence of those others. However, feeling oneself secure is not an altogether innocent act: it involves exercise of force as a component, at least, enough to impede others' arbitrary (unexpected) trespassing (breaking) of the socially established boundaries (limits of expectation). But feeling oneself secure does require more than sheer exercise of force, and this can only be achieved by some sort of order. And the establishment of order demands the conceptualisation, constitution and establishment of a hierarchy of values, mostly based on a (set of) principle(s) utilised in differentiating between what is good and what is wrong, what is desirable and what must be avoided.

What the order provided at the first hand was the integrity of the thing, the very constitution of that thing which will present itself as an integral whole. Without the parts that come together in a harmonious, beautiful order, each part knowing its proper place in that order, nothing could distinguish itself as a particular 'thing'. Unless this ordering of things within themselves at first, and then unless the ordering of things among themselves, the particular thing does not come into existence, and existence remains a meaningless, shapeless chaos. But one must constitute itself as a harmonious psuche-thing at the same time one can begin to put an order to the outside chaos.

The Greek idea was that to be able to constitute one's self and maintain it, one, first of all, has to construct a 'beautiful order' after the example of the harmonious order of the universe in one's soul by harmonising the highest, the lowest and the mean according to the other three principles (the soberness, courage, and intelligence). Without the

construction of this order it was impossible for a soul to present itself as a soul either, having an integral unity. Only after that unity is constituted and protected by a 'beautiful order' can we begin to talk about a thing, a living being, and a member of a society separated from the amorphous forces of chaos (body without organs).

2.1.2 The formation of the Self

But a desire can only be a desire of something that is already constituted as 'self' before any act of desire (or intuition) can take place. However, at this stage it would not be proper to reduce what we call as self to individual human beings with their distinctive capacity of reflective reasoning as Descartes once did. Rather at this stage we have to stick to a higher generality and say that by the term we should understand a certain constellation of forces that may present itself as a thing. Thus, self can be the human individual as well as a social group or the idea of a social group that represent an independent identity. We *don't know* at this stage of our thinking (not of the unfolding of the Spirit as in Hegelian thought) whether this agent was at the outset a body without organs in the Deluzian sense, or abstract will. All we can know is that it is that something. If we can talk about an agent who acts over its own life and others, it is for sure that this agent should be something that constructed itself as to be *something* capable of acting. For something to be able to act it has to find out that *it is that something.*

2.1.2.1 Order of the Self in Two Spheres of Existence According to the Self: The Self and the Other as the Split in the Existence

Even though the process of identification (feeling oneself as something) is crucial in the transformation of a thing into selfness, alone it is not sufficient for the awareness of self for it necessitates the realisation of the component of other. Only in their relatedness

self and other turn into particular, definite *the* selves and *the* others. This awareness of difference represents the initial stage of the reflective activity of the self. Differentiating is the first stage in the ordering activity but is far from sufficient to elevate the self to a moral being.

Therefore, we have to talk about two reflective acts of the self in its efforts to construct itself as an identity. The first act of the self was the recognition of itself implying a separation from the other. Its this capacity of the self coming into existence as the self that creates its right to exist. That is why Hegel starts his *Elements of the Philosophy of Right* with a discussion of the abstract will and personality because it is the will (and thus, personality as such) that which creates the right by simply existing.[6] This recognition of being someone by the first act of reflection necessarily leads to the separation of the self from the *other* forces, and by this separation the agent constructs itself and the outside world as two different things. This is the construction of the unity of the self as a unique being. Here, the self asserts its existence and says "I am I and they are they".

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[6] Right after the Introduction, the section entitled 'Abstract Right' starts with the discussion of the will and its relationship with the person. In the second paragraph of the section Hegel (1996: 67-68) introduces us with the dual character of the will. § 35 reads as follows:

> The *universality* of this will which is free for itself is formal universality, i.e. the will's self-conscious (but otherwise contentless) and *simple* reference to itself in its individuality [*Einzelheit*]; to this extent, the subject is a *person*. It is inherent in *personality* that, as *this* person, I am completely determined in all respects (in my inner arbitrary will, drive, and desire, as well as in relation to my immediate external existence [*Dasein*], and that I am finite, yet totally pure self-reference, and thus know myself in my finitude as *infinite*, *universal*, and *free*.

2.1.2.2 Order of the Self on Two Spheres of Its Existence: The Soul and the Body as the Split of the Self

But when this separation brought about by the first act of reflection of the self involves at the same time (co-terminus with it) another act of the realisation of its own reflective capability we arrive at another stage of the self's ordering activity. A self that can understand itself as a reflective being thinks itself as an agent of action (a subject) different from the other selves that cannot do this second movement of reflection.[7] Yet, it will be improper to ascribe such a specific ability to act performed by the self under the co-ordination of the reflective capacity of the self to human beings alone. Such a co-ordination of action is merely an act of being conscious of its own reflective capability and this can be achieved by some social groupings or processes while all human beings may not attain to such consciousness.[8] However, for the time being it will suffice for our present purposes to state that in this process of (second type of) realisation the self understands itself as a reflective being. And the moment that the self understands

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[7] Here we do not concern with the 'real' formation of the self that should be thought as a result of the certain constellation of forces interacting with other forces. But rather, the problem we deal with here is how self 'understands' its own unity and reflectiveness in the infinite space created by its own reflective capacity. In contrast to this, the problems of the process of the objective unification of the self and its objective becoming of conscious of itself are completely different things and should be discussed within the context of the concrete historical situations.

[8] Of course, both the structure and working of this being conscious of its reflective capability differ among different, for example nonanthropomorphic selves and should be studied separately. Here, we shall focus on unfolding of moral thought in the human individual self merely.

itself as a reflective being it is enforced to divide itself in a Cartesian fashion into its reflectiveness and physical existence (structuring or ordering of the unity of the self). The self which *attributes* (an act!) itself such and such characteristics of difference (which usually make him feel equal (to existence, to the *right* of existence) if not powerful or superior to most of the external forces) thinks (another act of reflection!) that these characteristics (here, capacity for reflective thinking) make it have an *inner* existence.

It is here that the idea of a morality comes into picture for the first time as the expression and organisation of the thought of 'me' desiring to construct itself as a unique whole (in its duality) distinct from the rest of existence (the other). In the first separation of the self from the other its hardly proper to speak of morality because the self cannot be aware of the existence of an infinite space opened up by its reflective capability. Only with its awareness of its reflective capacity, the self understands the existence of such an inner space and the contradiction brought about by this infinitude and the finitude of its own existence. It is only with this awareness established on such a contradiction that morality is brought into the picture by the desire of the self to overcome this contradiction and construct its integrity once again.

Starting from the moment of the realisation of these two reflective activities of the self, it *thinks* itself in a world divided in two parts (the self and the other) each of which has its foundations in two planes of existence (the finite and infinite). Indeed, the projection of the reflective self of its own reflective infinitude onto the other seems to be the reason for our construction of the idea of *Idea* [*Form* —things-in-themselves, *noumena*]. So, we have the couple of the self and the other, each of which is further divided into two as their finitude and infinitude. As Kant has constructed the relationship between the

reflective mind (the self's own interiority in its infinitude) and *noumena* (the other's interiority in its infinitude) any direct contact[9] between the two becomes impossible for they exist on two separate planes of existence due to the respective interiority of their infinitudes. In contrast to this, the body of the self and the *phenomena* share the same ground of finitude on which they socialise (interact) with each other. It is on this ground again where the self, by reflecting on it, can construct the objectivity of the world, for both the self's and the other's exteriorities can meet (confront with) each other only on the ground of the finitude. That is why the contents of the two spheres of the existence of the self are supplied by its partaking in the infinitude through its exteriority while their organisation is achieved by the interiority (reflective mind, soul, etc.) of the self. This is also because, beneath each sphere constructed by the self's moral ordering activity, there lays physical existence (world of exteriorities), usually and wrongfully called as nature supplying the ground for the sociability (co-existence) of the self's exteriority and phenomena as the exteriority of noumena.

The spheres of the consciousness of the self's experience of life, i.e. its interiority and exteriority should not be thought as independent constellations either. They are connected with strong ties in the unity of the self-consciousness of the self and together extend to the sphere of the other via their finitude as the mutual ground that their exteriorities share. Therefore, the products of the working of forces on each level (of finitude and infinitude) can find their reflections in the other, sometimes with determining power as in the case of the idea of an almighty god or that of an idea of a

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[9] That was the type of relationship that Plato wished to establish by his striving for wisdom as he wished to demonstrate with his famous story of a man sitting in a cave. There, we have a man sitting in the darkness of the cave, facing the wall and thinking to come out of the cave to the daylight.

universal (or social) good attempting to give a definite order to the social life.[10] The contrary can also be seen, for example in the case of a strong social order totally dominating the individual through the latter's more or less complete internalisation of them and leaving no place for the 'freedom' of the individual subjectivity.[11]

2.2 System of Order in the Inner Self: The Impasse of Morality

Once the self recognises the existence of itself as the self and of the other as the non-self, it also recognises at the same time that it has a pure inner part that enables it to elevate itself to the level of communicating with the overall infinitude in its totality[12] and

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[10] As Kant put it, we can know only the phenomena, as it regards to the noumena (the infinitude of the other) all we can do is to make some inferences driven from our own infinitude. That is why the *Ideas* of essence, universal order, an almighty God governing this order, etc. can only be *thought* (imagined) by our interiority, but not known as we come to 'know' the phenomena in our common finitude.

[11] Such a loss of freedom of the self should not be confused with the formal loss of freedom of the citizen under 'totalitarian' political regimes. Indeed, in totalitarian regimes the self has all the more reason to divert from the precepts of the given order, while in democratic regimes where the citizen is said to be free, the critical reflective power of the self tends to fall into a numbness and cracks open to the influence of the external. This may also have some bearing upon the recent discussions related with the demise of subjectivity, the subject turning into object, postmodernity, etc. that are originated and concentrated in developed democratic countries.

[12] This is what the self assumes, thinks by way of analogy, by imposing its own duality (as finitude and infinitude) onto the existence. Of course, this is only an assumption of the self

that it has a finite part that binds it to the same objective (in the sense that they are external) conditions that operate on the other. On the one hand, as the 'inner self' it tries to negate its duality by trying to limit the effects of its external existence (body) and turns back on to itself to construct itself in its own unity as a pure being of its own interiority. It also tries to *dominate* the limiting conditions of the external and strives to extend its infinitude over its external both by its own internal and external activities. But, the efforts of the inner self to shape (organise) both itself and the external remain meaningless for the content of such organising activity is still empty as long as the inner self negates the effects of the external forces. Since its interiority cannot absorb its external and dissolve it in itself totally, the self turns to its external (its own body and the other) to supply itself with knowledge and content. The body binds the self to the finite existence of the other and forces the self to respond to the concrete operation of the external forces.

Thus, the form of the moral order of the internal existence of the self as the product of its reflective activity, which is incapable of totally negating the effect of the external, gets filled with a content supplied by the ethical life of the self, but turned towards its interiority. Therefore, morality represents an act of 'taking inside' (internalisation) of the content supplied by the self's reflective perception of the existence, and this content is used in organising the further divisions, structures, relationships in the existence *as it is constructed in the inner self.* But the content can only be perceived as a result of the organising reflective activity directed towards the external and the confrontation of the empty moral form of the self with the external constitutes the ethical life of the self (and is different from the 'objective' ethics). In other words, when the self tries to extend over

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and the idea of such a parallelism between the self and the infinitude of the self and the infinitude of the other cannot produce knowledge, but belief.

to its external, the empty organising moral activity, enriched this time with content, 'externalises' itself to pose an order on the external (composed of both the body of the self and the non-self, the other) which is social. It is at this moment of confrontation that morality can acquire its content and thus both morality and ethical life of the self becomes closely connected to each other. This shows that the content (essence) can not be found in things as they are in themselves whether they have reflective capacity or not. It can only arise in their relatedness and interaction upon each other.

That is why we cannot find any content in the self, and despite that they are formed in the reflective capacity of the self alone, all the contents of moral virtues as well as ethical values as they are represented by the self can only arise in the interconnectedness of the quadruple world of the self.[13] For, despite the moral ordering activity of the self remains as a constant, relatedness of the forces operating in the external world may differ from society to society or according to the place of the individual self in that society.[14] It further explains why the self cannot take into itself its

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[13] Composed of the self and the other both having their respective interiorities and exteriorities.

[14] Hegel had discussed the idea as various moments of the transition of the abstract will into concrete will, thus he presents this activity as stages in a historical movement. Although his explanation was done in a somewhat mysterious and linear way, he suggested three stages in this transformation. The will starts its journey as abstract will with the abstract right of freedom, then arrives at a stage (through the acquisition of self-consciousness) in which the subjectivity of the will and the abstract (thus without content, reminding the Kantian categorical imperative) good. At the third and final stage the unity of the subjectivity of the will and the abstract good acquires its truth by their objective actualisation in the ethical life. But, such an explanation seems even more mystical than it seems at the first glance, for that it never wants to say that the ethical life is the representation of the totality of acts of

external as it is, but transforms the norms of ethics into values of its own ethical life. We should also mention that this world of the self, now organised as four spherical constellations of forces, is further organised (divided, related, structured) into various degrees of sub-levels that should be dug out in more detail in concrete situations.

2.2.1 The Moral Impasse or Tragedy

From the moment the self recognise through its reflective activity its own inner existence, it stands to the self as an inseparable part of its being, and this part is accepted as its infinitude (Plato, Kant and Hegel for example). It is thought as an *apparat* by the virtue of which the self partakes into and puts its own will on the *totality* of the existence (cosmos, whose components vary according to different authors). The *psuche* in Plato, Aristotle, soul in Christian fathers like Augustine and Aquinas or authors like Dante that constitutes the immortal part of human being and communicates with the rest of the existence created and governed by a deity, the subject having a reason and thus *a priori* categories in his innate 'unity of consciousness' in Kant, the spirit in Hegel, the reason of the rational man in modern economics are the names given to this apparat in various times and contexts with necessary alterations in content, but always only attributed to human beings with the exception of gods.[15] It

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actualisation of particular subjective wills in the reflective self, but rather imputes it a certain form of existence of its own. Indeed there is no problem in attributing the society an existence of its own independent of the subjective wills of its constituent individual members. But, for him, the actual or objective good has its own reasons (and that is mystical) to realise itself through an unfolding of the universal Spirit. To see how Hegel discusses the matter, see especially § 141 (1982: 185).

[15] As a good example of how the form of the connection between the idea of human soul and/or

represents the infinitude of being human because through this apparat human beings (as selves or subjects) *feel themselves* as partaking into (communicating with) existence. Thus, the self is in a sense finds out by the act of reflection that it is a microcosm partaking and projecting the macrocosm in the infinitude of its own reflection, yet nevertheless confined into the body of the individual subject. It is a definite someone's soul, Socrates' soul, for example, but being a part in infinitude it overflows the finitude of the individual human body. But again it's here, in some definite place, in Socrates' body, and thus has a dual existence: it is the soul that which what constitutes the most important part of our being and transcends it, but at the same time

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mind as the apparat that conceives and perceives, and macrocosm in its totality remains the same while the particular meanings attributed to both side of the argument changed, it seemed worth to take a short passage from Bonevac (1993: 43):

> Augustine thus follows Philo in identifying the forms with ideas in the mind of God, and describes the process by which we apprehend the forms as illumination, an act of revelation by which God allows us to make use of a portion of divine mental resources and by which, therefore, God makes our minds resemble the divine mind. We have innate cognitive capacities that reflect the principles according to which God created the world.

However, by emphasising the similarities we do not mean that both the ways of posing the problem and its competing solutions are always the same. The psuche thing first changed into soul, spirit, will, then reason and then a mixture of human psyche (in the modern sense) and reason. Lastly, we began to talk about the 'self' both rational and irrational but reflective and active. Each of these designations poses the relationship in a different and sometimes revolutionising way but the problem remains the same: How we can make ourselves a somebody out of a body without organs as *ourselves* (problem of identity) and relate this construction to the 'outside' existence (the problem of *other*).

As for the idea of god, it rejects such a duality because it is usually represented in various forms of infinitude.

it is tied up with that body that is a tiny particle in the fluxing world of becoming. That is why the individual human being (the subject) is thought to be a microcosm, the infinitude confined into the boundaries of a finitude. As microcosm, it is the infinitude in its finitude.

Nevertheless, the self remains to be bounded by its body as its prison and the soul cannot escape but recognise the world of flux, that continuously changing sphere of becoming. This is because the totality of the cosmos (or existence) understood as infinitude is not limited to particularities of the self's sensual and reflective activity, its something more than that and overwhelms the finite infinitude of the self. What makes the situation even worse for the self is that it understands its own finitude (the fact that it assumes a body form that turns it into something on the first place) on the face of the external. Indeed, it is the recognition of this overwhelming power of the macrocosm over itself that drops the self as microcosm into a tragic situation.

It simply goes on to occupy a different space, a physical space in contrast to the metaphysical space of the soul opened up in the working of human mind, or its ability of thinking. For some time this body was understood as something having carnal desires pleasure and aversion that should have been despised by the better part of human existence, that is, by the soul. But it proved sufficiently that it was persistent and resisted any attempt to exclude it from human existence, at least according to human knowledge that can be verified by the standards of the living (except, maybe, in the case of the Buddha or similar extraordinary persons). As a result, the subject, the agent of the act, should have to be content with living in a carnal (thus, finite) body while aspiring to the infinitude by his soul. As Cassirer (1972: 125) once said, even the Platonic psuche could not break apart the limits set by its prison:

> For the soul breaks through the original Platonic separation [the realm of being as its true site and the realm of becoming as the site of the sensible objects]; it

> belongs to the realm of being as well as the realm of becoming; and in a certain sense it belongs to neither. It is an in-between, a hybrid nature, incapable of renouncing either the pure being of the idea or the world of appearances and of becoming. In keeping with its nature, every human soul has contemplated being, and is capable of apprehending pure relationships of being; but at the same time each soul also bears within it the direction, the tendency, the striving towards sensible multiplicity and toward sensible becoming. Precisely this double *movement* expresses the constitution and the true substance of the soul. Thus it remains an 'intermediary' between becoming and being, between appearance and idea. It is *related* to both poles, to being and becoming, to the identical and the different, without ever being completely absorbed by, or even bound to, the one or the other. Whether it be in relation to the pure idea or in relation to phenomena, i.e., to the contents of sensual perception, the soul remains something independent unto itself. As the 'subject' of thought and of perception, it does not coincide with the *content* of what is thought or perceived.

But, the revenge of the self (in the form of the idea of justice) does not last long to come as its activity of imposing order (of whatever sort) by arranging the outside (cosmos) first making it a 'totality' and then giving it a particular content taken from the social and transformed by the (moral) thought as the ethical life of the self. It tries to create it 'in its own image' in the external by construct it as Being organised into an ethical order by the morality of the self in its expansion from the interiority of the self towards its outside.

2.3 System of Order on the External: Ethical Life of the Self

Hegel once said in his 'Introduction' to his *Elements of the Philosophy of Right* (1996: 63) that morality and ethics (or ethical life, *Sittlichkeit*) are generally used as synonymous words employed in place of one another. He pointed out the existing yet vague distinction made in the employment of these two terms even in 'representational

thought'.[16] He also implies in the same place the confusion in Kantian philosophy regarding the distinction and complains about the resultant destruction of the field of ethics.[17] Even thought Hegel (1996: 162) appreciate Kant for establishing the "knowledge of the will" on a firm ground "through the thought of its infinite autonomy", he still thinks that Kant's failure to make a transition from morality to ethics leave the concept "to an *empty formalism*". In Hegelian language this means that the subject will of Kantian philosophy is unable to determine the content of the principle that would guide its action. We have an individual will and a moral principle pertaining to it that should 'necessarily' guide its actions; but it is left as a empty form without any content. The moral categorical imperative of Kant is valid only in the mind of the particular will and for this reason it differs in its empty subjectivity from the universal ethical duty which is objective due to its universal validity. But, still it remains without a particular content for the law "contains no condition to limit it, there remains nothing over to which the maxim has to conform except the universality of a law as such; and it is this conformity alone that the imperative properly asserts to be necessary" (Kant, 1964: 88).

The conformity of the individual subjective will to the law makes the categorical imperative necessary, but since the law itself is left without a content it is unable to

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[16] He says, "*Morality* and *ethics*, which are usually regarded as roughly synonymous, are taken here in essentially distinct senses. Yet even representational thought seems to distinguish them".

[17] Immediately following the above quotation, Hegel (1983: 63) says:

> Kantian usage prefers the expression of *morality*, as indeed the practical principles of Kant's philosophy are confined throughout to this concept, even rendering the point of view of *ethics* impossible and in fact expressly infringing and destroying it. But even if morality and ethics were etymologically synonymous, this would not prevent them,

supply the categorical imperative with a particular content. According to this, the suggested freedom of the subjective will is filled in Kantian philosophy with the absolute duty to *obey* the objective (and thus external) law. The only assertion of the categorical imperative that supposedly form the basis of our moral actions is this: "There is therefore only a single categorical imperative and it is this: '*Act only on that maxim through which you can at the same time will that it should become a universal law*" (Kant, 1964: 88).[18] Seeing this one cannot take oneself from thinking that Hegel was right in asserting (1996: 163) that if such an imperative would be possible at all and function as the determinant of a 'universal legislation or if it would conform to such a legislation (e.g., the law),' then it would already have a content. This content will be acquired, according to him, in the ethical life when the individual subjective will transforms itself into the objective universal will (Spirit by its unification with the abstract good.[19]

Thus, after stating the insufficiency of the moral categorical imperative alone in supplying the foundation of duty to obey the law, Hegel goes on to construct the field of what he calls 'ethical life'. True that the metaphysical and dialectical particulars of ethical life that he tries to explain as the result [or specific moments] of the unfolding of Spirit (*Geist*) in history is rather mystical. Despite the mystical nature of his interpretation of the ethical life as something related with the unification and

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since they are now different words, from being used for different concepts.

[18] Italics belong to Kant.

[19] In Hegel's case, the abstract good descents from the Spirit of which the individual subjective will is indeed a part of, and in its abstractedness is empty. He describes the subjective good as follows (Hegel, 1996: 186): "That existence [*Dasein*] of freedom which was immediately present as *right* is determined in the reflection of self-consciousness as the *good*."

objectification of the existence (*Dasein*), the particular will (or personality) and the will in itself (the Spirit) is loaded with mystical connotations he was still right in asserting that the content of the moral reflection can only be acquired in the ethical life when the individual subjective will tries to transform itself into an objective universal will, and thus, enters into a relationship with the existence.

Notwithstanding for the obvious differences between the Kantian and Hegelian philosophies both presuppose the priority of reason over the phenomenal, and thus, ephemeral. In Kant, it is the subjective reason together with its categories that determine the nature of the world as it experiences it (the phenomenal world), and since what is knowable are only the categories of the mind the nature of the external can only be deduced from these categories. In Hegel, the superiority of reason works the other way around. According to him, all history composed of phenomena is indeed the history of the unfolding Spirit (Geist) from matter to reason. In the words of Rauch this process can be summarised as follows (1993: 255-6):

> If we agree to see human life as historical in its very essence, the historical dimension must be seen in a global perspective —even in a cosmic perspective whereby human history is regarded as a continuation of the development of the cosmos as a whole. In the terminology of our own time, we may see the cosmos beginning as simple matter composed of undifferentiated particles, but ending as mind and culture subsumed under the heading of what Hegel calls Spirit: i.e. all that has been created by humans using their minds, language, culture, and society. *Geist* has also been seen as a 'general consciousness, a single mind common to all men.' It is this metaphor that makes it possible for Hegel to look at history as though it were the report of the world's own coming to self-consciousness, like a mind growing up and achieving maturity and freedom.

The reason, or at least the seeds of it exist at the beginning in the undifferentiated matter and when the matter gets differentiated the particular subjective will falls apart from the unity of the Spirit. For this reason, the problem of Hegel is to *re*-unite the particular self-consciousness of the individual subjective will with the Spirit that unfolds

itself in the history without being dependent on the existence of this or that particular subjective will. But, in the ultimate analysis, what is common both in Kant and Hegel is the superiority of reason which uses phenomena to supply a content for itself and according to Hegel, ethical life is that moment when the subjective will meets the objective universal will (Spirit). The attributed objectivity of the universal reason (Spirit) is the solution that Hegel suggests for the problem of the connection of the subjective reason and objective external. Indeed, when he arrives at the discussion of the development of a moral world into the ethical life, without waiting to the section he devotes to ethical life, he hastily asserts the superior effectivity of the ethical life on the subjective morality. He goes in this assertion of the ethical life even to the degree of elevating it to a position of absolute duty for it is the Spirit itself from which the ethical life drives its existence.[20] But, such a stand is unacceptable for it denies the real possibility of the existence of some sort of interconnectedness of the reflective mind (lets say reason for a moment) and the world as it is (in itself, in Kant). If such was the case, then reflective mind could never reach over to its external whence it must get its particular content and construct its inner and external world as *this* self and as *this* world.

It seems that Hegel thinks the attribute of the objectivity of the Spirit and its lending off this objectivity to the subjective will via the intermediary of the ethical life (the meeting point) determined by the absolute good, as a solution to the problem of the objectivity of the will and ethical life. But the movement of morality starting from the reflective capacity of the self and proceeding towards the totality of the external world via the mediation of the phenomenal world (i.e. finitude, both of its own and the other) does not

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[20] One cannot take oneself in thinking that his is a thorough case of turning things 'upside down'

necessarily involve the assumption of the dependence of the objectivity of the externality (noumena) on the subjective will of the inner self. This would be an idealistic stand, rather the self, despite all its striving for purity of its inner existence by its morality, cannot escape from the unity of its inner and external existences. Regardless of its despise or appreciation of it the self partakes with its externality in the external existence. It is a part of it and precisely through this peculiarity it *can* touch the external and experience its forces as its objectivity (reality). The reverse of this movement is the movement of the social ethics as the content of morality in the form of various patterns (rules) of acting in society by its force of sanction on to the perception of the self (moment of confrontation again, but this time seen from the other end) which under the power of the organising activity of the self is constructed as the ethical life of the self. Thus, the morality of the self and ethics of society meets each other in the ethical life of the self where both make themselves felt by the other party by their power of effectivity.[21]

The real connection of the self with the external lies in this (its being a part of it), and it is this connection that forces the reflective capacity of the internal to form itself as a contentless form at first and then to acquire its content from the external. For this reason, even the proposition of a reflective inner self may suggest the priority of our modes of thinking, its absolute effectivity is limited to our *understanding* the external. But the inner self's capacity of understanding or misunderstanding (turning it into an order through the moral reflective activity), or not understanding at all, of the external

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as Marx once said about Hegelian philosophy.

[21] The power of the social ethics derives from its capacity of sanctioning, while morality of the self exercises its power of ordering first and then affirming (internalising) or negating (keeping outside, ignoring, etc.).

world can only have a *limited effect* on the power of the external forces as it is also the case with the movement of the social ethics into the morality of the self. As we said, the actual connection between the self and the external is established through the externality of the self (its body, its thingness) and the self can act on the external only through it by expressing its affirmation or negation. The internal moral self, borrowing its content from the activity of its externality, can act only indirectly on the external through its own externality by putting the sensual and reflective experiences of it into a moral order and directing its activities through the dictates of that moral order. In Foucault's worlds (1985: 28):

> Of course all moral action involve a relationship with the reality in which it is carried out, and a relationship with the self. The latter is not simply "self-awareness" but self-formation as an "ethical subject", a process in which the individual delimits that part of himself that will form the object of his moral practice, defines his position relative to the precept he will follow, and decides on a certain mode of being that will serve as his moral goal. This requires him to act upon himself, to monitor, to test, improve, and transform himself. There is no specific moral action that does not refer to a unified moral conduct; no moral conduct that does not call for the forming of oneself as an ethical subject; and no forming of the ethical subject without "modes of subjectivation" and "ascetics" or "practices of the self" that support them.

In other words, such a definite mode of organising and understanding (which is suggested by the philosophies as universal as much as reason is universal for human beings) can form the organised discourse of knowledge of the external through the intermediary of the phenomena. Because, the self in its unity (as internality of its reflective capacity and externality of its thingness) transforms the noumena into phenomena as soon as it touches upon them. But this transformation is not real in the sense that it does not take place in the external, but only happens in the internality of the self, that is the reflective capacity of the self (its internality) can only grasp noumena in an altered form from the point of view of its unity. Furthermore, it processes the already biased view of its externality through its ordering reflective activity. It is this double transformation of noumena that is transformed in the reflective capacity of the

self (internality) and presented to it as phenomena assuming a more or less coherent, but meaningful order for the self. True that this transformation takes place in the internality of the self, but the resultant phenomena stand *as if* external to the self, too. In this sense, phenomena of the actual practices, and thus, ethical life constitute the only recognisable 'reality' for the self and functions *as* reality. But this does not necessitate arriving at the conclusion that it *is the* reality. The reality as becoming of multiplicities (including the externality of the self) stand there without any alteration imposed on it *by* the self unless the self acts on it through its externality. Indeed, this relation of the self to externality is an interactive one both effecting it and being effected by it, and there is no possibility of self's inactivity unless its complete disintegration into formless multiplicities once again as in the case of death of the human subject. Hegel's acceptance of the formation of our particular type of conscience as a result of the historical process that the subjective will has attained in modernity can be understood under this light (Hegel, 1966: 164):

> As conscience, the human being is no longer bound by the ends of particularity, so that conscience represents an exalted point of view, a point of view of the modern world, which has for the first time attained this consciousness, this descent into the self. Earlier and more sensuous ages have before them something external and given, whether this be religion or right; but [my] conscience knows itself as thought, and that this thought of mine is my sole source of obligation.

Since he thinks that the subjective will can only unite with the Spirit at a particular moment of the unfolding Spirit, the ethical life that is formed as a result of this unity can only emerge at a certain juncture in history. Thus, conscience "representing an exalted point of view; a point of view of the modern world" becomes the result of such an historical dialectic. The problem with this interpretation is that is limits the conscience (understood as inner monitoring of the constitution and activities of the self) to a specific moment of the historical development of the subject. But if we re-interpret the above quotation with the addition of adjective 'particular' before the word 'conscience' (as

'particular conscience') we can arrive at a clear understanding of the significance of Hegel's idea. And then we can start depicting the development of a particular type of conscience as a result of the objective historical process and avoid falling into an incurable idealism as Hegel did when asserting 'his thought as it is known by his conscience' as the subjective will's only source of obligation. In fact, the moral principle of the inner self in its infinitude cannot oblige itself by itself to anything, because as Hegel admits, its without any content. Instead, the limitation comes from the outside as the opposing force of the external and this is what creates the difference between the morality of the subjective self and its ethical life. Thus, the similarity (obedience) and dissimilarity (disobedience) between the principles of the morality of the self and the rules of its ethical life emerges as a matter of confrontation of the forces both mental and physical. If there happens to be a convergence between the order of the ethical life and the internal order (moral order) people come to think external order of the ethics as just and desirable. And if the relationship between the two is that of divergence than the people's convictions turn out to be on the negative qualifying the external order as unjust and undesirable. In this sense, any act that reaffirms the convergence between the two gets termed as (the application of) justice and the reverse as injustice.

Another problem in Hegel's conception of the ethical life is his idea of ethical life having an absolute and universal validity. According to Hegel, the apparent variety in the historical process (understood as the universal, cosmic history) should be understood as the result of the unfolding of the one and the same thing, namely, the Spirit of the universal reason. Indeed, all history, for him, is the process of reunification of the particular will with the universal will after a long period of separation (lost child, in a sense). Therefore, while the universal reason displays great variety in its process of unfolding, the nature of the Spirit remains the same both in its initial and final stages carrying the seeds of its potential realisation from the start. But, the problem here is that the idea of history understood as a global system of the unfolding of universal reason,

and thus thought of as a unilateral progress denies the possibility of a variation that may lead different societies to different directions. Therefore, the Hegelian system of historical progress unifies the globe (indeed, a proper act for our 'global' age) and mystifies it under the spell of a cosmic universal reason that is Spirit. This move does not only negates the possibility of the emergence of multiplicity (of various Spirits) as the 'real' thing, but also close the way for the Spirit (if it is allowed to say so) to emanate from the unceasing mutual social activities of the selves. In contrast, the Spirit attains a position, from which it *absolutely* and *necessarily* guides the actions of the particular wills demanding a severe obedience from them, thus leaving no room for individual freedom.[22]

The idea of a universal reason, that is a reason having the same categories and working in the same way, and thus, creating the same type of subjectivity in all individual human beings seems to be endemic in Western thinking.[23] Even Karl Marx, the greatest revolutionary in European history was not immune from this. Despite all his criticism directed against the idealism of the Hegelian philosophy, he also presupposed

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[22] It is remarkable to see that both Kant and Hegel have started their elaboration of morality with absolute freedom and ended with absolute slavery (obedience) 'to be free' (!). In fact, the self can never be 'absolutely' free except in its inner reflective activity. For, it is also a thing, a physical existence, and this being thingness disposes it to the effectivity of the external. By the same reason, it can never be absolutely obedient to its perceived duty (imposed on it by the external) as they assert in the end of their philosophical argumentation.

[23] This problem does not only arise in philosophical thinking but can also be observed in ideological claims of European politics, especially when they try to stretch their power to the outside. The examples of the ideology of the Crusades, those of the colonial period, and lastly *moral* discourses of EU are enough to represent the point.

the existence of a subject with a universal reason. In *Critique of Hegel's Philosophy of Right*, written in 1843-44, his attack on the Hegelian notion of subject was limited to its metaphysic that mystifies the subject (Marx, 2000: § 279):

> "... the real subject [in Hegelian philosophy] appears to be the result, whereas one has to start from the real subject and examine its objectification. The mystical substance becomes the real subject and the real subject appears to be something else, namely, a moment of the mystical substance. Precisely because Hegel starts from the predicates of universal determination instead of from the real *Ens* (*hypokimenou*, subject), and because there must be a bearer of this determination, the mystical idea become this bearer. This is the dualism: Hegel does not consider the universal to be the actual essence of the actual, finite thing, i.e. of the existing determinate thing, nor the real *Ens* to be the true subject of the infinite.

But, still the contributions of Marxism to the discussion of the subject was immense, in that it made possible to think of subject as *real* individual beings which hitherto was understood as the infinitude of the self. On the face of the given variations of subjectivity in various societies or social segments and at different stages of historical processes, it made possible to think of the formation of different modes of subjectivity. But, it still sticks to the idea of the universality of determining features (recalling the categories in Kant) of the subject. Thus we were able to conceive a capitalist subjectivity, a proletarian subjectivity, etc. all formed under the influence of socio-economic conditions of the respective classes but yet sharing the same principles of subjectivity. In Hirst's words (1979: 105) this was "the empty subject who interiorises [but in the same fashion] through experience".[24] Under capitalism this empty subject gets filled with the feature (or faculty) of calculation. Again, at the same place Hirst says about the Marxian notion of the subject that

> [Capitalist economic] Calculation is an effect of experience, it is the interiorisation

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[24] Brackets are mine.

> of the appearances generated by the structure and action on the basis of these appearances. Calculation is an effect of the structure, an effect which continues the structure's existence through the generation of appropriate subjective behaviours and the results of those behaviours. For calculation to work in this way and to perform this social function supposes a *universal subject* of calculation and a given content of calculation. A universal subject of calculation: for all subjects placed in the same position to experience and to act in modes appropriate to the structure they must have the same constitution, the same modes of perception and the same process of reasoning to act on them.

Seen from the reverse this time, the Marxian subject seems to have freed itself from the mystifying effect of being an incarnation of an abstract will, but nevertheless still remains as an universal because this time its capacity of moral ordering in its interiority is neglected and replaced by a certain specific capacity (calculation in the case of the capitalist society). After all what we get, then, is still a universal that produces (rather passively) different appearances of the same subjectivity which are determined by the given specific conditions in the external world (both in time and space). It remains the same as universal (within the limits set by the actual social formation becoming in a definite time and space) owing to its universal mode of perception, reasoning, etc.

In this respect Marxian subject resembles more to the Kantian one except that the latter was a historic. On the other end of the pool we have the Hegelian mysticism of the Spirit enforcing its universality on the existence. It seems that both attitudes neglect to see the quadruple partitioning of existence by the double reflective activity of the self. While the self divides the existence into two as itself and the other simply to be able to be it establishes itself, but at the same time realisation of its own reflective capacity creates an inner vacuum in the self in contrast to its limitations in its external being. It is this split and the consequences thereof that are missed from the attention of the above mentioned positions. Indeed, as Marx well understood, the socialisation of the self in the external world bears much importance in its particular constitution because of the emptiness of its organising reflective capacity. But the self is not a passive receptor of

the external and even 'before' it acquires the content of its morality from outside, its own determination as a thing (which is not universal) together with the organising activity of its reflective capacity may process the external in a different way when it interiorises it. Thus, the self is a particular thing from the start and it does not owes its particularity solely to the internalisation of the external.

We have said that when the self's reflective activity after acquiring a content for its own turns onto the self and organises the inner space of the reflective self, this activity becomes a moral organising activity of the self by taking only the inner space of the self as its focus. When this morality of the self as organising reflective action (with content this time) tries to extend itself towards the external including both the externality of the self and the other(s) as it perceives it, its morality confronts the ethics of its sociability. But, the ethics of the social stands as noumena for the self and the self cannot grasp it as it is but forced to transform them through the filter of its own organising reflective capacity and thus creates its *own* ethical life. Here, the social stands in a similar relationship to the ethics and ethical life as existence stands to the finite co-existence of the self and the others and the self's perception of this co-existence. Therefore, while it is not necessary that there *is* an ethical order in the social actually, since there is no possibility for the self to grasp any disordered social without an order, the coming together of various selves and their interaction produce the idea of the ethical norm, that make itself felt in its force of sanctioning.

In their perception of the relationships between the others and themselves in their externality the particular selves, through unceasing interaction, come to form the idea of the pattern. As Hume had pointed out (1976: 25) it was the experience of repetition of

certain events that create in the mind of the self the idea of some certain relatedness.[25] Hume goes on to say (1976: 27) that the role of human reason is to reduce the complexity and multiplicity of the external to a greater simplicity and to establish certain relationships between them.[26] This explains the requirement of reason to organise things into certain groupings that form patterns. When the individual self becomes a social self in the coexistence of other selves their mutual activity (both reflective and practical) establish the idea of certain patterns of social action that are evaluated as proper or improper according to a given social situation. It was the social approval (affirmation) that creates the propriety or impropriety of such patterns of acting to certain situations, which in turn, elevates the ideas of these patterns of acting into the status of social norms. Thus, the social differentiation between the approvable (identity) and disapprovable (the other) emerges here as the ethical organising principle of society. But, since they (the norms) are external to the individual inner self they stand to it as noumena. And since the self is also an externality to itself, even though it partakes in the creation and effectivity of the ethical it cannot grasp it in its immediacy. Rather, it cannot but apply its organising reflective capacity on the ethical and internalises this transformed 'reality' as its own ethical life. Due to this transformation and reorganisation

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[25] Hume says,

> No object ever discovers, by the qualities which appear to the senses, either the causes which produced it, or the effects which will arise from it; nor can our reason, unassisted by experience, ever draw any inference concerning real existence and matter of fact.

[26] The actual expression of Hume is as follows:

> It is confessed, that the utmost effort of human reason is, to reduce the principles, productive of natural phenomena, to a greater simplicity, and to resolve the many particular effects into a few general causes, by means of reasonings from analogy, experience, and observation.

of the social ethics as the ethical life of the self, the self meets the possible content of its own morality. The norms of the social ethics that are turned into the values of the ethical life and then further transformed to the virtues of the self's morality constitutes the obligatory notion of duty in the reflective self that realises its impasse caused by its own finitude despite the absolute freedom offered to it by its infinitude.

This is also the moment of confrontation of morality and ethical life of the self, because of the possibility of divergence between them due to the organising activity of the inner reflective self when they are transferred from the values of the ethical life. The virtues of moral life, thus, are the reflections of the normative structure of the ethical life of the self in their altered form. But this alteration is not restricted to the necessary changes due to the limitations of the individual self's perceptive and reflective capabilities. It is also effected by a change, a shift in the plane of existence: they are taken from the finite social existence as norms, as patterns of experience felt through their effects on the self and projected on to the reflective capacity of the self which is directed towards the social (in the ethical life) as values. Finally, from there they are transported into the infinite interiority of the reflective self as virtues. It is clear that following such a transformation and transportation the virtues now exist on a different plane of existence with a different system, different concepts, relations and limitations. The internalisation of such social values as socially accepted behaviour gives the content to the moral system of the self and by this way the circle closes. The confrontation of the moral self with the factuality of its ethical life supported by the forces operating in the social ethics produce two results: 1. the conformity of the virtues of the self's morality to the values of its ethical life imposing duty on the self and thus producing obedience in it; and 2. The nonconformity of the moral virtues of the self to the values producing disobedience.

2.4 Justice as the Idea(l) of Order or the Expression of the Specific Content of the Moral and Ethical Systems

Discourses of justice, which are produced in both moral and ethical life of the self[27] reflect different contents that correspond to the levels of perception of the self as subjective self and social self. On the moral side they establish the principle of a 'harmonious order' for the inner self (soul), and then taking its content from the ethical life it endows this yet abstract principle with particulars from the ethical life (outside). In this moral application of norms or powers operating in the outside moral thinking seems to incline to turn them into abstract (infinite) concepts suitable for its own infinitude. Therefore, it can arrive at the ideas of an elevated reality such as those of some kind of divinity or transcendental principle of good and evil. In this sense, it creates the transcendental hierarchy of values through which the individual self alone had to confront itself.

In addition, as its well known, justice has an ethical relevance as well, that is, it is connected to the principles (norms) of living together, and operates also in the realm of the relations of man to man. But this time it does not refer to internally articulated system of moral values within the inner part of the self. Rather, it simply refers to the objective order of things (among which the self in its duality is also included) produced by the social activity of the self. But, in the common usage, we tend to think these two different sorts of reflective ordering as they are one and the same thing. True, they are

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[27] Law is understood as a subordinate part of the ethical life for that it represents an act of extension of the social (ethical) self over to the position of a controlling authority that transforms the discourses of justice into the discourses of law.

one and the same thing on a certain level of generality on which both can be seen as the ordering activity of the reflective self. But, they are the application of this same activity on two different planes of the existence of the self, and in this sense they are different, as their major categories are different.

For example, when Aristotle (1985: 1094b14-27), writing in the 4th century BC, was asserting the ethical (social) dimension of justice he was also emphasising that the preferences relating to the good and the vice were not absolute but relational:

> Now fine and just actions, which political science investigates, exhibit much variety and fluctuation, so that they may be thought to exist only by convention, and not by nature. And goods also exhibit a similar fluctuation because they bring harm to many people; for before now men have been undone by reason of their wealth, and others by reason of their courage. We must be content, then, in speaking of such subjects and with such premises to indicate the truth roughly and in outline, and in speaking about things which are only for the most part true and with premises of the same kind to reach conclusions that are no better. In the same spirit, therefore, should each of our statements be *received*; for it is the mark of an educated man to look for precision in each class of things just so far as the nature of the subject admits; it is evidently equally foolish to accept probable reasoning from a mathematician and to demand from rhetorician demonstrative proofs.

However, before Aristotle, Plato had defined justice as practised among men as a reflection, projection of an absolute and perfect (thus, universal) form (idea) of justice which claimed to exist in an elevated world above and out of this one. We will see that this duality continued to exist and reflected in the discussions in Kant referring to the impossibility of a total compatibility between the 'feeling of the just' and administration of justice. The suggested slippery nature of justice that causes it to escape from a general and enduring definition is a strong index of the influence of the social in determining its content. But this alone does not suffice to explain the discursive confusion around the concept. If the case was not so, then it would be possible to overcome this relatively simple difficulty by looking for justice in its social incarnations in a context bounded

manner.

All the confusion regarding the various representations of the idea of justice like just, justness, norm, value and law seems to arise from this *double* nature of our understanding of human subject as being and becoming (as well as the problem of other, of course).[28] One of the most hazardous results of this confusion is loosing sight of the unavoidable force emanating from the relations of the self with the other in two different spheres of its existence and acting upon the formation of the moral virtues and ethical values of the self.[29] Indeed, all these concepts make reference to the same thing, but on different planes of existence; they represent the idea of order in different planes of human existence. For, moral thought does not limit itself only to ordering of the inner existence of the self, but extends over to the sphere of the outside (where the body and the other stand together) in an effort to put it into an order to be able to solve the contradiction of its finitude and infinitude. Because of this confusion created by the

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[28] The confusion can also be seen in double meanings attributed to concepts such as 'rule' or 'law'. These concepts are usually applied in referring to the order of the infinitude, while at the same time they are used in the meanings of the rules of society, rules of ethics, political laws, etc.

[29] These spheres of existence of finitude and infinitude present the self necessary grids of its own intelligibility in Foucauldian sense. They also offer the common grounds upon which the concepts of moral virtue and ethical value acquire their meanings and become intelligible for the self. The Foucauldian concept of *dispositif* is commonly rendered in English as the 'grid of intelligibility' (Foucault, 1980: 199). Dispositif is conceived as being a tool to construct the infinite number of multiplicities which present an amorphous (chaotic) picture about an 'event' and render it intelligible into the main available means of knowledge production for the Westerners: the discourse.

double activity of the reflection of the self (moral thought and ethical life) we do not only loose sight of the difference between the inner (created by the self's reflective capacity) and outer space of the self but also began to think of morality, ethical life and ethics in a confused manner as if they are the same thing but 'somewhat' different. For the same reason we also try to apply the concepts belonging to these two spheres of life in worlds which they are not a part of.

For example, when thinking about the inner integrity of the self it turns out to be very easy to project the idea of justness (or the idea of good in its relation to it) as the basis of the ethical act while, indeed, the second is related with the social practices as Aristotle has pointed out in his *Nicomachean Ethics*.[30] Or the confusion regarding the relationship between ethics (or ethical values that are sometimes called as 'mores' or 'norms' and the rules of jurisprudence, the laws (and, of course, the actual administration of justice) is also the much expected result of this failure of differentiating law (understood as the rules backed by a political authority) from the habits of the people (*ethos*) as the reflections of the idea of justice onto two different planes of the social existence of the self. The understanding of the role of the double nature of the human construction of the human individual self in moral thinking bears much importance and this should be seen as something different from the efforts that try to understand the true nature of the human individual subject.[31] This seems to be the first

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[30] A representation of this failure is the extension of the idea of good pertaining to the arguments of 'justness' towards the idea of 'social good' in the discourses of 'justice'. There, in the mentioned book, Aristotle's usage of the Greek term *ethos* and its derivatives have been used in several meanings that are closely related with each other.

[31] However, the reader may rightfully observe that by stating the need for a reorganisation of the

necessary step in locating the 'proper' sites and roles of the processes called and differentiated as 'morality', 'ethical life' and 'ethics'.

Desire for justice, and thus order has to be, at the same time, a desire for an ideal that generalises. An ideal suggests an idea, a construction of thought that is *better* (perfect) than all its realised forms. In thinking justice one believes that one has a better idea of order than the one administered in actual reality. Furthermore, as an idea it is interventionist because when thinking a perfect justice one thinks in phrases that include the '*ought to be*', and one desires a replacement of the existing order with one's own hierarchies of values. Since the idea of order does necessarily include everything (one cannot establish an order without the things to be ordered) in the known universe under its binding spell as the expression of the desire for order it also claims the general validity of its own. It is an attempt to effect the existences of others, to change their place in the existing hierarchy of things and that is why justice is also politics.

The awareness of the self (first reflective activity) involves the idea of the other as its constituent element, for the self is constructed in its relations, or relative positioning with the other. Parallel to this, in very notion of justice we encounter some sort of awareness of the self whether it is overtly expressed or just covertly implied. Yet, the awareness as

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concepts we are also trying to establish a (new) order of things. But it should be understood that we engage in this effort to be able to make our *discourse* in this thesis intelligible for others, and it is this effort that forces us to construct an order. Otherwise, experience has shown repeatedly that human beings in their everyday lives can bear to be alive without constructing an order in which every black hole is successfully filled by mutually consistent arguments. Some societies and millions of people who never tried to theorise about existence and never produced a discourse on the order of things should be enough to support this last argument.

such of the self and the other does is not enough alone to give an idea a specific tincture that relate it to the notion of justice. The recognition of their relatedness with each other is also crucial for any idea of justice to develop. For this reason, any idea of justice extends itself from the self to its relatedness with the other. If the ideas of justice takes the self as their reason, their ground on which they extend themselves is the relatedness of the self with the other and this relatedness of the self with the other(s) is indeed what constitutes the social.[32] The world of the self was connected from the outset with the others and this is the problem of coexistence that marks all the discourses of justice. But realising the nature of the relationships between the self and the others in a notion of justice necessitates the existence of a reflective mind or of a knowing and deciding authority as an additional component.

The fact that every notion of justice involves the idea of a self acting upon its relations with the others as the ultimate authority creates the connection of justice with power and offers it a purpose and a centre. The extension of the self as authority over the social world composed by the self and the others gets the form of rule in the notion of justice. Hence, if there can be any notion of justice there must be some rules as its form that prepares the ground for the possibility of social expectability. It is for this reason that as their form of expression the notions of justice assumes the form of a rule designed to create an acceptable degree of expectability with regard to the otherwise unanticipated relations between the self and the others. For if the actions or counter actions of the agents cannot be anticipated then any permanent social relationship turns out to be impossible.

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[32] Social is understood here not in its narrower sense that refers to things pertaining to the human social existence, but in a more abstract sense as the relatedness of the self with the others in coexistence.

All notions of justice express an interest for order, and the component of order functions in any idea of justice as its unity. Justice as the product of ordering reflection of the inner self is the *idea* of order, and its being the idea of order (without a content) is its only universality on the moral level before moral self borrows its content from its ethical life. Hence justice as an abstract idea of order becomes a general feature of the human social life and can be encountered in any society, in any social segment or individual. But, since the content of the ethical life is the product of the articulative activity of the reflective self on what it perceives as objective world, justice as some definite idea of order is doomed to be partial. The variety in the points of reference both in the reflective thinking and the lived world as well as the selection of the major categories as the keynotes of the suggested order make the ideas of justice with content which is not only partial but also incommensurable. Therefore, it is necessary to differentiate its various applications and employ them in their specific meanings. Or rather, the various elements in the ideas of justice make it possible to understand and differentiate several levels of human perception of existence. For notions of justice do not relate themselves to particular acts alone, but express a desire to establish a systematic that organise the relations between the members of the social world. In the coexistence of the self and others in a social whole there must be some sort of order whose regulation is arranged by the rules that are applied by a reflective authority. To sum up, we find the self as the purpose, the relatedness of the self with the other (social existence) as the subject, the establishment of the authority of the reflective self (power) as the goal, and the rule as the form of any idea of justice. But it is the component of order that gives the ideas of justice their integrity. Therefore it is only natural that in the organisation of the things in a social world into an order as the ultimate actualisation of an idea of justice we can find all these components even if they are presented in disguise or in a confused manner.

We have already said that justice is about order. But it is also an idea(l) and if we cannot accept the somewhat mysterious Spirit of Hegel, Nature or a Divine Will who

has command on the things to enforce them into an order; then there will be no room in our thinking for any sort of logical 'necessity' of order pertaining to the things as they are in themselves. Indeed, only a reflective mind could be so arrogant to enforce its requirement of (or yearning for) order on existence. And this is enough to explain the highly strong connection between the subjectivity of a reflective will and its desire to knowledge, power and authority. In such a connection one cannot take oneself from thinking Nietzsche's notion of 'will to power'. The ordering of things seems to be due to the need of the reflective will who uses its capacity of reflectiveness as a tool to assert its power (deriving from merely its being existent) over the rest of the existence (the other). It is for this reason that it needs to have specific forms of discourses of justice that are produced by the capacity of reflection of the subjective will and that correspond to the levels of its perception of existence. For mere perception without reflection could only be a projection of chaos onto the will.

The various discourses of justice produced on different levels assume specific forms and are directed towards the achievement of the task of subordinating these levels of perception of existence to the ordering activity of the will as an expression of its desire to maintain and *expand* its own existence as the self.[33] It is in this sense that justice is the Idea, an idea of ordering of things or, as Plato puts it, the good and harmonious order of things.[34] As an idea it is also a will to power, a will that wants to see its

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[33] Knowing is at the same time expanding by interiorising.

[34] It seems that Plato understood better the only requirement and meaning of justice than Kant did, according to whom justice was the externalisation of the categorical imperative of the will that was a mere empty form. Indeed, Kant's categorical imperative implies in it, but rather in a well-hidden fashion, the will's requirement for order, because the maxim commands

expression in the external, or wants to construct the external in its own image. The only imperative left, then, turns out to be the *imposition* of order on things not for the sake of an abstract good, but for the sake of knowing and mastering over them.

As a result of this activity of imposing order on things by a reflective will we find the virtues of morality developed on the level of the experience of the 'inner' self, that is the self as such, the values of the ethical life developed out as a result of the reflection of the self over its confrontation with the other, and lastly, the norms of ethics on the level of experience of the social as the effects of the external forces. The first two of these categories which derive from the reflective activity of the self are imposed by the self on the outside with varying degrees of effectivity while the last one is coming from the outside to oblige the self to the rules of the social.[35] The laws on the level of the experience of the body politic do constitute merely a sub-category of ethics that are created in the field of the social where norms of the ethics emerge as the products of the never ending mutual activities of the selves. Lastly, even though it seems as if it is external to the domain of justice, and thus a through discussion of it falls outside of the scope of this work, we should just mention that the so-called laws of nature that are first tried to be uncovered by religion as the general ordering principles of cosmos, and then by philosophy as the general laws of nature, and finally by scientific activity as the laws of physics are also the result of this never ceasing collusion of forces of the selves in their social existence, and for this reason they seem to have a real existence exercising

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obedience to the universal laws that can function towards the ordering of things in an intersubjective manner.

[35] That is why morality unless meeting with the social in the ethical life of the self remains as an empty form, an abstract principle of order.

effective power on the existence of the particular selves.[36]

To sum up, the construction of the discourses of justice ordering different levels of the self's existence necessitate the existence of a subjective self with a reflective mind. The second stage, the passage from morality to ethics is achieved through the intermediary of the ethical life, as Hegel puts it in a different fashion,[37] when the self recognises the existence of the other. The moment of the self's awareness of the other is both the moment of its recognition of the potential danger of the other towards its previously opened up space (the 'inner'), and the moment of its realisation of the existence of a wider external space towards which it may expand itself. Morality elevated to the level of ethics (indeed ethical life, but here it is presented by the self as ethics) represents this moment in which the subjective self tries to expend its inner space towards its outside by an effort to impose its own values (rules of order) on the other to be able to cope with the presence of the multiplicities (of finitude, infinitude, and the other) in one. It is an order for which, allegedly, the individuals are willing to sacrifice at least a part of

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[38] Physics in the sense that 'not metaphysics'. When the universe is limited to the 'sensible world' of physics (or nature) discourses of justice shows itself as the expression of the relationship of the self with its environment (Marx). But, the subjective self, in its recognition of itself as 'free' (infinite) may extend the boundaries drawn by physics and by transcending them steps (*transcends* both itself and the given sensible world) into the 'insensible" world of metaphysics (and of religion, for that matter).

[37] As the unity of the subjective will with absolute good as objective criteria (Hegel, 1996: 185). Just at the beginning of § 141, he states the good "as the substantial universal freedom, but still as *abstract*" (Italics belong to Hegel).

their freedom.[38] But the self can never impose the power of its ordering principle equally on these levels, and the absolute freedom of the self remains limited only to its interiority. Yet, it is not the sense of duty, it should be stressed, that which obliges the self to conform the rule, but the effectivity of the outside forces acting upon it.

In this connection it is interesting to note that all discourses of justice starts from the morality of the self and moving towards the higher levels of social organisation ends up with an effort to establish a desired political order. Thus, the desire to establish political justice or a polity guided by the notions of justice prevailing in the minds of the founders express a wish to *extent* their convictions of justice to form a political organisation whose basic objective is to determine the ways in which others should live. The variations on the levels of definition, that is, in the content, form and context of the notions of justice are the variables that make a clear and universal definition of justice difficult, or rather, impossible and even *undesired*.

2.5 The State, Law and Jurisprudence

Politics emerges in the social life, in the coexistence of the self and others. It is the social life that gives rise to the formation of a *distinct* body as its organisation. The formation of the body politic represents a critical separation of a body from the actual web of the social relations. Indeed, the first separation from the social as to establish the 'existence' of a different thing is not the emergence of the state, but the constitution

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[38] In Hegel's' words (1996: 186): "A longing may therefore arise for an objective condition, a condition in which the human being gladly debases himself to servitude and total subjection simply in order to escape the torment of vacuity and negativity".

of a personified deity watching over the society and observing the application of its rules. But when an organised body emerges in the social which is capable to exercise power back on the social, it is only natural that a close connection becomes established between the already separated deity and this new body that emerges as the second separation from the social.

As we have discussed, the interiority of the self projects its duality on the other by the way of analogy and thinks of the other as something composed of two parts as itself: the finitude and the infinitude. The infinitude of the other is the complete, perfect other, for as Kant put it there is no way of knowing it, and thus, of socialising with it. It remains as a complete stranger and the deity represents this infinitude of the other in its totality. It remains a complete stranger, totally unknown to the self unless the self totally negates its body that binds it to the world of the finitude (of appearances) and by transcending it flies away as to experience the union of its own and the others' infinitude. When this world of the unified finitude in its totality severs itself in the mind of the self from the infinitude as a purified thing, the idea of deity is born as a first separation from the social world of the infinitude. The thing thus constituted is a complete stranger in its purity for the self cannot be pure and remains composed of its finitude and infinitude. In this sense the personal idea of deity is not ethical but purely moral, and religion emerges when the morally constituted idea of deity passes (becomes externalised) from the morality of the self to the social to grab the morality of the other selves.

In contrast to this, but historically at about the same time,[39] a second separation takes

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[39] It is not surprising to find out in the first written text of humanity that one of the main themes of the narrative was related with the establishment of justice as right order that would be brought

place when the more or less closed (unified) web of social relations (the society) give rise to the formation of another body as a *distinct* form of the social interconnectedness of the people. This is a process that completely takes place on the plane of the finitude and reflects itself to the self as the representation of the pure infinitude: the incarnation of the body in politic(al form). "The primordial despotic state is not a historical break like any other. Of all the institutions it is perhaps the only one to appear fully armed in the brain of those who institute it" (Deleuze and Guattari, 1977: 218-19).

It is in this sense Hobbes calls it as artificial for it is bound to the purity of the finitude (social existence). As he says (Hobbes, 1986: 226) "that [the agreement] of men, is by Covenant only, which is Artificiall". Whatever the reasons or necessities that may lay behind this 'agreement' could be, it is purely social taking place only in the world of the finitude. Hobbes further explains the logical and practical consequence of the constitution of this artificial situation as something which is (1986: 227) "more than Consent, or Concord; it is a real Unitie of them all" and which necessitates the "Generation of that great LEVIATHAN, or rather (to speake more reverently) of that *Mortall God*, to which we owe under the *Immortall God, our peace and defence*". With

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about by the unification of the king representing the society (as the totality of the finitude) and the deity (as the totality of the infinitude). The Sumerian epic of Gilgamesh, that very first narrative in history dated ca. 2675 BC tells us the difficult process of establishing this union of the king (Gilgamesh) with the divine power of gods through reconciliation. There we see the story of how the gods and kings as semi-gods as the representatives of both the gods and the totality of the social in the world of finitude take over the task of administering justice due to the power they get both in heavens and on the world.

Some authors predict the beginning of the oral tradition of the epic at an earlier date, but Mellersh (1994: 13) gives the time of writing of the epic on the stone as 2675 BC.

the last sentence Hobbes blesses the wedding of the totality of the finitude and the totality of the infinitude in their purity as a sacred ceremony of the reunification of the two worlds and the re-establishment of order emerges as the first sacred fruit (child) of this union in the form of a despot (sovereign) that brings once again "peace and defence" (justice and security) to the existence.[40] It is for this reason the ancient Mesopotamians and Egyptians and Hebrews, and after them, first Greeks in the period of kingships (as Herodotus and Aristotle tell us) were used to place the basis of the power to rule on an elevated deity separated from humanity. In all these cases we encounter a god or a god-like progenitor (who was quick to turn itself into a genuine all-mighty god -powerful enough to overcome other deities, in a way, representing other polities) to whom the ruler king was eager to trace his descent. An inscription from the city-state of Lagash, dating from c. 2450 BC gives us a clear example of such a narration regarding the source of power to rule: there the king was described as the son of a god and a goddess:

> Ningirsu (patron-god of Lagash) implanted the semen for Eanatum (King of Lagash) in the womb [...] rejoiced over Eanatum. Inanna (a goddess) accompanied him, named him Eana-Inanna-Ibqalakakatum (his full name: 'worthy of the (temple) Eana of Inanna of Ibqal'), and set him on the special lap of Ninhursag (a mother goddess). Ninhursag [offered him] her special breast. Ningirsu rejoiced over Eanatum, semen implanted in the womb of Ningirsu. Ningirsu laid his span upon him, for (a length of) fire forearms he set his forearm upon him: (he measured) five forearms (cubits), one span! Ningirsu, with great joy, [gave him] the kin[gship of Lagash].[41]

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[40] According to the Christian theology the first and thus original order was when Adam and Eve were in the God's Garden of Eden before their Fall.

[41] Kuhrt, (1995: 72) extracted from E. Sollberger, Corpus des inscriptions 'royales' présargoniques, Ean 1: iv-v; Sollberger and Kupper 1971: 1 C5acf.; Cooper 1983: 45. Kuhrt

It seems this was the first invented form of legitimacy for earthy power in which the privilege of having power was justified by the unification of a higher form of existence (the totality of the infinitude) with the specific form of human social existence in the body of the despot (as the totality of the finitude).

Hammurabi, the Assyrian king of Babylon, depicted his codes on the stone at about 1730 BC. His remarks right before the actual code depict a previous social situation similar to the Hobbesian state of nature which represents the disintegration of the unity of the deity and the king. The earlier order was disintegrated under the blows coming from the field of social and he, Hammurabi declares that before the codification of his laws, the moral values of the Babylonian society were not strong enough to protect the weak from the powerful evildoers. So that the well-defined and written rules backed by the force of the state were needed to be able to establish a righteous (just) order. For this reason his codes were intended "to bring about the rule of righteousness in the land, to destroy the wicked and the evil-doers; so that the strong should not harm the weak; so that [he] should rule over the black-headed people like Shamash, and enlighten the land, to further the well-being of mankind".[42] It is not easy to conclude

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(1995: 34) reminds us the privileged position of the kings over the clergy. This shows that the clergy as a profession has not been clearly differentiated itself from the rest to be able to exercise a monopoly on the religious power. It may also indicate that politics and religion (and of course, jurisdiction) have not been emerged as separate fields of the social life:

> It is essential to remember at all time that the cultic staff did not have better access to divine knowledge than the king. So they were not in a position to claim a god-given a authority greater than his. There were no separate religious and secular spheres with competing interests. All aspects of life were intertwined, and at the head of the politico-religious order stood the king himself, conceived, nourished and physically positioned by the gods.

[42] *Code of Hammurabi*, Internet, www.achilles net/~sal/hammurabi_code1.html, 1999.

whether Hammurabi did really achieved to put the land into an order regulated by his laws and enforce by his might as the priest-king of Babylon after a great social crisis due to the lack of justice in the country. But from what he has written it can be seen that he conceived justice as one of the pillars of his rule. For the first time in history, a ruler of a polity, the king of Babylon, Hammurabi wanted to codify his laws and had them written down on the stone so that the people living under his rule would understand what rights and duties they had under his regime. He wanted them to know that the establishment of a political regime strong enough to enforce its laws meant that they (the people) had been bound by some set of rules of conduct dictating what was right and what was wrong. This may be seen as an example of the efforts of the ruler to justify his rule by closing the gap in between and restoring the unity of the prevailing ideas of justice (emanating from the social ethics) and its administration by the polity on which the ruler stands.

Here, in the efforts of closing the gap between the purity (of the infinitude of deity or eternal justice and of the finitude of the state) and impurity (of the infinitude of the morality and social ethics) that the discourses of jurisprudence make their appearance as the theory, philosophy or justification of the state administration of justice. They also function as a bridge to be able to bring about the reunification of the infinitude (the just as the morally idealised and ethically socialised justice) and the finitude (state administration of justice). But this unification can only be achieved in the interiority of the self which functions as the actual plane of existence for this meeting. In contrast to this, in the finitude of the self where it socialises with the other selves both the deity and the despot remains separated, removed from the reach of the self. This distance, conceived by the self in its finitude creates the distance between the social ethics and the state administration of justice and when the self cannot explain this distance with the synthesis of a sacred union taking place in its infinitude, it comes to think either the prevailing social ethics as corrupt and takes sides with the state or the state

administration of justice as unjust and takes its stand with the norms of the social ethics.

The unceasing efforts of the rulers starting from the times of the god-kings of the ancient Mesopotamian cities where jurisprudence makes its first appearance indicates that they are not and cannot be the same thing any more. The state achieves to hold this distance on a balance for most of the time but when the gap between the two gets wider than the society can endure, the ground on which the political authority rests begins to shutter. The spread of the feeling of *injustice* then may become the index of the wideness of this hiatus between the accepted (ethical) notions of justice and its administration in the hands of the state. Since it is the political authority that administers for most of the time the prevailing justice or injustice, it is not surprising that it becomes the target of all the discontent and thus, is enforced to respond. Of course, it is only expected that its first reaction to such a discontent among the populace is to try to suppress all the opposition in the name of order. However, sometimes oppression may not be enough to silence the opposition. Whether the political authority is successful in oppressing the discontent or not, in either case a new adjustment of the prevailing composition of the law becomes necessary. Then, a new balance of forces comes to the fore either by the emergence of a new politico-juridical order or by a through reformation of the older system by the existing rulers in an effort to maintain their rule under the strain of the new situation.

At this juncture the state declares its laws, first to define its own shape and rules of its own working. In this sense law (as constitution) represents the particular assemblage of the state machinery. Law does not define who the rulers are, the initiators of the state are already given by their own might. What law as constitution does is just to give a form to the rule of the rulers. In this sense, it represents the declaration of the body politic of its own unity (oneness, thingness). Further, the state turns its attention to the

society where the self and the other coexist, and as an *indication of its superiority* (*power*) over the social, defines the rules of the socio-political membership. Indeed, this is its content and desire: to differentiate the members from non-members, and by this differentiation it draws the boundaries of its own territory (both geographically and socially) over which it rules. By this way, and of course, with a little help from its ability of exercise violence it becomes able to impose the notion of duty (to obey the rule) on the minds and bodies of the members. Or, to put it in other words, only those who obey the duty (of obedience to the State) are accepted as the proper members endowed with the full rights of socio-political membership.

The classification of social conduct as proper and improper is actually done by the ethics of the social. Moving in the only actual universe of the social, the state cannot but borrow the content for its empty rule that demand obedience from the world of the social relations as well as ethics as its normative structure (hence the state's relations with social classes as well as the normativity of its rules). But this is a critical relationship far from being devoid of conflicts and interruptions for both (the law and the social ethics) both demand from the individual self to obey their own norms and as long as they remain convergent the rule of the state becomes legitimate. As much as they diverge the state loses its legitimacy and either turns into an illegitimate power structure (tyranny) or is simply overthrown and replaced by a new state which re-establishes the convergence between the demands of the state and social ethics back on a tolerable scale. Now, jurisprudence taking place between the social and the state with regard to its social base can most of the time reconcile the two (by traversing the whole field of unity composed of the finitudes and infinitudes of the individual self and the other), of course with the help of the shared notions that are embedded in the infinitude of the self (morality) and projected to the infinitude in its totality (the divine, eternal order).

Now, lets see how, in the example of Turkey, these movements of the extension of the

moral self and penetration of the social ethics into the morality produce specific discourses of justice that pertain to specific modes of social organisation and that may coexist in the same society for various reasons. We will examine the case of Turkey as a social formation in which three modes of social organisation each dominated in a period of her history and each occupying a different (but sometimes overlapping) societal space can coexist side by side: the kinship based nomadic tribe, the religious empire, and capitalist nation state. These categories are in no sense universal and their selection is simply based on the particular history of the Turkish society that started as a tribal society, transformed into an agrarian religious empire where the society was under the tribal, central and monotheistic religious influences. Then at about the turn of the 19th century when capitalistic (modern) tendencies of the world began to be felt in Turkey, the society began to change in that direction as to form *something similar* to a capitalist society with a nation state. But in doing this, we should keep in mind that discourses of justice that may belong to different modes of social organisation may coexist and overlap and thus, now support and then confront each other.

CHAPTER 3

MODES OF SOCIAL RELATIONS & ETHICS IN TURKISH HISTORY

3.1 Modes of Ethics in General

The ethical life of the individual subject is the produce of the interaction between the individual reflective inner self and the mutual interactions between the self and the others and is constituted in the reflective mind as an idea, or sometimes as a theoretical system. Since it emerges in the process of social interaction the self cannot escape but classify the social content of its ethical life (due to the necessity of the ordering principle of its own morality). For this reason the structure of the society bears much importance on the form and content of the ethical life, and it will be proper here to summarise briefly what we intend to mean by the concepts of the modes of social relations and social formation and its different levels as well as modes of ethical justice (as the idea of justice dominating in a definite network of social relationships).

It is well known that when analysing the capitalist society Marx proposed the concept of 'modes of production' as an analytical tool that referred to the theoretical construction (thought-concrete) of the actual relations of men with nature and with each other as social beings.[1] So, in Marx's conceptualisation of the mode of production the productive

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[1] For the discussion of the relation of thought-concrete to real concrete see especially Althusser (1970: 41-42) where he says in opposition of the mystified concept of thought of idealism:

'thought' is a peculiar real system, established on and articulated to the real world of a

activity of men *against* nature and men's relation to other men were the two major components that determined the characteristics of that particular mode of production. Since he saw the activity of production as the primary activity of men he preferred to construct the sociability of men on this concept. The apparent emphasis laid upon the activity of production lead to his acceptance of the (*societal*) level of economics as the determinant of all other social relationships in the last instance. Thus, he dissolved the factor of the social in the relations of production. However, with the remarkable notes of Althusser on the 'social effect', the importance of the social come to the fore once again. Even though Althusser himself never concluded that social relations have a priority even over the economic level, nevertheless his emphasis on the social structure cannot but gave the idea a start.

First of all in the concept of modes of production Althusser (1970: 64-65) distinguished two problems that would make him to be seen by his contemporaries as an incurable structuralist: the problem of society as a historical result inseparable from its genesis, and the society as a body, as a contemporaneous structure. This 'body' or structure of society is composed of multiplicities which are determined in the last instance by the economic practices that constitute a level of this whole according to Althusser. In an unsurprising manner this notion of a complex whole is connected with the Deleuzian idea of rhizome, the social whole conceived as social rhizome. It seems that the major

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> given historical society which maintains determinate relations with nature, a *specific* system, defined by the conditions of its existence and practice, i.e., by a *peculiar structure*, a determinate type of 'combination' (*Verbindung*) between its peculiar raw material (the object of theoretical practice), its peculiar means of productions and its relations with the other structures of society.

Such an understanding of 'thought', combined with the reflective capacity of the self which is only an ordering principle without content can explain well why the reflective mind necessitates (or cannot avoid to take its content from the actual social relations.

difference between the two is the emphasis laid upon the structure on the former and on the relations within that structure both forming themselves and the structure itself.[2] Otherwise, both in Althusser-Balibar (and Poulantzas as well) and Deleuze-Guattari duo social relations are important and conceived as production in the most general sense of the term (organising activity of the reflective thought is thought as a form of production producing the thought-concrete of the actual, for example). And for such a conception of society it was only natural that there must be some levels on which it is possible to observe the constellation of some certain social practices together with some nodal points of articulation where these practices are connected to each other.

It was again Althusser, in a rather structuralist manner divided the social whole into four different ("*relatively autonomous*") levels of social practices each having a different historical time peculiar to themselves:[3] the economic, social, political, the ideological, the first being the ultimate determinant of the rest. The idea was further developed by Poulantzas who emphasised the thought-concrete nature of the concept of mode of production and draw attention to the difference between it and social formation as the real-concrete object of the concept. For him, a mode of production, as a pure theoretical concept "constitutes an abstract-formal object which does not exist in the strong sense in reality" (Poulantzas, 1982: 15). In this sense, Marx's classification of slave, feudal, capitalist, Asiatic and communist modes of production do not exist in reality, but appear before us only as theoretical abstractions drawn from the knowledge of the real-concrete object. So, what really exists "is a historically determined *social*

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[2] To see how Deleuze and Guattari develop the concept of rhizome see the section entitled "1. Introduction: Rhizome" in the Vol. II of *Capitalism and Schizophrenia* (1988: 3-25).

[3] See Althusser, 1970: 99-100.

formation, i.e. a social whole in the widest sense, at a given moment in its historical existence: e.g. France under Louis Bonaparte, England during the Industrial Revolution" (Poulantzas, 1982: 15). Furthermore, by taking the Althusserian idea of the *relative autonomy of the levels*, and basing his stand on Marx, Poulantzas argued for the possibility of the dominance of other levels of the social on the whole (the society). His quotation from Marx's *Capital* (Vol. I: 82) is as follows (1982: 28):

> My view that each special mode of production and the social relations corresponding to it, in short, that the economic structure of society is the real basis on which the juridical and political superstructure is raised, and to which definite social forms of thought correspond; that the mode of production determines the character of the social, political and intellectual life generally, all this is very true for our own times, in which material interests preponderate, but not for the Middle Ages, in which Catholicism, nor for Athens and Rome, where politics, reigned supreme... This much, however, is clear, that the Middle Ages could not live on Catholicism, nor the ancient world on politics. On the contrary, it is the mode in which they gained a livelihood that explains why there politics, and there Catholicism, played the chief part.

Now, these attitude opens up a new possibility, a possibility of seeing some societies as dominated by the level of politics in contrast to societies dominated by the capitalist mode of production where the economic level is conceived as the major determinant. In the above quotation we see that Marx is insisting on the importance of the economic practice ("the Middle Ages could not live on Catholicism, nor the ancient world on politics"), but in explaining the politics or Catholicism as the "mode(s) in which they gained a livelihood" dominating specific social formations, he departs from the ordinary concept of production in contrast to many anthropological studies that preferred to investigate the 'specific mode of production' in its narrowest sense, for example,

peculiar to Asiatic countries.[4] For this reason, to be able to avoid such confusion and possible misunderstandings deriving from it, we will prefer to use the term 'mode of social relations' or 'modes of social existence'. Such a preference is also based on the conviction that freeing the concept of 'mode' from its connection to the concept of production will open the way for a thorough understanding of different societies (or epochs) that have their own different histories, and thus, that are determined by different instances of their social life.

This modification of the concept is necessary for we are not going to talk about production and its result capital as the *ultimate value* in a society which by the attainment of it the individuals or social groups became able to dominate the society. True that the social capital forming the basis of power in the abstract sense of the term is connected with production process in the capitalist societies, but from this it would not be right to generalise the connection between power and production. Rather, as we will try to show, in nomadic-tribal societies or monotheistic empire, for example, power is not the material wealth (in the form of accumulated money) but 'ability to establish social alliances' and 'control of the centralised state machinery' respectively.[5]

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[4] Indeed, the famous (but now old) discussion of the Asiatic mode of production are marked by their restricted understanding of this notion of 'modes of production', and nearly without exception all of them looked for a specific pattern of production in drawing their line of demarcation for the Asiatic countries.

[5] As long as the despotic state offers the despot (or his men) the ultimate control of the whole socio-political structure as its limits drawn by itself, it is the perfect state. However, this does not mean that such a power can cover the whole social field as it emerges under capitalism. Since the mechanisms of control in despotic state is rather crude in comparison to those of a capitalist state there is not doubt that they can reach a limited area of social space. But the

But of course this does not solve the problem of the possibility different histories. Even though both Althusser and Poulantzas overcome the unilinear and teological understanding common to Marxist interpretations of history (unfolding itself or progressing from primitive communal mode of production to the development of the communist mode of production, if the term allowed) by accepting the existence of the different histories for different levels of a social formation, they seem to refrain from taking up the issue of the possibility of *independent* histories for different societies. It is true that there are very few societies known that did and does constitute a single whole totally isolated from other human groupings and this argument is commonly used in explaining the process of 'diffusion' of certain specific social forms from one society to another. Indeed, especially in the discussions related with the formation of state, the dominating power of the concept of 'Urstaat' seems to bear much influence on the ideas claiming the impossibility of the 'inner', 'genuine' state formation for some specific societies as in the example of Barfield (1994). At first, Barfield seems to reject the diffusionist stand and asserts that this is not a process of reception of a form developed in the outside. Nevertheless, he immediately adds that the development of state in the nomadic societies of Asia was possible only due to the existence of an external force (China, in that case) opposing them (and forcing the nomad society to develop higher levels of political organisation) in the organised form of a state (1994: 7):

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crucial point is that, it never intends to control such areas of social space as they are tried to be taken under control by the capitalist state. Indeed, such areas that fall outside the definition of power in a despotic state are never intended to be controlled. In such a situation there is always a possibility of the emergence of a social movement that may escape the attention of the centre of power, and that can find a time to grow to endanger the centre.

For a discussion of the concept of 'abstract power' see Yıldırım (1993: 109-116).

> This argument has a number of far-reaching implications for the understanding of nomadic states in Inner Asia. It is not a diffusionist explanation. The nomads did not 'borrow' the state; rather, they were forced to develop their own peculiar form of state organisation in order to deal effectively with their larger and more highly organised sedentary neighbours. These relations required a far higher level of organisation than was necessary to handle livestock problems and political disputes within a nomadic society.

In can be clearly seen in the above quotation that 'inner' processes of the nomadic-tribal mode of society is tried to be understood in terms of and reduced to the activities of 'handling livestock problems' and 'political disputes' which are thought to be restricted to 'local' relations of decision making and conflict solving. For, this supposition can never appreciate the importance of an idea of universal rule that was developed 'inside' the nomadic-tribal society and guided the direction of all its various incarnations from Mo-tun's insurrection to the establishment and expansion of the Ottoman Empire.[6] Besides, such an attitude can never explain why some societies could never elevated their political organisation to that of the state while they persisted as 'society' by the side of such a neighbour neither dissolving nor establishing a state of their own.

Then, after establishing the *possibility* of different histories for different societies, the last problem that we have to deal with remains to be the *co-existence* of various modes of production in the complexity of the same social formation. Theoretically speaking this does not constitute a great problem, and the real difficulty with such an understanding emerges in its application to the real situation, for a social formation is composed of many layers that overlap, interiorise and exteriorise each other at the same time.

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[6] For a discussion of the importance of the idea of 'universal rule' in the nomadic-tribal tradition of Central Asia see, for example, Bayat, 1993.

3.1.1 The Problem of the Oriental Society

The first differentiation of the tribes as Easterners and Westerners was very vividly depicted in Homer's *Iliad* in the midst of the battle of Troy. It was Herodotus' *History* that attributed the particular tincture of 'barbarism' and despotism to the eastern societies in general. About one century later, Plato and Aristotle's writings have also contributed to the enrichment of the distinction. The eastern (oriental) society whose image was mostly shaped by the western travellers in contradistinction to the western society was generally depicted either as a society in sheer poverty or as a society in ultimate richness. In this respect Bodin's words in his *Les six livres de la republique* published in 1576 was a good summary of the European attitude towards the East during the 16th century and long after:[7]

> And in all the Bible, the scripture speaking of the subjects of the kings of Assyria and of Egypt always calls them slaves; and not only the holy scripture but also the Greeks at every turn who wrote that the Greeks were free and the Barbarians slave: they meant the peoples of Persia and of high Asia. Likewise the kings of Persia in declaring war demanded water and earth, says Plutarch, to show that they were absolute seigneurs of goods and persons. It is why Xenophon in the Cyropedia writes that among the Medians it is a fine and laudable thing that the Prince is proprietary lord of all things.

Bodin was describing the 'eastern' society as seigniorial monarchy, and about one century later the judgement of Montesquieu was no different from his. According to Krader who prepared an extensive book on the development and content of the Asiatic mode of production (1975: 23) the common imagery of the European mind regarding the eastern lands throughout the 17th and 19th centuries was dominated by the

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[7] Excerpt taken from Krader, 1975: 22. The original is published in *Les six livres de la republique*, Book II, ch. 2.

qualification of the eastern type of sovereignty as personal and despotic. It was not surprising that the only possible model of sovereignty that European mind conceive as possible in such societies where the subjects and the land were thought to be the complete property of the despot sovereign (the reference is made here to especially the Ottoman, Egyptian and Iranian societies, the last of which was newly slipping away from the rule of the Safavids) was despotic. Indeed, such an attitude corresponds in its main lines to the distinctions and qualifications attributed by the ancient Greeks when they compare their own society with those of the 'barbarians' and it is so general and effective that it is possible to name both Kant and Hegel among those who think in that fashion on the problem of eastern society. Even Marx, with his idea of Asiatic mode of production, can be included in this group with a marked distinction that it was he that started for the first time to think about the eastern lands as economy-political systems.

His first involvement with the eastern countries starts as early as 1853 with his writings to *New York Daily Tribune* and his correspondence with Engels. He used the term 'Asiatic mode of production' in his *Contribution to the Critique of Economy Politic* (w. 1859) and later developed the concept during 1860s and finally gave it its final form in his *Capital* (w. 1861-67) (Krader, 1975: 2). Roughly speaking, when Marx formulised his universalist theory of (indeed European) history he mentioned the primitive communal society, feudal society and capitalist society as historical forms in order of appearance, and added that capitalist society will be followed first by socialist and then communist societies. But, it is possible to assert that in his writings (especially in *Grundrisse*) written after his interest with the 'eastern problem' began to grow he began to think of eastern societies in another scheme of evolution different from the European

evolutionary scheme.[8] But maybe due to the reasons that he has left the concept without developing it much or to the innate difficulty of exerting it into his general scheme of history the theory of Asiatic mode of production was left to oblivion for a long time.

But the difference was there making it impossible to interpret the history of Asiatic (or eastern) countries by using the general Marxian scheme of history composed of primitive-communal, feudal and capitalist modes of production. Thus, during the 1950's a new interest in the conceptualisation of the Asiatic mode of production began to arose again when European communist intelligentsia became aware of the 'differences' that determine various (sub)societies in the Soviet Union. The discussions attracted the interest of the Turkish intelligentsia in their efforts to find a solution to the problem of the peculiar structure of Turkey as different from the European countries during 1960s and '70s.[9] Now, during 2000s the theories of the Asiatic mode of production began to be a part in our fading intellectual memory. Even though they understand the existence of a significant 'difference' that separate the Asiatic nomadic-tribal society from the 'universal' European history they were unable to cope with the problem. One of the most visible reasons laying behind this failure may be that nearly all of them tend to

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[8] Marx discusses the problem of Asiatic mode of production in *Grundrisse* (1981:471-79) under the title "Forms which precede capitalist production. (Concerning the process which precedes the formation of the capital relation or of original accumulation). Even this title alone is sufficient to indicate that Marx was thinking of Asiatic mode of production in connection with the capitalist mode of production as a form preceding it.

[9] Just to mention a few examples Doğan Avcıoğlu, Sencer Divitçi, Taner Timur, Behice Boran, and Mihri Belli were among those who were interested in the problem.

interpret the Asiatic society with the notions and concepts borrowed from the European history. Even more important than that they all exhibit the insufficiency or irrelevance of applying the concept of 'modes of production' (in the narrowest sense of the term) on the histories of non-European societies by their efforts of looking for an economic (notion) of production determining the peculiar 'difference' of these societies. One recent example of such efforts can be seen in Divitçioğlu (2001) where the issue of pre-capitalist modes of production is related with the Asiatic tribal society (Kök Türks). There, in the last article of the book entitled "Pre-Capitalist Modes of Production (Nomadic Mode of Production) Divitçioğlu (2001: 170-90) seems to accept the special case of the Asiatic society and enumerates different approaches starting from Marx that emphasises the necessity of developing a different attitude (more anthropological) in dealing with such societies. He goes even to the extent of accepting the structures like kinship as the main determinant (both as a mode of production as infrastructure and ideology, political organisation, etc. as the components of the superstructure), but nevertheless his own analysis under the subtitle "Pastoral Nomadic (Kök Türk) Mode of Production he cannot help but concentrate on the material production process in a limited sense (understood as the application of the methods of value extraction from nature and social mechanisms of the appropriation of the surplus value).

This tendency can be connected with the general 'orientalist' tendencies in approaching the non-western societies. First of all, orientalist approach tends to construct the society that it takes as its object of study as an 'other' as opposed to the western society. The peculiarities of the society under study are evaluated according to the criteria of the western societal pattern. Secondly and as a result of the first tendency, the characteristics of the non-western societies are generally interpreted from the point of view of the established and nearly given concepts and institutions of the western society. One of the best illustrations of such a tendency emerges in the topic of property that we will discuss later in greater detail. The concept of property that was borrowed

from the Roman jurisprudence as it was connected with the land and divided as the ownership (rights) and possession (rights) is generally employed as one of the main criteria in the analysis of the non-western societies in which it is transformed into a notion of 'communal' property. Starting from the 16th century on travellers to Bodin, Montesquieu and Marx's concept of Asiatic mode of production all studies dealing with the 'otherness' of the non-western societies were conducted under the enforcing and forming power of such western concepts and institutions. Even most of the contemporary native social scientists seem to be under the spell of such concepts when they study their own societies.

It is true that in our contemporary world the property relations, for example, has become a factor that increasingly gains importance in all the societies in the world as a result of the 'integration of the globe' (globalisation?). But for the periods when the effects of the process of globalisation were not felt so strong as we feel it today, it would be misleading for the social scientist to base his analysis on the concepts or institutions like private property which we know were emerged only in western history as universals.

3.2 Modes of Social Relations in 'Turkish' History

It is a strong abbreviation to see the seeds of the Turks as an ethic community in some prehistoric community.[10] May it be *Ti'elo*, *Chou*, *Tik* or some other historic community it

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[10] This attitude is surprisingly common in Turkology literature. Just to cite one example Togan (1981: 13-14) seems to tend to accept that Herodotus' 'Yurcae' and Chou were Turks, or proto-Turks at least. Nevertheless he is cautious in his attitude:

seems as an overindulgence in the concept of ethnicity to extend it (or nationality) as to be the principle according to which communities are divided and formed far back in history. Ethic cleavages have to wait until the emergence of nation states (in Europe) before they could play such a decisive role in the formation of societies.[11] Yet we know that from the time of the Scythians whom some thought as Turkic and others as Indo-European up until the crossing of the Amu Darya (Oxus) by the Seljuks under the leadership of two sons of Mika'il, Toğrul and Çağrı the mode of nomadic-tribalism has been well established in the steppes of Eurasia. Moreover, starting from the first identifiable name of 'Turk' in the Orhun monuments dating AD 8th century we see the emergence of a unity that will gradually differentiate on lingual and cultural basis (again, not yet an ethnic group) as Turkish. As Gömeç (1992: 8) also accepts the substantive in the monuments does not refer to a homogeneous ethnic group but it is the name of a particular polity.[12] In the monuments it reads as follows (Orkun, 1992: 42-45, ID 27-30):

> akanımız kül teğin eki şad inim kül tiğin .. sözleşdimiz... eçümiz kaz..... (I, 40)
> tiyin, eçümiz kazganmış budun atı küsi yol bolmazun tiyin, türk budun üçün tün

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We know that a tribe (*kavm*) that was mentioned by some classic authors like Herodotus as 'Yurcae' and Plinius Secundus and Pompenius as 'Turcae' had lived in 5th century BC and later between the Edil (Volga) and Yayık (Ural) rivers. If the name 'Tik' really means 'Türk', then we have to accept that the first reference to our national name is a name that is mentioned in Chinese historiography that can be dated as far back a 14th century BC.

[11] On the concept of 'ethnic' see Hutchinson, 1996 and for its core elements Nash, 1996.

[12] Gömeç says, "This *political name* [Kök Türk] has gradually become the name of the nation, too". It is incomprehensible why Gömeç rushes to interpret that name as the name of a nation. For the name of 'Türk' to denote to a nation we have to wait until the last decades of the Ottoman State when Turkish nationalism began to develop in opposition to 'Westernism', Ottomanism and Islam under the domestic and foreign influences.

udımadım, küntüz olurmadım. İnim kül tiğin birle eki şad birle ölü yitü kazgandım. Ança kazganıp biriki budunıg ot sub kılmadım men özüm kagan olurtukıma barmış budun ölü yiti yadagın yalanın yana kelti budunıg iğideyin deyin yırgaru oguz budun tapa, ilgerü kıtay tatabı budun tapa, birğerü tabgaç tapa ulug sü eki yeğirmi süledim.... sünüşdim. anda kisre tenri yarlıkadukkutım bar üçün ülüğim bar üçün ölteçi budunıg tiriğrü iğittim, yalan budunıg tonlıg, çıgay budunıg bay kıldım, az budunıg öküş kıltım. ıgar illiğde ıgar kaganlıgda yeğ kıldım, tört bulundakı buldunıg kop baz kıldım, yagısız kıltım, kop mana körti. işiğ küçiğ birür bunça törüğ kazganıp inim kül tiğin özinçe kerğek boldı.[13]

The translation of the word *budun* is crucial here, for all retrospective reconstruction of history tends to interpret it as 'nation' as it can be seen in the English translation. But, as it can be seen from the passage *budun* cannot have an ethnic character because, because Bilge Kagan tells us that the Oguz who counted as the former enemy of the Bilge Kagan's tribal polity has been subjugated and included in the polity. Indeed, the

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[13] Orkun's translation into Turkish (actually, mine from there to English) reads as follows (at the same place):

"For that the name of the nation [budun] that our father and uncle had won would not disappear I did not sleep during night for the Turkish nation [budun]. I did not sit during the day. Together with my little brother Kültegin, with two Shads I worked hard until death. By working so hard I did not leave the united nation [budun] as fire and water (i.e. disintegrated). When I become kagan the tribe [again budun in the original but this time Orkun translates the word as *kavm*) that was scattered around came back barefooted and naked as if death and exhausted. For that I would rise high the tribe [budun-*kavm*] I went with the great army twelve expeditions and warred against the Oguz tribe [budun-*kavm*] in the above (north), against the tribes [budun-*kavm*] of Khitai and Tatabi in the forward (east), against the tribe [budun-*kavm*] of Tabgaç (Chinese) in the back (south). After that, since it was the order of god since I was fortunate, since I had the fortune I raised up erect the nation [budun] that would about to die, endowed the naked tribe [budun-*kavm*] with cloths, made the poor tribe [budun-*kavm*] wealthy, and numerous. I made it better than other states [ilig-ülke-country] and other kaganates. I subjugated the tribe [budun-*kavm*] all in four directions. I left them without any foe. They all came to me (paid homage to me) [itaat etti-obeyed me]. My little brother Kütegin who gave his days and works and won all this order (törüğ - order, law) passed away when his days were over.

Oguz, which is itself a name for a political constellation of groups, has always been a problem for the Kök Türk state as well as many other Turkic states that has intended to establish a more or less central authority.

If we put aside the complex problems of the determination of the racial characteristics of the prehistoric communities, we can start with the Huns (*Hiung-nu* in Chinese sources) that was a political union of various tribes which appeared in the Chinese historical records for the first time in connection with a war that took place in Shansi in 318 BC (Ligeti, 1996: 20-21). According to Ligeti, the Asian Huns who make their presence known to the Chinese in the 4th century BC were leading a pastoral nomadic way of life under the rule of Mao-tun during the 2nd century BC. Even thought we do not have much material to allow us to make detailed inferences about the political organisation of this confederation united under the name of Hun, we know that they were able to develop a highly complex political structure as to allow them to establish their power on a huge geographical area. Ligeti (1996: 28) says about their socio-political structure that "the conquered lands together with the lineages and tribes [budun, again] were divided into two as right and left, the second of which enjoying a higher prestige". Further, Ligeti also asserts the existence of a more or less developed social hierarchy and the differentiation of society into distinct social classes. He informs us that we have some date indicating the existence of a nobility in the Hun society at that early stage. Moreover, lineages or tribes were differentiated among each other according to "the material wealth and armed forces at their disposal" (Ligeti, 1996: 28).

The conclusion that one can draw from the above information is that from the time of the Scythians (from the 12th century BC on) and Huns the Eurasian steppes there were some groups which were leading a nomadic way of life. In addition, with the information about the Huns we can say further that at least some elements which later become politically dominant due to their specific way of life and socio-political organisation in the

steppe zone were organised into tribal unity formulised by the kinship terminology. Moreover, the societies they composed were differentiated already at that time, to allow them to establish higher forms of political organisation. We do not know the density or relative population of the settled communities in the steppes engaging in some form of horticulture. If they were existed in considerable numbers, still it is impossible to assess their relative importance and possible relationships with the nomads during this early period. But this much is clear that at least from the time of Huns who were able to unite the peoples of the steppe zone under a political organisation (the strongest period of which was in the 2nd century BC) and for this reason the steppes were dominated (at least politically) by the nomadic social groups that were organised along the tribal lines.

The ethnic origin of the Huns still remains a mystery. According to Ligeti, even though we have very few remains that allow us to make inferences about the language of the Huns, it "might have been Turkic with greater probability and mongolic (with a lesser probability)" (Ligeti, 1996: 31). Indeed, this question of the language (in connection with the problem of the ethic character) of the Hiung-nu polity is restricted to the language of the dominant element (a tribe?) in the organisation of the state. Otherwise, as Ligeti (1996: 34) puts it:

> We know that the Asian Hun empire was an empire that included various elements that were different from each other in their language or ethnic origin. This empire, as the European Hun empire, had the characteristics of a huge confederation. According to the data we have, this empire of the nomadic tribes neither hesitated to integrate with the foreign people nor was afraid of mixing with the foreign cultures.

This characteristic that hold ethnic cleavages on the background and emphasises the problem of political integration with the other people would to be one of the determining characteristics of the nomadic-tribal society and reflected in all its political incarnations from tribe to empire. Thus whether the Turks or Mongols (or any other group, or a

mixture of them) does not matter much. It much is certain that it included some Turkic speaking elements in it. From this it becomes possible to infer that there were at least some Turkic speaking communities (tribes) that led a pastoral nomadic way of life since the 2nd century BC.[14] From the information available to us we know that such a form of socio-political organisation dominated the peoples in the region (regardless of their ethnic origin) up until the Seljuks who crossed Amu-Darya and established a political unity in Iran. We also know that the Seljuk polity was established on two elements: the nomadic tribal Seljuk Turks as the executive (military) force of the polity and the Persian bureaucracy trying to apply the principles of the older Sasanian tradition of government in the Seljuk polity.

Despite the fact that this was a great leap in the socio-political organisation of the nomadic-tribal Turks, we can safely assert that the dominant element (not majority) both in the society and political organisation remained tribal (even though some of them had already began to settle). It was not up until the establishment of the strong central state mechanism by the Mehmed II of the Ottomans that the Turkic society achieved a critical transformation, a transformation in the fundamental principles of political organisation whose repercussions on the society will last until the final collapse of the empire and stretch far beyond it reaching out to the following era of the Turkish Republic. The collapse of the Ottoman Empire and the following foundation of the new

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[14] Ligeti (1996: 26) says, "The Hiung-nu was a nomadic people engaged in animal husbandry. The Chinese resources say that the animals that were husbanded by the Hiung-nu were generally horse, cow, and sheep and that sometimes donkey, mule and a sort of camel could also be seen and mention three more animals that might have been some sort of horse or donkey whose species we cannot determine today".

republic represent another critical jump in the history of the Turkish social formation.[15] With it the society began to reflect the organisational characteristics that are peculiar to the 'modern' capitalist social relations on its various levels of politics, economy and ideology.

This tripartite division of the history of Turkic (later Turkish) society is based on the concept of the dominant mode of social relations as we have discussed earlier. For each mode of social relations we also suggested a different level as the determining level for that particular mode of social relations. The nomadic-tribal mode of social relations is determined by the level of the political. The Ottoman period (starting from the arrangements of Mehmed II) is thought of as constituting a mode of social relations that is determined by the level of politics again, but his time with the rising of the level of ideology in the form of monotheistic Islam. So, it may be proper to think of this mode of social relations as marked by the determinacy of a mixture of political and ideological levels. For the sake of convenience we can call it as the determinacy of the religio-political level. Lastly, the Republican era gives us the history of the advancement of the economic level as to determine the characteristics of the Turkish social formation. But, still we should not think that throughout the passages from one mode of social relations to another the remnants (more or less intact) of the previous modes do disappear altogether. On the contrary, as the specific history of the Turkish social formation shows, the political structures, or patterns of political behaviour, for example peculiar to each mode of social relations can be traced in the historically following mode of relations and being lost their unifying power still continue to define the specific universes of their rule leaving some areas occupied by the mechanisms of power that

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[15] 'Turkish' with the Republic.

pertain to the other modes of social relations. Thus, in each mode of social relations we can expect to find the traces of the previous modes that may still be effective in social area that are left undefined and vacant by the prevailing one.

Of course, corresponding to these modes of social relationship (specific to the history of the Turkish society) there also exist specific modes of ethical relations that determine the universe of the rules of social conduct. This field of social ethics offer the wider societal ground on which a polity defines itself and its rules of power. Thus, as it is understood within the context of this study, social ethics constitute the wider ground on which *all* the rules of social conduct are determined. This means that, the laws of the country, their application and formulation, the form of the polity, etc. as well as the rules of everyday conduct among ordinary individuals are all included under the general title of ethics. But, this does not mean that, the laws in their formal expression do always reflect the ethical norms in the society.[16] Rather, to be able to find such a correspondence we have to look at the relationship between their interpretation and application (practices of the state administration of justice) and the prevailing ethical norms. An example for this can be the reception of laws from a different (alien) mode of social relations and their implantation into the Turkish social formation starting from the last century of the Ottomans to the era of the Republic. The laws that were received were pertaining to the capitalist mode of social relations that were developed in Europe starting from the 17th century on. But their interpretation and application in the Turkish society were doomed from the start to be different as the later developments sufficiently demonstrate.

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[16] Due to the reasons that we have previously discussed.

CHAPTER 4

TRIBAL MODE OF SOCIAL RELATIONS: POLITICAL DETERMINATION

The term 'tribe' seems to be rather controversial. In anthropological and sociological literature we see that the words 'tribe' and 'clan' are sometimes used as synonymous words and sometimes as terms denoting to two different things. Despite such confusions surrounding the various usages of these two terms, one can still discern a general tendency to describe the social organisation of the pastoral nomadic peoples (but not always) as tribal. In this sense the term 'tribe' is generally understood as referring to two things: one is the kinship nature of the social organisation and the other is connected with the social relations of solidarity, alliance, politics and territory. For example, when discussing what would the hypothetical conditions of man be if man had not a political organisation, Aristotle (1996a: 13: 1253a1-5) makes reference to tribe as the political structure which makes man a peculiar creature different from the higher and lower forms of existence, thus emphasising the political nature of the tribal organisation: "he who by nature and not by mere accident is without a state, is either a bad man or above humanity; he is like the 'Tribeless, lawless, heartless one', whom Homer denounces".

The association between tribe and political organisation is a well-known theme in social sciences, although it is not always clearly put forward. In his work on the Nuer, Evans-Pritchard (1940) interprets the tribe in terms of segmentary lineage system having, at the same time, crucial political and territorial importance in the social organisation. After describing lineage as a group of living agnates, descended from the founder of that particular line, he sets out to make a distinction between the lineage system and the

kinship system. Even though he makes a distinction between lineage that he describes as a group of living agnates, descended from the founder of a particular line, and undifferentiated kinship, he tends to interpret lineage in a rather ambiguous manner as just one of the sub-categories among many kinship systems (thus, seemingly ignoring the special importance of the —political— 'matters of choice' involved in the decision in differentiating the lineage from the overall kinship).[1] For him lineages that form groups out of kindred compose the main constituent element in the formation of clans. Thus he tends to describe clan (Evans-Pritchard, 1940: 193) as "a system of lineages" whose genealogical character he underlines. According to this schema, the term clan refers specifically to a system of genealogically based lineages as its segments, or sub-sections. At the same place we read: "Alternately one may speak of a lineage as an agnatic group the members of which are genealogically linked, and of a clan as a system of such groups, the system being, among the Nuer, a genealogical system". So, for Evans-Pritchard, there is no significant differentiation between clan and lineage, the only difference being a matter of the level of social organisation. At the bottom of social organisation we have lineages, and their coming together and composing a coherent system is understood as clan.

In this terminology, the terms of clan and lineage refer to a genealogical system different from the kinship system by their being based solely on the agnatic relationships. But, this identification of clan and lineage as genealogical systems

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[1] Evans-Pritchard (1940: 194) describes the relationship between lineage and kinship as follows:

> We thus formally distinguish between the lineage system, which is a system of agnatic groups, and the kinship system, which is a system of categories of relationship to any individual: and we speak of these relationships as a man's

creates further problems. As Baştuğ states (1995: 5), in contrast to the situation in clans, the role of knowing the genealogical links that bind the lineage to the founding ancestor is a distinguishing mark of the lineage systems. For her, it is very crucial within lineages that "the genealogy is specified; ancestors are known and named". On the contrary, clan can be described (Ferraro, 1995: 181) as a "formal, named group composed of individuals that consider themselves descended from a common ancestor but do not specify the genealogical connections to that ancestor". Accepting this definition, Baştuğ underlines the importance of lack of any genealogical links between such lineages and clans and points out to the possibility of the existence of lineages inside clans as higher units. According to her, this seemingly minor distinction has, indeed, important consequences for the form and dynamics of a social organisation. For, Clan, composed of lineages that have no specified genealogical links to the founding ancestor, erases the segmentation that is inherent in all unilineal descent systems and fixes the division of society into formalised internal subgroups based on descent.

In contrast, the presence of a certain *bias* (a choice) in favour of a particular line of descent (as different from the overall and undifferentiated kinship) indicates the existence of a certain socio-political preference to form a more of less organised (and coherent) body(-politic). The members of a lineage are chosen according to a certain set of predetermined principles and endowed with certain rights and duties with regard to the social group. This social group constitutes at the same time an active political body whose social boundaries are clearly defined. It is well known that lineages do generally tend to extend their genealogies up to 7 or 9 generations and each member can count his ancestors one by one throughout these generations, thus objectively

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paternal kin and his maternal kin, and both together as his kindred.

defining the socio-political limits of the lineage. The necessity and importance of such a historical memory emerges especially in times of crises where members of a lineage seek help (co-operation) from the other members as the concept of *'kan düşer'* indicates.[2] In this sense, the lineage system that differentiates a certain group of individuals out of ordinary kinship ties can function as a political unit.

This *potential for political organisation* is further emphasised by the free segmentation of lineages descending from a common founding ancestor. The easy segmentation of lineages due to socio-political reasons seems to be a further indicator of the importance of politics in the formation of lineages despite the apparent (over covering) kinship terminology. The non-existence of certain fixed divisions creates the possibility of the emergence of the head of a certain branch as the founder of a new lineage. For this reason, "unlike the clan system, the segmentary lineage system provides *no automatic division* into unambiguous, distinct and rigorously discrete named units based on the presumption of separate lines of descent" (Baştuğ, 1995: 7).

The importance of flexibility that is brought about by the non-existence of any automatic division of society into distinct groups becomes more visible when it comes to the

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[2] The concept of *kan düşer* determines the boundaries of a group of individual who are connected to each other with predetermined rights and duties and who are (theoretically) responsible to act in unison in decisive matters as a group. This bond between such individuals is expressed in kinship terminology and defined determined by the lineage membership. The group that is defined by the concept of *kan düşer* is rather theoretical for in actual situations, the segmentary nature of the lineage system can severe some constellations of individuals (determined as families or groups of families) from the main lineage due to several socio-political factors.

political organisation of society into tribes as highly flexible and fluid systems of political alliances. Indeed, it was Foucault who pointed out with a great insight to the importance of the interconnection between the simple relations of sex in the union of a man to a woman and kinship and what he termed as a 'deployment of alliance' that would eventually generate a political system (Foucault, 1978: 106):

> It will be granted no doubt that relations of sex gave rise, in every society, to a *deployment of alliance*: a system of marriage, of fixation and development of kinship ties, of transmission of names and possessions. [...] The deployment of alliance is built around a system of rules defining the permitted and the forbidden, the licit and the illicit [...]. The deployment of alliance has as one of its chief objectives to reproduce the interplay of relations and maintain the law that governs them; [...] For the first [the deployment of alliance] what is pertinent is the link between partners and definite statuses; [...] Lastly, if the deployment of alliance is firmly tied to the economy due to the role it can play in the transmission or circulation of wealth [...].

Thus, the system of political alliances emerges on the basis of familial relations (marriage and kinship) that emphasise the rules (law) in the transmission and circulation of the social wealth or social power. It is for this reason that the segmentary lineage system as both a strict system of rules (defining the artificial —social— nature of the kinship ties) and a flexible system of segmentation allows the arbitrary emergence of new lineages and lies a strong basis for the potential organisation of society into a body politic. That is why even Evans-Pritchard (1940: 194) has, too, pointed to a certain correspondence between tribe as political organisation and lineage systems:

> Political and lineage groups are not identical, but they have a certain correspondence and often bear the same name, for a tribal area and its divisions are often called after the clans and lineages which are supposed to have first

occupied them".[3]

With the reservation that in the case of pastoral nomadic tribal formations, perhaps it will be better to speak of a 'path' with its references to a certain time and place on a line of movement, rather then a territory,[4] the political and territorial character of the tribe becomes apparent. Besides, the interpretation of tribe as the political organisation of the lineage systems with some degree of autonomy (they "are not identical") seems very important in evaluating the special dynamics of the system of political alliances inside and among tribal formations. First of all, the connection between tribe and lineage is one of political domination rather than kinship and it is for this reason that the tribe may include foreign elements with different tribal or genealogical affiliations under the dominance of a leading lineage.

Another important idea in Evans-Pritchard's analysis is the idea of the existence of structural opposition between the segments of a tribe and its this peculiarity that creates

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[3] It is interesting to note the introduction of the notion of 'domination' few lines under the quoted passage. In p. 142, underlying the political character of the term 'tribe', he writes: "a tribal segment is crystallised around a lineage of the dominant clan of the tribe...".

[4] The concept of 'line of movement', instead of territory has further consequences in the analysis of pastoral nomadic tribes, for they do not have a concept of territory with clear-cut boundaries. Instead, when they are talking of a region they are referring to an area in and through which they can move freely, the boundary being interpreted as the barrier on the path that hinders further movement. Khazanov (1994: 140-50) has also pointed out the necessity of using the term territory with caution and some reservations. Bilge Kagan's monument also emphasises the problem of establishing domination over people (that is, tribes, *budun*) rather than a defined territory.

the flexibility in the formation of new lineages or tribes. As Baştuğ (1995: 13) says, the concept of structural opposition should be understood in terms of being just "one of several possible mechanisms for the delineation of kinship-based subdivisions in segmentary lineage systems". It, then, refers to the potential (or actual) structural opposition between different groups occupying more or less structurally equal positions in the tribal hierarchy. Since the groups occupying similar positions in the tribal hierarchy are structurally opposed to each other, rival groups move inside an economics of potential struggle against each other and of alliance with other groups that are not structurally opposed to them. Based on the matrix of descent relations, the highly fluid dynamics of political alliances have the potential to form the tribe, reshuffle it, and re-create it even long after the actual tribes dissolved. This peculiarity can be observed in various tribal formations.[5]

In contrast to the process of structural opposition underlying inner-group rivalry, which has centrifugal effects on the tribal unity, we should also mention the principle of integration that helps to hold the tribe as a unit in its external relations. Although they do not give a specific name to this peculiarity of tribal formations and prefer to discuss it, as well as the notion of structural opposition, within the context of lineage systems, both Evans-Pritchard and Baştuğ confirm the existence of such a process. In Evans-Pritchard's terms (1940: 142), "each segment is itself segmented and there is no opposition between its parts. The members of any segment unite for war against

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[5] As exemplified by the existence of certain tribes before the establishment of the Chinggisid state, the reshuffling of the pre-existing tribes into newly composed *tümens* under the command of, first, the members of the Chinggisid family, and then, by their loyal followers. It is also interesting to see some of these same *tümens* as tribal organisations one and a half century later at the time of Timur.

adjacent segments of the same order and unite with these adjacent segments against larger sections". Khazanov (1994: 229-30) also prefers to stress the role of external factors, which pastoral nomadic societies encounter in their relation with the outside world, in the formation of higher-order nomadic polities worth to call states.

To sum up, we have three major processes in tribal-lineage systems, all of which work on a genealogical terminology of the segmentary lineage system: structural opposition between those persons or groups that occupy similar positions in the tribal hierarchy expressed in genealogical terms, co-operation against any external threat or hiatus of power (rising the questions of domination or being dominated) as a result of inter- or extra-tribal relations, and lastly, relations of internal domination, which Khazanov (1994: 185-6) erroneously sees as a process working against the genealogical organisation of the society. All these relations are expressed in terms of genealogy.[6] Even the relations between the tribal or supra-tribal units and the outside world were tried to be adjusted to and expressed in genealogical terms as the numerous efforts to construct marriage alliances with such forces clearly demonstrate. But this seems to be rather a matter of terminology hiding the actual relations of power and mechanisms of trust that lie behind

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[6] Middleton and Tait (1970:5) write: "In the societies with which we are dealing here there is an ideology by which certain social relations are expressed in terms of kinship. Relations conceived in this idiom may be conceived with the interests either of individuals or of aggregates of unilinear kin."

And a few lines below they add: "The concept of a lineage structure may be used in various situations, to express various sorts of social relationship. Some of those are those of government, in which political power and authority are exercised between groups and statuses".

any form of political alliance.

As Khazanov and Barfield admit, there are great variations in economic and political organisation of the people which are evaluated under the common name pastoral nomads. However, both Khazanov's (1994: 172-97) and Barfield's (1993: 4-18) classifications remind us that the only common features that can be found among the variations of the social organisation of pastoral nomadic societies, each being expressed in terms of descent, are their being animal herders (not all of them pastoral nomadic in the same degree and sense) and being organised around genealogical ties. Their discussions on the political structure of these respective types show that in some of these variations the segmentary lineage structure of the society does not permit to establish a relatively permanent and hierarchised political structure. But, the acceptance of such a couple of premises brings one face to face with the problem of why and how the state could be formed at all among the Eurasian steppe nomads. The answers given to this question by both authors as well as many others point to the relations of these people with the outside world (and especially with China, in the case of Barfield as we have noted earlier).[7] They also tend to identify the segmentary lineage system embedded in the society with the tribal organisation of that society and use both terms sometimes as synonyms, despite the important reminder of Evans-Pritchard who have stressed that the political and social organisations of a society are not identical even though they have a certain correspondence.

Tribe can be seen as the political organisation of segmentary lineage systems encountered mostly among the pastoral nomadic societies. But, it seems that as a

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[7] On the question of how nomads of the steppe came to form strong central states in their offensive-defensive relations with China, see especially Barfield (1996).

political organisation *different* from the 'normal' social organisation of the society, it represents the emergence of a new technology in the political economy of such societies. As Khazanov admits, when society began to organise in political lines the importance of the 'real' genealogical system declines.[8] This can also be derived from the fact that genealogies around which such societies are supposedly organised, turn out to be more and more 'fictive' rather than real ones, increasingly representing the balance of forces and the system of prevailing political alliances rather than reflecting the actual relations of descent among individuals. Thus, in the analysis of tribal society, genealogies can play more the role of charts depicting the political structure prevailing in the society, but not give us much information about the actual kinship ties between groups or individuals even when they seem to tell about the actual relations of descent among individuals. Yet, they are important, for the reason that they show us the *organised* nature of the political structure of a society around tribal lines. They also show the habit of representing any relationship in terms of descent ties, which derives its own importance in showing the functioning of the underlying social structure beneath the political organisation. In the levels of family, household or small lineage (up to 3, 7 or 9 generations) the genealogies are real depicting the segmentary lineage system. As Baştuğ mentioned before, the importance of differentiating between clan having not cited genealogical links between the lineage and the founding ancestor, and tribe as an organisation naming these links one by one even though they are fictive rather than real, emerges from this crucial difference. It is this difference that makes it possible that

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[8] Khazanov (1994: 185) tends to think of genealogies as actual when he writes:

> "It should be pointed out that in the Middle East, as indeed is the case everywhere, the greater the social stratification and centralization of a nomadic society, the more limited and specialized is the genealogical principle in its capacity as an organizational force".

tribal principle survives when the actual tribes collapse, because the segmentary lineage system can withdraw to the lower levels of social organisation such as family, household, or small lineage, protecting the dynamics which may give way to the re-formation of tribes when the suitable conditions emerge.

It seems that the persistence of the relations of descent arises out of the need of trust and security in an unruly socio-political environment that emerges when higher forms of political organisation can not satisfy such needs. In a system that can be characterised by segmentary lineage, when such conditions begin to prevail for this or that reason and when the societal ties are still strong enough to enable the establishment of wide networks of political alliance, it is only normal that the society reacts this insecure and unstable social environment by carrying its level of organisation towards higher units which, in turn, becomes tribal in the sense of being an organisation marked by both politics and social stratification. But, when the tribal organisation reaches up to a certain level of centralisation as in the cases of the Chinggisid or Ottoman empires or Timurid and Seljukid states, even though it replicates the segmentary lineage and its tribal organisation in the formation of dynasties or prominent households, it turns against other tribes as well as other surrounding states as its 'other'.[9] Thus, it should not surprise us to see that even the Ottomans who were most successfully established a strong central state machinery and struggled fiercely against the nomadic tribes in the regions under their rule had maintained tribal relations in their own dynasty. It is also not surprising that after the tribes of the past living on the Ottoman soil had disappeared, after the Ottomans themselves had disappeared from the history, the

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[9] For a discussion of the reproduction of the tribal relations inside the Ottoman ruling dynasty and elite households at the end of the eighteenth century and beginning of the nineteenth, see Findley (1977).

tribal principle depending on the lineage system may still be ready to unfold itself when the forces that suppress them show any sign of weakness or insufficiency in covering and occupying various zones of the socio-political geography.

4.0.1 The Domain of the Tribal Political Power

We have said that the primary determining factor in the nomadic-tribal society is politics of alliance expressed in kinship terms. This means that the primary target of the social activity in such societies is to gain political power in its various forms (such as prestige, influence on others, etc.). For this reason it is impossible to explain the nomadic-tribal mode of social relations only with reference to its forms of subsistence (economic relations).[10] Therefore, the social action of the people in such societies that are intended to 'produce' a social 'value' cannot be explained on the basis of economic relations (relations of material production). Rather, as in the case of the Turkic nomadic-tribal societies activities that are directed to produce a social value are

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[10] In a rather reverse manner, Krader (1975: 229-30) seems to testify to this view when he is talking about the problem of bondage in the Asiatic Mode of Production:

> The bonds of the group and the bondage to the soil are in effect the same. While bound to the group, the individual is bound to the soil, and freedom from one is freedom from the other. (...) The individuals who are separated from these bonds are in the first place the rulers, at the time of the formation of political society.

Krader seems to forget that in nomadic-tribal societies there is no question of 'bondage to the soil' for such societies the soil is not 'a plot of land' but rather a *path* which is composed of points of temporary suspension of movement and distances to travel. So, if we accept Krader's relation between the freedom from bondage to soil and freedom from bondage to the group, we arrive at the conclusion that all the members of the nomadic-tribal society are free and rule, at least, over their own destiny, which is not the case.

primarily composed of activities like participating in the non-economic exchange, taking part in the raids for acquiring booty, or collective rituals for redistribution of booty, etc.[11] Participating in such activities in an efficient manner causes an increase in the individual's social wealth as it is defined in the nomadic-tribal society. In this sense, the meaning of the material wealth collected and accumulated in the tent of the tribal leader is not something that will be re-invested by him into economic production to increase the quantity of the original wealth. Rather it is employed in the process of acquiring political power through redistribution as well as making a show off the richness to attract a greater number of followers that connects the leader both to his followers and *alliances*. Even though it will remain as one of the critical elements in shaping the social ethics in the later history of Turkish society, this figure of 'concentrating' wealth at the disposal of the leader to be the subject of a later redistribution is, by itself, not a differentiating characteristic peculiar to the nomadic-tribal society and it functions in a similar way in other societies as well. But its close connection with the particular way of establishing political authority through alliances first with the kin and then with the followers and alliances gives it its distinguishing character that is particular to the nomadic-tribal society. The circulation of material wealth to generate prestige and power is a well known theme in the history of the Turkic nomadic-tribal societies. In all the texts that remain from the 'thoroughly' tribal times its possible to find this practice such as *The Secret History of the Mongols*, *The Book of Dede Korkut*, or *Baburname*.[12]

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[11] There is a whole bunch of writing in anthropological literature on this issue. Just to cite a few examples we can mention Durkheim (1977), Levi-Strauss (1944) and Sahlins (1965).

[12] For the importance of redistribution in the constitution of tribal alliance see, for example, Ibn Khaldun (1990:399-401).

For in a tribal society the follower whose loyalty is only to the leader and no one else is a scarce asset because everyone's place in such a society is determined primarily by his filial relations.[13] As an alternative the shamanist beliefs cannot determine the ideology of the tribal society for they can only offer a limited degree of unity lower than the tribe whose ideology is primarily determined by the kinship idiom. The tribal individual can find its place in the universe not by his connections with the shaman but through kinship ties. Even the *kam, bahshi* can find his/her place in the tribal universe through his/her attachment to a genealogical tree. It is for this reason that nomadic-tribal society is said to be tolerant towards religious differences while it is highly attentive in organising its political structure through tribal alliances as in the cases of the Timurid and Ottoman Empires. But the kinship idiom can only function as an ideological structure by which the actual political integration and disintegration is explained.[14] Thus, it was through the alliance of the groups (not equal in power) that the boundaries of the political unity (whether it be 'extended' family, lineage, tribe, confederation or empire)

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[13] Even though we see the formation of nomadic outlaw packs around a leader that can invoke the hopes of future prospects in the hearts of the members as, for example, in the case of Timur before its rise to power, such a pack cannot endure long without connecting itself to the wider web of tribal system of alliances. Indeed, Forbes Manz (1996: 45-46) interprets the formation of such groups as an instrument for the leaders to gain advantage in the inner-tribal power struggle.

[14] When Barfield (1994:26) says that the "genealogical charter was important because it justified rights to pasture, created social or military obligation between kinship groups, and established the legitimacy of local political authority" he doesn't seem to assess the importance of the fictive nature of such genealogies. See Woods (1987) and his "Timurid Genealogy" for example, for the manipulation of Timur's genealogy for explaining and justifying the latter political alliances.

are drawn. Without partaking into such alliances the individual cannot have a right to exist in the tribal society as the cases of the non-tribal elements that are enforced to attach themselves either to a leader or a powerful tribe testify. What counts in a nomadic tribal society could not be the possession of material wealth or land which remains unplotted, but it is the power over the people.

As Khazanov (1994: 123) points out the two items that could be at a man's disposal as his material wealth in nomadic-tribal societies are pastures and herds. But the herds constitute a highly vulnerable source of wealth and a man who leads a herd of a thousand sheep, for example, may loose all of them in just one night due to climatic, geographic or military/political reasons (raids for example). The pastures that remain unplotted, ambiguously defined pieces of land are important for a tribe only as long as there are animals to herd at their disposal. The only strategy for power left, then, is to use that material wealth as long as you can hold it at your disposal in collecting the most valuable asset, the control over the (groups of) men acquired by the establishment of voluntary or involuntary alliances. Thus, it is no surprise that nomadic-tribal power takes man as its target. But, it is not the totality, or the inner being of man that it desires to get hold of. Rather, it is the *loyalty*, the *alliance* of the men acquired through the relations of descent and affiliation by marriage both of which masking the actual power relations in the society.

The tribal universe is determined by the language of kinship. The tribal individuals, their enemies, friends, captives, slaves, everyone that are included within the confines of this universe is determined *in* (and *not by*) kinship terms (regardless of they denote to the actual situation or not) that varies according to the above mentioned personages' relationship to the ego. Generally speaking, tribal societies are thought to be 'group' societies that do not allow the emergence of the individual self. But, in contrast to this claim, groups like gangs, families, lineages and tribes seem to emerge rather as a

function of the 'social' relations among the individuals. The relationships between father and son, husband and wife, ego and brother and the like are all primary relationships established between the individuals. It is the existence of the forces that operate in the social environment that connects all these individuals in a stronger and mutual bond. In this sense it is not surprising to find that in a tribal society where the *pax* of a central and superior authority is either unknown or weak, the emphasis is laid upon the bond itself (as to constitute the 'group') rather than the individual. But, this situation cannot hide the individual lurking behind the seemingly all-powerful group bondage as it is exemplified in the frequency of the events of 'bondage breach' in the history of tribalism. True that tribalism emphasises the importance of the bond as the main apparatus of political alliance and domination expressed in kinship terms. But it is also one of the rare social environments in which the bonds of alliance are easily and frequently broken due to the incapability of the central mechanisms of oppression (or social control). The emergence of new families, new lineages, tribal formations and dynasties all mark the breach of the initial bonds of alliances between the parties. Despite this frequency of breach of the tribal bond the social universe yet remains covered and overcoded by it. Even the free-floating roamers or 'outlaws' that would be acquired by the 'potential' tribal leader as his followers have such previous tribal bonds.[15] The supply of such free-floating 'lonely wolves' is limited in societies where tribes maintain a strong hold over the individual and their abundance may indicate a social confusion brought about by the weakening of the existing tribal bonds due to various (especially political) reasons.

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[15] The stories of Chinggis Kagan, Timur and Babur all indicate the existence of such free-floating potential followers of a strong leader in the society. For Chinggis, see *The Secret History of Mongols* (1982), for Timur see Forbes Manz (1992), and for Babur see Babur (1985).

However, this does not necessarily mean that the society ceases to be a tribal one, for as long as the social mechanisms that generate the previous tribes continue to operate within the society it can be expected that new tribes will be formed and replace the older ones. It seems that the pregiven kinship vocabulary does not only structure the society according to a certain pattern of kinship, but it also defines the universe of the individual within the confines of the lineage first, and then, those of the tribe. So that any individual born to this universe is determined by his being someone's son, brother, etc. as his primary associations and alliances.[16] This network of alliance first developed within the web of primary alliances whether such alliances are established between the actual relatives or not and compose the tribal family as a unit of social action.[17] But as the fictive nature of the blood ties in the tribal society sufficiently shows, the actual basis of alliance cannot be established on the blood relation alone. In contrast, the primary factor that motivates the individual to establish alliances is the *need for mutual trust* that is, ironically, the most fragile and frequently broken social element in the tribal society which offers a highly insecure environment for the individual if it is left on its own. The kinship relations whether actual or fictive here offers the primary networks of other

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[16] This peculiarity has been usually interpreted as a proof of the priority of the group over the individual. But if this was the case, the modern individual who was born in a given national state, given city and given social class with given social duties and obligations should also be understood as an individual who is incapable of claiming his/her individuality over the superiority of such social powers.

[17] Here it is worth to remember the case of Jochi, the first son of Chinggis Kagan, who was suspected to be the son of a Merkit from Chinggis Kagan's kidnapped wife Borte-ucin. In this case, even though nobody could be sure about the biological father of Jochi, Chinggis Kagan had accepted Jochi as his true of without any hesitation.

individuals (a passage from individuality to society) through which the ego can open itself to the wider social environment and on which mutual trust can easily be established. Indeed, it is almost universal that the first place on which the feeling of mutual trust can be established is the relationship 'naturally' existing between the parents and their offspring. But what makes the tribal social relations of alliance so peculiar is the *extension* of the feeling of mutual trust towards the wider society through the peculiar institution of lineage that offers the individual a wider spectrum of alternatives of alliance for, as we have seen, the previously established bonds can easily be broken and new ones be established depending of the power of the concerned party.

This point draws us back to the subject of the importance of the notion of order and the necessity of establishing a higher ratio of social expectability to be able to constitute such an order under the authority of a superior power. Under this light it becomes much more understandable and 'reasonable' that in such insecure social environments individuals do prefer to choose their closest (the closest is the most dearest) as their most trusted ones first in the social milieu offered by the blood ties if that is possible. That is why the blood ties acquire so much importance in the constitution of various social units in the social history. If such a primary alliance with the blood kin is impossible due to either lack of such kin or the dissolution of the bond of trust that tie these kin, or the probability of better future prospects expected from a newer alliance, then we get the establishment of newer political alliances again expressed in kinship terms for that seems to be the only way of injecting the scarce feeling of trust into such bonds.

The feeling of mutual trust derived from the need for security (one may also call it 'self preservation' as Hobbes once did) spreads itself along the axis defined by the kinship terminology and draws the boundaries of the tribal universe. It constructs the tribe as a

political unit (not as a simple kinship unit) while at the same time limiting it both in the spatial and temporal dimensions of human existence. The kinship terminology as the main ideological determinant of the social system is also applied in the expression, sealing and breaching of the bonds of alliance contracts among the contemporaneous individuals or groups as well as their extension or breach in time. In this context, at the first glance it may seem that any member in such a society is tied up by all the surrounding kinship relations that bind him tightly as not to allow the development of the individual ('free will'). The power of the binding force of the tribal relations seems so strong that we are inclined to think that the individual cannot break free from these overwhelming social forces, and the only possibility of such a break is the emergence of an charismatic personality as a diversion from the normal as it was once suggested by Weber.[18]

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[18] Weber (1968: 21) defines pure charisma as totally pathological:

> 'Pure' charisma is contrary to all patriarchal domination (in the sense of the term used here). It is the opposite of all ordered economy. It is the very force that disregards economy. This also holds, indeed precisely, where the charismatic leader is after the acquisition of good, as is the case with the charismatic warrior hero. Charisma can do this because by its very nature it is not an 'institutional' and permanent structure, but rather, where its 'pure' type is at work, it is the very opposite of the institutionally permanent.
>
> In order to do justice to their mission, the holders of charisma, the master as well as his disciples and followers, must stand outside the ties of this world, outside of routine occupations, as well as outside the routine obligations of family life.

Weber's point here regarding the break with the previously established social ties by the leader is full of insight. But he misinterprets the relationship between the "institutional and permanent structure" of the society and the emergence of the charismatic personality and represents the latter as the 'opposite' of order, as a pathological case. But, as we have seen it is the peculiarities of the social 'institutions' and structure that generate such breaks with

In this sense what seems at the first glance as pathological is rather a structural peculiarity of the tribal system and suck breaks that initiate the foundation of new lineages, tribes and lastly states may happen frequently. Therefore, the tribal *törüğ* that demands loyalty to one's alliances cannot determine the social action of the individual in every case but rather express a *wish* to be able to make the social contract possible at an acceptable level of dependability. It is rather a rule formulated in the ethical life of the individual formulated by a desire to impose order on the 'chaotic' ethos that is formed in the actual social practices. Being a rule, it constitutes the basic criterion for the social good and evil, for social approval or disapproval, and as long as it stays as a rule not backed by a centrally organised armed force strong enough to sanction it, its effect remains rather limited. For, as in any other society, there can be found many channels in the tribal society to escape from the binding force of the tribal *törüğ*. First of all, the web of social relations in the tribal society allows many alternatives in terms of possible alliances. If one breaks one's alliance with this brother one can still have the opportunity to establish new alliances with other brothers, one's *anda*s, etc.[19] Secondly, the lack or inefficiency of a powerful central organisation allows individuals or groups to

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given order. The institution here is not the maintenance of the previously established bonds or alliances, but rather, the establishment and expansion of such bonds and alliances whose centre the ego stands. This is the institution and the individual who dares to do that becomes a tribal leader, a hero and does not exemplifies a pathological case.

[19] For example, when Chinggis Kagan was abandoned by his blood relatives (his uncles and their sons) after the death of his father Yesugei he established a strong alliance first with his brothers (even though he killed one of them for leadership). Then he began to acquire his first followers (Bo'orchu) who were not kin. Lastly, after a certain amount of the social power has been accumulated, he began to expand his alliances towards higher levels of social hierarchy by forming *anda* relations (with Jamuka and Toghrul) against his former allies (his uncles and

escape from one betrayed relationship to establish new ones in other areas of the social geography. Thirdly, the fact that the alliances can easily be broken as they can easily be established shows that the sanctions by the third parties against such behaviour cannot be very strong. Of course, the situation seems different seen from the view point of the betrayed party, but it should have to be quick and powerful enough to punish (avenge) such a betrayal.

4.1 The Turkic Tribal Ethics: *Törüğ*

Aydın (1996: 17) defines *törüğ* as the totality of the social and jurisprudential rules prevailed in the historical Turkic societies. However, we should mention that before being a world denoting to the jurisprudential (legal) rules, *törüğ* first related with the notions of creation, origin or genesis. Hassan (2001: 26) asserts that the word *törü* as one of the derivatives of *töz* (or *tör*) was related with the notions of giving birth, mother, mothers, ancestor, origin, tribe, kin, being created first, descending from the same root, tradition descending from the ancestors, being affiliated with a given lineage or organisation, people, and lastly, the law. These connected meanings of *törüğ* acquires

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their sons).

For the importance of such alliances in acquiring power (as *noyan* —leader— and not *nökher* —follower— in the case of Temuchin) see esp. Ratchnevsky (1997: 31-33). For *anda* Temir (1995: 37) drops the following footnote:

> "*anda ke'eldugu*: 'saying *anda*, being *anda*, establishing *anda*'; *anda*, etc.: 'friend, sworn friendship'. Among the Mongols individuals belonging to different tribes covenant alliance for friendship and by giving and taking of gifts become *anda*.

yet more significance when we see that *törüğ*[20] was also related with the notion of Kagan.

According to Togan (1981: 112) the ancient Turks believed that only the members of a special lineage that was thought to be descended from Ashihna lineage could be *kagan* or *han- töre*. Additionally, the Turkic myths of origin point to a certain Ashihna as the founder of a new lineage that would develop into the Turkic *budun*.[21] Under the light of such connections it becomes possible to link the notions of tribe (or people), ancestor, mother giving birth to a new community of kin, tradition of the ancestors and law under the concept of *han- törü*. Although it is difficult to ascertain if *törüğ* was related with the politics (or the political power of the kagans —*han- törü*s) from the start, it is clear that in its first written appearance in the Orkhun Monuments it was used as to cover both the meanings of the social custom (the tradition of the ancestors) and the political rules of the sovereign.[22] This, being an indication of the interrelatedness of the social order (experienced as ethics but perceived through the ethical life by the members) and political power (within the family, lineage, tribe and the state), also denotes to the delicate balance between the social customs (the ethical values) and the rules of the state (laws) both of which were unwritten, yet known by all the members of the society. In this sense, it would not be a mistake to interpret *törüğ* as all the rules (social, political and religious) that give an order (and identity) to the society. Further, its origins lay

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[20] Or *töre* in modern Turkish.

[21] For the two variations of the Turkic myth of origin and the place of Ashihna in the genesis of the Turkic people see Golden (1992: 118-119).

[22] Also for the connection between *törüğ* and the sacred see Hassan (2001: 29-42).

mostly in the social habits of the people (ethos) that elevate those habits to a ethical systematic (ethics) through their reflective capacity rather than a political authority. For this reason *törüğ* cannot be seen as the product of the reflective activity of a state organisation and it remains within the confines of the tribal organisation of the Kök Turk society where people and state authority has not been clearly differentiated yet. This also explains why *törüğ* is much more deeply rooted in the field of the social in comparison to any form of political jurisdiction as in the case of later *yasağ* which, as a concept, acquired its popularity among the Asiatic Turco-Mongol peoples after the foundation of the Chinggisid Empire.

4.1.1 Dictates of the *Törüğ*

The individual articles of the *törüğ* do constitute ethical values derived from the norms of social practice (ethics) and for this reason they do not correspond to the actual but rather represent the idealised forms of the social action that the members think as proper. We have already mentioned the frequent occurrence of the breach of the *törüğ* due to the peculiar character of the tribal social relations despite the heavy emphasis laid upon the values of the *törüğ*. Indeed, the gap between the idealised *törüğ* and the actual social practices creates a space in which the desire for order through the establishment of the reign of the *törüğ* operates against the chaotic freedom brought about the tribal norm which dictates the breach of alliance whenever it is seen as desired or necessary. The long durability of the *törüğ* derives its being composed of the values of the ethical life the society. As they are idealised forms they point to an ideal yet to be reached in contrast to the already actualised norms of the tribal ethics. As we have discussed earlier, we understand the tribe as a specific political organisation in societies where the agnatic lineage is the dominant pattern of the political alliance

which is expressed and formulated by the kinship idiom as the dominant pattern of reflective thinking.[23] Therefore, the tribal order that would be achieved by the establishment of the rule of the *törüğ* can only be realised through the arrangement of the things in the tribal universe according to the kinship terminology. But, this terminology is merely the product of the reflective mind covering the actual relations of power in the society.

Therefore, the primary principle of the *törüğ* (not corresponding to the actual social relations but being an ideal formed in the ethical life of the individual members through reflective activity of the self) concerns the notion of *loyalty* (being linked) for it is the most easily and frequently broken thing in the tribal society. Since the agnatic lineage is different from the cognatic kinship, this form of alliance based on loyalty, first to one's family and lineage, already implies a choice whose rules cannot be found in the natural conditions and therefore political. Thus, the first and most general dictate of the *törüğ* is a selective loyalty based on a political choice. But this first principle does not remain as a general and abstract rule in its applications and reflects itself on various levels of the social actors existing in the tribal society. Contrary to the general acceptance, within a tribal society we can enumerate five levels of social action that form their respective social actors: the individual, the family, the lineage, the tribe, and lastly, the state. By such a schema, it becomes possible to discern the limits of the tribal power. It starts with the individual and ends with the foundation of a state mechanism and what it attempts to control through the application of the *törüğ* in all these levels of social action is the nature of the alliance based on the ethical notion of loyalty. These levels also define the possible levels of trespassing the rules of the *törüğ* creating the torts and

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[23] We preferred the expression 'reflective thinking' instead of saying 'ideology' since the latter is

crimes respective to their seriousness.[24]

The Tribal Code: *Namus* (*Nomos*)

For a man to be acknowledged as a man, let alone as a leader, should have to have a definite place in the tribal hierarchy expressed in terms of kinship terminology. He has to be someone's *recognised*[25] child that gives him a definite place in the tribal world. Furthermore, as this position is not directly related with birth and resembles something that is acquired (due to the frequency of unofficial adoption by way of kidnapping, for example) the rules of the nomadic-tribal society enforcing on the people a certain code of honour incites the people to *fill* their social positions. A father should have to be like a father, a husband, the runner of the household exercising his power over the children and his family, leading and protecting it etc. The social sanctions exercised by the society can vary according to the severity of the situation. In most severe cases the infringement of this status of man as a tribal man is the complete exclusion from the unit. This means a sort of servitude for loosing one's tribe means being devoid of protection and alliance that may end in the death of the person or his articulation to another group as an inferior (alien) member.

Loyalty to one's alliances is the second critical element in the definition of *namus*. Since the whole system depends on a network of political alliances the tribal man is expected to be loyal to his alliances. Being the result of political necessity this is perhaps the

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laden with many theoretical suppositions with regard to its relation with the 'actual' or 'truth'.

[24] Since this issue will be discussed in Chapter 5, we will not go into detail here.

[25] Not necessarily biological, but socially *recognised* child as in the case of Jochi, the eldest son of Chinggis Kagan.

most frequently and heavily broken code of the tribal *törüğ*. Since the notion of the unit in the tribal society is not something fixed on a certain level except the father's household[26], and the society is organised on a segmentary basis there is always the possibility of unity and disunity. Thus, the only determinant of alliances is the political necessities of the parties involved. For this reason, the tribal duty to be loyal to one's alliances is always interpreted as an inter-unity relationship by the party that breaks apart the alliance and the alliance remains as a inner-unity relationship only as long as it the parties involved remain loyal to its terms. In a sense it is a contract between the parties but it is also at the same time not a contract in the usual sense of the term for it is not a legal agreement but political. Its validity depends only on the continuous consent of the parties and with the cessation of consent it ends immediately. Moreover, the consent involved in the tribal alliance is not something related with the voluntary action of the will or free will of the individual and it may depend as well on force or ultimate need and involve the ultimate dependence of one of the parties on the other. When a man or group breaks with the alliance the defined level of unity immediately changes and another web of alliances appears as the counterpart of the previously broken alliance whose parties are turned into aliens. It is for this reason the inner-unit definition of the duties of man does not work in the system of political alliances and enmities. For such relations are in a sense relationships with the other when the alliance that has been previously established is not strong enough to establish itself as a 'true' (still fictive but strong for the reasons of longevity or necessity) bond. Thus, the only sanction against a serious break of an alliance is the victory or the defeat of the

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[26] For the children, that is, brothers and sisters the situation is rather different for they may easily broke with them to form other loyalties. Even in the cases where father is alive the mature sons may broke their alliance with their brothers and their father as Babur tells us.

war.

4.1.1.1 Individual *Törüğ*

Contrary to the general and biased view of tribalism as something primitive and remnant of the past simple societies the individual constitutes the primary level of social action in the tribal social relations.[27] For, even though the group of individuals (on whatever level) is the most curious phenomenon for the Western eyes in the analysis of the tribal society, to begin with, the fact still remains that even in the tribal societies without there being an individual one cannot be considered to be a simple member of any group. Indeed, the recognition of this individuality in the tribal societies can be seen in the rites of initiation through which the newcomer is recognised as the full member of the society.[28] The old Turkic tradition of 'acquiring a name' for one's self can be considered as an example of such rites that may also indicate that no one is recognised

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[27] Among those who saw tribalism as the remnant of the simple, primitive past one can mention Marx, Durkheim and Weber. Marx's unilinear theory of historical evolution, starting from the primitive commune towards communist society, Durkheim's evolutionary approach from organic to mechanical solidarity and Weber's evolutionary schema from community (*Gesselshaft*) to society (*Gemainshaft*) were the major theories that greatly influenced the social scientific thought in approaching to the analysis of non-Western societies. Furthermore, Weber interpreted the manifestations of individuality in such societies as charismatic and pathological.

[28] The existence of the rites of initiation also testifies that the membership of the society is not something that is acquired automatically as it was suggested. Rather, they constitute a sort of ceremonial test passing through which the novice is expected to prove its worth for the full membership.

as the full member of the society in an automatic way by just being the son or daughter of a previous member. Moreover, the very frequency of the cases of breach of the tribal rule testifies for the existence of the individual that puts his 'will' onto the surrounding events. The existence of specific values in the *törüğ* that are intended to guide the individual action also shows that the tribal society *can* perceive and try to intervene the actions of the *individuals towards the society* (the other). We may think at the first sight that the values of the *törüğ* that are directed towards the control of the individual action are indeed moral virtues related with the ordering of the internal infinitude of the individual. But a closer look may reveal that such values of the *törüğ* concerning the individual like being courageous, honest, righteous, respectful towards one's seniors, loyal to the group, protective towards one's juniors, etc. are actually directed towards the regulation of the individual's relationship with the other and are not moral virtues designed to order the internal infinitude of the individual.

As the general principle of the *törüğ*, the notion of tribal loyalty, being a product of the interplay of the social ethics and the reflective activity of the individual as to constitute the individual's ethical life, tries to construct the individual in a certain way in his social relation with the other. Indeed, what it intends to create is an individual who is respected by his fellow members. Thus, the tribal individual (which is a man rather than a woman) should have some sort of power to allow him to exercise some influence over the rest of the social unit. For this reason, the first corollary of the tribal *törüğ* of loyalty operating on the individual level is related with the individual himself. It dictates the individual to be loyal to himself first of all and to keenly observe the opportunities of the establishment of the *best* possible political alliance in terms of one's self preservation and self extension. As we have discussed in the Chapter 2, such a self extension takes place in the form of extending the self towards the society through the accumulation of power over the others by way of alliances. Once the individual self extends itself towards the others up to a degree that will enable it to protect itself from the immediate

outside pressure, that is, once the self realises its purpose of being loyal to itself in the tribal society, then we can say that the tribal justice on the individual level is secured.[29]

What the values of tribal loyalty aim at is not the inner composition (morality with its infinitude) of the individual alone, but rather it aims to form the ethical life of the individual where the externality and the internality of the individual meet each other. So that, the morality of the individual's self cannot be totally independent of the influences of the social ethics. Thus, whatever the individual psyche may be it falls outside of the power of the tribal *törüğ*. And *törüğ* operates on the point where the individual co-exists with the other. If the very first condition of this co-existence is to be alive to be able to *be there*, the second condition is to acquire a good place as much as possible (and in accordance with one's powers) among the others. Then, at this moment, on the individual level, we come across with the two uncompromising values of the *törüğ* (of loyalty) which under the power of the social sanctions becomes elevated to the status of the two universal laws of the tribal society. Keeping to be alive and 'having a good name' (to be powerful) among one's fellows become the ultimate aims of such values emerging in the ethical life of the tribal individual and the principle of *loyalty* underlies all of them. Death as the opposite of life becomes something despised especially when it weakens the alive and powerful being of the tribal man. In this, dying weak we find the first crimes of the tribal society: betraying oneself both in terms of physical and social existence. The negative reaction (sanction) of the tribal society is reflected in the aversive feelings aroused by the death and 'dishonourable' act as well as in the

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[29] In a surprising fashion this seems to have some parallels with the Hobbesian idea of the first law of nature: self-preservation.

purification rites after the funeral.[30]

4.1.1.2 Family *Törüğ*

Following the individual the second constellation of the social forces that the *törüğ* aims at is the family. Being primarily composed of individuals who are linked together with direct blood ties the family is a complex web of alliance relations constituting a body politic. The political nature of the family was also observed by Durkheim who saw the existence of non-kin in the family web as an indication of the fictive nature of the kinship relations. This is supported by the multiplication of the family members in the tribal society by whatever way possible such as adoption, child kidnapping, purchasing of the slaves, etc. Moreover, Durkheim (1997: xliv) also asserts that the apparent preference for the blood kinship derives from the fact that it simply offers a good basis for the establishment of the relations of loyalty:

> ... blood kinship has in no way the extraordinary effectiveness attributed to it. The proof of this is that in a large number of societies relations not linked by the blood tie are very numerous in a family. Thus so-called artificial kinship is entered into very readily and has all the effects of natural kinship. Conversely, very frequently those closely knit by ties of blood are morally and legally strangers to one another. For example, this is true of blood kin in the Roman Family. Thus the family does not derive its whole strength from unity of descent. Quite simply, it is a group of individuals who have drawn close to one another within the body politic through a very specially close community of ideas, feeling and interests. Blood kinship was able to make such a concentration of individuals easier, for it naturally tends to have the effect of bringing different consciousnesses together. Yet many other factors have also intervened: physical proximity, solidarity of interest, the need to unite to fight a common danger, or simply to unite, have been causes of a different kind which have made people come together.

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[30] For the desire to live and the feelings of aversion among the Altay pastoral nomadic tribes see, for example, Roux (1999).

Firstly, the lateral (spatial) relationship between the spouses does not only connect the individual spouses but also it is a connection between their families and lineages for the individuals entering into a marriage relationship have previously established links with the society before the foundation of the marital house. Secondly, these previously established links of the spouses do, indeed, constitute the vertical (historical) axis of the familial web: that stretches from the parents towards the offspring. Unlike the contemporary nuclear family that maintains such relations in a very limited scope of spatial and historical axes, the tribal family has a much broader extent. Thanks to this peculiarity, each marriage in a tribal society while establishing a new family does not represent a radical break with the previously established families of which each of the new couple were a part.

Seen from the man's side as the actual founder of a new family, the marital union is a replica of the father's family taking place in the same network of alliance. It is the continuation of the father's family (thus, emphasising the historical connection with the lineage) in perpetuity. This desire for perpetuity in a social existence where socio-ecological conditions cannot present a stable environment is reflected on the tribal *törüğ* as the values that hold the sanctity of the family hearth in highest esteem. The never extinguishing fire of the family hearth representing the continuity of the blood of the father's side has two important meanings that can be observed in two occasions parallel to the extension of the family relationships on the two axes. On marriage, the burning of a *new* hearth represents the sealing of a *new* contract of alliance between two lineages. This moment is also the initiation (purification) of the bride into the new lineage with a somewhat inferior status for she can never be accepted as the natural and full member of her new lineage:

> On marriage, she (the bride) undergoes the fire ceremony: She passes between two fires on the road to her husbands tent (*Ordos*), bows to the hearth of the husband, and feed the hearth fire with bits of fat (in all the societies of the steppe).

> The purpose of this rite is twofold: She is purified of influence of the spirits of her natal family, and assures the fertility of the marriage in a family fertility rite (Krader, 1963: 341).

The family hearth again plays an important role in the establishment of the relations of alliance on the temporal (historical) axis. The hearth, being one of the two ultimate properties of the father,[31] as the supreme authority within the family, represents the abode of the family, its home. Therefore, the youngest son inherits this property intact that was kept distinct from the material wealth brought about by the latter efforts of the father. As for the other one, which is even more important than the first one is the *name* or title of the father representing his status and alliances among his fellow man, and this can only be inherited by the eldest son. Operating on both the spatial and temporal axes the tribal family intends to support the perpetuation of the alliances of the father as a reflection of the general ideal of loyalty of the tribal *törüğ* on the familial level in an environment where any form of stability and security is hard to attain.

The values of the *törüğ* promoting the loyalty with regard to the family level exercise their force along these two axes as well. Since the primary location of the tribal family is on the temporal axis, that is, since the determining relations of the family (understood in the narrowest sense including only the father, mother and the children) are the relations with the past, present and future generations, the value of loyalty operates as to ensure the perpetuation of this chain of generations. The present tribal family located on the

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[31] It is a common practice among the Turco-Mongol pastoral nomads that the youngest son inherits the father's tent together with its belongings including the family hearth as one of the ultimate property of the father that is inheritable. That is why, in tribal societies individuals value most the things that represent their closeness to the deceased person rather than the things that may have a higher use or exchange value.

juncture of the past and future encourages the loyalty of the younger generations, first, to the progenitor and then to his alliances.[32] The father's position as the crucial ring that binds the male ego both to the past and future gives him a specific place of domination in the familial power structure. He is the absolute ruler over the family members wielding a power akin to that of the Roman patriarch (*patria potestas*). Yet, his power may not extent as far as to exercise the right 'to give and take life' without a good reason.[33] Yet, it is the father's power that constitutes the tribal family as a minor political unit. The nucleus of this family is composed of three generations: the father, the male ego, and the son, while the positions of the female members within the family are secured by the extent and power of the spatial alliances that were effected by their marriage with the male members.

Here, on the family level, the number of the possible breaches of the tribal *törüğ* of loyalty is multiplied in convergence with the increasing complexity of the social relations. Any disloyalty against the 'sacred' union of the tribal family represented on the societal level by the supremacy of the father can be considered as a breach of the family code of the *törüğ*. Any manifestation of disloyalty or disobedience to the authority of the father or the family alliances represented through the father constitute the core of the injuries committed against the family *törüğ* from within. The establishment of the authority of the father as a social institution within the family organisation and its

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[32] In cases where the father is not present, a substitute like a paternal uncle or an elder brother may take his place as the locus of the familial loyalty in the agnatic lineage systems.

[33] As we will see later on, in most of the cases the use of the power of 'giving and taking life' is dependent on the approval of the other effectual family members temporarily organised as a 'family assembly'.

extension towards the foundation of other hierarchical relationships manifested as seniority and gender inequalities lay the ground for a possible definition of an act as crime or tort depending on its severity. Thus, it is here, within the family, we, for the first time, come across with the notions of crime and punishment as a response of the institutionalised authority to the acts of infringement. It is the father who connects the family to the wider society, and it is through him that the family is represented in it. For this reason, it is him who are 'forced' to establish his authority on the basis of socially accepted norms together with some specifically invented rules peculiar to his personality and the specific conditions within the family. Generally speaking, the application of these rules helps the institutionalisation of the father's authority within the family, while, at the same time, ensures the formation of the family in convergence with the norms of the tribal *törüğ*. It is for this reason that any breach of the tribal code of loyalty to the familial alliance constitutes a crime against the order (justice) of the father that he establishes within the family and is considered to be a punishable act.[34] The responsibilities (in classical terminology, 'duties') imposed on the family members by the society via the authority of the father also functions to strengthen the legitimacy of this authority. Since the father's power, which is limited within the society as an ordinary individual but almost unlimited within the family circle, is firmly legitimate, and the social

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[34] This is rather different from Durkheimian interpretation of the crime because according to him (Durkheim, 1984: 33-34) "the only feature common to all crimes is that [...] they comprise acts universally condemned by the members of each society". By this way he tends to identify the acts of infringement of the ethical codes as crime, while the approach adopted here tries to emphasise the vitality of the existence of an institutionalised authority in the recognition of an act as a crime. Thus, for an act to be defined as crime there must be some institutionalised authority who rise above the rules of the social ethics and a 'perpetrator' who tries to do the same but with insufficient social resources in terms of power.

existences of the other members of the family are determined by this power, it is a rather rare phenomenon that the members of the family try to break free from its bondage.

The most frequently committed breaches of the family *törüğ* can be observed to occur at the death of the father. In such a situation the balance (order/justice) of the forces within the tribal family tends to shutter and until the reestablishment of a new order under the supremacy of one of the male members of the family (or until the complete disintegration of the previous familial ties) it undergoes a period of severe turbulence (reign of chaos or injustice). At the death of the father figure as the recognised head of the family, those who have equal opportunity to be the new family head (especially, father's brothers and sons) fall into a competitive situation for the leadership of the family organisation due to the segmentary nature of the system. We will see the serious results of this potential of conflict when we will discuss *törüğ* within the context of the lineage. It will suffice here just to note that on the family level, especially in the cases of ordinary tribal families where lineage or tribal leadership means nothing this conflict remains as a potential in most of the cases and ordinary practice is the succession of the eldest son. Only in cases where there is no direct male descendant of the father we see the father's eldest brother as the protector and new leader of the family. Indeed, in such cases the original family tends to dissolve within the eldest uncle's family. Yet, in ordinary cases the establishment of a new family takes place in a peaceful manner. The father getting his sons married establishes a new house (*yurt*) for the new couple in a nearby place. This proximity together with his socially recognised authority over his own progeny gives the father the ability to maintain his power over the newly established family together with the alliances that it brings about. Generally the married sons (except the youngest one) acquire their share in the herds as well as the acquisition of

the right to use the pasture (automatically transmitted from the father).[35] Yet, we should keep in mind that this right of the son to the use of pasture, indeed, remains to be conditional, that the son can utilise this right as long as he, at least, avoids entering into severe conflicts with his father in addition to the normal obligations of an ordinary member to be able to stay as a legitimate (lawful) 'member'.

As for the social position of the females, even though the *törüğ* dictating the junior members obedience (loyalty) towards their seniors within the family implies respect for the senior female members (as mother, father's wife, elder sister, etc.) up to a certain degree; since the female members are not considered to be the genuine members of the family as a patrilineal kin group, obedience by the male members towards the female members is rather limited and in most of the cases overwhelmed by the male superiority. This restricted power of the female members within the family seems to be due to their *auxiliary* position within the family: *Mulier est finis familiæ*. In relation to the male ego, a woman essentially occupies four different positions within the tribal family. First, as the *mother of a son*, she has claim to some degree of respect which is limited and does not generally goes as far as exercising power over a mature son. But she supports the son with the potential alliance of her own line (the maternal uncles and other kin). Second, as a legitimate (socially recognised) wife, she represents the recognition of the male members with regard to her membership of the family as well as her (rather limited) authority as a representative of the father in some matters

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[35] When discussing the rules of inheritance Krader (1963: 216-7) says:

> ... only a small proportion of the family physical property was transmitted on the death of the father. Prior to his death, his sons, with the exception of the youngest son, had allotments made over to them of various kinds, in the normal course these sons would have a tent or *yurt* set up for them by the father, which was generally done on marriage, but sometimes earlier when they came of age;

regardless of the father's being alive or not. The first or legitimate wife is also a manifestation of the male ego's full membership to the society. Thirdly, being as a wife (or concubine), she is the incarnation of the sealing of the alliance established between her and husband's lines as well as supplying him with a sexual partner who may eventually offer him (preferably male) heirs. Of course, in the tribal context, sexual partnership extends the limits of the desire for sexual pleasure and links the male ego with the spatial alliance of her original family and the temporal alliance of the potential future sons.

Fourthly, as a daughter, she is the potential source of again future alliances and of material income (through her labour and exchange payment —*bashlik* or *kalym*). But, in all here roles, the female has to change her loyalty from one family to another, and hence she is an 'alien' in each situation. Keeping in mind her value arising both from her labour and *kalym*, it is possible to say that the most important feature of her role within the family derives from her value as a means of exchange as a means of establishing alliances with other families and/or lineages. Ibn Fazlan (1995: 35) tells us about the 10th century Oguz customs regarding the sexual chastity of women that allows even the display of the female genitals:

> Their women do not avoid both native and alien men. In the same way, women do not hide any of the parts of their body from other people.
>
> One day, we went to a man's house. We were sitting together with the man and his wife. The woman, while talking with us, opened wide her privy parts (vulva) and began to scratch it. We closed our face with shame and said, 'God pardon us!' Her husband laughed. He said to the interpreter, 'tell them: This woman opens it up in your presence. You saw it and protect it. There is no harm done to it by you. This action is better than that the woman covers it but allows other things.

In the footnote for the same excerpt by Şeşen it reads as follows: "The custom told with regard to Oguz women's unshyly attitude before the alien men was alive up until our time among the Anatolian peasants and Turkomans. At the same place Şeşen adds in

convergence with Ibn Fadlan that the Oguz of the 10th century lay great importance on women's sexual chastity. But, according to Ratchnevsky this can not be related with virginity as exemplified by Chinggis Kagan's wife. However, Hudson (1964: 46-47) informs as that at about the middle of the 19th century "virginity was expected of a bride and the lack of it usually entailed a relinquishment of at least a part of the kalym (bride price) by her father." Yet, he also adds that a man who have already paid the greater part of the *kalym* is allowed to have premarital sexual intercourse with the future bride in a tent that was erected by her the father and brothers. This shows at least that the ethical norms of the nomadic tribes with regard to virginity was subject to change as Ratchnevky (1997: 165) tells us about the Mongol custom:

> The Mongols attributed no great importance to the virginity of their women. Genghis did not hold it against Börte that, during her captivity with the Merkits, she was given as wife to Ghilger-bökö, the brother of Chiledu. Although he bestowed a greater degree of favour on younger and more beautiful wives, her sons enjoyed a special position above all others, the empire was divided among them alone and at decisive moments in his life Genghis took advice from Börte.

For this reason protecting the (relatively higher) exchange value of a daughter turns out to be very important for the family and especially for, first, the father, and then, other male members. Because it is they who represent the family in the outside world because her exchange value has a great import on the father's (and other male members') power acquired by the possible future alliances. It seems that before the conversion into Islam the exchange value of the daughter is determined by her obedience to the family *törüğ* as well as her potential to give birth to a male child for her new family rather than virginity. So that, with her loyalty and labour given, her capacity of giving birth to a male heir marks an 'incorporeal transformation' in her existence

within the family.[36]

By her son the female acquires her position in its fullest, but again, this is rather a secondary position with respect to the male members of the family. It is due to her secondary position within the tribal family that the female represents the weakest ring in the family chain. For her disloyalty (or disobedience which amounts to the same thing) that would make her something not desirable for the potential allies is the most severe blow on the authority of the male head of the family. Hudson (1964: 46-48) enumerated several sexual irregularities in the Kazak society like 'loss of virginity', 'having premarital sex', 'carrying illegitimate child', 'abortion', divorce,[37] adultery, all of which are related with women. The lack of mentioning any social customs regarding the sexual abnormalities of the men seems to be the result of the researcher's their own biased position with regard to the matter. For acts like kidnapping of a bride, raping, having extra-marital sexual relationship (as the existence the possibility of 'illegitimate children confirms) cannot be lacking in the society. But, the fact remains that the treatment of

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[36] Deleuze (1988: 81) points out to the relationship between language and actual existence:

> "You are no longer a child" [or "You are now the mother of a son!"]: this statement concerns an incorporeal transformation, even if it applies to bodies and inserts itself into their actions and passions. The incorporeal transformation is recognizable by its instanteneousness, its immediacy, by the simultaneity of the statement expressing the transformation and the effect the transformation produces: that is why order-words are precisely dated, to the hour, minute, and second, and take effect the moment they are dated.

[37] Even though sometimes allowed and accepted as legitimate, divorce by women was not considered something good and the woman involved could not expect a good welcome from her father's family due to the annulment of the alliance contract, an event which obliges the woman's family to pay back the *kalym* (bride price).

the men who committed such acts should be much more milder and tolerant in comparison to the treatment of the women who committed similar acts. Hence, we see the harshest reactions of the family as a corporate unit in such cases such as the loss of virginity which is punished severely by the family and adultery whose punishment, almost unchangeably, is the death penalty sometimes decided and executed within the family and sometimes by the larger society.

The tribal family constitutes a closed unit of jurisdiction for the rights of the eldest male within the family (of course, with some limitations) is recognised by the wider society. Thus, any act of disobedience to the father's authority will immediately be responded by a punitive reaction from the father as the primary judge and executioner within the family as well as from the other members of the family who recognise the authority of the father and wish to maintain the family unity as the potential power-base that supports their respective individualities in the larger society. As we have discussed, the most severe blow rendered onto the family loyalty is the female disloyalty that makes her an undesirable member. This 'crime' against the family is understood even heavier than the killing of one of the members of the family by another member. In the former case, the socially observed act of disloyalty is a menace directed against the very sanctity of the family hearth by whose purity and eternity the tribal family stands as a respectable unity within the larger society.

4.1.1.3 *Törüğ* on the Lineage and Tribal Levels

The tribal family is not a nuclear one. Rather, it has close connections with and embedded in the lineage. Even in the absence of any encompassing lineage, the tribal family is capable of producing one. Yet, it is not an extended family, either. For, in its organisation at most in three generations it resembles the nuclear family. But, since it emphasises the extra-nuclear kinship (alliance) relations, and not a closed unit in itself,

it tends to extent towards the lineage. In the agnatic lineage where patrilineal ties are emphasised the number of generations may vary according to the particular circumstances.

The minimal lineage may be composed of three generations while the maximal lineage is known to extent up to nine generations. There is generally a founding male ancestor of the lineage whom the members can directly trace their own lines of descend. The eldest male member of the lineage or the closest member to the founding ancestor is generally the head of the lineage. Yet, the institution of headman in an ordinary lineage structure may not mean much for the members in ordinary times in which the lineage displays a rather loose organisation and we may have a group of elderly (*aksakal*) during peace times instead of a headman (or war leader) who tend to emerge in times of emergency.[38] However, according to what Hudson (1964: 61) tells us at about 1936 among the Kazaks, on the local level, there were mainly two figures of authority: a person called *bij* "was a judge who administered the customary law" and an *aksakal* who "was the director and administrator of the economic life of the group" supervising "the occupancy of grazing lands and chose the routes and dates for migrations". If we add to these two the figure of the *molda* (*molla*) who takes care of the cases involving the Sha'ria and whom Hudson (1964: 61) defines as "an official" there we have at least

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[38] Arıcı (2000: 119) confirms the importance of the *aksakal* (*yaşulu*) institution in contemporary Turkmenistan villages:

> Within the village community the *yashulus* [*aksakals* - the elderly] have a great power in the public domain. It seems as if they were the only ones who control the application of the traditional symbols, norms and rituals. It is they again who organise the common rituals in which the village community participates.

three figures of authority on the local level.[39] From here we can conclude that on the local (lineage) level there were three personages of authority with regard to jurisdiction and politico-economic administration of the group.[40] But one page later (Hudson, 1964: 62) we learn that *bij* and *aksakal* were used interchangeably by the nomads in denoting to a certain status whose authority, following Radlov, rests upon wealth, ability, sense of justice and numerous relatives, who could, if necessary, support words with deeds through their henchmen."

Hudson (1964: 61) explains what he means by 'local level' in the following words:

> The local group was normally the *aul*, and consisted, as said above, of an *uru* in its functional sense of related family groups living and migrating together, plus individuals such as hired workers, slaves and relatives on the maternal side who belonged by birth to other *uru* but resided among the first.

As it can be understood from the phrase "related family groups living and migrating together" the basis of *uru* seems to be composed of several lineages. Yet, we should keep in mind the fact that although lineage is a kin group, the inclusion of alien elements together with the possibility of dispersion of some of the lineage members to other groups underlines the political nature of the lineage. It would be a mistake to suppose that all the members of a lineage are blood relatives, but the lineage may spread itself over the territory by the inclusion of the less powerful elements through local proximity. In contrast to this, the linkages among the lineage members who live apart may be weakened in time due to lack of communication and common interest.

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[39] But from what Hudson says at the same page, *molla* does not seem to be so much influential in the local power structure of the *uru* community.

[40] Politico-economic, because decisions regarding the selection of the migration paths and determining their date are political as well as economic in a tribal context.

Yet, observing the ability of the lineage to include alien local elements in itself, it can be suggested that the actual (not theoretical) lineage may, most of the time, bring together the blood proximity and local proximity with the passage of time.[41]

The *törüğ* of loyalty operating on the lineage level helps the extension of now clearly political alliances through real or fictive, and at the same time selective kinship ties. However, one should not forget that the importance of the real blood ties tends to diminish as one moves from individual level to the levels of wider forms of social organisation, and its here, on the lineage level, we observe that the place and importance of the non-kin in the tribal alliance begins to increase as we move from individual adoption (in the family) to the establishment of fictive kinship relations by the way of the construction and re-construction of the genealogical trees. While the norms of the social ethics on this level reveal the real nature of the social relations by directing the actual social practices of the lineages towards gaining more of the socially defined wealth (that is, power acquired through alliance), the idealised *törüğ* being formed in the ethical life emphasises the importance of being loyal to ones alliances (contracts) as the socially approved way of socio-political action.

The integration of lineages into a coalition through real or fictive genealogies lies the

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[41] Hudson (1964: 61) includes in his description of the *aul* as the basic local (local here should not be understood as in a sedentary context, for what we are talking about is nomadic people) political unit "individuals such as hired workers, slaves and relatives on the maternal side who belonged by birth to other uru but resided among the first" as well as the basic *uru* which is consisted of "related family groups living and migrating together".

ground for the formation of tribe as a thoroughly political entity.[42] It has become now a commonplace fact that the tribe as the higher (than lineage) political organisation of such societies is rather a loose(r) organisation during ordinary peace times. Its real strength that remains latent at such times becomes manifest during the times of crisis.[43] At such times the members of the tribe get closer and tend to unite against the source of the crisis. But, the interesting point here is that except some exceptions what the tribe concerns itself are rather events taking place on a massive scale rather than on

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[42] Khazanov (1994: 151) seems to agree with this point for he says: "My conclusion from this is that a nomadic tribe is never a purely territorial unit (cf. Salzman, 1979a). First and foremost it is a political organization."

[43] On this point Khazanov (1994: 148) admits the rather 'invisible' existence of the tribe by saying:

> They [as the largest associations of nomads, tribes and confederations] emerge in accordance with necessity and disappear, simplify or reform when the need for them diminishes. Their significance increases as the significance of the political functions they perform increases, and then decreases when the need for them declines.

However, even though he (Khazanov: 1994: 148-9) admits the existence of three levels of factors (intratribal, intertribal, and extratribal) that contribute to such an emergence of the 'highest organisations of the nomads', he concludes that relations on the third level, namely, extratribal relations that took place a tribe and an outside political entity, which in most of the cases a sedentary state, is almost decisive in the emergence of tribes and other factors that belong to the other two categories can be considered as 'secondary' (Khazanov, 1994: 151-2). This last point cannot be accepted for it is, at least in principle, clear that intra- and intertribal factors *can*, and indeed more akin to lead to the emergence of a tribal unity. However, it is true that in 'most' of the cases the most significant factor that contributed to the emergence of a tribal unity is the existence of an 'outside' threat.

the individual, family or lineage levels. Thus, while the security of the individual and family as well as lineage is protected by the respective actors (individual, family and lineage), the tribe functions as a higher organisation of security for the whole group. The issues that remain limited to the lower levels of security and conflict resolution, in other words, the establishment of intratribal order and jurisdiction are handled by infratribal units of socio-political organisation.[44] Therefore, the tribal *törüğ* concerning such matters remains the same in its general applications as *törüğ* on the lower levels and we (as outside observers) see the organisation of the intertribal and supratribal relations as the main tribal activity. For this reason many students of the subject like Khazanov (1994: 151), Barfield (1994: 7), Hopwood (1993: 129) and Ying-Shih Yü (1990: 120) with differing interpretations and conclusions have stressed the importance of the supratribal relations or factors in the emergence of tribal (and/or supratribal) organisations as solid entities.[45]

It may be true that nomadic peoples of Eurasian steppes meet their neighbours having

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[44] This is true as long as such issues remain limited to the lower levels of socio-political organisation and don't tend to effect the whole tribal community. When an event that begins as an ordinary, say, inter familial or lineage conflict spreads its effects on the larger society as it may be in the case of the ordinary familial enmities between two important families that have potential right (and power) to guide a significant section of a tribe, for example, the case becomes a tribal one and its impact may be felt even on the intertribal and supratribal relations.

[45] In contrast, Krader (1963: 324) emphasises the role of the class structure of the society (white vs. black bones): "In every society where these estates (white and black bones) occur there has been the establishment of a state or empire, some great despotic and monarchic enterprise."

large scale socio-political organisations with more or less corresponding higher levels of organisation. So that, a tribe make felt its effects on the people especially when it encounters another tribe and if necessary (if the neighbour is organised as a sedentary state, for example) tends to unite (voluntarily or involuntarily, it doesn't matter) in a higher level organisation like a tribal confederacy or an tribal state/empire. In such a situation the internal peace and security of the tribe seem to be guaranteed by the allied power of the tribe against the external challenge. Thus, here, on the tribal level, for the first time we observe the emergence of the problem of the management of the relationships between two groups loyal to different *törüğ*s in contrast to the individual, family and lineage levels of social organisation where we sought *törüğ* in its applications in a universe whose rules of conduct determined by the very same *törüğ*. Indeed, this situation allows us develop an insight into the tribal unity, for neither linguistic similarities, alleged common ancestor, common history, nor ethnic proximity have proved to be sufficient to explain the constellation of a group of people as a tribe. Instead, the shared *törüğ* together with the actual power relationships seem to be important factors that lay behind a tribal unity.[46]

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[46] Of course this does not mean to exclude the importance of the other factors enumerated above but just emphasises the significance of common *törüğ* together with the actual power relationships as the prime factors. For *törüğ* emerges as the idealised reflection of the actual social relations on the 'ethical life' of the society, the shared *törüğ* reflects, in a sense, the existence of a shared way of life that can make people feel closer to each other in certain situations. For the effect of shared ways of life in the mixing and unification of people between the frontier Byzantines and Turkic pastoral nomads in the pre-Ottoman Anatolia, for example, see Hopwood (1993). Yet, *törüğ alone* is not sufficient to the organisation of a tribe as a separate unity, but rather defines the boundaries of an *ecumenon*.

Whatever the reasons are that lay behind a tribal unity, on the tribal level there seems to be a differentiation of the internal and external regulation of the tribal organisation of the community. In the regulation activities of a tribe in the inter- and supratribal relations trade and warfare (as well as settlement of the peace) occupies the major place of importance and these activities are mainly regulated by the relations of power rather than the rules of the *törüğ* as the difficulties of applying the international (or interstate) law testify. In contrast to this, most of the intratribal relations are regulated by the rules of the *törüğ* that ascend from the basis of everyday social relationships. Yet, the constitution of a political organisation like that of a tribe brings about its own contributions into the tribal *törüğ*. The formation of the tribal body politic corresponds to the emergence and more or less specialisation of some organs. The emergence of such organs around the tribal leader as the major apparatus of power that are separated from the ordinary (actual) kinship relations prevalent on the lower levels of social organisation is itself a radical break.

4.1.2 Demise of the *Törüğ* and Rise of the *Yasağ* of the Central State

Since *törüğ* representing the ethical formulation of the tribal socius is the product of everyday social interaction, its domain of power can penetrate deeper into the lives of the members determining a larger area of the social geography. Even though this peculiarity gives *törüğ* a more permanent status in comparison to other forms of socio-political rule sets (such as religious and state laws) one should not think of the rules of *törüğ* as absolute and unchanging. As a general rule, we can assume that social customs and ethical rules that are derived from them are the products of the prevailing social practices, and its only logical that they should change in conformity with the changes taking place in the social life. *Törüğ* is not a total-sum of the patterns of the actual social practices (ethos) in the society. Rather, it represents the reflection of the

ethos onto the *shared* ethical lives of the individual members and for this reason it can survive as long as the mode of social relations it pertains remains alive.[47]

The close connection between the *törüğ* as the idealised values (rules) expressed by the reflective mind and the norms of the tribal ethics give way only to alternative directions of change which are related with the overcoming and overflowing the confines of the tribal society. The first of these alternatives is the wholesale transformation (overcoming) of the tribal social relations giving way to the emergence of another mode of social relations. The second alternative is related with the partial changes that take place in certain fields of the social formation due to the relative autonomy of its levels while the social level still remains tribal in its main lines.[48] We

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[47] With regard to the relative permanence of *törüğ* in connection with the appearance and disappearance of polities Aydın (1966: 17) says the following:

> It is understood that *Töre* had an important position in the old Turkish states and it had a longer life span in comparison to the life of those states. By the proverb "*İl* (the state) goes, *töre* remains" it is intended to convey this idea. This shows that *töre* in the form of a customary law passes from one Turkish state to another.

Togan (1981: 114-115) also points to the relative permanence of *törüğ*:

> It is an error to accept Chinggis, Timur and the like as the givers of the steppe customs and laws. Despite the interval of several centuries that separate the 13th century Mongol and Turkish *Türes* from the 7th-6th centuries BC Scythian customs and laws this error has now corrected thanks to the information given in the 8th century Kök Turk monuments about the Kök Turk customs and traditions, in the 10th century in Ibn Fadlan's *Seyahatname* about the Oguz, Bulgar and Khazar customs and traditions. It has been understood that the Scythian, Kök Turk, Oguz, Bulgar, Khazar, Uygur and Mongol customary laws do compose a certain *türe* system. In the whole steppe area there is only one '*türe*' that is alive perhaps for thousands of years.

[48] Here one should remember the Althusserian argument concerning the different paces of historical change pertaining to different levels of a social formation. What we suggest here is that in a social formation the shift from one mode of social relations to another can only be

have already stated that the dominant level in the tribal mode of social relations is the political field. The central role played by the political alliance which creates and moves on the kinship relations at the same time constitutes the core of the whole tribal social system. As the determinant level of the tribal mode of social relations it is what makes a society tribal.

Therefore, as long as a society remains tribal, that is, dominated by the tribal political alliance the tribal *törüğ* continues to occupy the core of the reflective (in Althusser, ideological) level and the ethical life of the members of the tribal society as part of the reflective level will remain to be based on the tribal *törüğ*. Togan give a rather long period for the existence and determinacy of the tribal *törüğ* starting it from the time of the Scythians (8th century BC) and connecting it to the 8th century (AD) Kök Turks and 10th century Turkic peoples like Oguz, Bulgar, Khazar, etc.[49] All these were the social formations whose dominant mode of social relations were tribal and they reflect a certain historical change that traverses different levels and forms of political

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effected by the change in the dominant level. Without such a change the changes in the other constituting levels of the social formation that move in the history at different paces can only create a patched outlook causing the coexistence of several modes of social relations under the domination of the determining one. This view is contrary to the view expressed by Üçok, *et. al.* (1996: 16): "Nomadism cannot develop on its own, but remains the same". Or again in the same book (1996: 17) we read: "For the true nomads do not know the concept of the state". It seems that the authors try to avoid the dilemma brought about by inconsistency between the facts of the Turkish history and the above thesis by asserting the idea that the ancient Turkic societies were semi-nomadic but not thoroughly nomadic (Üçok, *et. al.* 1996: 17).

[49] See footnote 47.

organisation as well as changes in other levels that correspond to these changes in the political alliance. Such a line of social change we can follow in the Turkish history up until the 15th century when Mehmed II has established the Ottoman State on a firm basis. This event which should be interpreted as the culmination of the tribal political alliance through its own dynamics in the central imperial state also marks the end of the tribalism as the *dominant mode* of social relations in the Ottomans (as a political organisation). But, of course, this does not mean the total disappearance of tribalism in the Turkish society as a whole that were moved into Anatolia before, during and after the Ottoman migration in the middle of the 13th century. This means rather that tribalism had lost its hold in the centre (the Ottoman State) but continued its struggle against the central state and retreated to the remote recesses of the society where it could still determine the nature of social relations by the principle of the tribal political alliance.

The Eurasian tribes have produced states and empires long before the establishment of the Ottoman Empire in the Byzantine frontier of the Ilkhanid ruled Seljuks of Anatolia. But, as we have seen, the tribal social relations do generally display strong centrifugal tendencies preferring to be organised on the lineage level where blood proximity more or less corresponds to the political and spatial proximity. The segmentary nature of the social system encouraging rivalry between the structurally equal groups, together with the difficulties of controlling and dominating the distant and continuously moving groups makes the establishment of a strong and effective political centre difficult. Thus, a tribe does usually emerge during the times of a crisis strong enough to overcome such tendencies. As long as such a crisis continues the tribe can maintain its effective political unity. But with the disappearance of the crisis, the tribal organisation tends to dissolve again under the impact of the immanent centrifugal forces. Yet, for most of the cases its disappearance is not complete, and the previously formed tribes can continue to offer rather (new) loose basis for the establishment of new alliances. For this reason it becomes possible to find tribes branched under several leaders who may easily

declare new allegiances to previous foes under new circumstances.

The elevation of tribal organisations into tribal confederations and tribal states/empires is also based on the same principle of a deep and continuing crisis. Although whether this crisis should be connected with an outside threat or not,[50] history shows that as early as the re-unification of the Hsiung-nu in 209 BC under Motun the decisive factor behind the rise of the state was the acute conflict between the central dynasty and the centrifugal tribal leaders.[51] We know also that under similar pressures that made vast territories difficult to control from a single centre, there developed a system of dual government in the Hsiung-nu.[52] The tribal tendency toward segmentation was further strengthened by the problems arising from the lack of any predetermined rule of succession (Yü, 1990: 137). So that, the principle of structural opposition innate in the segmentary lineage structure did not allow the establishment of a decisive rule of succession as this situation was endemic to all of the states established by the nomadic tribes up until structural transformations of the Ottoman political machine under Mehmed II.

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[50] Barfield, Khazanov and others assert, logically but unconvincingly, that the existence of powerful sedentary states as outside threat is the major impetus behind the establishment of nomadic tribal states. However, it seems more plausible to think that the strains of the inner structure can also be, at least potentially, the initiator of such a crisis that may lead to the establishment of a tribal state.

[51] See Ying-Shin Yü (1990: 118-150). We know also that the dualistic state structure was common to the tribal states of the Central Asian steppes.

[52] Ying-Shin Yü (1990: 135). On page 136 Yü says that "regionalism among Hsiung-nu caused them eventually to outgrow the dualistic structure.

The situation with the Huns was not any different either. The rise of Attila to power and the establishment of a new Hunnic confederacy in the West sometime before AD 439 follow a similar pattern. In their case, the leader, freeing himself from the rules of the tribal alliance (breaking the tribal *törüğ*) rises himself over the rest and establishes a political organisation under his power. In he words of Jordanes (McCullough, 1998: 165), "he proceeded from the destruction of his own kindred to the menace of all others." His death also produced similar results as one can expect to observe in all tribal states at the death of the powerful ruler. Let's turn to Jordanes once more to hear what he has to say on the subject (McCullough, 1998: 177):

> After they fulfilled these rites [at the funeral of Attila] a contest for the highest place arose among Attila's successors —for the minds of young men are want to be inflamed by ambition for power— and in their rush eagerness to rule the all alike destroyed his empire. [...] For the sons of Attila who through the license of his lust formed almost a people themselves, were clamouring that the nations should be divided among them equally and that warlike kings with their people should be apportioned to them by lot like a family estate.[53]

Historical record does not tell much about the foundation of the Juan-juan State that preceded the first Turkish Khanate. All we know about the Juan-juan is that their collapse cam again from within due to the internal strife in the AD 6th century reminding one the importance of the succession problems and particular ways of exploiting this problem by the independence seeking tribes (Sinor, 1990b: 294). We have already discussed the meaning attributed to the concept of *törüğ* in the formation of the Kök Türk Khanate in the AD 6th century. With the inscriptions on the Orkhun monuments (middle of the 8th century) one can begin to sense a shift in the meaning of the *törüğ*.

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[53] Sinor (1990a, 198) supports this view by underlying the idea that "the destruction [of the Hunnic State established by Attila] came from within."

Hence one feels that *törüğ* acquires the status of state law.

There are special clues that hints to crucial changes that took place during the Kök Türk period between the 5th and 8th centuries. First of all, despite the fact that there were still no definite rules of succession in the society, the institutionalisation of the state was sufficient to keep it going for sometime under the pressures of internal segmentation and external intervention. Even though the Turkish Khanate was disintegrated due to know rivalries, the successors were able to re-erect it once more. The religious make-up of the Khanate was also changing. As it becomes clear from the warning of Tonyukuk (Sinor, 1990b: 312-13) against sedentarisation and especially diffusion of Buddhism, there seems to emerge such tendencies among the ruling strata.

4.1.3 Monotheistic Religion: Effects of Diversification and Sedentarisation

There has always been some sort of social diversification among the members of a tribe in Central Asia. The acknowledged superiority of the lineage 'Ash-hih-na' and importance attributed to the holders of Ötüken were the early indicators of such a diversification. The line between the upper and lower segments of the nomado-tribal society had already seperated from each other by marked class distinctions which are mainly based on the access to political power rather than material wealth. For the latter was largely undependable and disposed to the whims of fortune. But, with the movement of the nomadic units towards the Transoxiana and the establishment of nomadic states like Karakhanids and Ghaznavids on the sedentary lands dotted by rich trade centers throughout the 10th century initiated a shift in the former class structure of the nomads. The division between *akbudun* (whitebones) and *karabudun* (blackbones) whose early traces can be found in the Orkhun monuments began to be deepened while the clear lines of descent leading back to the now legendary Ash-hih-nah became blurred. Now, in the 10th century, as the members of the *akbudun* we had competing

lineages that were strong enough to claim the right to rule. Doubless, one of the major reasons for this development was the availability of the rich cities that laid open to anyone who was able to gather a crowd of warriors. The separation of the rulers against the commoners in this period was of course further strengthened by the increasing availability of the free-floating warriors who began to lost their tribal affiliations, and for this reason enforced to get linked to a leader (potentially tribal) as his followers. But, the weakening of the tribal affiliations does not come to mean the weakening of the tribal principle as the main principle of social organisation. For these groups of warriors themselves were organised in accordence with the very same principle as later transformation of many of such groupings into tribes testifies. However, it is clear that throughout this process the adoption of major urban centres became one of the main the targets of politico-military activity by the side of aiming the control over people.

We know that the Turkic nomads of Central Asia had a rather long history with regard to their relations with the sedentary cultures. As Barfield (1996), perhaps too eagerly, suggests, the establishment of the great nomadic polities had largely benefited from their relationships (as trade, tribute extraction, plundering , war, etc.) with the great polities like the Chinese, Roman and Sassanian Empires. However, up until the movement of such nomado-tribal groupings into the *Maveraunnehr* region where they gained the opportunity of seizing and ruling the important urban centres such as Bukhara, Samarkhand, Fergana, Kashgar, etc. there was no tendency towards systematic sedentarisation within the nomado-tribal peoples of the steppes. Corresponding to the increasing sedentarisation of the nomadic society that started with the rise of the Karakhanids and Gaznavids in the 10th century was also marked by further differentiation of the society as well as its Islamisation.

In contrast to the heterogeneous religious beliefs prevailing among the nomadic tribes

of Eurasia, the emergence and spread of the notions of a Tengri, a commonly accepted sacred place (Ötüken), the spread of Buddhism offering a unified view of the universe and the sanctity of a ruling lineage (Ash-hih-nah) as the only possible source of legitimate rule, all point to the institutionalisation of the state organisation at an early period. If the Kök Türk Khanate was one of the initial stages if this process, the adoption of Islam represents a second stage that, as a monotheistic religion, was perfectly cut for the legitimation of a state that claims to rule over all (known) humanity. We know that it was the Karluks who moved to Türgesh lands after hostilities aroused with the Uygur and got acquainted for the first time with Islam via their trade with the Muslim merchants at the end of the 8th century (Golden, 1990: 350). In the 10th century some considerable numbers of Oguz tribesmen converted to Islam in Transoxiana region. It was about this time that the name Turkmen began to be used for these groupings of Oguz and Karluk that were converted to Islam. Golden (1990: 353-4) says that while the Muslim *sufis* resembling "to the shamans of Turkic society" propagated Islam, they were further aided by larger forces in operation.

> Conversion to Islam could and did symbolise a new political orientation the adoption of which may have been dictated by intratribal or intra-dynastic rivalries which had little reference to theology.

As Golden stated in the same place, the massive conversion of the Turks to Islam took place at about a time when a new dynasty (probably associated with the Karluk confederation and Yagma grouping), the Karakhanids rose to power at the second half of the 10th century. It was about this time that several Turkic states began to flourish. The Karakhanids and Gaznavids were the first of pastoral nomadic polities that were established in the older Samanid region on the basis of Islamic faith. Interestingly, this region (Transoxiana) did also include several important cities where the Muslim merchant met the nomad. The acculturation of the nomads were further strengthened by the recruitment of nomadic slave soldiers into the service of the Islamised Persian

dynasties and the Abbasid Caliphate. This confrontation of the nomads with the Islamic Persian states (like Samanids and the Abbasid Caliphate), helped them to adopt the old Sasanic Persian state tradition as well. Furthermore, it seems that the conflict between various social classes, especially between the nobles (begler) and commoners (kara budun) raised to be a contributing factor to the dissolution of the first Turkic Khanates (Sinor, 1990b: 310).

The close connections with the urban centres and their people and the rulers of the nomado-tribal society who were trying to establish wider and wider political units also casued an ideological shift in the interpretation of the tribal *töre*. Within these circumstances the Seljuks of Oguz-Kayi had emerged in the Khorasan region in the second half of the 11th century. The population in the region was mixed in their ways of life and the nomadic elements did only constitute a part of it. Klausner (1973:11) divides the areas under Seljuk rule into three categories as settled areas, tribal areas and "areas formed out as administrative or military *iktas*." Being located on such a mixture of population dotted with important cities as trade centres, the Seljuks preferred (or rather forced) to establish themselves in those towns to hold a better control of the region. But this process resulted in the settlement of the previously nomadic ruling dynasty of the Seljuks (Klausner, 1973: 20), and this preference to settle further strengthened the already existing structural cleavage between the ruling house and the other tribesmen. According to Golden (1992:220) this same process of sedentarisation of the Seljuks led to the alienation of the nomadic tribes from the Seljuk rule who increasingly preferred to depend on a non-tribal army composed of *gulams* that supported by Persian bureaucracy:

> The sedentarization of the dynasty meant that eventually the nomads would either have to become 'good' subjects (and sedentarize) or be perpetually at odds with the dynasty. The state, in any event, soon came to rely on *gulams* (largely, but not exclusively of Turkic, steppe origin) and the role of the Oguz or Turkmen tribesmen was diminished.

These cleavages between the ruling dynasty and the rest of the tribesmen who kept pursuing a nomadic way of life were also deepened by the adoption of *Sunni* faith by the Seljuks and their settlement in the cities. Whatever the actual reasons of the Seljuks' adoption of the *Sunni* Islam, it was clear that the nomado-tribal elements that moved to the Khrasan with the Seljuks were not ready to adopt such a creed but rather adhered to various unorthodox interpretations of Islam that allowed them to carry their own pre-Islamic beliefs as the remnants of Buddhism, Manicheanism, Nestorianism and shamanism. For this reason, these nomado-tribal elements rejected and did not pay much heed (or even understand) the complicated issues of theological discussions within the *Sunni* tradition (Köprülü, 1993: 6).

The Seljuks, now, was deserted and opposed by the nomadic tribesmen who helped them to gain the control of the region, and thus they had to depend on the native Persian bureaucracy to be able to counterbalance the opposing forces. But, this seemed to be an impossibility and the Seljuks could never establish a strong central state control. Rather, their administrative organisation was restricted to the urban centres and they tried to keep the nomadic tribesmen 'in-line' by an invention called the '*ikta* system' as well as the employment of older nomadic methods such as holding hostages, establishing marriage alliances and enrolling tribesmen into the army (Klausner, 1973: 12).

By the time that the first Turkic nomado-tribal state was formed in the lands beyond Amu Darya (11th century) the Islamic practice of the administration of justice was already blurred with the ancient customs of the Arab community and Persian institutions (Schacht, 1986: 15-22). Thus when the Seljuks, who were a part of the *karabudun* in the nomadic framework of legitimacy, adopted the Islamic ideology of legitimacy and justice as the basis of their power under the influence of their new power positions and established contacts with the urban centres, the Islam that they adopted was already

formed by the older traditions existing in the region. However, it would be wrong to suggest that the Seljuks' adoptation of the Islamic ideology was total and complete and they never hesitated to assert their unquestionable right to make political and juridical decisions. In connection with the Seljuk Sultanate Klausner (1973: 9-10) states that

> The Persian ideal of the monarch as sole ruler of the State was never completely acceptable to the Turkish leaders, who continued to think of a empire as the property of the whole family. This tribal conception of a loose confederation led by different members of the ruling house survived throughout the Seljuk period. Provinces were assigned to minor members of the family; and from a very early date it was appeared that separate dynasties, for example in Rum, Kirman, and Syria, would develop along more or less independent lines depending upon the particular conditions.
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> Again, even though the Sultan did in fact tend to appoint his successor from among his own children very soon, this departure from Turkish or nomadic practice was usually a signal for opposition, especially when a minor was elevated to the throne. The death of a sultan was almost always followed by struggles for supremacy among his surviving relatives.

As most of the students of the subject, Klausner was eager to connect the desire for supremacy of the ruler (and of the ruling house) in Turkic nomado-tribal societies to the contact with the Persian State tradition. A few lines earlier than the above quotation, she (Klausner, 1973: 9) says that "the Turkish sultans were influenced quite early by the Persian ideal of an autocratic sovereign which prevailed in conquered provinces". Whether the influence of the Persian ideal was important or not, the Seljuk Sultanate represents a major break in history leading to the emergence of the Anatolian Turks, for it was throughout this period that the Islamic faith began to change the older tradition of legitimacy among the nomads. In comparison to the Karakhanids the Seljuks represented a major break with the older tradition. In this connection the explanatory power of Golden's argument (1990:366), I hope, might be an excuse for this long quotation from him.

> The Saljuk State represented something new amongst the early Turco-Islamic

states. It occupied, in a sense, an intermediate position between the models represented by Ghaznavid and Karakhanid organization. The former was a largely personal and artificial creation, a mobile army or military caste (primarily Turkic but with sizable non-Turkic elements) and an accompanying Persian bureaucracy based on Samanid models imposed by conquest on a territory. It had almost 'colonial' and 'robber baron' mentality. It was held together by conquest, booty and such legitimation as it could gather from the Caliphate. There was no ethnic base of loyal subjects tied to the dynasty by a common origin and history to which it could appeal. Even the religious bond was not universal. The Karakhanid Kaghanate, on the other hand, was largely possessed of such a base, as *disquiting as it could often be*,[54] buttressed by shared Turkic traditions and a notion of *translatio imperii*. Islamic legitimization, which it too eagerly sought, was helpful, but not necessarily derisive with the tribes, the extent of whose Islamization is open to question. The Saljuks, although they attempted to enlarge on the 'charisma' of the royal house within the traditional, Turkic steppe context, were forced to rely more on the Islamic tradition as the Karakhanids had largely pre-empted and indeed had a better claim to the mantle of succession in the nomadic *imperium*. This, however, posed certain problems with their tribal followers whose consciousness in these matters remained at the tribal level.

The Saljuk sultans, transformed more into Islamic potentates, the spiritual heirs of the Sassanid Shahanshahs, were not able to impress their tribal kinsmen with their imperial grandeur nor, for that matter, firmly control them. Relying increasingly on Samanid models fostered by brilliant statesmen such as Nizam al-Mulk, and a mercenary and *ghulam* army, they were soon enstranged from the tribes that had brought them to power. The tension thus created had perilious consequences for the dynasty.

Putting aside his biased but commonly shared conviction suggesting the inability of the tribal society to generate a state structure without the help of a model (here, in this case, the model is supplied by the 'brilliant' administration of Nizam al-Mulk and the Persian bureaucracy),[55] here Golden well summarises the dilemma facing all of the

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[54] My italics.

[55] Indeed, at another place, contradicting the above argument, Golden (1992: 219) accepts that

nomado-tribal states: A lineage rises to the position of superiority through alliances and deeds, but since this act necessarily disturbs the original balance of power, it immediately annuls the previous contracts and causes a new state of strife to emerge that may eventually lead to the dissolution of the state into its constituent elements. For a new lineage like the Seljuks that was unable to find a strong legitimation basis for its claims to power within the context of the old nomadic tradition, Islam seemed to offer a new and strong basis for such claims, especially in a region where a considerable part of the population was already been Islamised.[56] Under such conditions, a new ideology of legitimacy supplied by Islam seemed to better fit to the Seljuk desire to establish their power against other groups including the Karakhanids. The relatively elevated position of the Abbasid Caliphs living in Baghdad under the Seljuks fitted also into this picture.[57] Instead of maintaining the rules of the nomadic steppe legitimacy of power, the Seljuks, being well aware of the impossibility of such an endeavour and themselves converted Muslims, preferred to hold the institution of the Caliphate with respect, for Islam and the authority of the Caliph had already been established in the region as the major codes of legitimacy.

"Tugrul and Cagri [the founders of the Seljuk Sultanate] were not steppe ruffians, but sophisticated and remarkably well-informed politicians who operated with considerable skill in both the nomadic and sedentary milieus." Further examples from the Chingisid and Ottoman Empires also testify for the nomado-tribal potential for statehood.

[56] The Karakhanid claims to legitimacy in the nomadic tradition had a stronger and better base, for they could relate their lineage to Ash-hih-nah and had the control of Ötüken, the region whose sanctity was accepted by all the steppe peoples.

[57] For the improved political conditions of the Abbasid caliphs under Seljuk rule, see Klausner, 1973: 28.

CHAPTER 5

THE OTTOMAN JUSTICE: *KANUN* AS *URF* AND SHA'RIA IN THE MONOTHEISTIC EMPIRE

5.1 The Seljukid Transformation: From *Töre* to Yasa(ğ)

Despite all these adversities, the Seljuks seems to be successful in establishing their claim to temporal power as opposed to the Abbasid claims to caliphate as the site of the otherworldly power. The Earthly power of the Caliphate has long been broken and it was almost became a tradition that their power was restricted to the world of religion. This reduction in the powers of the centre of religion helped the Seljuks to find a place for the legitimacy of their rule within the Islamic tradition that they could not find a place within the nomadic tradition. In Klausner's words (1973:6), depending on Binder (1955),

> the juridical acceptance of the [Seljuk] sultan as the agent of political and military administration alongside the caliph as head of the religious institution only served to define more clearly the actual functional division between sultanate and caliphate. Al-Ghazali, for example, developed a multilateral conception of the caliphate as an institution representing the whole of Islamic government and being composed of three main elements, caliph, sultan and *ulema*, each corresponding to some aspect of authority behind Islamic government and performing a function required by that authority. Each part also represented a major element of political power in the Sunni community.[1]

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[1] This point is further supported by Al-Ghazali's recognition (Klausner, 1973: 22) of the 'right' of the actual power holder to appoint the caliph.

As Klausner suggests in the above quotation it becomes clear that the separation of the religious authority and earthly (political) authority have already emerged as early as the Umayyad period at the first century of Islam (661-750).[2] Yet, such a separation of powers that crystallised during the Umayyad period was not convergent with the later European idea of the separation of powers as executive, legislative and juridical as formulised by Montesquieu (Neumann, 1959: li) that took place after the complete separation (subordination) of the Christian church to the earthly power of the sovereign. As Hudgson (1978: 218) asserts, the founder of the Umayyad dynasty, the early governor of Umar's caliphate in Syria did not pushed his "close relations with Muhammad", but rather, preferred to base his claims to power on the support of his loyal soldiers in Syria. Thus, from the establishment of the Umayyad power on in the lands of Islam "the caliphal state stood now as a more mundane imperial power, no longer based directly on Islam" (Hodgson, 1978: 218). Even though both the Umayyad and Abbasid caliphs preferred to keep the ultimate religious authority in their own persons as the representatives of the Prophet, their primary orientation was to hold the earthly power in their hands, thus, political. Indeed, the rise of the Islamic state was a compromise reached between both the Arab and non-Arab (*Mawali*) tribal powers that were sedentarised and the universalistic Islam.[3] When the Abbasids lost their earthly power and the absolutism of the caliphate gave way to the establishment of the earthly

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[2] This view was also supported by Schacht (1986).

[3] For the role played by the tribal elements in the politics of the Islamic state, see Hodgson (1978: 231) where he presents a chart showing the division of regions by tribal blocks during the Umayyad period. It is interesting to note here that the terms of the discussions in the first *fitnah* in Islam were also related with the claims of the kin of the Prophet over the rule of the Islamic community. This split between the central forces and centrifugal tribal forces was

power of various dynasties at about the 10th century, they continued to keep the religious power which, especially, under the Seljuks began to acquire some strength. When the Seljuks came into the picture there was already a well established tradition of the separation of the earthly and heavenly powers within Islamic ideology. This was well suited for the Seljuks who never intended to allow the Caliphate to intervene with their own affairs. However, this total separation of and sometimes opposition between the caliphate and sultanate did not prevent the Seljuks to adopt the local institutions of the regions through the mediation of Islamic faith and Persian bureaucracy.

The government officials who were transferred from the tribal *hakams* of the pre-Islamic Arab tribes and transferred into the Islamic *kadis* starting from the Umayyad period and *shutra* (police) were all kept in the service of the state by the Seljuks who were searching grounds of legitimacy in the region.[4] Another important source of legitimation for the Seljuks must have been the recognition of the *ulema* for they eagerly sought the support of this class of learned men in Islam among which the major juridical schools of Islam had already developed. The *ulema* as the bearers of the Islamic jurisprudential doctrine continued to be independent, at least in theory. So, with regard to the fields of social life into which Seljuks did not feel the need for any intervention left to the Islamic legislation of the *ulema*. The major innovation of the Seljuks in that direction was the establishment of *madrasah*s (religious schools) through which the Seljukid state was able to establish a strong link with the *Sunni ulema*. But, in the fields of social life that the Seljuks felt the need for exercising their power, both the earthly government (the ruler together with the members of the ruling elite) and its dependent agencies in the

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endemic in all Islamic polities founded upon a tribal basis.

[4] See Schacht (1986: 24-27) for the pre-Islamic *hakam* and its transformation into government appointed *kadis* as the delegates of the Umayyad governors in the cities.

field of law wanted to reserve the power of absolute control: the ethical *töre* of the nomadic state began to give way to the emergence of the *yasa(ğ)* of the newly forming centralised, monolithic, sedentarised agricultural state.

From the start the Koran as the ultimate book of Islam proved itself insufficient for a state that wanted to undertake the intricate task of the administration of justice (Schacht, 1986: 12-13). At the time of the first four caliphs who did not interfere with the arbitration of the conflicts, this did not present itself as a serious problem, "and the ancient Arabic system of arbitration, and Arab customary law in general, as modified and completed by the Koran continued to prevail" (Schacht, 1986: 15).[5] In contrast to this, such a system needed important modifications and when the Umayyads finally established themselves, they took an important step towards the establishment of the central control of the administration of justice in their efforts to eliminate the tribal disputes by starting to appoint *kadis* both as the Islamic lawgivers and arbitrators. Later, during the Abbasid period the state intervention to jurisdiction increased as exemplified by the revitalisation of some older Persian institutions of jurisdiction such as the dignity of *Chief Kadi* (*Kadi l-kudat* as the Islamicised form of the older Zoroastrian *Mobedhan Mobedh*), *kadis* tribunals, Courts of Complaints and the institution of the investigation of the complaints (*nazar fil-mazalim*) which reserved for the caliphs as the absolute rulers as well as their right to hear complaints concerning miscarriage, denial of justice or other unlawful deeds committed by the *kadis* (Schacht, 1986: 51).[6]

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[5] Schacht (1986: 11) asserts also that the ancient Arab *hakam* was freely appointed by the disputing parties in contrast to the state appointed *kadi*.

[6] Indeed, the same transformation of the *töre* into *yasa(ğ)* can be observed in Central Asia about a century later under the impact of the establishment of the great Mongol Empire by

All these Islamicised institutions of jurisdiction that were inherited from the older Sassanid Persia together with some Byzantine institutions like *muhtasip* (inspector of the market) were kept by the Seljuks. Yet, the Islamic culture and the juridical apparatuses of the Islamic State were mainly limited to the urban areas, and in the villages, and to a greater extent, amongst the nomadising tribes the older tradition persisted. This point was also supported by Köprülü (1993) who described the situation and religious affiliations existing among the migrating nomads during and after the Great Seljuks. It was the Great Seljuk policy at about the 10th and 11th centuries to drive the nomads towards the buffer zones (*ucs*) in the Byzantium frontier. For they mush have found the nomad bonds difficult to govern as Nizam al-Mulk's *Siyasatnameh* points out. Despite their apparent conversion to Islam, whether they lived in the *uc* regions or in the regions directly under the rule of the Seljuks, these nomads must have continued to cling to their earlier traditions and ethos that make them to be seen as 'uneasy, restless' elements by the sedentarised central establishment. As Köprülü (1993: 5) warns the historian against the misleading appearances, these nomadising Turkmen were only were only superficially Islamicised:

> It is necessary for the historian of religion to search for the traces of the old ethnic traditions under the new forms of Islam, to see the Turkmen *babas*, for example, who were popular saints as Islamicised versions of the old Turkish *kamlozan*. It surelly seems more correct to search for the influence of old ethnic religious beliefs than for the external and superficial factors in the religious life of the Oguz masses, who demonstrated their attachment to tradition by giving the names in the country

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Chingis Khan. The major difference between the two experiences was that Chingis' empire was too far to be directly influenced by the ideology of the Islamic legitimacy and the Mongol rulers remained loyal to their older ethical norms and developed the *yasa* out of the tribal *töre* according to the requirements of their state. Yet, when the Mongols came to the lands of Islam and finally established themselves is Khorasan, Iran and Anatolia, even this difference began to disappear.

that they had left to the mountains and rivers they encountered on their emigration routes.

On this account there was no reason for the Turkmen nomad groups which were semi-autonomous political units to call for the *kadi* representing the Seljukid justice in the arbitration of their conflicts. The *kadi*s (both in the Seljuk and Ottoman periods) were confined to urban centers and they were not supposed to wander in the countryside, at least, in practice up until the 16th century when corruption in this institution began to be a serious problem (Ortaylı, 1994: 26). It seems that the major juridical relations between both the Seljuk and Ottoman states and the nomadic tribes in Anatolia were related with either the suppression and massive punishment of the insurgent elements (that from the perspective of tribal ethics should be interpreted as inter-polity strives) or collection of the taxes.

Such an attitude of rejection of the administration of justice by the hands of the *kadi* who was an employee of the central government was not confined only to the rural (settled, nomadic or semi-nomadic) groups. A note in Lalelizade Abdülbaki 's *Sergüzeşt* informs us that one Sütçü Beşir Aga, a leader (*pir*) of the Melamiyye tarikah at the first half of the 17th century was performing the function of justice distribution among the members of its own group.[7] The existence of such tendencies among the settled villagers and nomadic tribesmen was also confirmed by Barkey (1999: 107, dn.s 46-47) in an indirect way. Despite the fact that she depended mostly on the *kadi sicil*s (court

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[7] The aforementioned part of *Sergüzeşt* is taken from a quotation in Zelyut (1986: 232). The same source also quotes from Müstakimzade Süleyman's *Ahval-I Melamiyye-yi Şuttariye* informing us in the same direction: "Among his friends and followers even those who have problems concerning *shari'a* were not used to go (apply) to the *kadi* courts. Their problems were used to be resolved in the presence of the Grand Pir."

registers) in making her judgments about the nature of the relations between the ruled and the *kadi* courts as most of the students of the field do, at the end of the same book where she gives a brief description of the *kadi* registers (Barkey, 1999: 260) she accept the biased nature of the *kadi* registers. Furthermore, at the same place, after enumerating some difficulties for the ruled (*reaya*) living in the countryside, she confirms the high probability of the existence and effectiveness of the internal conflict resolution mechanisms (vis., mechanisms of local administration of justice) which, with highest probability, were depended on the tribal norms persisting among the ruled:

> the problems that were resolved by family members of fellowmen did not take place here [in the *kadi* court registers], and for this reason the representativeness of the samples that will be taken diminishes. [...] Other people [who could not effort the payment necessary to apply to the *kadi* courts] could resolve their conflicts, within the village, by asking the notables of the village to stand as referees. We know that this was true for, at least, some issues, because there were cases that were brought to the courts at the end after they were first referred to the village notables. We see that in such examples either the claimant or the defendant was saying that they applied to the court because the village notables were not able to solve the issue.

It is clear that in contrast to her repeated claims with regard to the unorganised nature of the peasantry,[8] there *has to* be some (at least, loose) form of social organisation among the ruled (*reaya*) even in the late Ottoman period. For its existence becomes apparent in the frequently repeated insurgent movements and in both the Seljuk and Ottoman policies that were developed to ensure the victory of the central state over the organised tribal elements. Unfortunately the question of jurisdiction (and of

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[8] Barkey also insists to focus on the settled peasantry, and even in places where she talks about the nomadic elements, in nowhere in the book she ever mentions the existence of any tribal organisation let alone any discussion of their effects before, during or after the settlement of the nomads.

jurisprudence in general) in the Islamic countries was always seen from the angle of the modern tension between secularism and religious dogma.[9] Though being an important question in connection with the structure of the Islamic jurisprudence, this discussion is doomed to be confined by the limits set by the teleological (secular or religious) premises of the jurisprudence. Having such a political importance helped this hot issue to hide the problematic relationship between such ideological aspects of jurisprudential theory and the actual administration of justice in the history of the Turkish society. It is for this reason that we learn so little about the persistence of the vivacity of the tribal *töre* by the side of (or sometimes under the guise of) *Shari'a* law in the historical monographs.

5.2 The *Kanun* Under the Ottomans: Articulation of Yasa(ğ) and *Shari'a*

There is no doubt about the nomadic-tribal and Turkic origins of the Ottoman State.[10] Yet, as Lindner (1983: 36) their transformation from pastoral nomadism to settlement

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[9] Many works in the field such as Barkan (1943), Klausner (1973), Schacht (1986), Akgündüz (1990), İnalcık (1996b; 1996c; 2000), Aydın (1996), Üçok (1996), Akpınar (1999) and Hassan (2001) were all focused their attention on the problematic relation between *urf* (customary law) as having secular roots and religious *Shari'a*.

[10] For the Turkic origins of the Ottomans see Köprülü (1999). Indeed, it is not important whether the Ottomans was *originally* Turkic or not, in contrast, what matters most is the way that the Ottomans were identified themselves. For the nomadic-tribal origins of the horde of the Osman see Lindner (1983: 19-36).

was rather quick and about the reign of Murad I the son of Orhan, less than a hundred years after the rise of the Ottoman polity as beglik in Soghut they were already settled in a definite (but continuously expanding territory). The Ottomans started their career as (semi-)nomado-tribal polity that achieved to establish a thoroughly sedentary state in the course of their transformation and suppress the nomado-tribal elements in their territory. At the same time the other tribal elements wandering in the Anatolian peninsula became increasingly denomadised yet maintaining their tribal nature under the aegis of various *sufi/Batini* tarikahs among the already sedentary elements (both Turkic and non-Turkic) in the lands of Byzantium.

During the Seljuk infiltration into Anatolia the countryside was filled with wandering nomado-tribal elements in the 11th century as well as scattered urban centres of various size. When the Great Seljuk power was collapsed in the 12th century, these centres was subject to competition by the rival houses of either Turkmen nomads or the remnants of the Seljukid elite as well as some by Mongol elements. Under such conditions the reign of the *yasa* that once was supported first by the Seljuks and then the Ilkhanids in Iran lost its grip and gave way to the re-emergence of the ethical *töre* in the society. But, the field of *töre* was no longer immune from the ideological (moral) constructions of what is just, right and wrong, ad the *sufi* elements under the title of *baba* began to pour into the field left vacant by the demise of the Seljukid and Ilkhanid *yasa*s and the Islamic *Shari'a*. Neither the Ottomans nor the other *begliks* (princlets) that popped up in the Anatolian soil were no longer simple nomado-tribal units but communities in which the position of the ruling house (or elite, for that matter) was institutionalised reflecting, in one sense, the Central Asian model of legitimate ruling lineage of Ash-hih-nah, but in their smaller universes. Such an institutionalisation of the power structure did of course require more than the older Central Asian nomado-tribal *töre* and this requirement was met successfully by the *sufi* ideology that emerged four centuries ago and appealled the masses of the tribesmen.

Köprülü (1993) says that the carriers of such an ideology were the Turkmen *babas* who sometimes were called as *Abdalan-ı Rum*.[11] These *babas* were influenced by the *Batini* ideas arrived at a synthesis of shamanistic and Buddhist beliefs and practices and unorthodox interpretations of Islam and tried to ally themselves to the rising powers in Anatolia. Indeed, it was through them that those *begliks* were able to mobilise the detribalised and retribalised elements that were also eager to fight in the *ucat* (frontier) regions.[12] The marriage alliance between Osman and Shaik Edeb Ali who had *Ahki* brothers and who himself was a Turkmen *baba* is interesting in this connection.[13] So that during the formative years of the Ottoman polity until the reign of Bayazid the first juridical system was based on the *töre* with a very loose control and limited coercive power of the tribal polity that could hardly be called a state. Within the boundaries of the early Ottoman territory we had the coercive power of the Ottoman *begs* (especially Osman, his son Orhan and Murad I Hüdavendigar) as politico-military men of power side by side with the local groups of elderly (*aksakals*) mixed (or even leaded) by the *sufi babas* whose referee positions were originated from the respect they inspired among the populace as well as the *kadis* of the older regime.

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[11] This view was also supported by Melikoff (1997) and Ocak (1997).

[12] There have been many discussions on whether such elemets carrying the title of *alps* and *ghazis* after their names were moved for the sake of Islamic faith (*ghaza*) or individual gain that would be acquired by plundering the lands in the *ucat* (Witteck, Lindner, Köprülü, İnalcık, etc.). Whatever their motive might have been, they were well fit for the purposes and conditions in the *ucat*, which referred to the regions where the boundaries between the polities were not clearly drawn, and the power of the centres were disputable.

[13] For Edeb Ali's relations with *Akhis* and *babas* see Gallotta (1997: 56-57).

With the development of the Ottoman polity into statehood, however, this ancient *töre* disguised under the cloack of (unorthodox interpretation of) Islam appealing to the de- and re-tribalised elements together with the original *töre* represented by the elderly (*yaşulus*, *aksakals*, *babas*) of the nomado-tribal groups that had to come into grips with the Ottomans. Unsurprisingly, when the sedentarisation of the Ottomans went a good deal, the first to be removed from the juridical scene in the Ottoman ruled territory was the tribal *töre* itself. Starting from the time of Orhan and Murad I the Ottomans began to establish stronger ties with the *sufi* leaders who themselves cam into closer terms with the Orthodox Islam due to their prolonged stay in urban centres in contrast to the nomadic *babas*. As their influence on the Ottoman *begs*, and consequently, power increased, those who did not share such an orthodox interpretation began to be drawn into the nomado-tribal circles. It was with the help of the urban *sufis* that the older *töre* became more and more marginalised and finally replaced by the State *yasa* and the orthodox interpretation of Islam penetrated into the ottoman jurisprudence. In contrast to Togan who asserted the dominance of ' *töre* and *Yasak*' against *Shari'a* in the Ottoman legislation, İnalcık (2000: 30-31) asserts the coexistence of the two at the time of Orhan Beg.[14] The transformation of the tribal *töre* into the state *yasa* (laws) seems to gain a new pace with the legislation of Bayazid I in the 14th century. İnalcık (2000: 31) asserts that even though the influence of Mehmed Fenari was strong on the governmental affairs, Beyazid I did not hesitate to decree new laws based on *urf* despite Fenari's opposition. A note by İnalcık at the same place reveals the interesting nature of the struggle for Ottoman statehood that should fight in two fronts: "It was again at this era that the extensive use of the *kul* [slave] system in administration took

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[14] "According to Tursun Beg, the order established by the sovereign for the sake of the 'universal order' [*nizam-I alem*] is called '*siyaset-I sultani*' and '*yasağ-I padişahi*' which our *urefa* [experts in customary law] call as *urf*." (İnalcık, 2000: 27).

place that was completely based on the customary [*urfi*] laws." If this was really the case, then it was clear that the Ottomans as early as the reign of Beyazid I had begun to put a distance between themselves (occupying the central state machinery) and other nomado-tribal elements by the extensive use of slaves in the state administration and army. The important point here is that while doing this the Ottomans did not only tried to exclude the nomado-tribal elements from the affairs of the central government, but also transferred the older *töre* into *yasag* of the state and did not yet attempt to a full adoption of the Islamic *Shari'a*.

But, the defeat of Beyazid I (Yıldırım) before the tribal forces of Timur in Ankara in 1402 and the events that followed indicate that this process of central state formation was far from being devoid of some drawbacks. The Period of Turbulence (*Fetret Devri*) that followed the death of Beyazid I in 1403 (ended in 1413) due to the rivalries among the sons of Beyazid I for the sultanate seems to be a period in which the tribal tendencies in the Ottoman society regain some vitality against the central power of the state. Especially the decisive struggle for the Ottoman leadership between Musa Çelebi and Mehmed (I) Çelebi was instructive in this regard. The forces that supported Musa Çelebi were mainly composed of nomado-tribal Anatolian Turkmen and some tarikahs with *Batini* inclinations.[15] On the opposite side, the triumph of Mehmed (I) Çelebi against the forces of Musa Çelebi represented the growing power of the *kapıkulu*

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[15] For nomado-tribal Turkmen supporters of Musa Çelebi and the influence of *batini* tarikahs among his followers and the close spiritual relationship between the two, see Eyüboğlu (1987)K 149-153). Also see İnalcık (2000: 31-32) who explains the Bedreddin revolt with the Turkmen unrest in relation to the centralisation of the state apparatus.

(slaves of the Porte) army together with the *Sunni* urban *ulema*.[16] The formation of respective parties in this struggle was far from being accidental and displays the inner structural contradictions of the tribal society that would be more acute when a constellation of forces tries to exercise its power over the whole of the society. The alliance between the urban *ulema* and the urban population (both of which had already lost their tribal links in the wider society) with a *still tribal centre* (the Ottoman dynasty) aspiring to establish a central state with the help of its slave army is much telling in this respect. It was through this alliance that the transformation of the *töre* (with heavy ethical connotations) into the State *yasa* (enacted codes) was achieved.

During the formative years of the Ottoman State until the time of Süleyman I (or rather until the time of Beyazid II) the legislative activity of the Ottomans inclined more towards *töre* rather than to Islamic *Shari'a*. Schacht (1986: 89) supports this view by saying:

> At the beginning, mystical and antinomian tendencies prevailed among them, customary and administrative law predominated, and institutions, such as the *devshirme*, the periodical forced levy of children from the Christian subjects for recruitment into the standing army and their forced conversion to Islam, fiscal measures such as a tax on brides (*'arus resmi'*), and the system of land tenure. These particular features, and others, survived into the following period.

We should not forget to mention the early adoption of the rules of the Arabic *urf* and Turkic *töre* into Islam in this process that would form an important basis for the Islamic

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[16] Golden (1992: 363) summarises the situation as follows:

> In the power struggle that ensued among the Bayazid's sons, it was the centralized bureaucracy, state apparatus and *gulam* army and servitors, the *qapıkulları* ('Slaves of the Porte', a growing body since the time of Murad I), that proved to be essential to the survival of the state. They kept the now reduced state together and gave it a

Shari'a and its administration of justice. Indeed, the thorough reconciliation of the *yasag-ı padişahi* with *Shari'a* has to wait until the extensive codification of Süleyman I in the early 16th century (Schacht, 1986: 89). However, this movement had already got its pace with Mehmed II's legislation that could be considered as the first systematic effort of codification in the Ottoman history.

İnalcık's perfect article (2000) summarises the major changes in the Ottoman society that paramounted at the time of Süleyman the Lawgiver. Indeed, the signals of such changes was already apparent as early as the time of Mehmed II with the increasing dependence on the slave army (the *janissaries*), and *devshirme* bureaucrats and officials and the establishment of an alliance between *Sunni* (especially of Hanefi shool) *ulema*. But, the culmination of this process into the establishment of a central bureaucratic apparatus whose activities were regulated by promulgated (increasingly under the influence of *Shari'a*) *yasags* took place in the first half of the 16th century most of which passed under the rule of Süleyman the Lawgiver who seemed as the ideal incarnation of the Islamic-Middle Eastern monarch. During that period perhaps the most important impetus that brought about the restructuration of the political apparatus was the realisation of the increasing dependence of the state upon the agricultural revenues to the disadvantage of the significance of the war revenues (booty acquired in the conquest).[17]

It seemed as if the state increasingly dissatisfied with income collected through

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coherence during the years of instability that followed."

[17] Although I did not come across any information assessing the relative weights of these two in the overall revenues of the state, the later attitude of the Ottoman state makes it reasonable to suggest this.

conquest and with the annual sums extracted from the vassal states under its tutelage. These formed the major forms of income during the formative years of the Empire when tribal influences were much stronger. Thus, the Ottoman state turned its attention towards the production activities in the agriculture. It was clear that such 'tribal' means of income generation which tend to be highly unstable and subject to the whims of fortune could not meet the needs of an expanding bureaucratic state depending on the full-time paid troops of Janissaries as its major military power. Instead, the establishment of such organs necessitated a more stable source of income (now became state revenue) and this source the Ottoman state did find in the tax revenues extracted from the agricultural production engaged in by the *reaya* as the 'true' subjects of the Ottoman state.

The restrictions on the movement of the subjugated people was not new and applied in the older times as well.[18] Türks came across sedentary populations that they could easily subjugate whey they moved from Central Asia to Khorasan and Iran. When they established their states they immediately begin to utilise the older methods already employed in the region by former states and developed the institution of *ikta* as a means to support the regularly paid military units under the Seljuks. During the Ottomans, this institution was replaced by the advanced system of timars. However, both of these systems were indeed more suitable for the maintenance of armies composed of 'free' men who fought for the state due to his contract of loyalty and not for the armies composed of slaves of the sultan getting their regular salaries. Thus, the need for maintaining huge slave armies regularly paid by the sultan as the main force on which the security of the state and the dynasty depended, the timar system proved

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[18] We have seen how the Kök Türks were trying to bring back the escapee people after they defeated their military forces in the example of the collecting back of the Oguz.

to be insufficient. Both the implimentation and the dissolution of the timar system gave way to the dissolution of the older social relations based on tribal ethics as much as its dissolution disrupted the smooth operation of the tax collection for the state as the main means of state for social control. The end result of the corruption of the timar system was the emergence of a new type of *beys* in the provinces.

Parallel to the growing need for extensive and direct (not mediated by timar holders) control over the agricultural production to be able to extract more and regular tax revenue that would flow (at least a considerable portion of it) into the state treasury, the first systematic efforts in law making came in the 15th century at the time of Mehmed II. As it can be expected, most of the regulations promulgated during this time were related with the collection of taxes from *reaya* and with securing their 'rights' against the excesses of the sipahi timar holders and local authorities to ensure the expansion of the agricultural revenues.[19]

One century later, supposedly due to the increasing demand and dependence on the agricultural revenues, tax collecting has became a serious business necessitating the organisation of a highly complex bureaucratic machine and the establishment of a unified and homogeneous juridical system. İnalcık (2000: 78) brilliantly explains the nature of the relationship between centralisation (a distancing from tribalism) and the preference of *Sharia* (monotheistic religious rules for the living) as the unificatory principle of law during Süleyman's reign in the 16th century in contradistinction to the

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[19] These *kanunnames* of Mehmed II were not related in any way with *Shari'a* and took their inspiration from the existing *töres* in various regions of the Empire. For the *urfi* nature of the early regulation (*kanunnames*) of the Ottoman sultans, including those of Mehmed II, see İnalcık, 1993: 28-36.

localised (patched) nature of the earlier *kanunnames* which are directed by the tribal logic of the *töre*:

> That the sultanic legal system gained its final classical form under Süleyman, is confirmed by the fact that in the second half of the sixteenth century the 'Ottoman law' (kanun-i Osmani) was directly applied in the conquered lands (Hungary, Cyprus, Georgia), while in earlier conquests, the Ottoman administration was tolerant towards the pre-conquest laws and customs, thus acknowledging [the need for] a period of transition. Moreover, a strong Islamic influence in the making of sultanic laws conforming the shari principles, is visible in the later codes (the non-Muslims, for example, were now paying one fifth of their agricultural produce as *harac* instead of one eight or one tenth). Also Celalzade modified some of the provisions of the general code, thus introducing a more rigid definition of the status groups. All these were in conformity with the dominant trends which arose under Süleyman, i.e., a more strict traditionalism and religious orthodoxy. This general uniformity in law was in accord with the imperial standardisation efforts in other areas —in weights and measures, currency, in urban and rural organisations, and in architecture with its classical imperial stye.

In the same article İnalcık (1993: 78-82) also summarises the major social changes at that crucial period of transition as a) the unification of *kanuns* (laws) under the monotheistic principles of orthodox Islam, b) the standardisation of the measurement, currency, etc., c) the increasingly complex bureaucratisation as *ehl-I urf* (appliers of the customary/state law) and *ilmiyye* (religious experts), and their separation from *reaya*, and finally d) the development of surveys and book keeping methods that indicate the new attitude towards the subjects perceiving them as masses subject to the state government.

All these indicated some structural change taking place in the organisation of the state. As İnalcık (2000: 89) pointed out the Ottoman polity underwent a transformation from being a tribal state into becoming an agricultural empire. An anecdote on Süleyman II from Uzunçarşılı (1964: 420) that İnalcık cites in the same place is interesting in this context:

> Once, in a private gathering, Süleyman reportedly asked: 'Who do you believe is our benefactor in this world?' The unanimous answer was of course: 'You, Your Majesty!' Süleyman corrected them, saying, 'No, gentlemen, our benefactor is the peasant; he who forgets his own comfort for the sake of producing food for all of us.'[20]

Despite such an alleged recognition of the value of the produces by the Sultan, it was still the *reaya*, the tax-paying agriculturists who were strictly excluded from the central power structure.[21]

5.2.1 Ottoman Jurisdiction

Nevertheless, the unquestionable triumph of the *Shari'a* brought about by the tripartite alliance between the Ottoman dynasty, its slave army and now totally urbanised *Sunni ulema* starting from the early 16th century was also heralding the following crisis of jurisprudence in the Ottoman society which still included the nomado-tribal elements as a significant portion of its population. Moreover, the sedentarised, de-tribalised portions of the society that were included in the village peasantry protected their allegiance to the now older tribal *töre* that contributed to the *ordering* of *their* world.[22] Unfortunately,

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[20] It is remarkable to note the striking similarity between Süleyman's answer and Atatürk's motto that was highly popular during the first half of the century in the republican Turkey: "Peasant is the master of the nation!"

[21] The urban population was encouraged by the Ottomans as centres that facilitate the control of the population. Therefore they were held exempt from many taxes that the *reaya* had to pay.

[22] Even though he emphasises the tentative nature of the findings, İnalcık (2000: 85) repeats some statistics regarding the population of the Ottoman State based on Barkan's calculations. The entire population of the Empire during the first years of Süleyman's reign was estimated

despite the immeasurable value of the *kadi* records especially from the period after the 15th century that testify the frequent usage of the *kadi* courts by the Ottoman subjects, they have nothing to indicate the disappearance of the tribal forms of the administration of justice in social zones escaping from the immediate intervention of the centre. For, above all what the *kadi* registers shows is that the peasantry (a vague term covering the variation among the rural population) widely used this institution in the regulation of their relations with the men sent from the centre (the members or representatives of the *askeri* (persons military or sivil but in the service of the state) class that were alien to the indigenous elements. Many scholars (for example, İnalcık, 1996a; 2000; Singer, 1996; Barkey, 1999) emphasised the predominance of such cases in the *kadi* cours and commended on the intermediate and ambiguous position of the *kadi* as both the employee of the central state and protector of *reaya* against the *askeri*. İnalcık (2000: 49-55) also extends this peculiarity of the Ottoman justice by stressing the availability and frequent recourse to the right of appeal by everyone (regardless of their being *reaya*, *askeri*, Muslim or *dzimmi*) directly to the Sultan. What emerges from the records is the fact that the subjects of the Sultan, regardless of their social standing, made extensive use of the Ottoman juridical system based on a mixture of the state *yasa* and *Shari'a*. But one should also be aware that such appeals to the Ottoman *kadi* courts were mainly focused on the issues related with the regulation of legal relationships between the people and the representatives of the Ottoman political organisation.

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as about 15 million, living in Anatolia, Ottoman Rumeli, Syria and Palestine. In later years with the addition of new provinces to the Empire together with the population growth of a rate of 60 %, it amounts to 30 million. Out of this 30 million, according to Barkan, 10 % was urban and 16 % nomads, which means that at the middle of the 16th century there were approximately 4-5 million people nomidising in the Ottoman territory. Since the sedentarised portion of the population could hardly shift their tribal alliances, we can assume that the number of people in the Empire living within a tribal juridico-political context amounted much higher than 5 million.

5.2.2 The Ottoman Jurisprudential Crisis during the 16th and 17th Centuries

In such a juridico-political order where the government of the people was left to the hands of a privileged group severed from local social ties,[23] it was only natural that the people appealed to the *kadi* both as the representative of the system and protector of the rights of the people against that same system. This appeal to the *kadi* confirms his intermediary position as Barkey (1999: 106-110) underlines. But, the matters that were brought to the attention of the *kadi* courts were defined by the issues of the Ottoman legal universe: mainly, by the problems related with tax collection as it was the machinery of tax collection that forced a new regime (non-tribal) of property on the land.[24] From this lack (or relative insignificance) of other legal issues in the *kadi* records two possible conclusions can be reached: either the peasantry forgot all its near-past allegiance to *töre*, or they preferred to handle such issues *inside* the community (whether sedentarised or nomadic) according to the rules dictated by the *töre*. Despite the lack of satisfactory data on this issue, there are some indicators that force one to assume the possibility of the second alternative. Both Steward (1990) and Ortaylı (2001) assert the large-scale appeal to the local (tribal) leaders in the resolution of

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[23] Barkey (1999: 94) points to the importance of the absentee *Timar* holders in the formation of the rural social relations during the 17th century: "In the Ottoman type of patronage relations, the peasants did not know the landowners even to be able to distinguis hme from the swindlers!"

[24] To see how the land is divided according to the requirements of the tax collection, see İnalcık (1999b).

inner-unit conflicts instead of bringing them before the *kadi*.[25] Even Barkey (1999: 260) who apparently prefers to minimise the role of the tribal *töre* in favour of the Ottoman central administration of justice admits the existence of cases where people preferred *töre* for various reasons. The crisis that started in the 16th century and continued until the late 17th century supports such a conclusion.

There were manifold reasons behind this crisis arising from both internal and external conditions of the Ottoman society, but none of which is powerful enough to exclude juridical reasons. The emergence of Celali revolts and their spread among the populace was related with the socio-political changes that took place in the 16th century. It was suggested that (for ex., İnalcık, 1996a and Barkey, 1999) the decay of the previous Timar system was primarily related with the change in the situation of the *Sipahis* (Horse Riders) holding small plots of land and constituting the backbone of the military forces of the state. Starting from the 16th century onwards, collapse of the *sipahis* as

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[25] Ortaylı (2001: 77) also stresses the priority of *töre* (or *urf*) before the *Shari'a* law. Besides, he also adds at the same place that, in most of the cases, for example, in the cases concerning the conflicts arising from the payment of *kalym*, the *kadi*, the Islamic judge who is expected to give judgment according to the principles of *Shari'a*, gives his decisions in accordance with *töre*, integrating it into Islamic jurisprudence as a form of *mihr*. Emphasising the undisputable difference between *kalym* and *mihr*, Ortaylı concludes by saying that *kadis* were preferring to arrive at a compromise between Islamic principles and the principles of the tribal *töre* instead of trying to apply *Shari'a* in a strict way and thus avoiding a direct confrontation with the *töre*. It is remarkable to note here that the *kadi* consciously insists on the Islamic interpretation (*mihr*) of the *töre* (*kalym*) in theory, while he accepts the validity of *töre* in the actual practice. This and similar other examples that arise when a possible confrontation of *Shari'a* and *töre* occurs give valuable clues about how the Islamic jurisprudence 'overcodes' the older tribal one.

the effective military force forced the Ottoman state to adopt a new policy that resulted in the allocation of large plots of land as *zeamets* to state officials who were largely recruited from the *devshirme* slaves of the Ottoman sultan (Barkey, 1999: 66).

The implementation of this new policy went hand in hand with the increasing importance of *Shari'a* in the Ottoman legislation. This crucial shift in the policy as well as in the basic tenets of jurisprudence that could be attributed to the centralisation of the state was also backed by the increasingly stronger hold of the *devshirme* on the Ottoman administrative and military apparatuses since the time of Mehmed (I) Çelebi. The *reaya*'s and small Timar holders' reaction to this shift was quick to come in the Celali revolts of the de-tribalised and sometimes re-tribalised elements which supported from time to time by the actual tribal formations.[26]

The gap between the principles of the state legitimacy and justice represented by the Ottoman *yasa* (in the form of *Kanunnames* and *Adaletnames* as well as specific *firmans* and *fatwas* of the Sultan and his authorities) and tribal *töre* became institutionalised by the attitudes of both parties. Up to the 18th century, with the forced sedentarisation of the majority of the nomado-tribal units and the harsh oppression of the revolts, the state had succeeded in penetrating into the society's mechanisms of social control. But this new universe that was founded by force of arms and whose boundaries were drawn by this achievement presented a totally different world from that of the rural population.

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[26] For the reaction of the tribes to such policy changes in the constitution of legitimacy as well as the administration of justice by the Ottoman central state machinery, see, for example, Yetkin (1979), Timur (1994), Halaçoğlu (1997) and Gündüz (1997). In addition, see also Aydın, *et. al.* (2000) for the tribal reaction in the eastern provinces of the Empire in the example of the tribes around Mardin.

The population came to the attention of the state only as a reservoir of warriors and tax-payers among which insurgent and politically dissident units could always be found. Unsurprisingly, the state legislation and application of justice were limited to the regulation of such relations leaving other fields to the control of either *kadi*s who did not hesitate to compromise the rules of *Shari'a* to the advantage of the *töre*, or tribal agents of justice.[27] Although this may indicate an early alienation of the Ottoman jurisprudence from the ethical tribal *töre*, as long as the two worlds remained separate and the relationship of domination-subordination stayed as it was, that is, as long as the state did not intervene into the daily lives of the people (the rules of which were left to the determination of the ethical *töre*), there would be no reason for a confrontation of the two potentially rival jurisprudential systems. Indeed, such is the nature of the tribal jurisprudence elevated into state law (*yasa*) that, as we have seen in the section dealing with the tribal *töre*, it lets the lower political units operate freely inside themselves and tends to intervene in the matters concerning the relationships between itself and immediately subordinating (or equal) units of social organisation.

But, since the 16th century the Ottoman state began to chage from being a predominantly tribal one to a non-tribal, monotheistic central state[28], and the impetus for

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[27] We have already pointed out the intermediary position of the *kadi*s. This ambiguous position became visible also in their allegiance to *Shari'a* and *yasa* at the same time. The fields that were left vacant by *yasa* legislation were filled by *Shari'a* in the hands of the *kadi*s.

[28] The term 'monotheistic' is not used here referring to a specific religion such as Islam or Christianity. Rather it points to a certain moral world view that tends to construct the totality of the universe as an 'harmonious' order (which is not the case in tribalism that resembles more to a patchwork in this respect) under the rule of a certain centre of gravity whether it is a deity, a sultan, or an absract state machinery.

this change came from the society itself. In the 16th century a considerable portion of the population had already been sedentarised despite the unceasing resistence of tribalism and nomadism. Most of the population, sedentarised or not, was already tamed as tax-paying subjects,[29] and especially owing to the existence of *kadis* and other state officials like governors that offer an alternative social world a part of the population began to be severed from their earlier tribal affiliations.

The expected oppression of such masses by the Timar and Zeamet holders through their duty of collecting taxes in the name of the state must have created enmities between them and the local population. In such a situation the state tried to present itself in an intermediate role as the arbitrator of the conflicts through its *kadis* and other local agents. The state's concern to protect its tax-paying subjects against the accesses of the *sipahis*, coupled with the hostilities between *reaya* and *sipahis*, created a natural environment of alliance between the state and the *reaya*. But, without means of effective social control mechanisms, the performance of the *kadi* was far from being sufficient due to his limited affiliation with the society and his lack of coercive power, and for this reason the state could not fulfil the task of the true arbiter as the following revolts (referred under the generic name Celali) of the 16th-17th centuries proved. Therefore a crucial step was taken in the advancement of the power of the *devshirme* officials side by side some powerful local men who were able to gather a powerful army recruited from the de-tribalised sections of population endowed with large timar holdings (iltizams).

This process seems to be the result of various negotiations and concessions between

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[29] For example, the *yörüks* has been differentiated from the Turkoman tribesmen who retained their semi-autonomous position towards the state.

the operating forces. The state wanted to establish an effective machinery of power that would enable it to acquire a closer control over the people and therefore tried to employ its slaves as the most dependable segment of society for they had neither social connections with the local society nor any *raison d'etre* except their loyalty to the state itself. Thus, such men replaced the older *sipahi*s who hold increasingly smaller plots of land, and came into direct conflict with the local population in their efforts to extract more tax for its own well-being. Besides, the society was far from being a homogeneous one in terms of the constitution of the social power, and it was straited by local constellations of power by the side of the power of the centre represented by the local agents of the state. The local notables who had, in most of the cases, their own tribal affiliations were also able to mobilise tribally organised units (not necessarily nomadic), or even some brigand groups (*eskiyas*) gathering de-tribalised adventurers seeking a better life than the ordinary peasant. By this way, the local notables (later turned into *ayan*) gained control of large areas and even disrupted the production (and thus tax collection) in the provinces. The state's response to this development was to sent new type of officials and iltizam holders to the provinces to be able to render the local notables and brigand groups ineffectual or harmless (for the purposes of the state) sometimes by the use of military force and at other times by negotiations and concessions (Barkey, 1999, and Yetkin, 1974). In this process, the tribal leaders or even whole tribes became marginalised and criminalised, a process which, in itself, shows the destruction of the boundaries separating the field of legality from that of illegality.

The disappearance of the clear and well defined criteria determining the boundaries of legality and illegality, with wider changes taking place in the social scene, went in hand in hand with the increasing corruption of the *kadi*s, their assistants (*naib*s) and other law enforcement agencies like *sancak begi*s (province governors), and even *beglerbegi*s (regional governors) who got exited by the opportunities of unlawful enrichment by the

extraction of wealth produced by the labour of *reaya*. For example, a *kanunname* (belonging to Egypt) issued at about 1525 at the time of Süleyman I, mentioning many cases of oppression and banning them, also described the situation with regard to the *kadi* courts and cited the complaints of *reaya* about the semi-autonomous and corrupt behaviour of the state officials. According to İnalcık's summary of the *Kanunname* of Egypt (İnalcık, 2000: 91),

> The court officials should not accept bribery from the litigants. *Beylerbeyi* and other *beys* should not appoint their own men to the offices at the disposal of the treasury. The cases related with *reaya* should not be attended directly by the *beylerbeyi* in the absence of the *kadi*. [We have been informed that] Some *kadis* were selling their courts to *naibs*. The *beylerbeyi* was commanded that such *kadis* should be put in prison and the Padishah Porte should be informed. Temporal offices filled by the servants in the service of the governors and *mültezims* [tax collectors] are abolished. These intermediaries are the main cause of may venalities and they rob the people by using the authority of their masters. Such *naibs* and *muhzirs*[30] are becoming the instruments of fraud. In some cases, even though the accuser is present with full command of his mind, some covetous persons assume the case as procurators and cause injustice. The *kadi* should always call the accuser and give notice to the *beylerbeyi* about those who appoint procurators for themselves without any valid pretext according to *Sharia*. Both the procurator and the client will be punished with the sentence of heavy *siyaset*.[31]

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[30] *Muhzir* was an officer of a court of justice who summoned persons and produced them before the court.

[31] In its general meaning, *siyaset* meant capital punishment by the decision of the administration. It differed from the *Shar'I* death penalty by being based upon totally secular reasons of the political authority. It was usually a penalty that were applied to the slaves of the sultan who were appointed as the higher officials of the state. Since the sultan was decorated with the rights of a slave owner against his slaves he had also the right of killing them by his order (will) without following the usual procedures of Islamic jurisdiction. Thus, *siyaset* was emerged as a form of punishmet that find its application against the 'crimes' including *zulm*

5.2.2.1 Ottoman Dual System of Justice

All these information related with the origin, foundation and institutionalisation of the Ottoman state allow us to reach some conclusions regarding the relationship of the Ottoman state administration of justice with the practices of justice of the people based on the tribal *töre* and gave birth and support to the Ottoman dynasty and *their* state at the initial phases. But, the development of the tribal state to a central machinery of power forced the Ottomans by the start of the 15th century to come into grips with the ethical interpretation of power and justice in the form of *töre* to which a considerable portion of the population still adhered until even now. The *adhoc* solutions developed through the numerious efforts put forward to solve the problem, such as the overcoding of the tribal *töre* by *shari'a* (as it is well exemplified by the Islamic tone of the Ottoman *kanunnames* deriving complately on this worldly *töre*) and the mediation of one of the most important components of the Ottoman juridical system, namely, the *kadi* between *shari'a* and *töre* finally finally proved ineffective and could not save the Ottoman polity from falling into a period of 'deterritorialisation' that immediately followed the achievement of the establishment of the absolute monarchy with the ideological and political support of the monotheistic religion.[32]

(injuries done by the powerful against the powerless —*reaya*, in most of the cases) committed by the slaves of the sultan who were decorated with the state authority. Mumcu (1985) extensively discussed the types of *zulm* crimes committed by the powerful against the weak. Indeed, the very development of the concept of *zulm* in the Ottoman jurisdiction is itself enough to show the importance and frequency of such crimes as well as pointing to the main nodal points of the social confrontations in the society.

[32] It is evident in Ortaylı (2001) that not only the Islamic *ulema* but also the clergy of the other monotheistic religions had benefited to a great extent from the Ottoman rule. This alone is

This duality of jurisprudence embedded in the unity of the Ottoman polity and its subjects was to cause serious problems and constitute one of the major reasons of deterritorialisation (of course not the only, or most important one) in the society especially at any time when the centre tries to make advances onto the periphery. In contrast to this, when the centre remains alien and distant to the actual social practices leaving them alone and confines itself with ruling from distance, the class of the rival modes of ethics becomes undermined and even forgotten. However, the greater part of the Ottoman history, from the 16th century onwards, is full of the rises and declines of this tide of unceasing confrontation between these two rival modes. The times when such clashes most dangerously felt should be read as the most successful periods of the Ottoman state machinery in centralisation and exertion of its power on the other centrifugal elements. In this context it would not be wrong to say that up to the end of the 17th century the Ottoman central state was on the offensive. But the end of this period was marked by the weakening of the central state under the pressures coming from inside as well as outside, and the Ottoman state began to feel the need for some modifications to be made in its structure including the those in the jurisprudential system.

5.2.3 Towards Ottoman Modernisation

The long reign of Süleyman the Lawgiver (1520-1566) is generally accepted as the golden age of the Ottoman state and society where everything was perfectly arranged. At least for a century or so the rulers did not feel or any need or get the opportunity to initiate new arrangements for the betterment of the functioning of the state while the timar system went on a silent decay in the years immediately following the death of the

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enough to explain the success of the *millet* system.

Magnificient Lawgiver. Actually, the realisation of the necessity of doing some reform was already felt in the Ottoman circles during the time of Osman II and the primary target of such efforts was the reordering of the timar system for both the Ottoman state machinery and army were dependent on it. For this purpose in his rather short reign, Osman II (1618-1622) adopted the policy improving the position of the Turkic Anatolian peasantry to the disadvantage of the *devshirme* janissaries in the constitution of the army. But, he met with the revolt of the janissary corpses that brought the reign and life of the Osman II to a dramatic end. Yet, teen years later Murad IV would initiate important reforms with the decisiveness and power that would suffice to silence the opposing forces.

It was only after the accession of Murad IV to the Ottoman throne in the first half of the 17th century the Ottomans tried to find effective solutions for the accumulating problems of the state. According to Barkey (1999: 65) if the corruption between the years 1572-82 had continued without any interruption (primarily by Murad IV) we would find the timar system in total collapse the years 1654-55. However, before this to happen Murad IV initiated the reorganisation of the timar system to reassert the superiority of the centre. "In the years 1632-34, Murad IV ordered the reorganisation and renovation of the provincial [timar] system" (Barkey, 1999: 64). By this way, it became possible to hinder (to a certain degree) the allocation of the *dirlik*s (revenues granted as means of living) to the persons outside the *askeri* class who were untrustworthy or without any guarantor. Instead, what was aimed at with the reorganisation of the timar system was to establish a balance between the janisssary army in the centre and the sipahi armies of the provinces. As it is understood from the contents of a firman sent from the centre, the new strategy of the centre was to allocate the timars among those who were capable of serving in the army regardless of their early social standing. By this way the centre was trying to get rid of the usually tribal and/but absentee timar holders by replacing them with those who had lost their tribal connections and eager to seek a

place for themselves in the Ottoman society.

The reforms of Murad IV were not limited to the reformation of the army and timar system but extended towards the field of jurisprudence and public morality and ethics. Following the insurrection of the *kapikulu* soldiers in 1632, the meeting of *Divan-I Hümayun* (Imperial Chancery) after the call of Murad IV was the decisive moment for the initiation of such reforms. Immediately following the meeting, Murad IV began to get rid of the leaders of various fractions and corrupted public officers. Yet, this was not an easy process, and the call for a general public mobilisation (*nefir-I amm*) for the elimination of the corrupted elements both in the state and society where the hands of the centre could not reach demonstrates the weakness of the centre in controlling the society. Following the operations of the centre a more or less dependable control of the centre could be established. Moreover, despite there were no special extension of the *shari* law throughout that period, new decrees were issued by the state and the existing laws were tried to be thoroughly applied. Barkey (1999: 234) describes the situation in the following terms:

> And, finally, to be able to protect the moral values of the country new prohibitions were decreed. Murad IV believed that the tranquillity and order could only be possible by people's adherence to strong moral values and aversion from alcohol, tobacco and other vices. Therefore he decreed prohibitions on their usage and sent agents to control the cities and towns.

Yet, the effectivity of such effort remained limited to major cities and towns as it was always the case with the Ottoman juridical and administrative organisation and could not be exerted onto the villages let alone the tribes which were most of the time led a semi-autonomous existence if they were not on the move. Furthermore, Murad IV's efforts to reform the Ottoman state and society were doomed to be temporary in terms of its effects, and after him the repetitive defeats of the Ottoman armies especially before the Western powers made it necessary to confront the problem of reform again

and again in the Ottoman administrative organisation. The army's position in this connection was crucial for it constituted the main façade of the Ottoman State facing both its society inside and rival powers outside. The army was so deeply embedded into the juridico-political and economic system brought about by the Ottoman State that when repetitive defeats of the army before the external forces finally necessitated its radical reorganisation, such a reform did also entail systematic interventions into the very structure of the society.

5.2.3.1 Reformation (*Tanzimat*)

By the time of Ahmed III (1703-1730), about half a century after the time of Murad IV, such a necessity for reformation in the structure of the state (and especially of the army) became unavoidable. It was the Ahmed III, of all the previous Ottoman sultans, who officially recognised in 1718 the need for a reformation in the Ottoman army to be able to tackle with the European armies. It was also at about this time that the Europeans began to play a role in the Ottoman efforts of reform taking the initiative from the Ottoman hands for the first time (McCarty, 1997: 285).[33] This concern with the reformation of the Ottoman state machinery under the 'indirect' pressure of the Western powers continued until the direct intervention of the same powers into the Ottoman jurisprudential system with the declaration of the Imperial Edict of the Rose Chamber

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[33] The granting of capitulations to the European merchants and entrepreneurs started with Mehmed II, but at that time they were viewed as encouraging measure for the development of trade relations supervised by the superior power of the Ottomans. But the weakening of the Ottoman state and the loss of initiative in the interstate relations to the foreign powers there occurred a dramatic shift in the interpretation, extension, and function of such grants of privileges.

(*Gülhane Hatt-ı Hümayunu*) on 3 November 1839. Indeed, the period starting with the reign of Selim III (1789-1807) that corresponds to the French Revolution until the declaration of the Imperial Edict in 1839 was marked by the struggle of the central state against the *kul* (slave) system which supplied both the army and higher bureaucracy to the disadvantage of the Turkish subjects of the Empire.

With the decisive enforced settlement, exile or deportation of the overwhelmingly Turkic tribes that followed the effective oppression of the *kizilbash* revolts of both the sedentary and nomadic tribesmen especially in Anatolia, the older alliance of the central state with the *devshirme* army and bureaucrats against the nomado-tribal elements in the Empire had lost its meaning throughout the 17th century. During the elimination of these nomado-tribal elements from the Ottoman political scene the Janissary corpse and *devshirme* bureaucrats secured themselves a powerful base in the Ottoman administration. But, when the oppression of the nomado-tribal elements was complete the insistent interventions and resistance of the *kul*s of the sultan came to be felt by the sultan as the centre of gravity as the major obstacles before the implementation of the centralising policies. Therefore, the alliance has been dissolved and the Ottoman centre tried to seek the support of the sedentarised masses who had lost much of their earlier tribal affiliations and who concentrated in the cities and towns. As for the nomado-tribal elements and sedentarised peasantry in the remote villages, they were completely fell outside of the sphere of the central politics. But, this change of policy by the centre to rely more on the provincial but, hopefully, non-tribal (yet having a tendency to re-tribalisation through the operation of the norms of the tribal ethos) resulted in the new constellations of power against the *devshirme* and produced important consequences for the future formation of the Ottoman society. The struggle between these forces came to the surface with the establishment of a new and relatively modern army by Selim III called *Nizam-ı Cedit* (New Order) in 1793. The foundation of this new army was interpreted by the older *Janissaries* and *ulema* as a

threat to their power and influence in the centre and Selim III was dethroned by an insurrection of the *Janissary* corpses supported by *ulema* in Istanbul on 25 May 1807.[34]

Following the death of Selim III, dethroning of Mustafa IV and accession of Mahmud II to the Ottoman throne, the Bill of Alliance (*Sened-i İttifak*) was signed on 29 September 1808 by most of the *ayan* (leaders of the local dynasties in the provinces) that came to the capital with their troops after the invitation of Alemdar Mustafa Pasha. Even though the Bill of Alliance accepted the ultimate authority of the Ottoman sultan, it was interpreted as an attempt to restrict the hitherto absolute authority of the sultan by the principles of the mutual consent (of the *ayan*, of course) and common good.[35] İnalcık (1996d: 346) assess the Bill of Alliance in the following terms: "The Bill of was a document dictated by the *ayan* that took the power in an environment of war and resurrection for the purpose of guaranteeing their own positions against the absolute authority of the Sultan."

Indeed since the glorious days of the Lawgiver, the absolute authority of the Ottoman sultans was left only in theory with the exception of Murad IV and the will of the sultans became subject to the pressures from the *janissaries*, *devshirme* bureaucrats and

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[34] The janissaries led by Kabakçı Mustafa crowned Mustafa IV but could not execute Selim III until the arrival of Alemdar Mustafa Pasha with his own troops to the capital to re-throne Selim III in 1808.

[35] For example, İnalcık (1996d) seems to be convinced on the 'crime' of the *ayan* as told by Slade (1883) cited by İnalcık in footnote 8 on p. 347: "They (*ayan*) were the protector of rayas as well as Musullumans, and for their own sakes, resisted exorbitant imposts... Their crime ... was being possessed of authority not emanating from the Sultan." Coşkun, *et. al.* (1996: 268) also adhere to the same view.

ulema. Now with the declaration of the Bill of Alliance, another group, the *ayan* were exerting themselves as an important player in the power game. Despite this fact, İnalcık (1996d: 343) insists on the conservative nature of the Bill. However, the Bill, as it is, was the declaration of a will to restrict the theoretically unchangeable authority of the sultan for this reason it was not welcomed by the sultan himself (Mahmud II) who was, in a way, forced to put his signature on it. Furthermore, depending on the power of his own soldiers Mehmed Ali Pasha extracted the consent of the sultan to 'appoint' him as the new *sadrazam* and pushing aside the sultan established a strict regime under his rule. Perhaps for this reason Mahmud II preferred to remain inactive when the insurgent *janissaries* surrounded the abode of Mehmed Ali Pasha and finally killed him.

Yet, contrary to İnalcık's interpretation, the Bill of Alliance remains to be the first attempt by the leading subjects (local notables)[36] to establish a contract with the sovereign that put into official record the already evident fact that the sultan's authority was no longer an absolute one. In this respect, it becomes possible to conclude, as İnalcık did, that their main aim was the restriction of the absolute power of the sultan. They were trying

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[36] The *ayan* were the leaders of powerful 'dynasties' leading, or rather, controlling the Ottoman provinces due to the inability of the central Ottoman state to exert its power on these regions. They were the leading subjects of the sultan if not noble by birthright as in the case of the European nobility. As it can be understood from Slade's (1883: 219-20) definition that we cited in the preceding footnote, they were leaders of the powerful Muslim houses increasingly replicate the patterns of tribal alliance between the tribal leader and his followers in their relationship with the local population in respective domains. Of course, we should add that they differed from older tribal leaders by the existence of paid regular military forces at their disposal. Yet, this difference was not so much crucial for at that period we observe that many tribal leaders who survived in the distant parts of the Empire were also forming regular military forces.

to secure themselves and their authority in their respective regions against the arbitrary and 'unlawful' exercise of power by the centre which was dominated at that time by the power of the *janissaries*, *devshirme* bureaucracy and *ulema* whose position became increasingly archaic and detrimental to the proper functioning of the centralised state. Indeed, the aim of strengthening of the central leadership of the Ottoman state was clearly stated in the second article of the Bill written and signed by the *ayan* who saw their future in the survival of the state:

> 2. Since both our own and our dynasties' survival are dependent upon the survival of the state, the soldiers that will be recruited [by *ayan*] will be seen as the 'soldiers of the state'. If the *ocaks* [the *Janissary* corpses] resist this, we all will work in alliance for their punishment and repulsion and removal (İnalcık, 1996d: 344).

Thus, with the Bill the *ayan* declared their with to protect the state in the person of the sultan while, at the same time, tried to re-assert the principles of tribal alliance within a supratribal polity in the arrangement of the relations between the centre and the local powers located in the provinces. It was only in this sense that as much as it was a reassertion of the principles of the old tribal alliance into the field of politics instead of the supremacy of the bureaucracy (unbounded by the law in its struggle against the local powers) the Bill was traditional. However it was not conservative under the given conditions in which the main obstacles in the way of modernisation set by the existing *janissary* corps, bureaucracy and *ulema*. Actually, hitherto nearly all the reformatory efforts did originated from the person of the sultan who, in this process of the implementation of the modernising reforms, increasingly tended to rely on forces other than those that dominate the decision making mechanisms of the state in the capital. Indeed, the increasing support of the hitherto peripheral forces (including those of the tribal Turkmen) to the sultans (first Selim III and then Mahmud II) who adopted reformatory policies in the state administration against the interests of the *kul*s and *ulema* testifies for an increasing awareness on the part of the local notables that their persons' and dynasties' survival were both depended on the survival of the state before

the rising power of the European states. Even though the Bill was inoperative and short-lived, for such a re-assertion of the tribal principle on the regulation of the inner-polity relations was no longer possible,[37] it heralded the later development of the idea that the restriction on the power of the centre for eliminating the arbitrary execution of power was good and necessary as well as the final extermination of the *kul* system. The abolishment of the *kul* system in the army (called *Vaka-i Hayriye*) was a very crucial event that would become possible at the time of Mahmud II on 15 June 1826 with the support of the population of Istanbul and the New Army (*Sekban-ı Cedit*) that was founded by one of the *ayan* after the order of Mahmud II.

As the Bill's concern for the survival of the state shows, this period was conceived by the Ottomans as a period in which even the very existence of the state was in danger under the pressures of the foreign (namely, European) powers. Contrary to the wishes expressed in the Bill of Alliance, the reformation (modernisation) of the state could not follow the tribal pattern any longer, but paradoxically, has to follow the path drawn by the superior European powers. Indeed, starting from the time of Selim III reforms in the fields of education, law and administration had already began to give their fruits until the declaration of the Imperial Edict of the Rose Chamber a few decades later in 1839. By the Imperial Edict that was initiated by the newly developed Western minded

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[37] This shows the waning power of tribalism in the Ottoman society to give way to the ascendancy of the modernising forces. But, as it will be seen later, the principle of tribalism in the social organisation was able to survive and continue to influence the social practices of the people both by penetrating into the ranks of higher bureaucracy and politics as well as by regulating the lives of a considerable portion of the population. Such a persistence also calls for a thorough questioning of the commonly shared conviction asserting that tribalism is devoid of any rationality of its own.

bureaucracy achieved its most important success in the regulation of the legal status of the bureaucracy itself. This was an important step taken in the direction of the elimination of the members of the older bureaucracy that were recruited through *kul* system after the extermination of the *janissaries*. By this way two important sources of power that insistently resisted to the modernisation of the Ottoman state were taken away. The growth of the Western minded bureaucracy that would replace the older *kul*s of the sultan in the state administration was indeed made possible by the reforms in the field of education that enabled the penetration of modern methods of education into newly formed Ottoman educational institutions. In complete contradistinction to the attitudes of the older bureaucracy, the new generation of bureaucrats got their education in the Western tradition of knowledge and aspired to live in a 'Westernised' way (*a la franga*) rather than pursuing the traditional way of life of the older bureaucrats and other elite now referred as *a la turka*.[38]

Crucial to the transformation of the legal status of the bureaucracy from being the slaves of the sultan to the servants of the state were the legal reforms of Mahmud II who wanted to have 'civil servants' that will represent him in the remote provinces and abroad (Findley, 1996: 25). The growing strength of the centre in the person of the sultan went hand in hand with the abolution of the right of the sultan to confiscate and inherit the wealth of his servants (or slaves) by the orders of Mahmud II. This was followed by the abolution of the older revenue system as the basis of personal income extraction for the state servants and rather they were paid wages from the state treasury. Again, the foundation of the *Evkaf Vekaleti* (Ministry of Vakfs) was intended to

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[38] On the initiation and force of the reforms to pave the way for the emergence of this new type of bureaucratic class, Lewis (1968) and Davison (1963). For the emergence, qualifications and ideology of the new type of bureaucrats see Findley (1996) and Ortayli (1995).

restrict the economic power of the *ulema* in Istanbul. Furthermore, the establishment of several ministries (the Ministry of Interior, the Ministry of Exterior), the transformation of the *sadrazam* into a sort of prime minister, and the constitution of several state councils (*Dar-ı Şura-ı Askeri* -Council of Military Affairs, *Dar-ı Şura-ı Bab-ı Ali* -Council of Prime Ministry, and *Meclis-i Vala-ı Ahkam-ı Adliyye* -Superior Council of Justice established in 1837) were among the important reforms of Mahmud II's period that paved the way for the crucial transformation and modernisation of the state structure which culminated in the declaration of the Imperial Edict of the Rose Chamber. Üçok, *et. al.* (1996: 269-30) interpret the situation as the advancement of the Ottoman state towards being a state governed by the rule of law:

> To be able to institute the rule of law it was necessary, in addition, to secure the immunity of right to live, the property, chastity and abodes of all the subjects was necessary. [...] The first step taken was to secure the position of the civil servants that were protected from the calamities of the confiscation of their property. In 1838, *two penal laws for the* ulema *and civil servants were decreed.* These laws had a much bearing on the Turkish jurisprudence. For the first time, a certain class of subjects could not be accused except for the crimes written in a text of law and could not be punished with any penalty other than those written in the law. According to these laws, the civil servants could not be punished by the death penalty except in cases requiring *kısas* and *hadd* punishments. In this way, *siyaseten katl* [death penalty by the order of the political authority, especially that of the sultan] which was the major threat for the civil servants for centuries became a matter of the past. Moreover, [in these laws] the crimes that the civil servants might commit were enumerated with their corresponding penalties. Even though these laws were written in a very diverse way from the contemporary techniques of law making, what strikes the eye in them is that they represented a first step towards the direction of a systematic penal justice. Again, despite their limitation to two groups [of people, vis., the *ulema* and civil servants, with these laws] the principle of 'no crime and penalty without a law' was introduced into the Ottoman state.

It was these new type of bureaucrats, indeed, as the emergent new elite of the Empire who stood behind the preparation and decreeing of the Imperial Edict of the Rose Chamber on 3 November 1839 that initiated the *Tanzimat* (Reformation) era. The bureaucrats were willing to reform the administrative structure of the state and for this

purpose they had to struggle against the conservative powers of the *ulema* and older type of bureaucrats, and sometimes even against the sultan himself. But it should not be forgotten that the effect of the reforms were still limited to the urban areas (especially to Istanbul and to the bureaucratic and religious elite). As the new generation of bureaucrats began to disperse towards the other urban centres in the provinces the effect of the reforms gradually began to be felt in those places as well. In the remote rural areas, however, both the sedentarised peasantry, semi-nomadic and nomadic groups continued to adhere to the principles of the tribal ethics (*töre*) for a rather long period of time to come.

Lastly, it should be added that the new elite was willing, but the Imperial Edict was also the result of the pressures coming from the Western powers that already began to form their states on a *national* basis one by one following the suit of the French Revolution. Indeed, the developments in the West were a tremendous impact on the future course of the developments in the Empire, and in this sense, the Edict of 1839 can be read as the declaration of the death of an already collapsed system of justice and the gradual ascendancy of the Western notions of legitimacy, justice and sovereignty, at least on the formal plane, in the future determination of the Turkish jurisprudential system.

CHAPTER 6

PRINCIPLES OF MODERN JURISPRUDENCE

6.0.1 Early Origins of Modern Jurisprudence

The impact of the Roman jurisprudence on the formation of the contemporary European jurisprudential systems (both Continental and Anglo-Saxon) is well known.[1] Generally, Western authors like to trace the origins of the contemporary European jurisprudence back to the ancient Greek society.[2] Authors like Meier (1990), MacIntyre (1988) and Finley (1984) are just a few of them. Thus, the ancient Greek ideas about the nature of justice, politics and jurisprudence are important for the development of the ideas that lay behind the philosophy of law in the contemporary West. However, one should not neglect the importance of the particular articulation of the ideas derived from the Christian faith (whose roots can be traced in the ancient Hebraic tradition) in the formation of the major ideals of the contemporary Western jurisprudence. However, when the men of Renaissance turned their attention to the study of law they preferred

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1 For example, Carpenter (1958: 91) emphasises the fusion of Germanic law and Roman law as the major factor effecting the formation of the Continental European law. Though he neglects the influence of the ancient Greek philosophy on the formation of the Western law, he adds to his list of contributors the merchant law and canon law.

2 Usually, such a history of jurisprudence cannot neglect the juridical tradition of the ancient Mesopotamian societies where we first met the systematic efforts of the state to *regulate* the field of justice. But, as in the case of Sir Maine (1983), for example, the serious systematic analysis of jurisprudential structure starts with the discussion of the ancient Greek society.

to give the primary place to the Roman law as the almost perfect synthesis of the older traditions. Writing about the developments in this field after the beginning of the 'scientific' and 'systematic' study of law in the twelfth century, Carpenter (1958: 107) says,

> "But it was Roman law and not German law to which the learned doctors of these [law schools at Bologna and elsewhere in Italy and France] schools addressed themselves. By taking up the *Corpus Juris* of Justinian the Bolognese glossators not only recovered the Roman law but also put it in form where it could triumph over the folklore of the German communal courts. In the competition between the Roman law and the Germanic customary law, the learned world was on the side of Roman law.
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> ... The final step which was to establish Roman law as the common law of the empire was taken in 1495, when the *Reichskammergericht* was created as a central imperial court.

Carpenter adds in the same place that the acceptance of the rule dictating that the judges should not take into account the doctrines not recognised by the Roman glossators marks the accomplishment of the process of the 'reception of Roman law'. Thus, especially after the 12th century, culminating during Renaissance, Roman law was able to establish its prominence over the Germanic customary law. Of course, this process can be associated with the dissolution of feudalism and emergence of the central power of kings as the supreme authority if not absolute yet. Furthermore, it is also possible to find some connection between the need on the part of these developing central powers to overcome the local powers of feudalism and the recent superiority of Roman law having a statutory character. Later definitions of jurisprudence may give us an idea regarding how statute (later, positive) law gained prominence in the understanding and interpretation of jurisprudence in the Western world.

On the conceptual level, one of the most important contributions of the Roman law to modern theory was the development of the concept of natural law. It was through this

concept (that assumed different meanings under the influence of Christianity) that the idea of a moral (divine and/or universal justice) find its way into the modern European jurisprudence. When the ancient Greek society began to organise into city-states, its form of legitimacy had also shifted from being based on a god-king cosmology. Instead, a new ordering of things was necessitated and the first known well-articulated response to this new state of affairs came from Socrates, the wise man, as it was narrated in Plato's various dialogues concerning the trial and death of Socrates.[3] Another interesting point in *Socrates' Defence* is found in the part concerning the status of the judgement of the Athenian (this-worldly) court. Between 40c and 41b, Socrates validates the significance of the court's sentence on two grounds. For him, death (the decisive sentence of the court) is either a dreamless sleep, an annihilation and having no consciousness of anything, or a migration of the soul from this place to another which lies beyond the reach of our so-called justice. In both cases, he asserts that the judgement of the Athenian court is unable to catch him up. He slips into a zone where forces of this world cannot penetrate and act. Indeed, this zone borders on the limits of this-worldly power that Foucault in his *Discipline and Punish* will later try to describe. As Foucault (1979) suggests, sovereign power has had to entangle with this limit of death, this zone of escape until the formation of a new form of power. This new form of power, as Foucault calls it, bio-power tends to control and administer life instead of restricting and prohibiting life and sending to death as its strategy.

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[3] Even in Socrates we can see the traces of a cosmology which attributes a divine reason for men to be what they are. In *Apology*, Socrates says that his choice to follow a philosophical life was due to a God (with capital initial) who had appointed him to the duty of philosophising:

> when God appointed me, as I supposed and believed, to the duty of leading the philosophical life, examining myself and others (Plato, 1980a: 28e).

In these first dialogues of Plato we also see the formation of another theme which will be articulated into the later theory of natural law and reach up to our own time. After Socrates establishes the immortality of the soul and the mortality of the body as the problem of an honourable retreat from this world, he also comes to defy the validity of the judgement given by a court of this world, and emphasises the existence of a true court seen over by the divinities in the other world where soul will live up its immortality freed from the debasement of the mortal body. But this negation of the validity of the judgement in this world puts Socrates as free, unfettered individual self, in a line of confrontation against the society in which individual subjects (in the sense of their being subjugated, leashed, or disciplined members/citizens of that society) demand predictability and security in the face of others' actions, in short, order. But, however he believes in the triviality of this world and its socio-political order, Socrates cannot deny the social need felt for order and security, and tries to avoid damaging it by his rejection to oppose the sentence of the Athenian court. In *Crito* (Plato, 1980d: 50b-c), when Crito tries to tell him the preparations made by Socrates' friends to provide his escape from the punishment and persuade him to realise the escape, Socrates answers Crito by saying that a city cannot continue to exist with a destroyed system of law:

> Suppose that while we were preparing to run away from here -or however one should describe it- the laws and constitution of Athens were to come and confront us and ask this question, Now, Socrates, what are you proposing to do? Can you deny that by this act which you are contemplating you intend, so far as you have the power, to destroy us, the laws, and the whole state as well? Do you imagine that a city can continue to exist and not be turned upside down, if the legal judgments which are pronounced in it have no force but are nullified and destroyed by private persons?
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> How shall we answer this question, Crito, and others of the same kind? There is much that could be said, especially by a professional advocate, to protest against the invalidation of this law which enacts that judgments once pronounced shall be binding. Shall we say, Ye, I do intend to destroy the laws, because the state wronged me by passing a faulty judgments at my trial?

6.0.1.4 Natural Law

Indeed, the theories of natural law have always been the most effective and sometimes dangerous critics for the established systems of law throughout history. The history of natural law theories reaches as far back as the ancient Greek society, but there it was limited to the interest of the philosopher especially during the times of political turmoil and crisis (Güriz, 1966: 149). It was in Roman times that the theory of natural law got prominence in jurisprudence. Defined by the stoics (a good representative of them in Roman jurisprudence was Cicero) natural law is understood just before the Christian era as the *right reason* in agreement with nature.[4] This meant that apart from the specific laws of different societies there was a law that is perfectly in accordance with the human nature. By the use of right reason, the jurist thought, human beings can discover the dictates of nature that are applicable in all human societies. This general principle the Roman jurists were able to unearth in the practices of the *jus gentium* that was developed under the principle of equity offered by the various edits of praetors. However, for the Romans natural law could never be something that has priority over the laws of the country.[5] We can even suggest that there was no agreement between the Roman jurists over what was the status and meaning of natural law. For example, Gaius, thought no distinction between *jus naturale* and *jus gentium*, while Ulpian,

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[4] Note the reflective essence of the natural law that makes it a product of a combination of ethico-moral thinking.

[5] This idea, which also existed in ancient Greek thought, was to be highly relevant in the emergence of the notion of law as a synthesis arrived at as a result of the reconciliation of the notions of sovereignty as the absolute authority and of individual as the legal subject having rights and duties of its own.

dividing the law into three as *jus naturale*, *jus gentium* and *jus civile*, thought that natural law was never something more than animal instinct. In contrast to Ulpian, Paulus thought again in a similar fashion with Gaius and asserted the equality of the natural law and *jus gentium* and underlined the notion of equity in the theory of natural law. By the time of Justinian the threefold distinction of law was accepted.

It could only be expected that the fathers of the Christian church would eagerly adhere to the idea of a law that is valid for all human kind as the creatures of one and only god. The only difference in their interpretation was that they would rather define natural law as the law of god:

> Seneca had already depicted the state of nature as a state of innocence in which men lived in complete happiness. They passed out of this state through the growth of vice. Human greed destroyed the original happy state of man. It was but one step for the Church Fathers to identify the state of nature with the condition of man in the Garden of Eden before the fall of Adam. The principles which God intended to apply to mankind in the unfallen state were the principles which men must seek to find in the law of nature (Carpenter, 1958: 56).

Previously, natural law was the law valid for all humanity that can be acquired through the work of reason but it had no priority over the particular laws of various nations. But, with the intervention of Christianity and its the identification of natural law with the law of god, natural law does necessarily elevated over the laws of men and thus acquiring an infinitude of its own established itself as a religio-moral field independent from the field of ethical life. Interestingly, the confrontation of natural (now divine) law and laws of men roughly corresponds to the collapse of the powerful state in the western provinces of the Roman Empire and the rise of Church power together with the initiation of barbaric invasion. This confrontation finds its sharpest expression in St. Augustine's *De civitate dei* (AD 426) where he identifies natural law with the law of God and gives it a superior position and defines the human political organisation (state) as a result of sin. Because of sin, for him, man fell from the Garden of Eden where he had lived

previously according to the dictates of the natural law (of God) and had to live up the imperfect situation in political community. Because of God's punishment for sin human beings should have to suffer various inequalities of status, property, etc. For example, although in natural law the mastery of one man over others is not justified, the institution of slavery in this world and their masters' position is justified through the notion of sin. Likewise, the rights of sovereign is justified through the same notion of sin and the rule of men over men is doomed by God (even in the case of bad rulers) to punish sin or redeem the believer. But, whatever the characteristics of men's rule in this world are, this is rather an imperfect state whose basic rules are derived from man's insufficient reason and God's laws are always superior to the laws of the state. Such an understanding of natural law was of course to bring it into contradictory terms with the human political organisation, indeed, it was a denial of the validity of the state power as well as the denial of individual freedom and responsibility.

Augustine's position was characteristic of a period when the central state mechanism began to shatter and society fell into turmoil and marked the medieval jurisprudential thinking. But this was a temporary situation even though a long one and when feudalism began to be replaced in various parts of Europe by more or less powerful central state organisations a new stand in jurisprudential theory of natural law began to be felt. The conciliation of man's reason and God's revelation and of divine order and political order was the main burden of Thomas Aquinas' thought. Indeed, the recognition of the superiority of the divine will over and above human reason supported by Augustine carried in itself the seeds of a future difficulty in the newly emerging social order in terms of the question of liability of the individual legal person as author to punishment. Increasing trade and developing property rights in feudal Europe as well as dissolution of feudal ties had gradually made it necessary that the notion of individual responsibility should replace the notion of divine will in the formation of crime. The first step in that direction did come from Aquinas; being a member of the Church

himself, he was able to arrive at a reconciliation between the notion of divine will and human reason and open the way for human responsibility in human actions. This was a major step in the way leading to the supremacy of the sovereign and individual liability to punishment without which punishment would remain an act of vengeance or a demonstration of power among the legally equals.

The four types of laws that Aquinas mentions in his *Summa Theologia*, reflect his effort to achieve this reconciliation of reason (the infinitude of the self) and divine will (the infinitude in its totality). According to him, the eternal law that finds its expression in divine will dominates everything that exists. Natural law is the reflection this all-governing divine law onto the intelligent creatures. Since human beings are intelligent creatures, they partake in the divine law or reason by the use of their own reason and come to know the dictates of natural law. By this knowledge of natural law they also possess the knowledge of good and vice. Once one can get the basic tenets of divine law by the way of reasoning through natural law, it is only one step away to arrive at the composition of human laws in accordance with the divine law. With such a knowledge natural law (behind which divine law lurks) it would be easy to assess the compatibility of the human laws to divine law. Thus, for human laws to be good they should be in accordance with the divine law, at the ultimate instance. But, in addition to this, Aquinas introduced another condition for the goodness of human rights, that, even though they may differ in their particulars according to the characteristics of society in which they are made, they should be designed to promote the well being of the members of society.

The years surrounding the compilation of *Summa Theologia* by Thomas Aquinas (1266-1273), European society witnessed the establishment of Inquisition together with massive persecution of dissident sects. These were also the years of the last waves of now waning Crusades onto the Holy Land. Indeed, the increasing tension in the

theology discussions was heralding the later conflicts between the Catholic Church of Papacy and newly emerging central states. While on the one hand new Aristotelianism supported by the doctrines of Aquinas (Roger Bacon, William of Ockham, etc.) and the arguments of Franciscan Order, on the other hand the Papacy and Jesuits sternly defended the superiority of the divine will, and thus, divine order represented by the Papacy over the authority of the political power of the secular sovereigns. For example, in 1296 Pope Boniface VIII issued the *bull Clericis Laicos* in which he declared that no layman had the right to tax the clergy or church property to which King of England Edward responded by outlawing the English clergy. When the protection of the law was removed, the English clergy accepted the demands of the king. At about the same time Philip the Fair of France was cutting off the export of the papal revenues to Rome. He even arrested a papal legate and tried him for treason. The cleavage between divine order and humane political order resulted in the unceasing religious wars in Europe (the Hundered Years' Wars between 1337-1453) and the final division of Christianity into Catholic and Protestant sects.

6.0.2 Humanistic Turn in the Renaissance

The rise of Humanism in the 16th century was also the declaration of the supremacy of the earthly power of the monarchy over the divine order of the church. The historical minded humanist jurist of the 16th century turned their attention to serious study of the Roman law and discovered there the idea of the historical transformation of the law. The historical understanding of the growth of law led these jurists to think on the necessity of new legislation. Besides, the discovery of "the law of a more rational and bureaucratic society such as imperial Rome had been and Europe was now becoming", as Friedrich (1973: 54) asserts, was much more suitable to the requirements of early capitalism than were the legal institutions of the disintegrating feudal society. Indeed, these were the formative years of the modern European capitalist society and as

Foucault suggests it was a period that would last about two centuries and marked by crucial changes in the technologies of power as well as in the principles of the organisation or structuring of the universe.[6]

However, the discovery of historicity of law by the 16th century humanists did not shutter the idea of a natural law which is valid for all men. Rather, they only shifted its basis from the Divine Will to a law that was the product of human making. In their eyes the Roman law was this law and its re-ascendancy over the Divine law of the church constituted they very foundation of humanism (Friedrich, 1973: 54-55). Thus, it was they, the jurists like Guillaume Bude (1468-1540) and Andrea Alciati (1492-1550) who initiated a huge process of reception of the Roman law, and by the end of the 16th century this trend of legal dogmatism of Roman law was giving way to a more general legal philosophy. In Friedrich's (1973: 56) words, this meant that "the older Christian natural law was about to be replaced by a secular and philosophical law. At the same time, [...] in the sixteenth century the importance of a man-made positive law became fully visible, as contrasted with the all natural law."

6.0.3 Concepts of Sovereignty and Common-Wealth: Rise of the Nation State

Indeed, the doctrine of natural law, from the time it was first formulated in ancient

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[6] By talking about a European society we do not intend to overlook important distinctions among various societies in Western Europe. It is clear that in the field of jurisprudence they differed sharply into the Continental and British traditions as in other fields of social life. But, there is still a specific culture common to all European societies that determine their basic attitudes in the matters of jurisprudence.

Greece, was a product of the reflection of the self in its infinitude and therefore it was very easy for it to be articulated to the notion of divine law. But, when the disintegration of the feudal order gave way to the emergence of the prince as the sovereign who proved his powers against both the local feudal lords and the universalistic (infinite) rule of the Christian church, it became necessary to develop and depend on a practical philosophy that would function as the ground on which statutory (positivist) law could be made and function. Starting with the thinkers like Machiavelli, Bodin, Hobbes and Locke, the question of sovereignty come to the fore in the theoretical thinking of the sixteenth and seventeenth centuries. Machiavelli was the first to separate moral thinking of the infinite self from the practical (finite) thinking of the political subject. Bodin carried this attitude to the field of jurisprudence by asserting the necessity of an all-powerful sovereign who is entrusted with the making of the statutory laws which was vital for the order of the new type of polity and common-wealth (Friedrich, 1973: 58).

What was interesting here was the development of the notion of a commonwealth that had to *obey* the will of the sovereign that replaced the divine will. Despite the fact that the idea of a natural law which was common to all mankind never disappeared altogether, now it was reduced to the background and to the field of inter-polity relations (as it was in the Roman times). And the sovereign, the land and people under his dominion began to be perceived as the logical juridico-political unit. The emergence of the sovereign as the sole supreme power on earth[7] also coincided with the process of

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[7] Regardless of his authority being originated from a divine will or not. Indeed, up until Hobbes, the authority of the sovereign was liked to the consent of a divine will as it was the case in the Islamic tradition. The criticism by the monarchists directed against Hobbesian idea of sovereign deriving his power from the dangers lurking in the state of nature and a social covenant made possible by reason shows the popularity of this tradition of reasoning in

subjugation of the masses that culminated in the juridical definition of the legal subject and the political definition of the citizen. Therefore, the domain of law created by the coercive power of the state was now gradually turning into positive dictates of the sovereign power rather than being a body of moral precepts of the divine will or the infinitude of the reflective self. It could not leave the determination of the juridico-political relations of the people to their own fate but has to intervene, overcode and determine all such relations. The mass of people began to take shape before the ruling sovereign as his subjugated subjects, and positive law increasingly assumed its higher status among the newly emerging technologies of power.

When, finally religious wars ended in Europe with the close the last of religious wars, Thirty Years' War in Germany in 1648, Europe had undergone the humanistic impact of Renaissance and the rise of Protestantism. These movements were the major blows on the theoretical plane delivered on the supremacy of the divine power in this world, and at the close of the war with the Treaty of Westphalia in 1648 the supremacy of the worldly power of the monarchs over papal power was unquestionable. The Habsburg predominance representing the old order of a feudal empire and the supremacy of the Papacy was broken and the era of national states under powerful monarchs was inaugurated. It was also the era of international law. While the war was still continuing, Hugo Grotius, influenced by the cruelties of war, began to write his famous *De jure belli ac pacis* (1625) in which he once again pick up the theme of natural law, this time stripped off its religious connotations. Indeed, up until the time of Grotius, natural law whose knowledge can be acquired by human reason was already secularised to a great extent. The influence of Aristotle via Aquinas and other thinkers as well as division of Christianity and the rise of powerful monarchies had cleared the way. Indeed, even the

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Europe through the 17th century (Macpherson, 1986: 13).

final effect of the arguments of the Jesuit order whose major aim was to defend the supremacy of divine law (and thus, the rule of Papacy) against human made laws (inspired by natural law) and the supremacy of the monarchs had contributed to the development of the notion of natural law as totally distinct from divine law. Within such a climate Grotius argued (Carpenter, 1958: 62) that common law among nations (natural law) which is different from the law of nations is the dictate of right reason and "have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him." Despite this clear expression of the unrelatedness of the affairs of men with those of God we see that the influence of deistic thinking was to continue to be effective in forming the basis of European jurisprudence for many years to come, and Grotius was no exception to this. In his understanding the status of natural law that can be comprehended by reason, nevertheless, represents some essential traits that are implanted in man, which, in their turn, can be "rightly attributed to God, because of His having willed that such traits exist in us" (Carpenter, 1958: 62).

A few years later when long parliament had decided to wage war against the king, Charles I, and finally beheaded him and established the dictatorship of Cromwell in England, Thomas Hobbes was writing his famous *Leviathan* (1651). The interesting point in this book from the point of view of European jurisprudence was that in it Hobbes was boldly defining law as the command of the sovereign. Moreover, he also swiped away all the convictions regarding the divine basis of the power of sovereign, instead, his was the first effective introduction of the concept of 'social contract' into the political theory, offered as the valid basis of the sovereign right over the subjects (for example, see Hobbes, 1986: 228). However, both in Hobbes (1986) and in his rival Locke (1967) the infinitude (of the moral self with its reflective capacity from which they will drive the notion of right) still remains outside the sphere of the domain of the sovereign power. For while Hobbes based his argument for the necessity of obeying to

the sovereign in convergence with the dictates of reason, Locke insisted on the superiority of a moral law to which both the people and the sovereign alike should obey (Reiman, 1990: 35-36). But, this element of reason or moral requirement both derived from the reflective activity of the self in its infinitude did not mean recourse to the Christian divinity. Rather, it was reduced to being an instrument of subjugation through which the self gets convinced by itself to the necessity of obedience to the rule of the sovereign.

Yet, when the notions of absolute sovereignty began to give way to the idea of constitutional sovereignty whose powers were restricted by the rule of law, this reminder of the conception of natural or moral law turned into a channel of communication of the relations of subjugation and domination between the self and the sovereign power. It was through the utilisation of such a channel that the morality of the individual self was subjected to the sovereign will, but also that individual self was able to restrict the absolute power of the sovereign by the idea of a superior law that could dictate the requirements of reason or a moral imperative as suggested by Kant and transfer this authority to a corporate body other than that of the sovereign himself. Indeed, the introduction of the notion of a *social covenant* in Hobbes symbolised the level of abstraction reached by the independent reasoning of the individuals in the state of nature as the actual basis and limit of the power of the sovereign.

Both for Hobbes and Locke, according to the natural law human beings were absolutely free and equal in the state of nature, but since their absolute freedom and equality were harmful for their physical and social existence, the double restriction of both equality and freedom by an outside power was necessary. So that, the sovereign power could only be right (legitimate) as long as it functioned to serve the requirements of human reason or morality. Thus, we see that with Hobbes and Locke, the basis of the legitimacy of the absolute power of the sovereign got linked to an earthy purpose:

the constitution and protection of the commonwealth constituted by the restrictive social covenant (especially in Hobbes). In this connection, it was not surprising that a few years later, the Parliament in England issued a Declaration of Rights, which was enacted into a law as the Bill of Rights in 1689, clearly limiting the king's power and establishing a constitutional rule by a combination of the powers of the king and the Parliament.

The emergence of the idea of a social covenant that brought about the legitimacy of the absolute power of the sovereign coincided with the development of the notion of a superior reason that was capable to transcend the immediacy of the finitude. Indeed, it was this idea that opened the way for the romantics of the Enlightenment. In the jurisprudential field, this meant gradual constitution of the legal subject having its own reason (and his will) and therefore, legally liable. In the ideas of Rousseau (1712-1778) it is possible to observe a return to the Hobbesian state of nature but this time with a different meaning.

In contrast to Hobbesian attitude that took away the moral content off from the composition of human actions, Rousseau (like Locke before him) reintroduces the morality back into the scene by judging the man in natural condition as being morally good. This insertion of the moral component into the human nature also implied a return to the natural law, but this time, derived from the universalistic traits of the nature of man. The law became once again universal and corresponded to the expression of the *general will*. As Rousseau wrote in his *Discourse on the Origin and Foundation of Inequality* (1967: 177, first pub. 1755), his intention was to discover a law common to all mankind: "As mankind in general has an interest in my subject, I shall endeavor to use a language suitable to all nations; or rather, forgetting the circumstances of time and place in order to think of nothing but the men, I speak to, [...] in the presence of the whole human species as my audience." Since the society corrupts the individual who

was initially good (especially as a result of the development of private property), to be able to reinstate a good society Rousseau replaces the individual sovereign with the sovereignty of the majority as the expression of the general will. Now, each individual as participants into the society has to obey to the dictates of the general will which is also presented as the general good: the self feeling itself as a moral being cannot escape but has to internalise this moral imperative of obeying the general will as a responsible and thus legal subject.

The assumption of a social contract based on the reason and initial equality of all, contributed to the transfer of power from the individual sovereign to the representative body of social institutions. Thus, this time, instead of a sovereign endowed with absolute powers we had a representative body exercising absolute power over the individual self both by means of physical and moral force. This insertion of the moral imperative that would be made crystal clear in Kant also necessitated a shift in the technologies of power of course. A Foucault (1979) asserted, the sovereign power that hitherto aimed to ensure the physical subjugation of the subjects in their finitude now turns its attention as bio-power towards the mind and the soul (infinitude) of the self in addition to the former. With the inclusion of the self in its totality (both as infinitude and finitude) into the domain power, the circle of power closes down on the self leaving no room for its freedom.[8] At this stage Foucault talks about the emergence of new technologies of power in various fields of the social life. In the field of criminal justice, for instance, Beccaria (1986:9) writing in 1764 and following the path paved by Hobbes

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[8] A reminder will be in order here. As we have discussed previously in this study this seems to a an interesting paradox in the modern jurisprudence that the flow of thought set out with the idea of absolute freedom and ends up with the absolute subjugation of the individual self under a certain moral imperative.

and Rousseau, establishes characteristics of the new relationship between law, crime, punishment, legislator and social contract as follows: "...only the law may decree punishments for crimes, and this authority can rest only with the legislator, who represents all of society united by a social contract."

This passage demonstrates the establishment of a curious relationship between the theories of social contract and those of the rule of law. The first act of contract that constitutes the human aggregate as common-wealth becomes also the first law of the community. "No man freely give up a part of his own liberty for the sake of the public good", says Beccaria (1986:8). So, one may not want to but has to give up a portion of his liberty to create sovereign power which is achieved through a fictive social contract that puts everyone under the obligation. Since "its in everybody's interest that the contracts useful to the greatest number should be observed. Their violation, even by one person, opens the door to anarchy" (Beccaria, 1986: 9-10). The result is the duty put on the ordinary self to obey the dictates of the sovereign (corporate or not) who would *protect*, in return, the individual from falling into an anarchical state presented as the anti-thesis of the moral order brought about by the 'contracts useful to the greatest number'.

So, the man, hitherto untouched by any power except those of his equals, thus came to be defined as absolutely free in an hypothetical state of nature, and with the introduction of civil society has to give up a portion of his freedom through 'contract' to the advantage of the sovereign, now understood as a representative body rather than the symbolic body of the monarch as the first subjectification of the despot. Before entering into the civil society by means of an imaginary contract, man was conceived either as beast (Hobbes) or angel (Rousseau) but in either ways as a pure being, for it fell outside the scope of reason's understanding. In the original state, either as a beast or angel, he enjoyed absolute freedom and equality, but as such he was a challenge

against reason and civilisation and therefore he has to be subjugated and at the same time turned into an object of knowledge (legal objectification of man) in the hands of reason. The quest for knowing the nature of man, thus, first discovered the reason in man that dictated him to discern, formulate and follow the norms of the social morality (social ethics being left in the state of nature) producing a discourse of social contract and the sometimes heavy terms of it. As soon as reason emerged as the determining characteristics of man, the latter lost his finitude in the resultant confusion and came to know his own infinitude determined only by the laws of nature or general will (the dawn of morality).

The effects of the discovery of reason as the sovereign power in the mind of man far exceeded this twisted configuration of man's infinitude and extended to a universality which reduced each and every man legally (or theoretically) equal to each other under the same all-encompassing law (of reason, state or God). Furthermore, the apprehension of social inequality and its condemnation by the moral discovery of man's ultimate equality in his goodness (as a moral being) supplied the rising elite (bourgeoisie) with the idea of the possibility establishing a better social order by suggesting the transitory nature of all the existing social contracts (if the contracts are made by the majority of men, they can be changed again by the same majority of man). Thus, it would not be wrong to suggest that the idea of the historical transformation of society through man's political action originated in the theories of social contract and finally supplied the theoretical grounds of the French Revolution in 1789. The new French constitution of 1791 contained a declaration of the rights of man which asserted all men to be free and equal in rights; assured freedom of conscience, speech, and press; decreed the right of men to possess property. The sovereignty of the people and the separation of governmental powers were principles embodied in the constitution. The monarchy was retained, but the king became a limited and constitutional ruler. The financial difficulties were met by seizing and making public the property of the church.

During the years that led to French Revolution theoretical comparisons between the old order and the new one was becoming common among the thinking elite. Saint-Simon (1760-1825) compared the religiously oriented medieval society and the new society that was gradually taking shape following the industrial revolution and Enlightenment. Indeed, this new concern with social chance and its methodology suggesting dual structures[9] that are formed in complete contradistinction to each other was to remain as one of the long lasting features that shaped the European interpretations of historical transformation.[10]

In thinkers like Comte, Durkheim, Marx and Weber as well as many others one can observe the same theme lurking behind colourful variations. Indeed, the main target of such an approach was to assess the newly emerging capitalistic 'modern' social order in comparing it to the older one. But, adopting such a perspective, the thinkers of the period also contributed to the idealisation of the values of the new society which was increasingly understood, in a paradoxical way, both as segmented and united as a

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[9] Dualisms like Gemeinschaft-Gesselschaft, community-society, mechanical-organic, Oriental-Western, traditional-modern, despotic-democratic, etc.

[10] Gellner (1998: 192) states that "the major theme of European, Western or Atlantic sociology" was

> "the transformation from Gemeinschaft to Gesselschaft; the transformation from community to society, that is, from the closed community as a unitarian world in which the assumptions concerning the world, social hierarchy and social life all are interwoven with each other to form a fluid, open, progressive, growth oriented and central society."

nation.[11] It was paradoxical, for, on the one hand, the existence of various social segments with conflicting interests was recognised, and on the other hand it (the society) maintained its unity miraculously based on the 'atomised' individual masses. This paradox was to resolved and the supposition that the basic organising principle of society changed (from mechanistic to organistic in Durkheim, for example) came to the aid with its introduction of the notion of (functional) division of labour into the social analysis. By utilising the possibilities of this concept the European though was able to overcome the difficulty brought about by the simultaneity of the social conflict and integration. This theory was further enriched by Marx's discovery of the theory of class struggle as the motor of history.[12]

But, until the time Marx's theory emphasised the prominence of the class struggle as the factor behind the historical transformation rather than the functional division of labour, the theory of nation state was well established in the Western political thought. For the theory of functional division of labour with its supposition about the rational interdependence of atomised individuals leaving happily inside a common-wealth that

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[11] Until then the organicist approach which until then dominated the Western image of society. According to this, society was resembled to an organic body whose constituent parts were expected to function in unison under the guidence of soul, hearth or mind. In this respect Plato's perfectly functioning republic did set the pattern that would be imitated by the later European thinkers.

[12] Yet, Marx went further that what was desired and suggested by the bourgeois theory of society and historical transformation by suggesting that the society cannot achieve a permanent balance as long as classes and inequality that produces them exist. This much was not desired by the thinkers of the European 'establishment' of course and his ideas as well as their adherents were persued and oppressed.

formed a political community was well suited for an explanation of the new society sufficient to the dominant bourgeoisie. Thus, the idea of a common-wealth forming a political community was already connected with the idea of social or common good (in Britain, with the idea of common utility as in Bentham) as the translation of the metaphysical concept of 'general will' into the practical thinking.[13] Here, the rule of law was expected to emerge in a mystical way (Ross, 1993: 166-169) as a result of the expression of the general will through democratic institution of general election.

The growing industrialisation had long changed the class composition of the society and after the French Revolution bourgeoisie emerged as the dominant class in the European society. The destruction of the older (feudal) forms of social ties created the effect of the advancement of the individual rights and freedoms for the totality of the population. Yet, what happened in actuality was not the abolition of the class society as it was suggested by the ideology of the French Revolution but rather the replacement of the older classes by the new ones that emerged due to the advancement of the new social relations. Thus the dreams of 'fraternity, equality and liberty' for all in the society came to be the reality of only a small portion of the new society. The rest of the society that are severed from their earlier feudal ties but not included in the juridico-political control mechanisms of the newly established national central state fell easy prey to

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[13] In his famous monologue *A Fragment on Government* (1995: 26, first pub. in 1776) Bentham explained that what he understood as utility was based on a politico-moral definition of the social good. For a detailed discussion of the evolution of the concept of will see Friedrich (1973: 23) where he suggests that Rousseau's idea of general will was not a direct reference to the rule of the majority. According to this, Rousseau adopted a metaphysical interpretation of general will that may sometimes escape from the grasp of reason, but still, in a mysterious way, sets the standards for the righteous government and laws.

control and manipulation. But their newly acquired 'equality' through subjugation brought about the development of a new juridio-political conception of the individual that was defined as a free agent (within the limits set by the juridico-political order) who was held responsible for his actions owing to the freedom enjoyed by his reason. Thus, in contrast to the ideal of legal individual who is free and absolutely equal before the law with all the others, the juridico-political individual became an individual who was liable to punishment owing to his faculty of reason that make him responsible for his actions (Kant). Of course, the realisation of such a freedom necessitated the establishment of democracy as the scene of the new power game whose rules were determined by the class relations covered by the apparent vision of the general will that was supposed to be incarnated once in a while in the general elections.

CHAPTER 7

TURKISH MODERNISATION AND THE ESTABLISHMENT OF THE REPUBLIC AS NATION STATE

Turkish modernisation[1] came rather late in comparison to the European one. It was primarily the result of the increasing power and influence of the European states, and neither the social basis nor intellectual developments in the Turkish country was the initiator of the process. Rather, as it was discussed earlier, Turkish modernisation was the result of the reform movements led by the new type of state bureaucrats who took the example of the European modernisation as their guide.

Even though the Westernisation of the Ottoman state machinery (together with a considerable portion of the population) was a process that was hardly devoid of important withdrawals, the reforms that started at the end of the 18th century continued until the final collapse of the Ottoman Empire in the early 20th century. The reforms, especially after the Imperial Edict of 1839 took their driving force and inspiration from the Western example and played the key role in the final modernisation-Westernisation of the Ottoman, and later after its collapse, the Republican Turkish polities.[2] It could not be expected that the jurisprudential ideology and formal juridical structure of the

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1 In the Turkish context the term 'modernisation' refers actually a process of 'Westernisation' or adoption of the Western ways.

2 Tanör (1999: 90) points to the similarities between the Imperial Edict of the Rose Chamber and the 1789 French Declaration of Human and Civil Rights.

Ottoman State were to remain immune to such changes. With the Edict, the sovereign himself was set to restrict his own absolute rights and power. Furthermore, the Edict also introduced the principle of the rule of law in the Ottoman jurisprudence and administration by intending to eliminate all arbitrary activities of the state bureaucrats through the regulation of the official procedures by the laws. The exertion of the rule of law was not limited to the regulation of the activities of the state bureaucrats by the laws however, with the Edict, the sultan himself recognised the superiority of the law over his will. The Edict also asserted the principles of 'equality al all before the law', 'no crime without law and trial'. These were, indeed, the signs of a profound transformation towards modernity and the major initiative for this transformation come from the sultanate itself, for the Edict of 1839 was the result of the reforms started by the earlier sultans about a century ago. When Mahmud II died in 1839 after a long reign, a new class of elites had already emerged to support the new structure envisaged by the Edict.

The insistent continuity and unavoidable expansion of the reforms after 1839 shows the existence of a powerful minority in the persons of the new type of bureaucrats as the initial social basis of the modernisation. These bureaucrats could gain the support of the new intelligentsia and the middle ranking army officials. For the role of the army Ortaylı (1995: 85) says the following:

> After [the accession of] Mahmud II, the army was reorganised in a reformist way and it was the natural ally and guarantee for the reformist group against the conservative *ulema*, provincial *ayan*, and of course, the segments of population that were under their influence. It was not an accident that *Serasker* Rıza Paşa stood side by side with Mustafa Reşit Paşa and Mustafa Reşit Paşa's initial reforms were complated by the military reforms of Rıza Paşa.[3]

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[3] It is interesting to note here the reference made to the 'segments of population under the

This alliance of the new bureaucrats with the military officials and newly developing intelligentsia also coincided with the replacement of the older institution of the slaves (*kuls*) of the sultan with the notion of people which will be gradually transformed into modern citizenry endowed with civil rights and duties as one of the most important steps. Yet, it was clear that since the reforms aiming modernisation did not pressed from bottom to up as it was the case in Europe,[4] their effects remained within the confines of a rather narrow group gradually expanding from the centre of power. Even the emergence of new bureaucrats, the army officials and the members of the new intelligentsia who were all educated in the new schools established according to the Western (positivistic) standards was the result of the and therefore they were the genuine supporters of the reforms. But, as the persistent and frequent attempts of the reformists to modernise the society since the 18th century testifies that for the majority of the population the reforms were either undesirable or irrelevant and the carrying out of the reforms on the societal level could not be achieved satisfactorily until now.[5] Yet,

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influence of the conservative *ulama* and provincial *ayan*. Even though there is no reference to the social organisation of this mass of people in any text dealing with the period, under the guidance of other indicators it is possible to infer that they were *outside* the reach of these reforms for they also stood outside the domain of the direct state control.

[4] The role of the Western powers should not be forgotten here. As Tanör rightfully summarises (1999: 20),

> "The European states, and especially England, were trying to alter the Ottoman laws and [the structure of] the state machinery to make them conform to the requirements of Western capitalism. 1838 Commerce Treaty, the firmans of the Reformation and the new laws were all the products of this process. Westernisation in this sense means to be colonised by the West. Reformation, in the field of law, too, is a movement of being colonised by the West. Those who enjoyed the fruits of this movement were also the Pashas of the Reformation and a collaborator bourgeoisie composed of the [ethnic] minorities.

reforms continued and new laws decreed that were made through reception of various Western laws.

7.0.1 The Reception of the Modern Law and New Institutions

The first criminal law (*Ceza Kanunnamesi*) was decreed in 1840 and amended in 1851 under the title 'New Law' (*Kanun-u Cedif*) to be applied for all of the subjects of the Ottoman state equally regardless of religion and class differences (Ortaylı, 1995: 162). Finally, it was replaced by a new Criminal Code adopted from the French Criminal Code in 1858. The Land Law (*Arazi Kanunnamesi*) decreed in the same year was probably the most important step towards secularisation (Ortaylı, 1995: 162). All these developments were the result of an extensive movement of reception of the Western laws and their promulgation created a dual system of state administration of justice. However, among all these translated and adopted foreign laws, the preparation and enactment of *Mecelle* (the Civil Code, *Mecelle-I Ahkam-ı Adliyye*) in 1876 by Ahmet Cevdet Pasha represents the possibility of an alternative way of lawmaking that would remain unique both in the Ottoman and Republican Turkish history. For in its content, the *Mecelle* was Islamic being a collection of the prescriptions of the Hanefite rite, but in its form it was imitating the Western law. As Liebesny (1967: 21) suggested,

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[5] Even though Tanör (1999: 113) claims that "the novelties initiated by the Reformation were enjoyed by the masses of peasantry that constituted the majority of the population and incited them to hold public demonstrations in some places", it is impossible to share this view for we do not know much about both the social dynamics behind such demonstrations and their extent to allow us to reach the same conclusion. Thus the above statement can be an expression of the rather naïve expectations of the reformers than a description of the actual situation.

> "the Majalla, [...], was a compliation of the religious law of Islam and by its very nature could hardly have an exclusive character. In practical application, however, the Majalla achieved a position as an authoritative codification very much like that of a continental European code."

The years between 1840 and 1879 were also the years in which the fundamental reforms were done to modernise the organisation of the Ottoman judicature. In 1875 the plaintiff was introduced into the newly formed Ottoman court. The Law of Organisation of the Courts in 1879 increased the number of judges present in the courts and founded the institution of notary public. Ortaylı (1995: 161) comments on these developments as a serious blow on the *shari'a* procedure:

> By these developments the Islamic procedure was struck at its roots. The increase in the number of the judges, introduction of the public prosecutor and defence attorney into the court trial, and more important that these, the introduction of the right of appeal did not fit into the Islamic jurisdiction which was based on a monist (one judge) court system.

7.0.1.1 First Constitutional Period

Whatever the significance and meaning of the Reformation, it was first of all the manifestation of an irreversible process, that ultimately led to the enactment of the First Constitution (*I. Meşrutiyet*) in 1876 that was made possible by the efforts of the Western minded and supported bureaucracy (military and civil) and intelligentsia that began to evolve as the future elite and subjects (in the modern sense of the term) of the state. The first signs of the emergence of politics in the modern sense of the term were previously felt in the rivalry between the Reformation pashas and traditional pashas, *ulema* and *ayan*. In the years preceding the declaration of the first Constitution (*Kanun-i Esasi*) in 1876, politics was lowered down to the level of intelligentsia and the first political opposition aspiring to catch up with the Western modernisation emerged in the *Young Ottomans* movement. Despite Tanör's (1999: 123) conclusion, it was very limited being confined within the narrow limits of a small group of intellectuals and civil

servants except the minorities that supported the Constitution for their own purposes. But, still it was very important for the political history of the Turkish society in its demonstration of the limitations of the notion of sovereignty adopted during Reformation for the purposes of extensive modernisation.

During the Reformation, the powers of the sovereign wanted to be restricted but for this purpose the acceptable example in the eyes of both the sultan and Reformation bureaucrats was not set by the democratic governments of the West. Rather, they tried to imitate a limited version of modernisation as exemplified by the Western monarchies especially in Prussia and Russia (Tanör, 1999: 116). By this way, they were trying to protect the supreme power of the (hitherto) reformist monarch as a security valve against excessive the rule of law and the reactive pressures from the conservative social forces. But, the reaction of the Young Ottomans gained support in the army and bureaucracy and finally led to the dethroning of the Sultan Abdülaziz by a coup d'etat and the declaration of the *Kanun-i Esasi* in 1876. Again, the highly narrow limits of the social basis on which the newly declared constitution depend does not allow us to share Tanör's (1995: 126-127) conclusion emphasising the role of the common support in the promulgation of the Constitution. In contrast, as Tanör himself admits, the newly emerging public opinion and interest groups in the modern sense were composed by a very small group that concentrated especially in Istanbul. However, it seems to be true to suggest that this small circle was very effective not because of its size or control of the public opinion through penetrating deeper into the society, but because the positions occupied by its members in the Ottoman state organisation and their influence on the opinion of those who took part in the administration and on minorities.

For this reason, despite the increasingly growing rhetoric of 'public opinion', 'public support', 'the support of the nation', etc., the social basis of the Constitution remained limited to the newly emerging elite and minorities. However, despite its weaknesses the

newly developing 'public', not yet including the majority of the great Ottoman subjects that fell outside the sphere of the central politics, was to play an increasingly important role in this new type of politics developing itself around the modernising state. The important point here is that the opposition of the Young Ottomans evolving around the state policies was powerful not because it was widely supported by the majority of the population but because the newly organising state machinery was based on their labours and without their active support it could not hope to stand much longer. The oppressive policies of Sultan Abdülhamid II (1876-1909) following his suspension of the Constitution and the Chamber of Notables (*Heyet-i Ayan*) a Chamber of Deputies (*Heyet-I Mebusan*) on 14 February 1878 was mainly directed against the increasing power of this new and limited circle of elite in to be able to protect the absolute power of the sultan.

Yet, the declaration of the *Kanun-i Esasi* in 1876 and the foundation of the first Chambers of Notables and Deputies (however they may be only consultative in character and not yet evolved into assemblies) and the organisation of the first 'elections' for the Chamber of Deputies in 1877 had left their restrictive impact on the power of the sultan to the advantage of a wider (in comparison the older elite) social group of new elite.[6]

The *Kanun-i Esasi* also brought prescriptions for the institutionalisation of the judiciary. For it gave a constitutional basis to the office of the judicature (related with their promotion, appointment and retirement) an protected them by stating the impossibility of the dismissal without being condemned for a crime (Art. 81), secured the courts from

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[6] The first elections cannot be qualified as democratic, but perhaps as 'democratising' with their multi-staged organisation.

any kind of intervention (Art. 86) and established them as independent institutions (Tanör, 1999: 144-45). With such regulations the *Kanun-i Esasi* contributed a great deal to the modernisation of the Ottoman political structure and juridical system despite the active opposition of the conservative forces suggesting a turning back to the traditional Ottoman ethos. However, it was not completely destructive with regard to the institutions of the old and tried to protect some of them by the side of the new institutions. One major example of this in the field of jurisdiction was the keeping of the old *shari'a* courts bye the side of the new *nizamiye* courts that operated by the new modern (and secular) laws. This caused the formation of the so-called famous dual system in jurisdiction and the ensuing confusions arising from the conflicting decisions taken in the modern and Islamic courts. The *Nizamiye* courts were arranged by the *Kanun-i Esasi* according to the modern principles governing the structure of the judiciary. Again Tanör (1999: 145) says that *Kanun-i Esasi*

> Was taking the authority of classification of the courts into various divisions according to their fields of responsibility and degree of authority, and the appointment of the judges from the hands of the executive and giving it to the law (Art. 88). KE also defined the institution of the public prosecutor within the constitution (Art. 91). In addition, [by it] a higher court composed of 30 members called *Divan-ı Ali* [the Supreme Court] was established that would pass judgments on the deputies, the members of the Assize Court and those who commit crimes against the sultan (Arts. 92-95). The Assize Court (*Yargıtay*) was a higher court that was mentioned but not overtly regulated in *Kanun-I Esasi*.

Moverover, by *Kanun-I Esasi*, though they were not extended as much as today, some crucial civil rights were also recognised and constitutionalised. For this reason, except some extraordinary powers of the sultan, and its limitations concerning elections and full parliamentary rule, *Kanun-i Esasi* was a great step towards modernisation. Basing his views on the experts on the subject, Tanör (1999: 147) comments on the *Kanun-i Esasi* that "despite some defects found in its regulations and the fact that its prescriptions remained largely on paper, it can be seen as more advanced even than

the 1924 Constitution." It seems that on the advanced (modern) nature of *Kanun-i Esasi* of 1876 there is a consensus among the scholars. But one crucial remark in Tanör's above expression deserves further attention. That it was largely remained on paper. This would also be the fate awaiting most of the prescriptions of the later constitutions that shows the great difference between making a law and applying it properly. The repetition of certain themes again and again both in the late Ottoman legislation and legislation under the Republic up until our day clearly shows that the basic principles on which such legislation was built did not depend on the social ethics practiced among the people of the two states, but rather they arose from the reformatory incetive of the Ottoman and Republican bureaucratic elite even in the face of passive or active resistence of the masses.[7]

Kanun-I Esasi and *the First Constitutional Period* did not last long. Sultan Abdülhamid announced a temporal but forced suspension of the first Ottoman parliament on 14 February 1878 on the pretext of the closing Russian threat, and the absolute and long lasting (from 1878 to 1908) reign of terror started. However, the enactment of new laws in Western fashion as well as the spread of Western type of educational institutions (especially military and medical schools) and courts, and the introduction and spread of press gradually created a political arena especially in important urban centres closely connected to the capital and composed of those who were interested in central politics.

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[7] With regard to the resistance Tanör (1999: 159) says that *ulema* (including the Shaik-ul Islam), old type of bureaucrats, bankers of Galata and *ayan* were the segments of the Ottoman society who felt uneasy with *Kanun-I Esasi*. As for the large masses of former *reaya*, we see that they were encountered neither among the forces of opposition nor in the ranks of the supporters. They wre simply out of the central circle of power.

7.0.1.2 Second Constitutional Period

The Young Ottoman movement had waned during the oppressive years following the suspension of *Kanun-i Esasi* but not without leaving their trace on the Ottoman political life. The fruit of their efforts ripened and was collected by a new opposition movement at the end of the 19th century struggling against the oppressive regime of the Sultan Abdülhamit. This new opposition first took its roots among the students of the military medical school (*Tıbbiye-I Şahane*) and then spread among the students of the military schools. Just like the Young Ottomans, this new opposition that was to be called Young Turks had no definite systematic ideology but united against the despotism of the sultan which they viewed as the major threat to the strength and integrity of the state. As it can be expected, their aim was not against the state, but on the contrary, they were primarily trying to protect the state against its external enemies by furthering the modernisation of the state.

Remarkably, the movement gained its main support among the lower and middle rank army officials especially serving in the Balkans where the sovereignty of the Ottoman state was at stake due to the increasing nationalism among the various ethnic groups living in the region. This atmosphere coupled with the acquaintance with and adoption of the ideas that prepared the French Revolution among the low rank military officials who got their education in Western style schools seems to be one of the main reasons behind the spread of nationalism among the members of the Young Turks (Akşin, 1987: 22). Claiming their civil rights in convergence with the now established tradition in Western nation states, the Young Turks' opposition turned itself into a political association at sometime about 1895 and called themselves as the Ottoman Committee of Union and Progress. The nationalistic ideas began to develop among the members of the Committee and they first tried to develop Ottomanism as their own version of nationalism advocating the creation of an 'Ottoman nation' as a higher level of unity and

identity that would gather all the ethno-religious formations under its aegis on the basis of the loyalty to the Ottoman State (Mardin, 1983: 191-193). Later, in 1907, the first Ottoman Committee of Union and Progress (the majority of whose members were intellectuals and university students) united with the Ottoman Liberation Society (*Osmanlı Hürriyet Cemiyeti*) which was founded by active military officials who adhered to the Turkic version of nationalism rather than Ottomanism. The union of the two associations was crucial for the later development of Turkish nationalism as well as the active role assumed by the Committee in declaration of the Second Constitutional Period in 1908. According to Tanör (1999:174),

> It was the cadres of this society [the Ottoman Liberation Society] that would be the typical representative of the libertarian movement and the real author behind the 1908 Revolution. Their common and shared characteristics were that they were mostly Turks, young, military officials or civil servants, and well educated [*mektepli*]. As for their ideology, it displayed classical bourgeois features by being liberal, reformist and nationalist. The Ottoman Liberation Society united in 1907 with the Committee of Ottoman Union and Progress; injecting it a new blood; and revolutionising it. Later on, the organisation was to be called as Progress and Union. But, in the sequence of events that led to the promulgation of the Constitution, the real organising and striking force was to remain until the end the cadres of the Ottoman Liberation Society.

Under their pressure Sultan Abdülhamid was finally forced to declare the offset of the Second Constitutional Period by inviting the Parliament (*Meclis-i Mebusan*) to meeting on 23 July 1908. As Tanör (1999: 177) asserts, the Second Constitutional Period was the result of a social uprising rather than a *coup d'etat*. The wide support behind this second movement in contrast to the weakness of the popular support behind the First Constitutional Period showed that the new notions of sovereignty, civil society and civil rights began to take root at least in some sections of the urban population. Yet, the main actors behind the declaration of the Second Constitutional Period remained to be the small circle of state servants (both civil and military) and the large mass of the supporters could quickly turn into silenced onlookers under the ensuing political turmoil

when the heydays of the revolution passed away.

The law rank army officers and civil servants were educated in Western style schools and due to their position in the society and state administration directly interested in the affairs of the state believing their power to influence the state of affairs. Yet, at the initial states, they did not felt confident enough to take the power directly in their hands and prepared to refrain from taking the responsibility of running the state on their shoulders. This fact clearly demonstrates that they were not aware of the real power of the people that they saw as an auxiliary factor in the central politics. Indeed, contrary to what is said and asserted such an attitude with regard to the common people continued to be an important feature of the later Turkish elite as well with the exception of the period of the War of Liberation. The members of Union and Progress initiated another tradition that would also continue into the Republican era: since their social basis was narrow and the power in the Ottoman society could not be derived from the economic wealth alone, they preferred to influence the course of the events within the narrow confines of the administrative organs and cadres. As a rational result of such a tendency, their adopted the method of *coup d'etat* and other antidemocratic means as the possible instruments of exercising power on the opposing forces.[8]

The Second Constitutional Period witnessed the strengthening of the modernising reforms of the earlier period. This time the power of the Sultan was successfully undermined and the Parliament and judicature began to emerge as the real powers within the state structure. The start of the World War I and the Ottoman State's engagement in it under the Union and Progress rule brought the final collapse of the

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[8] On the limits of the economic wealth in generating social power at that period and its relation with the military and bureaucratic dynamics, see Ahmad (1995: 7-13).

state and a new republic was founded on the lands which were left from the old Empire.

However, by the collapse of the Empire in 1923 with the declaration of the Turkish Republic, most of the basic principles of the modern jurisprudence had been established. The civil right were recognised to a great extent, the nationalist ideology gradually became the leading ideology in the state, the elected parliament became the place where major decisions concerning the 'nation' and the state were taken. Even though the duality in the state administration of justice continued, the *Nizamiye* courts developed and gradually replaced the older *shar'i kadi* courts, the structure of the judiciary was reorganised as to ensure the independence of the judges and the court procedure was modernised. But, all these regulations remained mostly in paper and could not be carried on in the actual practice. For example, even though the law envisaged many regulations to be able to establish the judiciary as an independent force, the practice of appointing judges on the basis of personal acquintance and/or political affiliation rather than merit continued.[9]

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[9] Hüseyin Kamil (Ertur), who was a judge in the new fashion during the last years of the Empire gives an account of such relations and the position of the Ottoman judiciary as a profession during that period in his memoirs (Ertur, 1994).

CHAPTER 8

TURKISH JURISPRUDENCE IN THE REPUBLICAN ERA

The defeat of the Ottomans under the rule of Union and Progress before the Western powers brought the end of the Empire. In Anatolia the War of Liberation began against the invading forces under the leadership of Mustafa Kemal Atatürk and army officials who ascended to highest ranks during the turbulent years of the Union and Progress rule and the battles of the World War I. At the end of the war the new Republic of Turkey was founded in 1923 by a new alliance of the despot backed by the army and the landowners taking the peasantry in reserve. The new republic was from the beginning a constitutional one and claimed to put the will of the nation above everything else and considered the Parliament as the objectification of this newly constituted national will. The opening sentences of the 1924 Constitution (*TC Anayasaları*, 1982: 21) sat the regime of the new state as republic: "Art. 1: The Turkish State is republic."

With this constitution the Turkish State adopted the regime of constitutional democracy, at least, on paper, aiming universal suffrage and installing the power of the state in the hands of the elected parliament. The ideal of the separation of powers between the government (executive), the Parliament (legislative) and judiciary (jurisdiction) was still to be realised later. Although there was still much way to go for the establishment of capitalism, it had already penetrated into the social system and the Turkish society was about to undergo important changes through which the limits of the new order were to be drawn by the capital on the economic plane, by the forces of democracy on the political plane, and by the rule of secular laws and the principle of equality before the laws on the juridical plane, and lastly, by the unity of the nation (or people as it was used to be called in the early years of the Republic) on the societal plane. Thus, the new order began to be realised starting from the foundation of the Republic aiming at

the elimination of all the previous codes of the older society or overcoding them by the forms peculiar to the new order.

8.1 Articulation of the Republican State

When the first National Assembly met in Ankara on 23 April 1920 the deputies had a good deal of democratic experience acquired either in the hot discussions of the Ottoman Parliament or in the local congresses held during the early days of the War of Liberation.[1] Therefore, despite imperfections of the elections, the first National Assembly was highly democratic and keenly protected its rights against the one-man rule of M. Kemal Atatürk (Velidedeoğlu, 1990: 243). One of the first important legislation of the Grand National Assembly was to compose a code in the semblance of a constitution (if not a true constitution) called the Law of Main Organisation (*Teşkilat-ı Esasiye Kanunu* -hereafter will be referred as TEK) in 1921. Since, the government in Istanbul still continued to function, the TEK was mainly concerned with the working, rights and duties of the Grand National Assembly in Ankara and the War of Liberation that was directed by it. However, by the phrase in Art. 3, "the Turkish State is governed by the Grand National Assembly", the TEK was giving the first signals of the new state as a *de facto* formation and what the TEK did was only to express this situation *de jure*. Since it was not intended to found a new state, the TEK was proved to be an insufficient one for the regulation of an increasingly complex political structure. The second Grand National Assembly that met for the first time in 1923 following the elections replaced the TEK with a new constitution in 1924. The first Grand National

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[1] For the importance of the local congresses in the advancement of the democratic culture, see Tanör (1998).

Assembly had already abolished the Sultanate in 1922 (Decision of the General Assembly Concerning the Abolition of the Ottoman Empire and the Foundation of the Government of the Turkish Grand National Assembly, nr. 307, 30 Oct 1992) and declared itself as the sole sovereign in the name of the 'Turkish Nation' with another decision enacted on 1-2 November 1922.

8.1.1 Ideals and Realities: the Two Constitutions

The second Grand National Assembly was mostly composed of the deputies who supported the republican and secularist policies of Mustafa Kemal, and even though with a slight hesitation, was able to declare the foundation of the new Turkish Republic on 29 October 1923. Following this, in 1924 it abolished the Caliphate (3 March) together with the *shari'a* courts (8 April), thus giving an end to the dual regime in the jurisdiction. That was a hotter issue than the abolition of the Ottoman State whose repercussions would continue to be felt throughout all Republican era. Finally on 20 April 1924 the Grand National Assembly accepted the new constitution with the same name (The Law of Main Organisation). The first article of the TEK of 1924 repeated that the form of the state was republic and Art. 3 made it clear that "the sovereignty belongs to the nation unconditionally". Although the implementation of democracy as an integral part of the Republic setting the form of government has to wait to be realised fully in the modern sense of the term, both the Republic with its constitution as its ground of legitimacy and the nation composed of citizens having civil rights thus established. One of the important achievements of the Constitution of 1924 in the direction of juridico-political modernisation despite some later reversals and reactions arising from the society, was the constitutional separation of powers. The Constitution clearly stated the independence of the judiciary and the (partial) separation of the government from the Parliament (Kubalı, 1960: 166; Tanör, 1998: 305).

1924 was a very active year for the parliament and the promulgation of the new Turkish Civil Code was as important as the abolition of the Caliphate and the *shari'a* courts. The Turkish civil life was regulated by the famous *Mecelle* as a compendium of the regulations of the Hanefite rite, but due to its *shar'I* character it was difficult to adopt it to the newly emerging conditions of the social life. Maybe more important than that it did not fit the demands of the Western states that pressed and encouraged the Ottoman bureaucratic elite for the realisation of the modernising reforms. For this reason there had been several attempts already in the Ottoman times to amend some articles of that code (in 1916 a Civil Code Commission was established and in 1917 a Family Law decreed). After the foundation of the Republic the efforts to change the civil code continued and in May 1924 several commission were established to write a new modern civil code. But, since the efforts of the commissions were not successful in the preparation of the civil code, In 1924, The Minister of Justice, Mahmut Esat Bozkurt declared the need for a radical revolution rather than partial reforms in the judicial system (Bozkurt, 1944) and abolished the commissions. His closing speech was so radical and revolutionary in attitude that it is worth to take a short extract from it in order to be able to grasp the dilemma of the modernist revolutionary elite:

> Dear friends! The decision of the Turkish revolution is to adopt and appropriate the Western civilisation unconditionally. This decision depends on such a firmness of mind that those who may oppose it are doomed to destruction with iron and fire. Due to this decision we must take all of our laws from the West. In this way we would act in accordance with the will of the Turkish nation. We owe to succeed according to the demands of our nation, not our personal wishes and desires. I thank you for your services and abolish the duties of the commissions (Velidedeoğlu, 1972:169).

On the one hand they wanted to modernise the country in the European way, but on the other they had to face the anti-modernist tendencies of the majority emanating from an amalgamation of tribal social organisation and its Islamic overcoding. In the following year, in 1925, the first law school of the Republic was founded in Ankara and a new

Turkish Civil Code received from the Swiss Civil Code enacted and put in force in 1926. This rapid process of transformation was interpreted by the contemporary men of law as follows:

> Following the reception of the Civil Code and the Law of Obligations from Switzerland that form the basis of the jurisprudential system, other laws of the country, again through reception, were translated one by one from the laws of the Western European countries and put in effect. The new arrangement was made with an incredible firmness and rapidity and the Turkish Republic, with its jurisprudential system, integrated into the Continental jurisprudential system. In this way, 'laws that were suitable for the contemporary needs were enacted within the short period of three years by the revolutionary cadres who were decided upon 'creating a contemporary jurisprudential system by enacting contemporary laws'. The reason for this was that the revolutionary cadres saw the need for a radical jurisprudential revolution to give an end to the contradictions between the older jurisprudence and Western jurisprudence to be able to create a jurisprudential system that could meet the needs of the period. (Üçok, *et. al.*, 1996: 309).

But, as the growing base of the administration were not immune to the wider social influences, the signs that point to the difference between the theory and application of the law began to be apparent as early as this stage.[2] The results of the elections that formed the second Parliament, for example, were determined to a certain extent by Atatürk who would be the unquestionable leader of the nation as the 'Eternal Chief'. The Shaik Sait rebellion forced the government to adopt harsh measures in dealing with the opposition and the government enacted the Law of Establishment of the Public Order (*Takrir-i Sükun Kanunu*) on 4 March 1925 and closed down the opposition party (Progressive Republican Party founded on 17 November 1924) on 3 June 1925. The enactment of the Law of Establishment of the Public Order was indeed one of the first signs that the happy days of democracy was coming to an end.

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[2] In his article written in praise of the Civil Code of 1925, Sevig (1951: 210, 232) confirms that both the Ottoman *Mecelle* and the Republican Constitution (of 1924) were far from being duly applied.

Tanör (1999: 318) describes the situation at that period in the following terms:

> The situation of individual rights and freedoms, especially from the point of view of individual freedom and security was marked by many defects. Declarations of martial law, some arrest and convictions made by the Martial Law Courts and Independence Courts were among the main causes for this situation. The Laws of Enforced Settlement (dated 14 June 1934) and 25 December 1935), oppression and imposition of enforced labour on peasantry were all hazardous for the individual rights and freedom. It was clear that militant secularism was a strong barrier against the religious freedoms (like closing down some mosques, prohibition of pilgrimage, lack of religious education, etc.) In this respect, the Turkish Criminal Law and the Law of Treason to the Country should not be forgotten.
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> The foundation of the Independence Courts (*İstiklal Mahkemeleri*) to be able to condemn the political opposition and its semi-juridical acceptance bye the Parliament (Tanör, 1998: 307) was shadowing the constitutional prescriptions that 'ensured' the independence of the courts as well as the protection of the civil rights. Moreover, it was also a clear sight of neglect with regard to an important principle of modern jurisprudence, namely, the principle of natural judge and court. All these were understandable for a new political regime that was struggling to establish itself on a firm basis in the face of strong opposition from the supporters of the old order. Otherwise the movement that started with Reformation and culminated in the establishment of the Republic was still heading under the leadership of the progressivist elite. They were revolutionaries who were determined to reform the society in the way of modernisation even with the cost of giving concessions from the principles of democratic rule. Mustafa Kemal Atatürk's own ideas constitute a clear index of his goal shaped under the influence of the French Revolution.[3] The firm decision made in 1923-4 by the new Turkish government to change the existing system of jurisdiction in a radical way towards the establishment of modern institutions had become already clear.

Yet, the hardships of implementing a 'foreign' order was compelling the revolutionary

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[3] For a concise collection of his thoughts see Atatürk, (1997), written as early as 1929 and intended to guide the education of the new generations of the Republic on the issue of civil rights and duties.

government to the young Republic to stand fast and take harsh measures against any form of opposition. This protectionist policy of the government closed the gates of the state to all social forces other that those which are included in the coalition that formed the elite of the republic. The peasantry, local merchants and artisans who constituted the great majority of the population were kept outside the ruling mechanisms. The formative years of the Republic that lasted until the first free elections in 1950 were the years in which the secular and national republic was established on a 'firm' basis without much democracy.

Indeed, the founders of the Republic, the military and civil bureaucracy under the leadership of Atatürk as their Eternal Chief seemed to be loyal to the democratic ideals of the French Revolution and were well aware that without democracy it would be impossible to establish the modern state. For this reason, when they felt that the new regime was strong enough to tolerate organised opposition of an alternative political party that would, of course, share the basic tenets of the modernist ideal of the ruling PRP, they did not hesitated to allow the foundation of new political parties. But they were highly cautious in this regard for the early experience of the foundation of the Progressive Republican Party by the opposition deputies in the first parliament was ended with a dramatic failure. The quick success of the Progressive Republican Party that emphasised the adherence to the values of the older society as well as religion proved that the popular support behind the PRP as the founder and ruler of the new regime was not strong enough to guarantee the future of the Republic. The Progressive Republican Party was immediately closed down and their leaders were tried with heavy charges in the Independence Courts.[4]

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[4] The treatment of the Turkish Communist Party was even harsher as their members, not only

As a result of this negative experience the PRP preferred to oppress all the actors who may insist not to accept 'the rules of the game'. But when Atatürk felt that the regime was strong enough, he did not hesitate to encourage the foundation of an opposition party. Yet, the foundation of the Liberal Republican Party in 1930 showed once more time that the majority of the population continued to be dissatisfied by the existing regime and would support any other alternative than the ruling PRP. With the failure of this second attempt the project of democratisation was put on the roof for an indefinite space of time. Despite the modern and democratic prescriptions of the text of the Constitution and some of the laws, it seemed that the real problem in the way of modernisation was the unwillingness of the society, and especially the elite to apply those laws. Velidedeoğlu (1972: 110) narrates an illuminating conversation that passed between him and Mahmut Şevket Esendal, the Secretary General of PRP. To the question of Velidedeoğlu asking if it was not necessary especially to apply the Constitution in full to be able to found a wealthy and democratic society Esendal's answer was:

> You are a professor of law. You know that in some countries constitutions are written and in some not. For example, the French Constitution is written, but the British is unwritten. But *we have two constitutions*: written and unwritten.
>
> The *written* one is the Law of Main Organisation that you read in the book. But the unwritten one is our contemporary situation, that is, the chief system. This system takes its power from the party.

It seems that this duality between the theory and practice that started since the first attempts at modernising the juridico-political system during the Reformation era would continue to hound the Turkish society up until our day. Despite several and sometimes

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leaders, were also prosecuted and sent to the extraordinary courts that did not hesitate to distribute heavy penalties (Ergüder, 1978).

serious retreats, the formal texts of the later Constitutions and laws that were made with an idealistic attitude became more and more modern in their approach to the implementation of democracy, equality, and fundamental human rights. But, the practice was highly different and the words of the Secretary General did reflect the real situation. On the one hand, there was an ideal to be reached, and this ideal is reflected on the Constitution and some critical laws, such as the Civil Code, but on the other hand, there were the realities of the society for which this ideal of the elite was not even desirable. Therefore, the only solution left, as Esendal pointed, was to try to follow the dictates of the two Constitutions at the same time. Especially in matters concerning political action challenging the power of the modernising elite cannot be tolerated. Despite the dictates of the Constitution referring to fundamental human rights, equality before law, right natural judge and court, independence of the judges and courts, and political liberties, the application diverged from the spirit of the law and any opposition was tried to be 'destroyed with iron and fire'. However, during the early years of the Republic up until the mid-40s it seemed it was relatively easy for the ruling elite to keep this dual position of idealism and realism, because the large masses who were thought to be conservative, reactionary and anti-modernist were successively kept out of political participation. The modernist project of the elite was that before giving any opportunity to the people for political participation, they had to be transformed in their ethos from traditionally minded crowd to a nation. Only in that way, by building the Turkish nation, it would possible to unite the two Constitutions one representing the ideal and the other social reality. In Esendal's words modernisation and economic advancement could only be made possible by "constituting virtuous, proud society depending on the good will and mutual trust by reincarnating the ancient Turkish character on the one hand, and on the other by keeping the principles of the Revolution" (Velidedeoğlu, 1972: 109).

Enter the Society: the Process of Democratisation

During this time until the mid-40s, the social classes of the old order were changing under the impact of the advancement of capitalistic money economy led by the state. The older collaborationist bourgeoisie was gradually evolving into a national bourgeoisie whose existence fundamentally depended upon the state help, nomadism began to disappear altogether and the domestic agriculture gradually began to give way to an intensive agriculture that slowly integrated into the money economy dispersed by the state, the older landowners and tribal leaders were able to utilise the fruits of their support with the ruling bureaucratic elite, and in cities the influence of the *ulema* began to be replaced by the increasing crowd of the civil servants, professionals and intellectuals. But, all of the members of those groups were part of the older society who were internalised the tribal principle as the ethos of social organisation.

For the groups that had close relations with the state controlled by the ruling bureaucratic elite the transformation from older ethos to the modern one was rather a smooth process. They adopted themselves relatively easily to the new situation but in varying degrees according to the level of their dependency on the state resources, the power they were able to command independent from the state intervention, and by their geographical proximity. The bourgeoisie was culturally closer to the bureaucratic ruling elite and most of the time powerful enough to ensure its demand to be heard by the state. For this reason it was capable of taking independent action even in the face of opposition from the state, but since they were the group whose culture the ruling bureaucratic elite aspired to (after all the bureaucratic elite had made the revolution to be able to establish bourgeois ethos in the country) there could be no serious clash between the state and the bourgeoisie. The landowners, as the other partners of the bourgeoisie had strong connections with the bureaucracy and in rural areas acted as

the local representatives of the state and the PRP. But they were powerful enough to maintain their existence even against the wishes of the state bureaucrats, for a greater portion of their power was derived from the local social connections they could command and located in distant places where direct control of the state was an impossibility. During the War of Liberation they were the real agents of the leading bourgeoisie in mobilising the otherwise disinterested and tired peasantry. Since they were deeply rooted in the local society they shared the social ethos of the local peasantry that was basically the tribal and in that they diverged from the ruling bureaucracy. The ideals of modernisation meant nothing for them and they tried to benefit as much as from the state help as long as the partnership with the state continued without any serious problems. As for the increasing mass of civil servants, professionals and intellectuals, indeed it was the state who created them to be utilised in its service. Since they were mostly concentrated in cities as the local and official agent of the state they were integrated into the state machinery with a limited access to the decision making mechanisms. Their education (if not cultural background) was the same as the ruling bureaucratic elite and therefore shared the same cultural values with it. Being located in cities and increasingly sucked into the money economy with the help of the state salaries they became severed from the older social ethos and began to create the true culture of the modern capitalistic society as the future most crowded class of that society.

On the opposite side of the equation stood the alienated masses of the peasantry, *ulema* and town merchants and artisans who could not find a place for themselves in the newly forming society and continued to cling onto the older tribal ethos that functioned as the basic principle of social organisation inside their world from the beginning. As for the working class, there was no place for them either despite they began to constitute a part of the urban population and became a part of the market economy. They still retained their older societal ties with their original local communities

and kin groups as a means of securing their lives in times of crisis due to the insufficiency of the state backed social security institutions established for them. Besides, even though the working class showed a considerable increase between 1923-45 (from 20-30.000 to 250.000) numerically they still constituted an ignorable portion of the population due to the low level of industrialisation in the country (Tanör, 1999: 336).

When the land reform policies of the PRP government began to be a threat to the economic bases of the landowners through the mid-forties this picture of the constellation of classes underwent a rapid change. In 1945, the protectionist economic policies adopted by the government during the years of the World War II and the following promulgation of the Wealth Law and the Bill of Land Reform and the Bill of the Nationalisation of the Forests turned out to be the crucial points of cleavage in the previous alliance of the ruling bureaucracy, bourgeoisie and the landowners.[5] The bourgeoisie and landowner who that took part in the ruling coalition began to feel uneasiness against the government policies that tried to extent the Republics' social base to be able to keep the 'nation' under the growing tensions in the lower recesses of the society. Thus, starting from 1940s the bourgeoisie and landowners "started to search for a government that had more respect for the private property" (Tanör, 1999: 336). The economic crisis of the War years had destroyed the economic bases of the urban middle strata. The merchants and artisans were ruined under the economic pressures arising from the ensuing inflation and the conditions of the civil servants began to deteriorate.

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[5] For a discussion of the effects of the Wealth Tax and Law of Land Reform see Sencer (1971: 185-192).

These tensions also find their repercussions in the ranks of the ruling PRP. The dissolution of the initial alliance with the bourgeoisie and landowners left the party without any popular support. During the long years of the one party rule the landowners played an intermediary role between the state and the peasants trying, but with the dissolution of the coalition now they stacked the channels of communication between the central state and the rural population leaving the PRP alone in the rural areas who was forced to depend heavily on the only channel the may re-establish the relations of the party with the peasantry, namely, the village institutes. The loss of popular support compelled İnönü who became the absolute leader of the party as the 'National Chief' after Atatürk's death in 1938 to pursue more populist policies to regain, at least some part of the lost support of the masses whose consent to government began to have an impact on the legitimacy of the rule of the rules and given the collapsed economy and increasing grievances of the masses İnönü choose to adopt a pro-democratic policy as a part of his efforts to regain the public and began to give the signals of the oncoming multi-party political regime by taking tours in the country, tolerating opposition and supporting the liberal wing within the PRP against the conservative revolutionaries. Finally, under such pressures repeating the pattern of Atatürk, İnönü, the President of the Republic and the all-powerful 'National Chief' of PRP, announced from the radio in a critical speech in 1945 that the conditions in the country are now ripe for the implementation of the muli-party political system for that the republican political regime was well establihsed to tolerate the existence of opposition parties and mentioned "the possibility of the foundation of another political party" (İnönü, 1946: 395; Eroğul, 1992:15).

8.2.1 Democratisation under the Multi-Party System

Finally, starting from 1946 the young Republic took the last step and decided to give way to free elections into which more than one party were allowed to participate,

especially the governing People's Republican Party (PRP) and its major rival Democratic Party (DP). The foundation of DP was the result of the split between the deputies of the PRP based on the growing dissatisfaction of the landowners from the existing regime. After severe discussions on the Bill of the Land Reform four representatives of PRP resigned from the party and a few days later founded the Democratic Party in 1946, Celal Bayar leading as President. The newly founded opposition party, being itself the representative of the great landed interests in the parliament quickly attracted the support of the other classes which were increasingly dissatisfied with the dictatorial one-party rule of PRP. The bourgeoisie, landowners, peasants, petty merchants and artisans of the towns, tribal leaders all flooded into the ranks of DP which, under these influences, showed a rapid development and began to reflect the traces of tribal ethos that remained within the majority of the population who were excluded from the circles of power under the rule of PRP. The rapid allegiance of the peasantry to the landowners with whom they had to have antagonistic class relations and from whose hand they suffered most since the initial sedentarisation during the Ottoman times deserves some attention here, for it points to the power of the shared tribal ethos in the quick formation and dissolution of the alliances.[6]

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[6] A contrary argument was suggested by Sencer (1971: 230-31) to explain this paradoxical situation. According to his view, which is rather based on economic considerations, the reason for this development was the relative improvement of the economic conditions of peasantry with the help of foreign aid as well as the DP government's intensive focus on the agricultural development policies. Yet, if one thinks that this shift of alliance on the part of the peasantry took place *before* the DP's coming to power in 1950, the convincing power of the argument suffers serious losses. In contrast to the speed of this alliance, for example, the urban 'civilised' masses who became an integral part of the socio-political system established by the Republic could not react to the changing situations so quickly and continued to keep

In this connection, it is also important to remind the inability of PRP to establish direct contact with the rural population. It seems that with the removal of the assistance of the land owners the PRP had lost its most important contact with the countryside. Indeed, the gap between the juridico-political ethos of the republican elite and the local rural population was so great that, Velidedeoğlu (1973: 371) did not hesitate to criticise the members of his own party in one of his newspaper articles in 1947:

> Some higher bureaucrats see the [local] people of the places that they are appointed [to serve] as if they are a foreign people or even people of a colony, rather than the nation among which they rose to power. We could not incite them to work amongst the people together with the people.

In addition, it seems that the enthusiastic efforts of the government to implement its modern laws (especially the Criminal Code and the new Civil Code) in the provinces, let alone its enforcement of the harsh oppressive measures against the religious and ethnic insurgent elements among the rural population during the early years, in such a way that was never seen before, contributed further to the estrangement of the rural masses and the PRP rule. It was, perhaps, for this reason that the later governments and judiciary tried to regain the hearts of the urban population by implementing supportive policies in agriculture and by softening the implementation of the prescriptions of the laws which concerning most the lives of the peasants such as family pride, blood feud, sexual chastity, valid marriage, status of the illegal children, etc. According to Örücü (1996: 94),

> The fundamental problem here [with the project of modernisation through social engineering by the reception of laws], however, is one of discord between the social systems and the official formal legal system. The transplanted formal legal system does appear to be successful in spite of popular support for the Islamic religion. This can mean one of three things: that a formal legal system of the type is

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their loyalty to the revolutionary ideals of the Republic as it was shown in the 1960 coup.

> sufficiently independent of the social and culture systems to exist whilst maintaining a high degree of dissonance with the central cultural values, that the formal framework is flexible enough to accommodate the diversities, or that the formal legal system is marginal to the people who continue to live according to their own rules, whatever the formal legal system.

Unfortunately, the worst of the alternatives presented above seems to be the case. The third alternative, suggesting the indifference of the masses to the dictates of the formal legal system was most likely the case in the Turkish example. And the diversity between the formal prescriptions of the transplanted modern (foreign) laws and the social ethos living in the society was tried to be eliminated by setting to work the mechanisms of equity that ultimately represented a shift in the meaning of law, frequent amendments of the laws, frequent amnesties, and even sometimes, by staying inert and assuming an indifferent attitude.[7]

8.2.2 Towards 1960 Military *Coup d'Etat*: Putting the State Back on its Feet

The struggle in the mid-40s between the alliance of landowners, bourgeoisie and peasantry on the one hand, and the ruling republican bureaucratic elite of the PRP now only supported the civilised urban masses on the other was to reflect itself on the juridico-political plane as the arbitrary restriction of the democratic and civil rights as well as the political pressure exercised on the judges to effect their decisions. Interestingly enough, when DP was first formed, it presented itself as the defender of

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[7] For the importance of the discretionary power of the judges in dealing with the legal problems related with the practices originating from the social ethos (both in criminal and civil cases), see Örücü (1996).

the democratic and civil rights. The texts of the 'Quadruple Declaration' (*Dörtlü Tahrir*) of 1945 and the 'Pact of Liberty' (*Hürriyet Misakı*) of 1947 written by the founders of DP emphasised the indispensability of the civil liberties and rights against the arbitrary rule of the one-party dictatorship. Yet, when DP came to power after the first free elections in 1950, it will prove that it was not the party that would struggle and stand for the protection of these rights and one of its first movements became the liquidation of the state bureaucrats most of whom had identified themselves with PRP's one-party rule.

Towards 1954 the optimistic wave created by the support of the foreign (Marshall) aid was over. Most of the resources acquired through foreign debt were invested in agriculture and wasted in an unsystematic fashion, and the corruption of politicians and bureaucrats became a real problem as well as advancement of partisanship and patronage relations in the appointment and promotion of the state cadres. In addition to these, Velidedeoğlu (1972: 150-56) characterises the DP rule between 1950-60 as a period of government's distancing from the intellectuals and concessions given to the masses who did not know where their real interests laid". However, especially the increasing inflationary trend that began to disturb the conditions for the advancement of the industrial production and state restrictions brought about by the DP government to be able to control the economic developments began to disturb the bourgeoisie. So that, at about 1955 we observe a new constellation of the social forces started to take shape with bourgeoisie drawing its support from the landowner back and seeking the support of now highly democratised PRP that had lost much of its jacobin revolutionary vehemence during the humiliating years in opposition. Indeed, by such qualities of PRP, it could not be expected that it could satisfy the demands of the bourgeoisie even though one may think for a moment that the motive behind this new friendship was to rise the flag of democracy together against the increasingly despotic DP rule. It seems more plausible to think that the constitution of the Commission of Investigation in the parliament in April 1960, the promulgation of the Law of National Protection (*Milli*

Koruma Kanunu) on 6 June 1956 together with other measures taken by the DP government directed to control and limit the activities of bourgeoisie were the actual motives of bourgeoisie in this new friendship. On the part of PRP, the need for the DP government to oppress the opposing PRP was becoming more urgent and for this purpose it did not hesitate to enact new oppressive laws in the parliament that was under its control. However, the enforcement of such laws met with resistance from some courts that insisted upon the superiority of the Constitution as the mother law and emphasises the contrary nature of such laws to the prescriptions of the Constitution (Tanör, 1999: 335-57). Such a resistance from the judiciary led DP to develop an active reaction and increased its pressure and intervention onto the court decisions. One of the most serious results of this development was the enforced retirement of some judges throughout 1955-7.

> In this period, since the professional careers of the judges, like those of other state servants, were regulated by the Law of Retirement Office [*Emekli Sandığı Kanunu*], nr. 5434, the prohibition of sending the judges to retirement which was the most important safety precaution for the professional security of the office of the judge could not be put in effect, but on the contrary, this law was used in the hands of the government against the judiciary. Indeed, the government of the period [DP], by amending Art. 39(b) of the Law of Retirement Office with the Law, nr. 7242 in 1953, decorating the government with the authority of sending civil servants who completed their 30 years in service to enforce retirement regardless of their age "on the basis of necessary considerations", sent may trial court judges to enforced retirement on the basis of this amendment (Ünal, 1994: 72).

As it was expected the DP rule between 1950-60 was a period during which the depreciation of the initial ideals and strategies of the revolutionary founding elite went further under the pressure of the Anatolian landowners and villagers until the 1960 *coup d'etat*. This attitude coupled with DP's elimination of even the lower ranking civil servants on the pretext of their PRP inclinations completely changed the profile of this segment. While these policies alienated the 'civilised' urban masses who still felt some affiliation to the original ideals of the Republic from DP policies, they also gave way to

the penetration of hitherto excluded masses into the state organs. This last phenomenon was especially important for it marked the establishment of the first direct contact between the Republic and the majority of the population who lived until now encapsulated inside their own universe still regulated by the rules of the tribal *töre* and away from the state intervention as much as possible. For, throughout the Republican era the meaning of the central state since the Ottoman times did not change for them, oppressing the villagers, supporting the local notables or tribal leaders, extracting taxes, exerting its own rules, etc. Now, for the first time, with this change in the composition of civil servants and state employees brought about by the partisan policies of DP rule, and the massive migration from rural to urban areas under the pressures of the economic difficulties arisen from the unsystematic and inflationist policies of DP and the increasing oppression of the landowners, the 'masters of the nation', as they were called once by Atatürk could finally meet its state in its abode. Indeed, this was the most important step in the democratisation of the society having far reaching consequences for the future composition of the Turkish society that the formal enactment of the laws that were tried to be used in the hands of the executive either to oppress the masses, extract more revenues to be able to meet the financial deficits of the state budget, or give the society a desired shape as a part of the methods of social engineering.

Thus the composition of the hitherto more or less homogeneous urban population began to change as expressed by the 'civilised' urban folk when saying they say, "cities are invaded by peasants!", "There is no longer anyone left in İstanbul other than peasants", etc., etc. For the flood of mass of peasants into the cities filled the urban social scene with pictures taken from peasant simplicity and ignorance, from 'primitive' tribalism, and from religious intolerance and fanaticism overcoding and hiding from the eyes the tribal nature of desired theocratic state. This As for the 'original' urban population who by now civilised in Western ways and felt themselves as *the* genuine

urban folk and generated the genuine modern bourgeois ethics and morality, as we said they were alienated from DP policies and some of them became the firm supporters of PRP that gradually displayed populist and slightly leftist overtones under the DP oppression. Indeed, it was a way of re-meeting the peasant in the cities on the part of PRP that resulted in the political unrest during the later part of the 60s and 70s that also supported by the cleavages in the urban centres due to the disruption of the original homogeneity of the urban population that criss-cross the society along the tribal, ethnic, religious, local, political, economic, and cultural affiliations. One surviving peace of these cleavages was the socio-local differentiation of the urban population as those who are urbanised and dwell in the parts of the cities where municipal services are regularly supplied and their property rights recognised in contradistinction to those who retained their allegiance to pre-modern affiliations like *töre* and Islamic faith and try to live in shantytowns that they erected by infringing the capitalist right of private property where, until recently it was difficult to find a trace of the municipal services. Only a few of them could find proper jobs either in the industrial sector or in the state service. Most of the newcomers being unable to find 'decent' jobs composed the reserve armies in the cities guaranteeing the supply of cheap labour, and in the mean time, kept themselves busy with the transitory jobs in the informal sector. Those who were witty and brave enough either became the cheap soldiers of the Mafia-like organisation or joined the crowding ranks of the militant political groups both of which were, indeed, hiding behind the surface of their appearances the decisive influence of the tribal *töre*.

Such a split of the population was not a new phenomenon as we have traced its roots deep into the Turkish social history. But, under the DP rule during the 50s it assumed a new meaning generated by this face to face confrontation. It was the unintended but a thorough process of democratisation that would sack the population into the domain of central politics with increasing numbers. However, the participation of the great

numbers into politics did not assume any form that the founders of the Republic could anticipate. Originally, they wished to awaken the civil consciousness within a society that would be composed of individuals emancipated from their formal, pre-modern societal ties. Theirs was an idealism that envisaged the formation of an independent and harmonious nation, in which social co-operation based on the increasing division of labour prevailed overwhelming the emergence of serious social cleavages such as class differences, ethnical or religious divergence, etc.

Even though this dream came to an end at an earlier stage in the life of the Republic under the harsh conditions of the war economy during the one-party rule of PRP when Kemal Atatürk was still alive, it was almost completely deserted even by its former adherents during the turmoil of the political struggles in the decade that passed under DP rule. Indeed, it did not take too long for the ruling elite that the original ideals of the Republic did not corresponded much to the wishes and desires of the *real* forces operating in the society as it was exemplified by the adoption of the populist policies to the disadvantage of its original ideals to be able to gain wider popular support. It seems that with its requirement to intervene into the increasingly details of the daily lives of the individual by the enactment of detailed laws and regulations, forcing the society to obey their prescriptions coupled with the methods of policing and military oppression. This strategy that was easier to pursue and justify during the turbulent years of the liberation and state foundation has turned out to be difficult to follow during the unintended democratisation of the society that started in the mid-40s under the deteriorating impact of the war conditions. It was this tendency that carried the DP to power in 1950. But, contrary to its initial declarations, DP had shown that it could not be any other than the society among whose ranks it rose to power, and despite the initial rhetoric of freedom, democracy, civil society, human rights, etc., could not escape from adopting the very policies of oppression with the help of the law, police, and the military (but not until 1972). Perhaps this may explain why the lawyers, bureaucrats, police officers, and

military officers were so densely represented among the ruling elite of the country throughout all these years (!).

The reaction of the true believers of the Republican faith came with the intervention of the middle and low rank military officers supported by the urban middle class 'Republic generations' including a greater portion of civil servants, students, intellectuals (who were disappointed with the advancing democracy which was not to be realised in the Western idealistic sense) but excluding merchants, artisans and professionals (Landau, 1979:10). For, the participation of the larger masses, which were not yet subjugated, in to the politics and the existing decision-making mechanisms could not and did not assume the deferential participation of the individual citizen, but rather, the traditionally organised and careless participation of a horde of tribesmen. It was thought in the liberal theory of democracy that the recognition of the right of free and general vote should create individuals who would make their political preferences according to the dictates of their reason and conscience by this way ensure the perpetuation and health of the modern democratic state.[8]

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[8] There were innumerable examples naively expressing this view, but it will suffice her just to cite one example to show the spirit of optimism in relation to the role of the free elections in Turkish politics. Ahmad (1994: 155-6), interprets the 1950 elections under a very optimistic light:

> When they saw that the state official were not trying to justify the party in power, the voters realised that a crucial historical turning point was reached. They gained courage and voted according to the voice of their own conscience, and gave an end to the Republican regime that had lasted 27 years.

It is interesting to see how such and optimistic tone of voice could be kept at the end of the 20th century.

In contrast to this ideal, however, the large masses of peasantry was bounded and led by the local and/or tribal leaders who supported DP and unhesitatingly followed their suit.[9] Or, in other words, it might be better to say that what those masses of peasants understood from politics was not the same thing as what the urban citizenry and former bureaucratic elite understood from it. Theirs was rather a form of 'modernised' tribal politics in an age where tribal relations still survived despite the gradual disappearance of the actual tribes as autonomous political entities.

The duty of making the 1961 Constitution completed by the Republican idealist intellectuals who were appointed to the task by the idealist middle and lower rank army officials who constituted the Committee of National Unity as the main legislative authority. For this reason, despite the anti-democratic experiences of the near past and present, the 1961 Constitution aimed at the extension of the democratic and civil rights, the sphere of the rule of law and the institutionalisation of the social justice. Thus, as a formal legal *text*, the 1961 Constitution became the most democratic constitution ever made in Turkey. The Constitution was marked by its specific emphasis on two things that did not attract much attention in earlier constitutions. Firstly, based on the bad experiences of the past during which many laws were complained to be contrary to the Constitutional prescriptions, the '61 Constitution was founding a supreme court with the name 'Constitutional Court' whose duty was described as to control the constitutionality of the laws enacted. It was thought that, in this way, the arbitrary legislation of the governments that control the majority of the chairs in the parliament would be held in check. Secondly, since the onset of the process of democratisation in the second part

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[9] For the social bases of the PRP and DP at that period, see Landau (1979:2-8) and for discussions on the actual dynamics of the voting behaviour of the masses in Turkey, see Varol, (1989) and Yıldırım (1995).

of the 1940s after the collapse of the economy, there was a certain social democratic concern for the 'even' distribution of wealth among the intelligentsia. Under the harsh rule of DP between 1950-60, the inflationist policies caused even more unequal income distribution within the society. While the grievances of the middle and lower classes began to increase, the PRP began to adopt a softened version of leftist policies called by İnönü as 'left-of-the-middle' policies. Thus, it was not surprising that when the intelligentsia (mainly professors of law) set out to make the new constitution, this theme of social justice was to be introduced into the text of the '61 Constitution as to became one of the three defining characteristics of the Republic (Ahmad, 1994: 187). From now on, in theory, the Turkish Republic was also a social state as well as being a secular state governed by the rule of law (state of law - *rechtstaat*).

But, the dilemma of the early elitist modernisation continued in this period as well and despite the highly democratic character of the new Constitution, the applications tended to be oppressive and kept deteriorating the significance of the modern and democratic text of the Constitution. The former ruling party DP was shutdown and its leading members mercilessly persecuted as the enemies of the modernist Republic. A brochure printed during famous Yassıada trials in 1960 accuses the leaders of the overthrown DP government in the following words:

> The political power [the executive], which is supposed to represent the ideas of the State, law, justice, morality, public interest and public service, and to protect the public rights, has, unfortunately, lost this character since mounts or even years and turned into a power that represents personal power and ambitions as well as estate interests. The State power which should be a social power bound by the law before everything else, was turned into an instrument of the realisation of personal ambitions and influence. For this reason, political power lost its all moral connections with its army as the main state power, its judiciary and bars, civil servants who were loyal to their duties, its universities, the press representing the public opinion and with other social institutions and powers, and turned into a enemy of the essential and fundamental institutions of the State and the Atatürk Revolutions which play an extremely valuable and important role in Turkey's

> achievement in the acquisition of the place that she deserves as a civilised [modern] state within the international community (Yassıada Broşürü, 1960, 17-18).

As it can be inferred from the tone of the brochure, the results of the Yassıada Trials were a strong blow on the DP leaders and after a short trial (that lasted about a year) 15 DP members were sentenced to death, 32 to life imprisonment and others to prison for 4-15 years in September 1961. While most of the death sentences were amended under the pressure İnönü, the leader of PRP, the sentences of the former Prime Minister Adnan Menderes, and two DP ministers Fatin Rüştü Zorlu and Hasan Polatkan were executed. However, it did not take long that the military government began to loose its grasp and allowed the foundation of Adalet Partisi (AP - Justice Party) by the former members and supporters of DP in February 1961 and became its heir in the political arena. In the elections immediately following the Yassıada Trials, however, the results show clearly that the public support for DP was still strong constituting the greater majority. For the total votes of the parties that claimed the heritage of DP (AP, Republican Peasant Nation Party and New Turkey Party) got about 62 % of the total votes. Indeed, this was a defeat for the military revolutionaries and the PRP that represented the modernist republican policies of Kemal Atatürk, because, contrary to all their expectations, their share in the public support could not exceeded 37 %. Despite its limited public support in comparison to the right votes, under the pressures of the military, the PRP formed the new civil cabinet by forming an enforced coalition with AP. However, the PRP and AP rule did not last long (six mounts) and AP formed a new coalition with the other parties. Thus, the long rule of AP that would interrupted with two military interventions and short periods of PRP started. This was, in a sense, also the defeat of the modern ethics before the tribal and religious modes of ethics.

The years between the two major military *coup d'etat*s in 1960 and 1980 went in the dust and turmoil of the newly discovered political activism arising from the already discussed cleavages brought about the process of democratisation. However, under

this dust there appears the significant development of the expansion of the economic field initiated by the cheap and abundant supply of labour brought about by the massive migration of peasants into the cities. The growth (however unhealthy) of the cities helped the expansion of the national market, and thus the development of industrial production while the former peasants became the suppliers of cheap labour. Yet, it was in this period that the voices of the workers began to be heard from the heights of the political power structure.

Between 1960-80, Turkey was able to insert a long period of martial law and a minor military intervention brought about by the political instabilities and intense hostilities amongst the 'rival' political parties and fractions. The 1980 *coup d'etat* was largely due to a legitimacy crisis as a result of the incessant political instability in the country. The better part of the political activism was not content with the limits imposed on the regime by the state and leaked into the illegal ways of the political practice, which was not acceptable for the defenders of the 'Holy Republic' who were appointed to the task by the Eternal Chief, Atatürk. Indeed, the real *coup d'etat* had been already realised with the economic decisions taken by the civil government on January 24, 1980. Those decisions represented a total negation of the old economic premises on which the Turkish social formation based hitherto, and gave Turkish economics an utterly new direction. Till then the Turkish state was based on nationalistic principles and followed, or rather, tried to follow a more or less protectionist economic policy. But with the declaration of January 24 economic decisions by Turgut Özal, the whole picture changed in terms of both practice and ideology. Before January 24, 1980 nobody could dare to follow such a 'realistic' economic policy, enforced, in fact, by the international

finance interests.[10] This caused a social shock in the Turkish society. In his Memoirs, Evren, the leader of the junta of fives of 1980 takeover, relates the crisis between the two most eminent political party leaders which came up due to the January 24 decisions as follows (1990:354):

> In order to explain and defend these decisions which were taken, Demirel held press conferences in there days one after another. Ecevit who lied down at his home due to sickness immediately stand on his feet and began to attack on the decisions. He went so much further in his speeches that he claimed that Demirel tried to change the regime and asked the workers to stand up for their rights and do not allow this change. He said that this new regime was similar to those which can be encountered in the countries of South America and thus increased the political tension which, of course, we hoped, would diminish.

In this junction there lied a critical point for the future direction which the Turkish social machine would assume, as it was encountered in all the critical junctures of Turkish history (a process is always composed of lines of break as well as lines of continuity). The Turkish polity, indeed, has always allowed itself to be changed. It began as a nomado-tribal state, and in the process of metamorphosis transformed itself into a despotic state gradually to the point where the dominant characteristic of the state begin to become capitalist through the double processes of deterritorialization and reterritorialization. The above mentioned exigencies were mainly the confrontation of the various forces in this process. But, it will be a mistake to assume that these forces were the re-emergence of the same components of the previous conflicts. Rather, each critical point has its own peculiar (unique) forces struggling with each other and letting themselves being transformed (not only in form but in essence too) to another force.

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[10] For the importance of the 24 January decisions and Özal's liberal policies in the Turkey's economic transformation in 1980's see Büber and Söğüt (1993: 53-55).

The January 24 decisions were the decisive and ultimate intervention of capital into the organisation and functioning of the state machine. While it caused a much more abundant flow of capital both inside an inter-societal machinery, it also brought about the danger of system's total collapse. The words of Evren in *Memoirs* express this point very clearly. Here Evren develops a monologue with Bülent Ecevit, the leader of PRP, time's main opposition party showing increasingly overt leftist tendencies (1990: 354-55)

> It is of course his [Ecevit's] right not to be pleased with the model and criticise it. Indeed the two parties have different programmes. But why to call the whole mass in the name of criticising, to resistance, in other words, to resurrection, why to resemble the country to south American countries? In a country which is boisterous with anarchy, and despite the fact that the problem of anarchy could not be solved even under the rule of his government, is it good for a leader of such a big political party to encourage the new anarchy centres to action?

A little bit later in the same place, he draws the limits of the political system in which he wishes that Ecevit supposed to act within (Evren, 1990: 335) and gives him wise advises: "let the new government realise its economic policy. Give it a little time. After enough time has passed, begin criticising. But yet criticise without inciting the workers to resistance." The growing tension just before the *coup d'etat* in 1980 between the two biggest parties, AP and PRP was one of the main reasons which brought the Turkish political system into the threshold of a total collapse. Those parties were the main sources of legitimacy functioning in the Turkish social machine and bestow the regime the facility of a common acceptance and obedience from the wide masses. In September 12, 1980 at 4 am. the opening sentences of Evren's press announcement was read in all the TV and radio stations (Evren, 1990:546)

> Great Turkish Nation;
>
> As we all have seen in the recent years, the State of Turkish Republic which Great Atatürk entrusted to us and which constitutes an inseparable whole with its country and nation, is threatened by insidious assaults, both mental and physical, directed

to its very existence, regime and independence due to the incitements of indigenous and foreign enemies.

The state is rendered ineffectual in its main organs, Constitutional Institutions are in contradiction with themselves and rendered silent, and due to vicious quarrels and with their uncompromising attitude, the political parties could not achieve the unity and solidarity and did not take the necessary measures which would save the State. For this reason the separatist and destructive centres did increase their activities and thus the citizens' security of life and property is endangered.

[...]

Great Turkish Nation;

Under these conditions, the Turkish Armed Forces decided to fulfil the duty of watching and protecting the Turkish Republic, which is given by the law of Internal Service, in the name of the Great Turkish Nation, within the chain of order and command and by command, and seized the country's total governmental power.

The target of the operation which is attempted is to protect the unity of the country, to facilitate the national unity and solidarity, to prevent a probable civil war and enmity among brothers, to re-establish the authority and the existence of the State and to eliminate the causes which hinder the functioning of the democratic regime.

Whatever the real reason might have been what was implied in this text was, indeed, the awareness of the danger of the dissolution of the intact state power and an covert acknowledgement of the existence of some forces missing outside the axiomatic of the State. Social forces had already developed up to a point where they exceeded the limits of the juridico-political system. 1980 power take-over was an attempt to put the State back on its track, on its original system of modern idealistic codes (the Great Turkish Nation, the State of Turkish Republic which constituting an inseparable whole with its country and nation, independence, duty of watching and protecting the Turkish Republic, unity of the country, national unity and solidarity).

CHAPTER 9

CONTEMPORARY TURKISH JURISPRUDENCE

Juridically, the major problem of the later *coup d'etats* was to shrink down the limits of the civil rights and emanating individual freedoms that were drawn by the 1961 Constitution to which the leaders of the Justice Party (AP), the natural heir of the closed DP, referred as a 'oversized mantle for a tiny body'. Perhaps since the 1980 junta did not find the tailorship of the preceding 1972 junta, wanted to deliver a decisive blow on the 1961 Constitution and abolished it altogether. Again, but this time higher rank officers invited the professors of law to sew a shrink-to-fit constitution instead of the older one. Interestingly, while the 1961 Constitution could get a limited approval from the population (61.5 %) in the first referendum in Turkey, the 1982 Constitution was approved by the great majority of the voters who rushed to the ballots and said a big yes! (about 98 %). This was an interesting result, or perhaps again the good tailorship got its well-deserved prize for its sewing mastery from the exhausted masses in the toils of the intense political instability prevailing in the country *just* before the intervention. Otherwise the 1982 Constitution shrunk down the extent of civil rights and decorated the executive with much power over other institutions of the state. And it was this Constitution that now determines the confines and basic principles of the contemporary Turkish jurisprudential system.

9.1 The Constitution of 1982

According to the system of the contemporary Turkish Constitution the doctrine starts with the qualifications of the state and then proceeds to the topic of fundamental human

rights (and obligations). As we have seen, this is convergent with the priority of the political organisation over an abstract, universal man particularly in the Turkish history, if not in the histories of other societies. While the history of the notion of the political sovereignty in the Turkish jurisprudence is as old as the known history of the Turkish society, we can trace the origins of the notion of an abstract individual having certain rights only emanating from his own person as a living and equal part of the body politic to 1876 when the first constitution of the Ottoman State was decreed. Since its evolution in the Turkish jurisprudence went hand in hand with the modernisation (Westernisation) of juridico-political structure it was not surprising that first it was 'sensed' in the Imperial Edict of the Rose Chamber, than strengthened through the adopted laws of the 19th century, and finally appeared (however vague) in the *Kanun-i Esasi* of 1876.[1]

Following the first *Kanun-i Esasi* of 1876, the historical transformation of the Turkish legal structure went further decisively in that direction as it acquired its most brilliant form in the Constitution of 1961. However, the major constitutional amendments and finally the abolition of the 1961 Constitution in 1980 as well as the frequent and long lasting martial law and emergency applications, all were reversals in the expansion of the fundamental rights. Despite this fact, Turkey had participated into the foundation of the United Nations in 1945 and applied to the Organisation of European Economic Co-

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[1] Even though İnalcık (1996d, 356) tends to see this concept in the recognition of the sultan his duty of treating his subjects equally and of protecting them from any injuries, for us, this recognition was only the recognition of the duties of the sultan as an integral part of his office of the sultanate. However, from the tone of the Edict and the conditions surrounding its declaration it is impossible to 'sense' the blurry penetration of the concept into the Ottoman jurisprudence.

operation in 1948 when it was founded. In this way, the ideological preferences of Turkey in favour of the Western world acquired a legal meaning as well. Since then Turkey continued to develop strong economic and cultural ties with the Western countries and was a partner (even though with some reservations) in of most of the international treaties that oblige the government to respect and expand the extension of fundamental human rights that became the basis of international lawmaking.[2] Especially after Turkey's participation into the Convention of the Protection of Human Rights and Fundamental Freedoms in 1950 that founded the European Court of Human Rights, the relationships between Turkey and European Community began to acquire new dimensions and delegates from various European countries started to frequent the country to see the condition of fundamental human rights. As expectedly, this development increased the pressures from the European Community and the number of cases that condemn Turkey for the infringement of human rights increased.

Thus, under such conditions (and given the loyalty of the members of the military junta to Atatürk's Revolutions, and in conformity with the Turkish constitutional history the fundamental human rights and freedoms occupied a major place in the written 1982 Constitution while the 'unwritten' application was completely in the contrary direction. However, this time it seems that some parts of the unwritten Constitution was also included in the written one. According to Üskül (1991: 42), the 1982 Constitution includes two constitutions at the same time one of which is the constitution for normal conditions and the other one for extraordinary (emergency) conditions. The Constitution defines the concept of the fundamental human rights in Art. 12 (GA, 1984, 14) as 'the untouchable, indispensable and inalienable rights and freedoms that are connected to

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[2] For the international treaties and conventions that concern the extension of fundamental

everyone's personal being" but in the immediately following article (GA, 15) added the conditions of the restriction of those 'indispensable' rights:

> Article 13 - Fundamental rights and freedoms can be restricted in conformity with the letter and spirit of the Constitution for the purposes of protection of the unity and integrity of the State with its country and nation, national sovereignty, Republic, national security, public order, general tranquillity, common good, general morality and general health as well as the special reasons referred in the related articles of the Constitution.
>
> [...]
>
> The general grounds of restriction mentioned in this article are valid for all of the fundamental rights and freedoms.

Thus, the 1982 Constitution became the subject of severe criticisms for its restrictions of human rights and some fundamental freedoms and came to be known as an 'anti-democratic' constitution of the military democracy (Üskül, 1991; Parla, 1995). During 1980s the vehemence of the urban masses for political participation between the years 1945-1980 was over now and the 'cooling' effect of the harsh applications of the military junta was decisive in this result. According to the 1987 human rights report of Helsinki Watch (State of Flux, 1987: 2)

> in the years immediately following the 1980 coup in Turkey some 178.000 were detained by the police for questioning; most were brutally tortured, and many were sent to prison to await the outcome of mass trials that dragged on over a period of years. Prison conditions were deplorable, resulting in frequent hunger-strike protests by prisoners which sometimes resulted in deaths. In the early fall of 1983, the prospects for human rights in Turkey seemed ominous indeed.

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human rights, see Pınar (2000).

9.1.1 Some Basics of Jurisdiction

9.1.1.1 Rule of Law

The second article of the Constitution defines the Turkish Republic as "a democratic, secular state governed by the rule of law" (Polatcan, 1989: 9). By this, the Constitution acknowledges the necessity of obliging the law in state administration. According to the decision of the Constitutional Court dated 29.1.1980, Prin. 1979/38, Dec. 1980/11, the state governed by the rule of law is described as follows (Polatcan, 1989: 29):

> The state governed by the rule of law means a state that respects the human rights and protects these rights, that establishes a jurisprudential system that follows the principles of equity and equality in social life, and obliges itself to maintain this order, that follow in all its actions the legal rules and the Constitution, and that puts all its procedures and actions under juridical control.

In short, the assumption asserts that all the decisions and actions of such a state *ought to be* under the restriction and control of the laws and judiciary. And it seems that the state, in the persons of its executive officials should accept the rule of law as the basic principle of its jurisprudential doctrine. But of course, the formal acceptance of the rule of law and enactment of laws are things quite different than their actual operations in the field. To be able to assess the conformity of the state decisions and actions and eliminate the effects of those which are not in conformity with the laws, there has to be laws at the first place whose authority is derived from the parliament in democratic systems as the embodiment of the *general will*. For this reason the Parliament as the legislative organ of the juridico-political system stands as the major fountainhead from which the laws pour down on the society. Again, according to the theory of the separation of powers it should be immune to the possible pressures coming down from the other constituent powers of democratic systems. Furthermore, since it acts in the name of the general will one has to have an authority decorated with the necessary

powers and guarantees. Indeed, what was aimed by the doctrine of the separation of powers was exactly the composition of such an authority, and as such, this ideal is carried over to the text of the Constitution: "Art. VII. The legislative authority belongs to the Turkish Grand National Assembly in the name of the Turkish Nation. This authority cannot be transferred" (GA, 1984: 7). Since the Turkish Nation is the real sovereign according to the Art. 6 of the Constitution, the parliament functions as an agent of the nation, according to the theory, it sends back to the nation in the form of laws what it takes from it as the expressions of the general will whether they are in the form of ethical norms, moral virtues, or political ideals. Thus, law, according to the current doctrine in Turkish jurisprudence, emerges as a juridico-political formulation of the general will through the mediation of the parliament.[3] Owing to this intimate connection between the laws and the will of the nation, the laws enacted by the parliament acquire their binding status over all the other organs of the body politic.

In addition, the parliament is decorated with some juridical power restricted to specific cases where the will of the nation is required as the supreme judge. According to Art. 87 of the Constitution, the parliament is authorised to decide declaration of specific or general amnesties, and to approve the capital sentences send by the courts (GA, 1984: 120). Furthermore, with Art. 98, the parliament authorised to carry out parliamentary inquiries and investigations that are originally designed as the prime parliamentary devices of control over the execution but may also function as a procedural step as preliminary investigations that may result in the legal actions of the judiciary (Art. 100).

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[3] By this move, it becomes apparent that the Turkish doctrine gives precedence to statute law over any other form of law by emphasising its formal and normative character.

9.1.1.2 Is the Judge Really Independent?

The second inseparable component of the doctrine of the rule of law is the constitution of an authority that checks and judges over the decisions and actions of the state organs if they are in accord with the enacted laws of the country. Since the executive is thought in the doctrine being prone to the misuse of the immense state power at its disposal (Taninli, 1981: 376), even on the judiciary, the first principle of the judiciary becomes its immunity to the pressures of any other authority. Art. 138 of the Constitution says about the principle of independence of the judges that,

> Judges are independent in their service; and take their decisions according to their conscience by following the prescriptions of the Constitution, laws and the doctrine.
>
> Any organ, office, service or person cannot give commands or orders, issue circulars, make recommendations and suggestions to the courts and judges in the executions of the authority of setting judgement (GA, 1984: 179).

According to this, judges and courts are accepted as independent units protected by the law from any outside pressure, and the execution of their decisions is secured by the same article in the following paragraphs saying 'no one can do that, no one can do this, etc. Art. 141 states that the court trials should be held in public, open to the general observation. However, Art. 140 (§ 6) states that the judiciary is under the authority of the Ministry of Justice in relation to their administrative functions. Even though this article seems to contradict with the preceding article by implementing an executive body over the 'independent' judges, at this stage one may think that even the judges should be connected to and controlled to a body of the state, because in the unitarian, national states the sovereignty cannot be divided. But upon reading Art. 144 (GA, 1984, 186) one may easily change one's mind, for it is stated in this article that the authority of control over the judiciary rests with the same ministry:

> Art. 144. With the permission of the Ministry of Justice the inspectors of justice control the services of judges and public prosecutors if they are performed in

> accordance to the laws, regulations, instructions and circulars (administrative circulars for the judges); investigate if they committed crimes in connection with their service or during their service and if they behave and act according to the requirements of their office and service, and if they deem it necessary, initiate inquiries and investigations. The Minister of Justice may entrust the duty of inquiry and investigation to the hands of the senior judges and public prosecutors.

In the statement of reasons for the same article (GA, 1984: 187) the administrative and juridical control of the judiciary are explained as two separate processes which are connected to the institutions of The Supreme Council of Judges and Public Prosecutors (*Hakimler ve Savcılar Yüksek Kurulu* - the administrative control, thus the Ministry of Justice) and the Supreme Court (*Yargıtay* - the juridical control). According to this, the Supreme Court evaluates the judges decisions from a juridical point of view and grades them according to the precision in their judgements. There seems to be no problem with this for the supervision is done on the judicial decisions of judges from a juridical perspective and the Supreme Court has limited authority to effect the career of a judge in the long run. And since the probability of the establishment of a personal relationship between the supervisor and supervised is minimal, judges can feel themselves safe from this angle as long as they kept being good judges taking right decisions.

But the state of affairs is slightly different in the relationship of the judiciary with the Supreme Council of the Judges and Public Prosecutors (SCJPP) as indeed many complains rise from this corner. The SCJPP is founded by the Art. 159 of the Constitution. According to this, the Council is a highly effective institution determining the professional (not the juridical) careers of the judiciary. The article (GA, 1984: 206) says that

> The Supreme Court of Judges and Public Prosecutors accepts, appoints, transfers, endows with temporary authority, promotes, appoints to the first class the juridical and administrative judges and public prosecutors into the profession; allocates the cadres, decides about those who are not appropriate to stay in the profession, gives disciplinary punishments and forced leave from the office. It decides on the

proposal of the Ministry of Justice about the cancellation of a court, the cadre of a judge or a public prosecutor, or about the alterations of venue of a court.

By the same article the Minister of Justice is designated as the chairperson of the Council. He and his under-secretary who is also the natural member of the Council represent the *superiority of the political authority* over and above the rest of the members of the Council. Even though the other members of the council are elected among the professional members of the judiciary,[4] the superiority of the Ministry over the Council seems to be further strengthened by his under-secretary as the natural member of the Council and the lack of any administrative organ that works under the orders of the Council. It is widely complained by the members of the judiciary that since the administrative functions of the Council are performed by the administrative organs of the Ministry of Justice, the Council feels itself dependent of the good intentions and policies of the Ministry. Thus, it becomes understandable that the Ministry can exercise considerable power on the judges and public prosecutors by using the vast authority of the SCJPP over the 'professional' careers of them while at the same time hiding itself from the attention of the public eye.

As it is continuously and frequently complained (Özgen 1997: 3-4; Selçuk, 1999: 46-49; Alan, 2001: 11-12), that the executive often tries to effect the decisions and activities of the judges and public prosecutors by the threats of sending them to distant places on the pretexts of temporary appointments and investigations and inquiries started by the incitement of the ministry. The Chairperson of the Turkey Bars Union attorney Eralp Özen (1997:4) says,

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[4] Three regular and three alternate members among the members of the Supreme Court, and two regular and two alternate members among those of the Council of State (*Danıştay*).

> In a system where the Supreme Council's [of Judges and Public Prosecutors] own Personnel Directorate is not constituted, and thus the Supreme Council is left in a situation in which it has to negotiate the issues of appointment and promotion on the lists which will be prepared by the Ministry [of Justice] Personnel Directorate which is in hierarchical relations with the Minister of Justice, the possibility of political influence is always an actuality. We witnessed the disadvantages of the non-existence of the Supreme Council's own personnel directorate during the period of the previous government in each appointment list prepared annually. We witnessed the attempts of sending the judges and public prosecutors, who were loyal to the Atatürk revolutions and principles and to the secular character of our State, to exile [to distant places with temporary duties].

The organisation of the SCJPP still remains the same to this day and now and then we read in the papers that some judges are being threaten by appointment to mobile courts or courts in distant places (Uygun, 1997: 10). Another method of putting pressure on the judiciary is, of course, the inquiry and investigations that can be started by the inspectors of the Ministry of Justice, or by the incitement of the Minister of Justice. Mehmet Uygun, the First President of the Supreme Court in 1997-98 also mentions the negative aspects of the actions of a Board of Inspection that is connected to the Ministry and acts according to its orders on the independence of the judiciary. Perhaps, the words of Uygun (1997: 12), the former First President of the Supreme Court, best summarise the real situation of the judges and public prosecutors in relation to the question of independence:

> expecting that the judges and public prosecutors who might have been exposed to all the above mentioned undesirable attitudes [meaning pressures] of the execution, should endure, resist and stay independent despite everything is just to say 'act as a hero' and that no one has the right to ask this.

9.1.1.3 Juridical Unity

Another problem related with the formal structure of the state administration of justice in Turkey is related with the fragmented structure of jurisdiction. The existence of a military and administrative juridical apparatus with its courts and laws side by side the

'normal' judiciary apparatus creates a tripartite structure in the Turkish jurisdiction. The Articles 156 and 157 of the Constitution found the Military Supreme Court and the Military Supreme Administrative Court that deal with the cases in which military personnel involved based on special military laws distinct from the laws that are applied for the general public.[5]

By the side of the military jurisdiction, there exists also special administrative jurisdiction especially determined by a law called the Law of the Trial of the State Civil Servants LTSCS) enacted as early as 1913. The original purpose of this law was, understandably to protect the civil servants from the arbitrary accusations during their service under the Ottoman conditions. According to LTSCS, when a state servant is accused of a crime that arises out of his/her service or during service, all the investigations until the last one will be performed by the state organisation of which the civil servant is a part. Following the completion these investigations, the institution (either the head of the local administration or the boards constituted by the related ministry) may either decide to the dismissal of the charges or authorise the commencement of a criminal action. Such a precaution that originally designed to protect the state civil servants from outside pressure, however, seemingly ended, in practice, to the increasing pressure from the politician in power on the civil servants in performing their duties as well as giving them the opportunity to commit serious misuses and abuses of office in collaboration with the politician.

Since the boards that conduct the investigation are founded and called to service by the related minister or governor, there seems to be a tendency in those boards to protect those civil servants who trespass the law after the orders of the political or executive

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[5] For the particulars of the constitution of the military courts and laws, see Kocaoğlu (1993).

authority, or even in some cases, partisans of the party in power. In the contrary fashion, the competence that the law endows the political and administrative authority allows those authorities to use administrative investigation as an instrument of suppression of those civil servants who do not share the political views of his/her superiors or who do not take part in their unlawful activities including malversation. For example, lately there are two administrative inquiries initiated by the inspectors of the Ministry of Justice after the incitement of the Minister against two public prosecutors (Nuh Mete Yüksel and Talat Şalk) who were investigating two important cases of malversation that were also considered as serious cases of organised crime. The consequence was that one of the public prosecutors is taken from the case and the case was given to another public prosecutor while the other is forced to reduce the pace of the investigation. Again, during the Parliamentary Inquiry in 1997, concerning the infamous Susurluk case, some bureaucrats like Hanefi Avcı are compelled to be silent by the administrative authority with the initiation of an administrative inquiry about him by the related ministry (the Ministry of Interior). As a result, it seems that the effectivity of the power of the administrative authority (especially, the government and their governors who, most of them holds office due to their connections to the party in power) over the career and future of the civil servant largely derives from this outdated LTSCS. Indeed, in the Constitution there is an article that capacitates the civil servant to resist the unlawful order of the administrative superiors.

> Art. 137 - A person who works in the public service under a certain title or in certain way should not obey the order of his/her superior which he/she sees as contrary to the prescriptions of the by laws, regulations, laws or the Constitution and state this contradiction to the one who gave the order. But, if the superior insists on his/her order and repeat it in writing, this order should be obeyed; in such a case the one who obeys the order has no legal liability.
>
> An order whose content constitutes a crime should never be obeyed; those who obey such an order will be held legally liable.
>
> In the execution of military services and emergency cases the exceptions

> designated by the law for the purposes of the protection of public order and security are kept in reserve.

The second paragraph clearly states that if an order is unlawful, the subordinate should not carry out the order, otherwise they will be held liable to legal action. However, despite the prescription of the Art. 137 of the Constitution that states the right and duty of the civil servants to resist to the unlawful orders of their administrative superiors, the capacity of the political and administrative authority deriving from § 3 of the Art. 137 and LTSCS far exceeds the power of the civil servant to resist the authority. Because the third paragraph states some exceptions that are related with the concerns of state security and renders the whole article a meaningless sequence of words especially in the commitment of important crimes for political purposes by the state agents. In this way it becomes possible to keep many crimes committed by the known subordinates under the command of some 'unknown' superiors outside the reach of the jurisdiction. A quotation from the famous Susurluk Raport written by Kutlu Savaş (1991: 61-62), then the Chairperson of the Prime Ministry Board of Inspection clearly describes the actual situation with regard to this matter:

> Despite the fact that it was clear who he was and what he was doing, the State could not cope with him [Behçet Cantürk, a PKK terrorist and supporter]. The legal methods proved not adequate for the purpose [?], and in the end, 'the office of the newspaper *Özgür Gündem* [a pro-Kurdish newspaper supporting PKK, run by Behçet Cantürk] was blown up with plastic explosive, and while it was expected that Cantürk would yield to the State, when the above mentioned person [Cantürk] sat out to found a new complex, it was decided by the Turkish Security Organisation [Turkish Police] that he should be killed and this decision was executed.'
>
> [...]
>
> Here it will not be discussed if the extermination of Behçet Cantürk was right or wrong, or if it was necessary or not. Yet, some necessary questions should be risen. Who did give the order to get him killed? By whom could this authority be used? Under what conditions could such an authority be used? Who was responsible to whom? How should the system work and how should the

responsibility be allocated?

In our conviction, the objection saying 'there is no place for such questions in the State of law' is neither valid nor realistic. This procedure [investigation] will be followed in our country as well as it is followed in all countries of the world. But, (even though this is not acceptable for the Prime Minister) such decisions [referring to the decision to kill Cantürk] will be taken within the limits dictated by the rules of the state of law and carried out with State seriousness.

Otherwise, such a state of affairs that allows Yeşil [code name of Mahmut Yıldırım, hopefully a former secret agent that served for various state intelligence services who committed numerous unlawful actions] and his likes to say all around that he interrogated and killed an officer of the Turkish Army (Cem Ersever case), a debased man and a smuggler like Tarık Ümit [another person who was used in the service of state intelligence services] to commit meanest villainy by telling around 'we busted this and that and after interrogation killed him', or allows a person who works in [secret] service of the State like Abdullah Çatlı to commit smuggling [of drugs and weapons] and terrorise many people, and by using this fear, create opportunities for others to take their share in the booty; our country does not deserve such a state of affairs that is a la turc, mean and allows such frivolous operations to take place.

The mentality that allows such sort of conduct caused a certain group of person — civil and public servants— to cross over the line in a short while and make a turnabout from the service of the homeland-nation towards personal gain.

All the related institutions of the State [except the judiciary and the public as the source of all the authority a state can harness according to the Constitution] are well informed about these deeds and actions. In the end, with the Susurluk accident, causing the water to overflow the glass, irresponsibility spread around and the subjects that should be considered as State secrets became the main subjects of the media coverage and newspaper articles.

There are several points worth to dwell upon in the above quotation. First of all, it was confided that there are some situations that laws put aside and some people tried to be 'punished' or eliminated by applying unlawful methods as it is exemplified by the explosion in a newspaper office. Later, the rapport confirms that there are persons employed for this purpose by the orders of 'unknown' authorities. But more interesting of all is that the rapport regrets that all these cases became known to the general public

and accuses some for their 'irresponsibility' in that, but never calls for public legal action! Indeed, the records and newspapers are full of such events that never been carried to the courts and authorities that are never sent to the courts under the pretext of 'state security'.

Another institution that jeopardises the juridical unity is the State Security Courts who included military judges until recently that adjudicate the actions of civil and military persons related with 'state security'. Being founded under the extraordinary conditions and constitutionalised in 1973 by an amendment they were extraordinary courts devised to deal with cases under emergency situations and martial law to which especially during the political turmoil between 1960-80 and later for the cases related with the 'reduced war' conditions prevailing in the south-eastern part of the country. Since they are much criticised before 1980 for they included military judges and judge over the civil persons in most of the cases as extraordinary courts infringing the principle of the 'natural judge and court'. For example, Taninli (1981: 598) stated that "it is without doubt that these juridical offices whose judges and public prosecutors are appointed by the government and which falls contrary to the principle of 'natural judge' accepted by our Constitution, and the cases that they adjudicate are of 'political nature', are indeed political and extraordinary courts." Despite the fact that they were abolished by a decision of the Constitutional Court in the following years, in the 1982 Constitution they were established again on a firmer basis. However, since the 1982 Constitution felt the innate contradiction between the existence of such courts against the principle of 'natural court and judge' (1982 Constitution, Art. 37), it tried to 'naturalise' these courts by including them in Art. 143 by describing their office of venue as

> the crimes committed against the indivisible unity of the State with its country and nation, liberal democratic order and the Republic whose characteristics are defined in the Constitution and the crimes that concerns the State's internal and external security" (GA, 1984: 85).

9.2 The Courts

Except the Constitutional Court and the Court of Jurisdictional Disputes whose president is elected among the members of the Constitutional Court and authorised to resolve the disputes between the general, administrative and military courts (198 Constitution, Art. 158), the most important court is the Supreme Court whose foundation and functions are designated by the Constitution in Art. 154. According to this, the Supreme Court functions both as the court of appeal for the decisions given by the general courts and as the court of first instance for certain cases that are defined by the law. Since its decisions concerning the decisions of the general courts are always in the nature that sets the juridical standards, the Supreme Court also functions as an instance of equity through its interpretation of the laws and their possible and valid applications (Taninli, 1981: 607).

The Supreme Court has many subdivisions separated into two main branches as criminal and civil. Under the General Board of Criminal Department there exists teen criminal departments and under the General Board of Civil Departments there are as much as twenty civil departments both of which are highly occupied with trying the decisions of the lower courts.[6] Similarly, the Council of State acts both as the court of appeal and first instance for the administrative cases.

As for the lower courts, in addition to general criminal and civil courts, there are some special courts whose foundations are designated by special laws such as State Security Courts, Juvenile Courts, Traffic Courts, Labour Courts, Courts of Enforcement,

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[6] In 1991, 102036 cases in total are tried by 557 judges (JS, 1993: tables 1 and 7).

etc. All in all, there were 5.039 judges and 2.942 public prosecutors working in the juridical apparatus (JS, 1993: 8) meaning that there is a judge per 12.000 persons out of a total population of approximately 60 million. In addition to these there were 30.471 attorneys and counsellors in Turkey in 1991.

9.2.1 Law Enforcement Agencies

Excluding the functions and numbers of the intelligence of secret security services whose numbers and fractions cannot always be known precisely, the forces of law enforcement in Turkey can be separated into main bodies as civil and military. The primary institutions in law enforcement are Gendarmerie as a part of the military organisation as well as a subordinate organisation working under the directives of the Minister of Interior and the Police organised as the National Security Organisation and connected to the Ministry of Interior. The Gendarmerie are defined by the Law of Gendarmerie Organisation, Duties and Capacities, nr. 2803, 1982 (Kocaoğlu, 1993: 429) as "a military security and law enforcement force protects the security, tranquillity and public order and fulfils the other tasks designated by other laws and regulations". According to the same law, the General Command of Gendarmerie is a part of the Armed Forces and thus for its duties connected with the armed forces and education is bound to the General Stuff, but for its duties connected with security and order is connected to the Ministry of Interior. Further, Art. 10 of the same law (Kocaoğlu, 1993: 432) clearly states that the fields of responsibility and duty of Gendarmerie are the regions are those that fall outside the police controlled zones.

The duties and capacities of police are designated by the Law of the Duties and Capacities of the Police (LDCP), nr. 647 dated 16.07.1965 and applied with later amendments. According to the LDCP, Art. 2 (Malkoç and Güler, 1993: 430), the duties of police are defined in to different categories as the duties related with general security

(dispersion of unlawful or even sometimes lawful meetings, etc.) and the duties related with the committed crimes as defined by the Law of Criminal Procedure. Thus, the police, being a sub-organisation of the Ministry of Interior, works both under the command of the Ministry as well as the highest local authority (under the province and county governors) with regard to its security duties. However, in the performance of the duties connected with the Law of Criminal Procedure (LCP) enacted with nr. 1412 on 4 April 1929 (translated from the German Law Of Criminal Procedure enacted in 1887), Art. 154, § 2, the police works under the command of the public prosecutors. The LCP (Dönmezer and Yenisey, 1999: 279) states that

> All law enforcement offices and officers are obliged to inform the public prosecutors on the cases they are dealing, people they caught and the measures taken as well as to carry out all the commands of the public prosecutors that are related with judicial matters.

The same article (§ 1) states also that all the civil servants of the State are obliged to inform and help the public prosecutors about the matters they ask for. Furthermore, the § 8 of the same article capacitates the public prosecutors to directly initiate legal action against those civil servants and law enforcement agencies who neglect and miscarry the judicial demands of the public prosecutors. Yet, since the law allows important exceptions in connection with the chief officers of law enforcement agencies and chief civil servants like province and county governors, it seems that such an authority given to the public prosecutors can easily be diverged from its main objective as it is explained in the statement of reasons of Art. 153 of the new Bill of Criminal Procedure of 1999 prepared by a commission under the chairmanship of Prof. Dr. Sulhi Dönmezer (Dönmezer and Yenisey, 1999: 282). Thus, according to the Law of Procedure of the Trial of Civil Servants, legal action against such authorities can only be initiated by the related ministers, and only if the investigation carried out by the inspectors of the ministry deem it necessary the case is allowed to be transferred to the judiciary. Since the inspectors are the direct subordinates of the Minister, this situation creates a

serious problem with respect to the principle of the unity of law.

Since the governors and chiefs of law enforcement agencies are excluded from the law and the investigations about them initiated with the charges of negligence and misuse with regard to the juridical demands of the public prosecutors can only be initiated with the concerned ministers, for the charges that may be put against them no legal action can be taken. Since the ministers, as the authorities that may allow the initiation of administrative investigation and legal action against such persons, are part of the political and executive authority, in cases when such persons are connected with them either personally or politically (indeed, this seems to be the most frequent case) there cannot be any possibility for the public prosecutors to take any legal action against such persons. Indeed, it is precisely for this reason that in Turkey there have been frequent and numerous suggestions to establish a separate law enforcement agency that would work directly under the command of the public prosecutors.[7]

To summarise, it can be said that the basic principles of modern jurisprudence in Turkey starts with the assumption of (a) the unity of the nation creating a certain set of norm in their united ethical life, and continues with the assumptions of (b) equality before the law suggesting the neutrality of the state before social and personal distinctions; (c) existence of the state of law; (d) unity of jurisdiction; as well as the claims of the state (e) to hold the monopoly of jurisdiction; and (f) to sovereignty as the

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[7] For example, both Mehmet Uygun, the First President of the Supreme Court (Uygun, 1997: 21) and Eralp Özen, the President of the Turkish Bars Union (Özgen, 1997: 6), in their addresses in the opening ceremony of the 1997-1998 Juridical Year, voiced the need of constituting a such special law enforcement agency under the command of the public prosecutors.

sole representative of the nation (Constitution, Art. 6).[8]

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[8] Art. 6 of the 1982 Constitution (GA, 1984: 6) reads as follows:

> Sovereignty belongs unconditionally to the nation.
>
> The Turkish nation uses its sovereignty through the mediation of organs authorised according to the prescriptions of the Constitution.
>
> Sovereignty cannot be transferred under any condition to any person, estate or class. Neither anybody nor any organ cannot use the State authority that does not originate from the Constitution.

CHAPTER 10

THE CONTEMPORARY CRISIS

Despite all the faults of the legal structure of the contemporary jurisprudence in Turkey and the limited budget of the Ministry of Justice, it would not be just to assert that they are the real causes that lead to a serious crisis of jurisprudence. Given even a limited bit of good will and time, all these faults can be corrected and the system can be made to function in a desirable fashion. Indeed, despite some recessions, a certain (however slow) development throughout the years in the extension of the fundamental human rights and freedoms can be observed in the formal legal structure. Turkey has recognised these rights, constitutionalised them and by now developed a very complicated system of juridical apparatus with its courts setting judgement on various fields of social life, with its law enforcement agencies, etc. Thus, knowing very well the problems of the formal legal structure of the judiciary in Turkey, there is no need to be pessimistic, the future is full of hope bringing better formulised laws and better organisation of law enforcement agencies and courts, etc. However, any person who had any experience of legal practice may tell that the picture is not so bright at all and remind the negative aspects of application such as the long and tedious trials, being exposed to mistreatment by the law enforcement agencies like torture or various intimidations, acquittals due to insufficient evidence, etc. Even then, one may think that such events are largely the result of the insufficient budgets or high number of cases to be tried and connect this last feature to the economic conditions or the generally low level of education of the population. The foundation is there, the good will is there, and as for the good cadres it is possible to educate if not they, too, are there. With a good planning and organisation, so it seems, the problems can be overcome and judiciary can be put to function properly (Yücel, 1997). To be able to see if that is so, we have to

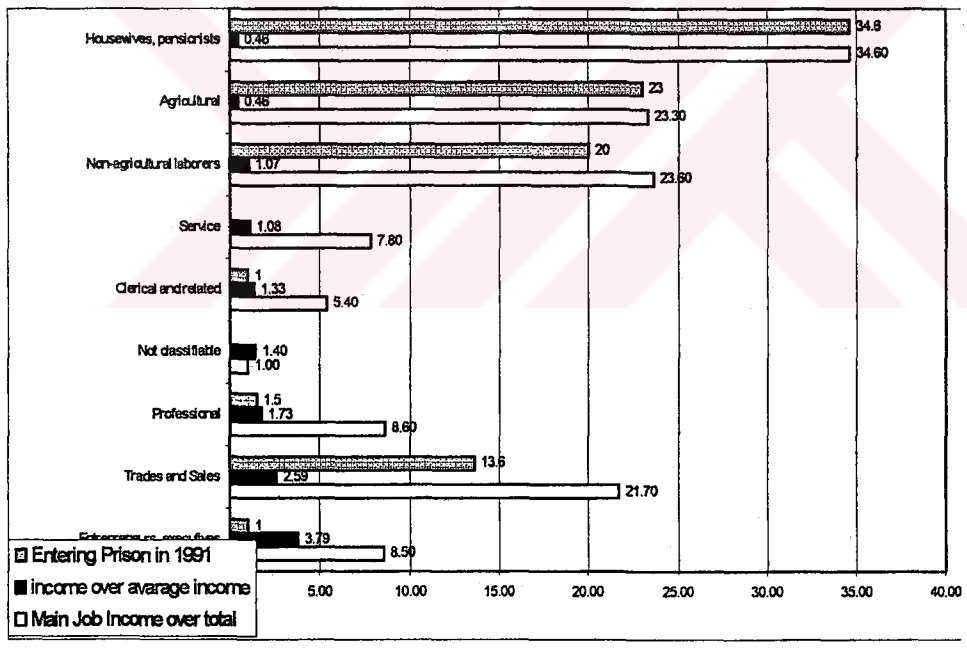
check if the basic propositions of the Turkish contemporary jurisprudence.

As we have seen in the preceding chapters the situation with regard to the harmonious unity of the nation is not like what is told by the law and indeed constitutes one of the serious problems before the system. Indeed, the law, too, is not so naïve, and takes its precautions against those who claim the superiority of one of the segments that divide the nation. In addition to the many articles in the Constitution referring to this issue there are also countless articles in the Turkish Criminal Code or in the laws like the Law of Struggle Against Terror generally collected under the titles that start with 'felonies against the State's ... etc., etc. that make it clear that there are some segments in the society that may (be expected to) commit such felonies. However, even a brief look at the functioning of the jurisprudential systems of the various Western countries which are themselves divided into various social classes may reveal that this segmented nature of the society is, in itself, not *necessarily* a drawback for the smooth functioning of the system as to tranquillise the good consciences of the overwhelming majority of the population. Then what makes the Turkish social segmentation so problematic for the smooth operation of the system? Some may answer that it is a transformation process that Turkey undergoes, and for this reason it is normal to have some serious problems with regard to the functioning of the juridico-political system. But what transformation?

If we look at the statistics we can clearly see that the enormous majority of those who enter into prison are the disadvantaged in the society. In the table showing the convicts by occupational group (data taken and processed from JS, 1993: 185, tb. 86 and SYBT 2000, 2000: 682, tb. 421), the distance between those who are entrepreneurs, managers and administrators the most crowded category which is composed of housewives, the retired, income recipients, students, disabled, unskilled workers and those whose occupation not reported (most probably the unemployed) is huge enough.

Thus the category of managers, entrepreneurs etc. getting about 4 times of average income per head and 8.5 % of the total income as group and represented in the prison with only 1 % of the inmates. While, on the other hand, the categories of unemployed, agricultural and non-agricultural workers So, one can safely say that those who took the prisons as their abode are the economically disadvantaged could get little more than a half of the average income per head (~ .66 %) and about 25 % of the total income as a group, but, alas, they are represented among the convicts with a highest percent of 77.6

Table 1. Number of the convicts went into prison in 1991 by occupation



In short what these figures tell us is that those who are the poorest are the real birds of the prisons while the well-to-do and well educated folk remains (mostly) away from the prison. Indeed, this analysis does not tell much, but only shows that there are some significant and classifiable differences among the prison folk. But, that was enough for

our purposes just to show to whom the state administration of justice targeted. As it can clearly be seen from the state apparatuses of justice work for the poor folk to be able to 'correct' and 'rehabilitate' them according to a theory of punishment (Ignatieff, 1995: 52). Lacey (1988, 30-37) also stresses factors like the desire for social protection, grievance satisfaction (of the victim of the crime), maintenance of respect for the legal system, reparation and restitution in addition to the desire to rehabilitate as the possible (and sometimes mixed) the motives that lie behind punishment. Personally, the punisher, the executioner may have these motives in his conscience, of course, when punishing, but I haven't yet come across any data showing the correction ratio of the convict or the ratio of the satisfaction of the grievances (however, I should confess that there may have been such data somewhere). But, before starting to discuss punishment, let's turn to the start (briefly) where an action that falls within the domain of law starts and ends up or escapes punishment or its justice in the Turkish case.

10.1 The Practice of State Administration of Justice in Turkey: A Turkish Odyssey

10.1.1 Being a Self, Being Born to a Polity

For each type of society dominated by a certain mode of social relationships (ethos) generating their specific patterns of socio-political organisation and domination, there has to be a certain code (the law, the founding expression of desire) for through the expression and application of that code a society can establish a terrain on which the self expressing the desire can expand itself. Leaving aside the hypothetical question what happens if there was nothing outside (no society, no other being at all to get connected to), lets stay loyal to the historical sequence of events that we followed throughout the course of this study. But before doing that let's allow us just to remind

the reader that without the other there is no self or vice versa, these are connected together that has to born at the same time, a situation that necessarily brings about the polity. However, without a code that establishes the relative positions of the self and other the terrain on which they can stand together does not come into existence, and without such existence of a terrain that unite them in a relationship neither the self nor the other can *be*. Thus, it is the *Law* that creates a specific space, particular to each mode of relationships on which the self and other establish a political relationship of domination. Now,

10.1.2 Being Born to *One*: a Polity of the Kin, the Tribe

The self being born to a tribe meets its other as a social distance or proximity from its own self, it is its place and movement on the distances that makes the other *of* the kin or *not* the kin. The primordial relationship that the self establishes with the other that stands nearest in the distance is the relationship of blood (whether fictive or real).[1] And as such, the blood becomes the code of the tribal self that extents itself as to establish a political unity of all the surrounding others (the kin). It is therefore the tribal *leader* express its desire to expand on others starting from the nearest and moving towards the distant that he may render as his kinsfolk: In his monument Kültegin cries aloud to his folk, "For that the name of the nation [budun] that our father and uncle had won would not disappear..." (Orkun, 1992: 42-45, ID 27-30), emphasising his connections with his *budun* which move on the verge of coming and going and with his nearest kin that already acquired a stable place relative to him (that they have passed away and became settled in relation to Kültegin, but still distancing for the newer and newer born ones, thus, being on the move).

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[1] Please refer to the Chapter 4.

Thus, the claim of code (not yet law but *töre*) is the expression of the desire of the tribal ethos that stretches itself of a terrain where geographical space means not much if anything at all. The centre of gravity of the whirling (always of the move) world lies with the self, while the self seeks to establish its terrain on which it would establish its relation with its other by the act of declaring its claim (*töre*). In such a situation where the tribal self cannot find anything fixed (and hence the frequent breach of the tribal *töre*) as its law other than the tribal *alliance* (of *töre* again) that would establish a terrain that stretches on the social space thus created and the temporal space brought about by the counting of the generations and blood proximity. As one can see, there is no geography here except distances that should be traversed, heterogeneous paths that are open or blocked by obstacles.[2] Later, we will see that this blood alliance (again, fictive or real) established by the *töre* that takes place on another dimension will not only survive but extend itself over the domains of other modes of ethics. For it is the

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[2] Deleuze and Guattari (1988: 371) said that, "a field, a heterogeneous smooth space, is wedded to a very particular type of multiplicity: nonmetric, acentered, rhizomatic muliplicities that occupy space without 'counting' it and can 'be explored only by legwork'". However, in the case of *töre* the counting does take place, not on the societal dimension that is of movement as Deleuze and Guattari say, but on the temporal space that man counts generations as they don't say. Actually, the multiplicity (tribal polity of the kin) is truly 'nonmetric, acentered, rhizomatic as the terrain (or rather path) of the social space (paths crossing each other from every angle is the rhizome) as they say, allowing no place for a centre of gravity to emerge (thus centrifugal). But, again, on the temporal space, the self finds its place by counting the fixed distances of blood between itself and its kin, and by this way it acquires its centre of gravity that would endow it with a desire to expand towards outside (thus the importance of the male child that would maintain the line dotted with fixed intervals of the generations, as they don't say.

closes to the material (finitude) being (here and now) of the self, when it 'sense' (since it cannot see or comprehend with the powers of reason)[3] a weakness on the part of the overcoding modalities.

10.1.3 The Conqueror: a Double-Edged Knife

To be able to be a member of the society of a central state one has to be recorded on a register and acquire and ID card (or a number nowadays) symbolising that his/her coming to a world governed by the central state, is perceived and thus legalised by the authority of the state. Osman did not have such an ID card, neither his sons that would allow us to identify them in all their clarity in the records of the history Ottoman history. In this sense, when Mehmed the Conqueror says, "... therefore I ordered this to be the law and commanded"[4] what *he* actually means is to establish a terrain of domination in which the conqueror (or despot) wants to regulate the events whose limitations are determined by the always following articles of a law code (*yasağ-ı padişahi*). The expression of the desire of the tribal leader (*töre*) now turns into a law code definitely

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[3] This does not mean that it does not command any power of reason. On the contrary, the tribal self is keen with regard to its capacities of practical (ethical not moral in the Kantian sense) reason. Yet, this reason does not go much beyond the realm of the ethics (the social life). But since it cannot do without conceptual thinking, it steps into the domain of the ethical life where finitude meets the infinitude (hence the shallow *formulation* of the töre) and gets a vague glimpse of the realm of the morality (infinitude but not yet in its totality). And thus it produces an image of the deity (Tengri) that is elevated but yet concrete in its locality by the side of the more concrete deities of the ethical life (the totem).

[4] As the Ottoman original of the text in İnalcık (1996c: 331) reads, he says, "... sebebden bu vechile kanun emr edüb buyurdum ki..."

putting his desire on others'. The emergence of the binding law, binding in the sense that it claims universality for itself over the terrain for the sake of the conqueror who desires to extend himself by diffusion, is the emergence of the central state. This is also the emergence of the despot-sultan as the first subject and the genuine centre of gravity for the forces that eventually constitute the relations that link the centre and the remote, and thus form the central state structure. About 150.000 tribal province soldiers get connected to the person of the sultan sitting with 18.000 slave soldiers in the centre, and creating a centre of gravity (Uzunçarşılı, 1944). Yet, the organisation of the social forces is so that they are dense in the centre (the inner limit) and loose in the remote (outer limit, *ucat*).

Therefore, the sharp lines separating plots in the centre of the space of the cadastrated (but not yet homogenous) geographical space of the despot-sultan get blurred in the distance. However, as different from the preceding one this is a true terrain on which the cadastre registers are keenly kept as the meaning and purpose of the conquest (however still vogue as to allow only to estimates to be made).

As the law and the central army of the despot-sultan establish the terrain of his domain on the cadastrated, but also striated[5] and still heterogeneous space (therefore the long trade routes) which extends on geography, the rule of the despot-sultan rejects the 'shallow' practicality of the tribal ethos (*töre*) and leaning back on himself[6] this time, conquers the land of ethical life that lies as the previously empty space of the law

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[5] For 'striated space', see Deleuze and Guattari (1988: 353).

[6] As he had done the contrary on the geographical space of its expansion, that is, by elevating himself above the previously equals.

(ethical, not ethics) and discovers the thoroughly universal deity that primarily dictates the ethical norms as a compendium put in a book. From the world of ethics where the despot-sultan stands now, it becomes possible to get a view of the two worlds (of the finitude on his back and infinitude in its totality laying before him).

Thus, it becomes the fate of the despot-sultan as the sole real subject to stand (settle) in the middle of the ethical life (first with the support of the sultan's *ulema* and then as sultan-caliph supported by *ulema*), seeing the both extremities but being unable to totally conquer them due to the binding force of the norms of the ethical life that also destroy the primary alliance with the kin. Now, the kin, being the closest in blood, turn out to be a dangerous alternative for the sultan's sole subjectivity. Thus, the new alliance of the ethical life arranged by the norms (not practices of the ethics) is established between the sultan and the remotest (the *devshirme*), the subjugated alien to the elimination of the subjugated kin from the political life.[7] The selection of the remotest as the natural ally is due to his envy for his likes as well as his internal loneliness that he tries to overcome with a universal, all encompassing deity that, he likes to think, dominates in all of the three worlds despite the sultan's conquest of only the two of worlds: coming from the infinitude of ethics and moving onto the in-between space of the ethical life by way of conquest: the adoption of the orthodox (*sunni*) religion (Islam) and an emphasis on its ethical normativity (*shari'a*).

10.1.3.1 In the Middle, Cutting to Two Sides: Deity/Sultan - Sultan/Askeri - Askeri/Reaya

The extremities of this geographical terrain is determined by two forces operating at the *ucat*. First, by the density of social interaction taking place in that area, and, second, by

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[7] His rule is sharp and harsh where it is near (killing of the brothers).

the force of opposition encountered which cannot be determined by the centre. However, the arrangement of the lines of interaction and their density is a matter of the central organisation determining its success or fall. If social interaction dense, that is, if the area is filled with densely crowded people generating frequent contact both among each other and with the centre,[8] the probability of getting them (the in-laws) and the stranger (the outlaw)[9] caught is much higher. Thus, now, seen from the one who is not the sultan there are various alternatives. If one lives in an urban area where social interaction is dense and frequent, then the chances are that one cannot do but get an ID card sooner or later. In the contrary fashion, if one is born in a geographically and socially far and remote place where the density of social interaction is low, then one either dies (passes away without being perceived) or is perceived by the immediate community which would be rather slow in communicating this information to other social units. In this sense, since the state is now a central machine,[10] if one is born far away from the centre in a region where there are only a few people having limited relations with the outside it is possible that the centre does not come to know one's existence, at

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[8] The urban centres as islands in the wilderness.

[9] Stranger is in the singular here, because when the stranger multiplies it becomes either the foreign or an alternative (a rebel), in both cases trespassing the threshold of the criminal justice and jumping into the domain of political power struggle. That is why there is no systematically governed prison houses, but massive exterminations and sporadic contamination.

[10] Central here, meaning links coming and going from the centre to the distant places, thus when the links stretch towards remote places the distance between the lines of interaction increases lowering the density of interaction per distant unit which lay dispersed onto the terrain.

least for a while until someone informs it about the occasion.

Thus, this showing the quadruple effect, being away or not and having dense relations with the other or not (See table 2 below) producing relations of dependence and autonomy given that resources of the centre is more than the distant. As it can be observed from the Table II, there emerges a double hierarchy with respect to the groups relative wealth/power[11] and dependence/autonomy relations that can be summarised as follows: On the upper right corner of the table stand groups which are the wealthiest and most powerful but completely dependent on the existence of the central structure. In contrast to these, on the down left corner of the table we observe the poorest groups that display the lowest degree of integration, but locally autonomous and for this reason independent of the existence of the central machinery that covers the whole realm represented by the table and refers to the above mentioned terrain of the state constructed by the law. The first of these groups, the group A stands for the centre and with the disintegration of the central machinery it loses its ground of existence and disappears. For this reason it holds fast the idea of law that enables it to construct a realm on the first place. The question of how intense and closely the application of this law is watched and regulated determines the relative distance of the groups by densely populating the area with people and their interactions with the centre.[12]

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[11] Since it is the wealth and power that communicates through the lines of connection whose capacity is determined by the domination-integration-resistance-autonomy relations.

[12] In analysing the table it should be kept in mind that it can be applied for each group presenting any sense of centrality in its organisation. Thus, at times, when looking at concrete situations it may be need to project into one of the categories as the 'realm' and then proceed.

From the point of view of the group B, however, the picture is completely different. Begin poorest in terms of resources it is quite clear that is the weakest group in its relations with the other groups. But since it has the lowest level of social interaction with the centre (B), it is also the most insensitive group to the events emanating of the centre. And for this reason, it is the least effected and controlled group by the centre. Furthermore, since such groups tend to develop a sense of autonomy, the direct confrontation with the centre may cause severe clashes from which even the centre may be effected and forced to take a new position (the relationships domination/subordination, power/resistance do always operate in two directions) (Garland, 1991: 250-1).

Table 2: Intensity/distance by integration/dependence (Central)

One	Distant	On/with the Centre
Dense interaction	**C** * Lower integration * Higher dependence * Local Dominant groups (richer)	**A** * Highest integration * Dependence * Central dominant groups (richest)
Low density interaction	**B** * Lowest integration * Independence * Local autonomous groups (poorest)	**D** * Higher integration * Lower Dependence * Local subjugated groups (poorer)

Of course, this process of direct relationship between group A and groups B does not take place very often in the history but when it does it may point to some historical changes in the total configuration of power. Or group A and groups be may have lost

contact with each other due to the inability of the centre to establish dense and frequent relationships powerful enough to integrate the groups B into its system. In such a case, the territory begins to disintegrate starting from the remote. Indeed, such was the Ottoman case in which the Central State could not establish its domain on a firm basis after the 17th century disintegration began with the Celali uprisings. And, as we remember the reaction of the State was to come into direct contact with the disintegrating (in terms of their relationship to the power of the centre) centrifugal forces most of which are organised around the tribal lines (groups B). The clash was severe, destructive for both of the parties if not deadly. The centre sent huge and frequent armies the remote to suppress and sometimes extinguish the masses composed of several group Bs. And finally being unable to establish a permanent and dependable structure that would allow the establishment of dense relationships with the centre began to disintegrate due, first, its loss of terrain on the social space and then on the geographical space.

10.1.4 Being a Legal Person: Abstract Individual in a Modern-Central State

It may suffice for one being born to be included in the terrain of a central state, but being born to a modern-central state requires more than that. The law code that establishes the terrain of the modern central state far extends the limits of the terrain of the central state that stretches over only two of the dimensions: social and geographical spaces that is relevant to the self's finitude.[13] Its demand reaches to a hitherto known but untrodden realm for the central state. All that the central state believes is the

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[13] Time only being the change in the state of affairs.

existence of a realm in which the self experiences its infinitude in its reflective activity.[14] As different from that recognition of belief, the modern central (national) state calls its law as the sovereignty of the general will, or as it is expressed in the consecutive constitutions, "indivisible unity of the state with its country and nation!" and replaces the physical body of the sultan that elevated itself to the despot sultan with the abstract notion of the general will (or nation) which is nothing but the reflection of the state on the moral plane of infinitude, now trying to homogenise the striated space of the despot-sultan. Earlier Europe had achieved this in three ways and sat the example for the new Turkish Republic. First, by the dispersion of the centre as to cover the previously striated space and level it. The advancement of the tax system, and the constitution of the regular armies as well as the widespread organisation of production and initiation of extensive but unificatory lawmaking together with extensive cadastration, and better that that its liquidation contributed to the homogenisation of the geographical space. Now, it was possible to draw clear-cut boundaries, clear lines between the plots, the geographical terrain finally occupied on which the market (with its fetish, money) could spread. And it was under the force of the market that the land tended to expand not by the ambitious desire of the despot-monarch. Money became ethos as the complete usurpation of the field of social relations.

Secondly, the former composition of the forces as A/C versus DB (that is king/nobility versus freemerchant-artisan/serf and a new alliance of interest has been established between A (monarchy) and B (bourgeoisie) leaving the other two groups outside the power ring (C ← AB → D). This is the first unification of the below and above forcing both of the groups towards the middle where the bourgeoisie politics (in the narrowest

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[14] Please do refer to the second chapter.

sense of the term, that is, the parliamentary politics) would find its ground. While the internal boundaries between the groups blurred outer extensions emphasised by borders. Thus, within the confines of these borders the idea of the general will of the nation found its social basis in the unification of the diminishing monarch and rising bourgeoisie. This was the democracy as the game of the middle in which a new set of norms (of the ethical life) began to develop around the concept of the *civil* (not human) rights began to develop. The destruction of the nobility and the gradual transformation of the peasantry into a working class contributed the formation of the nation unified (but always bringing the seeds of disintegration in its own way) under the powerful will of the parliament.

Thirdly, the invasion of the infinitude of the self helped the discovery of a new dimension of existence determined by the calculative capacities of the mind. Thus, the reason (a particular kind of) could emerge and with this emergence elevate the humanity into the place of the hitherto unconquered deity. Now, with this, a unifying order (science) can be established on the known (for us, writing now and here) tripartite universe. By this way the circle closed (for a moment) and a new order (justice) of science can be established: Law as the governing principle of the modern centralised nation state. It was about at this moment the West emerged as a formidable other for the Turkish polity.

10.1.5 Being Soldier - Landlord - Bandit: The Turkish Crisis

At the end of the 19th century when the Ottoman Empire began to disperse from the distance (the *ayan*), one of its primary reasons was the weakness of the direct

connections of the centre (A) with the *reaya*.(D).[15] Due to the dissolution of the timar holdings the forces that fell in the category (B) weakened (only some officials of the Ottoman central machine were left in the remote like most of which were religious man who at that time had to choose between their loyalty to the centre or to the local powers most of which were depended on the tribal *töre* under the cloak of religion (Shaik Said is an example). Later these religious men would play an important role on the inclinations of the lower segments in the remote. With such a weakened and dispersing internal structure it was indeed impossible for the Ottomans to hold against the advancing forces of the outside. The blow from the West was indeed at the beginning ideological (effects of the ideas of the French revolution on the minorities —the Balkans— and Turkish elite forces —Reformation—in the centre) and economic (capitulations, increasing debts, etc.). Later, to these the European powers added their active political and military interventions and the Empire collapsed giving way to the Republic.

After the War (of Liberation) was over the new form of the Turkish society began to crystallise. The war was led the Western minded military elite and bureaucracy[16] (A) who allied itself with the (C) composed of land owners and tribal leaders. Indeed it was through their capacity to communicate with the (D) and (B). The constellation of the forces was like this: B→ D→ CA. After the war, bourgeoisie immediately included into

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[15] It was always mediated by some agents, the most important of which was the small timar holders that can be considered the time's middle class in the remote (provinces).

[16] Bourgeoisie was very weak then, and being located mostly in big cities like İstanbul and İzmir as well as their different ethnic origins they fell at a distance from the centre now moved to Ankara.

the (A). However, what was different from the Western experience was that there the revolution was led by them as a social class. But in Turkey, bourgeoisie being so weak as not to be able to constitute an independent class, with a reversal of history, was led by the progressivist military and bureaucratic elite. The founding sentences of the Republic was, after the French Revolution, "to constitute effective national power and the sovereignty of the national will" as it was declared in the fourth decision of the Erzurum Congress held just before the War of Liberation (Atatürk, 1993: 69). It was this principle that would guide the actions of the military-bureaucratic elite for a time and will be mentioned later as the second 'unwritten' constitution.

What strikes the eye at the first glance is the defensive tone in it, despite the apparent agility and warlike gesture. Even though it is not surprising, given the conditions of the times, it declares the *need* to establish an effective political apparatus and speaks in a defensive tone, contrary to the spirits of the previous codes we have talked. Secondly, the sentence claimed two things, the first of which was the constitution of a national power (polity) that should be effective. This was relatively an easy task (of course, relative to the second one), for, after all the society had good political experience in politics and military organisation since the tribal times. Yet, it was still a reversal, a drawing back from the claims of geographical expansion of the territory, but also in convercenge with the times to come.[17] Thus the War of Liberation ended with a shrunk territory, and now it was relatively easy to handle it. But the real problematic with this law of foundation lied in its second emphasis, that the constitution of a nation out of an

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[17] However, one cannot take oneself remembering how the results of the Lozan Peace Conference and 'peace in the home, peace in the world' policy were criticised by some side by side the fascistic aspirations developed within the ranks of PRP in the early years of the WWI.

amalgamation of A, B, C, and D was difficult indeed.

To start with, the social space of the Ottoman times remained intact due to the alliance of the (A) with the (C), and (C) being the intermediary between the (A) and (D) was also a barrier for the establishment of any direct contact between the two. This also ensured the maintenance of the tribal töre under the cloak of Islam. The specific nature of the relationship between the (C) and (D) was a replica of the relations of the kin group. As we have discussed earlier, the difficulties of establishing a direct contact with the (A) and (D) seem nearly impossible, for while the other groups remained loyal to their former alliances to töre and the overcovering Islam, the ruling elite had shifted the direction of its alliances and fell into the ideological domain of the Western culture which continues to expand even today. Thus the self pertaining to the ruling elite fell into the hands of two opposing forces: There were to necessities indeed that seemed as two alternatives: either remaining inert and thus occupying the space of the already trod field of the ethical which also amounted to establishing the Ottoman ties with the religion that was especially strong among the groups in (B). But when Atatürk defeated the opposition in the second parliament the way wide opened before him to proceed Westward where he though he would meet the nation presupposed in the law code.

However, this had also its drawbacks and finally ended with the alienation of the groups firs in (B) and (D) from those of (A). After the geographical space, the social space had been shrunk and there was no plausible alternative left other than to assume the political position of the despot-sultan occupying the normative (juridical) field of ethics as the legitimate 'Eternal Chief' of the nation. Behind, laid the rejected but yet applied tribal politics governed by the alliance of töre, before him, however, stood the 'general will of the nation' still to be realised. The situation did not changed during İnönü, who became himself the 'National Chief'. Actually, as their code made it appear, their first aim was to establish a polity which would be strong and effective. And the harshness of

their rule contributed to this end, otherwise political unity might easily fall into jeopardy given the conditions at the times.

The sings of the decisive change begin to come during the mid40s when the groups in B, D, C, and even some groups (especially bourgeoisie and urban professionals) began to press on PRP's already weak basis of social power. Finally when DP took power, the masses whose mode of action was directed by *töre* in the field of socio-political action and theory of legitimacy depended on Islam (in the form of the norms of ethical life covering the real organisation and meaning of the action and not yet penetrated into the field of morality; hence *takiyye*, or the democratic claims of DP and its actions after its coming to rule). However, the social basis of the power of the centre has increased as a result of flow of the masses towards the centre and not as a result of a meeting in the middle there the terms of the agreement could be negotiated under more even conditions. Now the constellation of the forces was like this: the barriers that separated D and B were weakened closing these two groups together, and they together, started an assault on the centre leaded by B (DP was standing among the groups of B) that carry them with itself into the A: an invasion of the centre, indeed, that was shut closed to these groups previously.

Could this coming together of these two ethical normative attitudes be an end to the apparent duality in the society? Being able to answer to this question in the positive is rather difficult. For perhaps it was the persistence of this duality, or the inability of the centre (as the sole subject) that divided the society and perhaps hindered the proper invasion to the third realm of morality that will enable the centre to develop a specific order with its own pattern of legitimacy and jurisdiction that would enlarge the socio-political and moral geography of the society. And the meeting of the groups in big cities as the main centres of power proved that the amalgamation was to take long years and be in a hard was. For neither the infiltrating tribal-Islamic (Turk-Islam synthesis?)

masses nor the groups that are still in A (Republican generations of the big cities) were willing to negotiate on their demands and desires. Perhaps, maybe more important than that this wasn't possible either. For the self primarily existing on the domain of the ethical field and could not yet stretch into the field of morality it is impossible to form a higher abstract unity in the form of a nation, let alone developing a general national will that would enlarge the social geography for the support of such a large legitimacy.

For this reason, main parties PRP and AP and their respective allies remained blood enemies since the foundation of DP in 1947 leaving the task of developing a central morality (something as a will of nation) to the heirs of the actual founders of the state: the military. And, as indeed, it was the case, these years (from 1947 to 1998, 28 February) were punctuated with several military coups that each and every time failed to produce a moral (deriving from the reflective activity of the mind, and thus abstract) concept as to convince the majority of the population to give their support for a national will. Thus, it became never possible to develop a national or civil will in the country.

Rather, the preferences of the military were rather in the westerly direction and paradoxically enough, it was by their constitutions that the concept of national will was replaced by rather post-modern, and thus, even more abstract conception of the Fundamental Human Rights and Freedoms. It seems that the real problem of the legitimacy of the juridico-political structure in Turkey lies in its inability to develop a bourgeois culture on which it would base her own legitimising moral structure. Only by this way it she could open herself a terrain, a homogenous space in which the tribal-Islamic base of its society would be overcoded by a more abstract and generalising moral principle as to give way, perhaps, to the genuine Turkish citizen.

But it seems, the times are over for this to happen. For, the concept of the fundamental human rights and freedoms they was introduced into world politics after the disastrous

years of the two World Wars seems to advance to create a even more abstract and general base of power all over the world to the advantage of the Western world. Is it possible to share it? Perhaps. But, more important than that is to be able to survive it. As the recent development in the world show, however it is most abstract in itself, it creates so large a space for power to dominate that it seems it will be impossible to escape from its powerful grab. Yet, this should not take us saying what we have to say about it as the conclusion of this work.

CHAPTER 11

Conclusion

It seems that the historical roots of the concept of the fundamental human rights and freedoms derives from two major sources. One is the well-known and modern concept of the general will, or the national will that was voluntarily confined itself into the keenly protected boundaries of the nation state. The other one seems to be much more related with the practical political problems of the War periods and the following international relations. On this side the 1918 Wilson principles was the first sign of such a development. And after the World War II, for the purpose of not living such an experience again the declaration of *Human Rights in the Peace Treaties* accepted on 10 December 1949 by the United Nations, not as a binding convention but a text having political significance as to recommend it to the member states (Pınar, 2000: 38). Yet, the latter developments increased the political importance of the text, and with appearance of the Convention for the Protection of the Human Rights and Basic Freedoms (European Convention of Human Rights) on 4 November 1950 in Rome it acquired a new meaning. And since Turkey tries to enter into the European Union the meaning of the text is even greater for Turkey. Because she is often subject to criticisms of European institutions for frequent and systematic violation of human rights as indeed is the case.

Irrelevant to the above issue, here what will be taken up is the question of the possibility of a convergence between the abstract rights and freedoms and the advancement of a

postmodern[1] world before our very eyes. In this world Western jurisprudence increasingly exerts itself as the universal jurisprudence by various means supplied by the economic, politic, military, and ideological resources at its disposal. By this way it becomes possible to replace the adjective 'European' with the adjective 'modern'. As for the order of this modern jurisprudence, a dramatic extract taken from the 1999-2000 juridical year opening address of the First President of the Supreme Court, Sami Selçuk (1999, 2), seems to be highly instructive:

> I look at the world. I shudder. In 1989, 100 million in Latin America, 350 million in South Asia, 150 million in East Asia, 300 million in the sought of the African Sahara, 100 million in other regions struggled against starvation. Let alone solving the problem of starvation, the gaps between the developed and underdeveloped countries has become wider. In 1998 the money spend on consumption duplicated the 1975 numbers. Out of this total 86 % was consumed by the rich and 14 % by the poor countries. The total wealth of the three wealthiest persons in the world is more that the total income of the 48 poor countries. The total wealth of the 15 wealthiest men amounts more than the total income of the whole black Africa. Only 4 % of the wealth of the 225 wealthiest men can meet the needs of all the people in the world. Of all the scientific research in the world 90 % is done in the North America, Western Europe and Japan. The same ratio in Latin America is 1,9 %, and in Africa 5 ‰. In 1994, The USA and Canada spent 178 milliard dollars on scientific research, Nigeria spent 20 million dollars.
>
> This is a cruel and pitiable world where the nature is destroyed by technology, cultures and civilisations pitilessly clash with each other, the fruits of the world are not allocated justly.
>
> In such a world, some states are aspiring to be the armed guardians of morality and reason with the lifeless language of a law deprived of the essence of justice.

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[1] Postmodern is used here for the lack of any other better word and in no technical sense of the term, only meaning 'following the what is modern'.

11.0.1 Rights of the Abstract Individual

In the short foreword of the Human Rights in the Peace Treaties it says that (Pınar, 2000: 39) "... and the recognition of their [all members of the human family] equal and indispensible rights...". In a similar fashion, the Art. 12 of the Turkish Constitution of 1982[2] (GA, 1984: 14) says, "Everone has fundamental rights and freedoms that are connected to one's person and are untouchabe, indivisible and intransferable."

Putting aside the question of specifying the content of these rights since it can be filled with any 'right', if we turn our attention to the quality of their being 'connected to everyone's personality with inseparable ties, what strikes the eye first is that they are inseparable from one's personal being, implying that they come into existence as soon as one comes into existence regardless of the recognition of any authority. Secondly, the empty content of the rights levels the individual human being in the empty word 'everyone' without defining who this everyone is. Thirdly, this emptiness of 'everyone' grasps a certain individual who lives at this time, at this place and elevates it into the field of the infinitude, and thus by sucking *this* particular individual into its empty universe attributes it a *moral* value. Thus, *this* particular individual acquires a moral existence (remember the Kantian moral imperative that should guide the human social interaction) that allows him to *feel* united with the totality of the infinitude to the loss of its *this* particular being (his finitude).

The result is the creation of an empty and smooth space of the infinitude filled with empty and thus equal bodies of the unqualified *ones*. Here one may ask the import of such an abstract reasoning on the statutory law that deal with the detailed lives of the

specific human beings. Actually it lies at the hearth of the modern jurisprudence for what makes the modern jurisprudence different from the pre-modern jurisprudential systems is its insistence on the *voluntary* obedience of the individual to be able to function smoothly in the empty space of the infinitude. For, instead of extracting forced obedience from particular individuals in a chaos-like world filled with *different* and therefore *unpredictable* bodies of the *others*, it wants to base its arguments on a mutually and voluntarily entered contract that will ensure the peaceful obedience of the parties. Fortunately, the need to supply this abstract form of the 'right' is recognised by every lawgiver in the modern world departing from the actuality of the finitude and arriving at the abstract emptiness of the infinitude as it can be observed in the voluminous compendium of modern jurisprudence which is filled with the descriptions of certain rights, their restrictions, obligations, duties, definitions of crimes and their penalties, etc.[3] And, indeed, this act of supplying the seemingly irrelevant content to the abstract and empty form of right,[4] is the reason why the one having the right tends to think that the terms of the contract are neutral, and therefore just. The feelings of security and trust (contracts must be made by good will otherwise they became void and null) thus created is further supported by the suggested equality of the parties of the contract in their infinitude that they are sucked as the necessary result of their being the subject of the abstract right.

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[2] The most criticised one for its anti-democratic features.

[3] Exceptions to this, I think, are the bunch of moral philosophers who prefer the to traverse the distance between the finitude and infinitude in the reverse direction.

[4] The supplied content seems irrelevant because of the elevated position of the self having the right into the pure realm of the infinitude.

But, in the actual stipulations of the contracts, as in the actual distribution of the rights and duties that took place *necessarily* in the finite world —because an encounter with the *other* is simply *impossible* in the world of the infinitude— the parties to the contract *can never* meet each *other* as equals. The danger that lurks in such an implementation of *a certain form* of morality onto the *different* ethoses[5] and elevate it to the position of a law that binds each and every individual human being can be understood through the experiences of being forced by some other (not necessarily human) being to do something that one does not want to do. Since in such a case one cannot assess one's the relative position to the other, the experience may become even more disturbing. Actually this is the general case common to all moral contracts giving birth to moral obligations whose content is supplied as the *common will* or *good* by the unknown other party who presents itself as the God, the State, the Nation, the Society, the Man, etc. Or, on the contrary, think yourself, for a moment, as a prophet having a strong army at his disposal, making laws and demanding from others both belief in and obedience to your self-made laws. That's why the modern state does never ever wishes to arrive at its own ideals, for such a success would only mean the disintegration of the state in the smooth space of the infinitude. So much so for the *indispensable* fundamental human rights.[6]

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[5] '*Different* ethoses, because being the expressions of the dynamics of action in definite, particular, finite systems that are bounded by space and time, they can never be universal and therefore one, but always different and therefore multiple.

[6] Indispensable, because one can never get rid of it.

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TÜRKÇE ÖZET

Adalet ve onun bağlı olduğu kural (yasa) düşüncesi toplumların ortaya çıkışıyla birlikte belirmiş ve bu iki düşüncenin benlikte var olan bir düzenleme ve yapılandırma arzusundan kaynaklanmıştır. Buna göre, 'ben' (self) olmak, 'ben' ve 'ben olmayan'dan oluşan varlık konusunda bir iddiada bulunmayı, varlığın içine girmeyi ve ona 'ben' olunduğunu gösteren bir müdahaleyi gerektirir. İnsan boyutunda 'ben'in kendisini ortaya koyduğunu ilan ettiği birincil faaliyeti varoluşun kavramsal/hukuksal bir çerçevede 'ben'in istediği bir düzene (order) kavuşturulması gayretidir. Ancak 'ben'in kendisini bu şekilde ortaya koyması aynı zamanda kendisini 'öteki'nden ayırdığını belirten ve onun düşünsel faaliyeti sonucunda biçimlenen bir deklerasyondur da. Bu bölünme, 'ben'in kendisine ait düzeni 'ben olmayan'a dayattığı birincil varolma faaliyetinin bir sonucudur ve onun düzeninin (ve adaletinin) birinci kuralı olarak karşımıza çıkar. Bunun ilk sonucu 'ben'in maddi varoluşuyla (buradalığıyla ve bu zamandalığıyla) belirlenen ve 'ben'in kendisi ve bütün ('öteki' ve diğer çevre elemanlarından kurulu) 'ben olmayan'la ilişkilerinin düzenlendiği bir toplumsal etik olanın kurulmasıdır. Burada soyutlanmış kurallardan daha çok 'kuralsı' pratiklerden söz etmek daha yerinde olacaktır. Bu alanın düzenleyicisi olarak Etik, toplumsal pratiklerin oluşturduğu, giderek gelenek haline gelen belirli (ve 'ben' ve 'öteki'nin toplumsallığı içinde benimsenmiş) toplumsal davranış kümelerinden oluşur. Bu nedenle, böylesi bir toplumsallıktan kaynaklanan Etik, 'ben' ve 'öteki'nin 'ben ve öteki olmayan'ın sağladığı maddi varoluş zemini üzerinde oluşturdukları bir düzeni yansıtan (ve bundan vazgeçmeyen) toplumsal davranış kalıpları olarak karşımıza çıkar.

Ancak, 'ben'in düzenleme faaliyeti kendisini bu alanla sınırlamaz. 'Ben'in bu ayırımın ortaya çıkışında kendi düşünsel faaliyetinin oynadığı kilit rolü kavraması, onun kendisinde de bir bölünmeye yol açar ve başlangıçta bir bütün olarak beliren 'benlik', 'iç'

(moral ruh, bilinç, akıl) ve 'dış' (ethikal vücut, fiziksel ve toplumsal varlık) olarak ikiye yarılır. Ancak, 'benlik'in bir bütün olması, bu yarılmayı sonuna kadar götürmesine engel olduğundan, yeni keşfettiği düşünsel sonsuzluğundan (moral dünyasından) fiziksel varoluşuyla belirlenen sonlu dünyasına (toplumsal, etikçe belirlenen dünyaya) geri dönmek zorunda kalan 'benlik', kavramsal düşünce yetisini maddi dünyaya uygulayarak kuralları (yasası, ve bu yasaya bağlı olarak ortaya çıkan düzeni) bu ikisinin karşılaşması sonucunda belirlenen bir ahlak alanı (ahlaki yaşam, *ethical life*) kurar. Zaten yasanın normatifliğinin kaynağı da buradadır. İçinde 'ben'in 'sonluluğunun' (*finitude*) belirlendiği toplumsal yaşantıdan ortaya çıkan etik (uygulamaya konan toplumsal pratikler dizgesi) ben'in sonsuzluğundan (*infinitude*) kaynaklanan yükseltilmiş moral 'erdemler' aracılığıyla işlendiğinde yasanın ve onun belirlediği adaletin idealist vurgusu da tamamlanmış olacaktır.

Bu yaklaşımın bir sonucu olarak (ben'e ait olan ve bu nedenle 'öznel' olan) düzen, adalet, yasa ve yasanın getirdiği (ben'e ait olmaktan çıkmış ve nesnelleşmiş olan toplumsal) düzen kavramlarını genel olarak yasanın gelişme tarihine ve özel olarak da Türkiye toplumunda yasanın gelişme tarihine uyguladığımızda farklı toplumsal ilişki kipleri tarafından üretilen farklı düzen, yasa ve adalet kuruluşlarıyla karşılaşılacağı son derede doğaldır. Konuya Türkiye ve Türkiye'de egemen olan adalet düzeni ve bu düzenin ifadesi olan geçerli hukuk açısından bakıldığında, Türk toplumunun[1] kendi tarihsel süreci içinde yasanın dönüşmesi açısından üç farklı evreden geçtiği, ancak evrimsel bir bakış açısının tersine, tarihsel olarak sonra gelen etiksel (etiksel yaşantıda ifade edilen) düzenlerin önce gelenleri yok etmekten daha çok, kendilerini başka düzeylerde oluşturdukları görülecektir. Başka bir deyişle, başlangıçta 'ben'in arzusunun

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[1] 'Türk toplumu' terimi, burada, etnik bir toplumsal üniteden daha çok hukuki-siyasal bir

bir ifadesi olarak ortaya çıkan güç kendisini, sırasıyla, içeriği gene toplumsal örgütlenme kipi (etik) olarak belirlenen 'ahlaksal yaşam' (siyasal) ve moral yaşam (ideal) dünyalarında kurar. Bu birbirine paralel üç dünyada işleyen temel prensiplerin birbirine uyumu ise genel (kozmik) düzenin ya da 'adaletli' düzenin oluşması sonucunu doğurur.

Bu açıdan bakıldığında, Türkiye toplumunun tarihi dönüşmesini kabaca herbiri kendi ahlak (adalet de) ve güç (siyasal örgütlenme) kipine sahip dört ana dönem içinde ele almanın mümkün olduğu görülmektedir: i) İslam öncesi göçebe kabile toplumu; ii) yarı-göçebe İslam toplumu, iii) dünya kapitalist yapılanmasıyla giderek daha fazla bütünleşen laik, ulus-devlet toplumu; ve son olarak iv) yeni biçimlenen postmodern dünyaya entegre olmaya çalışan Türk toplumu. Bunların birincisinde benliğin kendisini öteki'nden ayırması ve kendisini onunla ilişkilendirmesi, benliğin (siyasal olan) kendisini dışarıya açma, yayma girişiminin aracı olarak (gerçek ya da uydurma) 'kan bağı' ilkesi etrafında gerçekleşmektedir. Bunun sonucu ortaya çıkan ahlak yaşantısı ise aşiret oluşturmanın ve aşirette yaşamanın kurallarını belirleyen bir töre (ya da töreler) manzumesi olarak ifade edilir. Bu yapı, (gerçek ya da uydurma ve hatta öykünme) kan bağına dayalı ilişkilerin ben'in siyasal iradesini ifadesinin bir aracısı olmasını gerektiren durağan olmayan ve bu nedenle belli bir varoluş güvencesini kendiliğinden sunmayan toplumsal ilişkilerin maddi zemini değişmeden kaldığı sürece devam eder.

Türk toplumunun tarihine bakıldığında halkın (*karabudun*'un) varoluşla olan ve esas olarak değişmeyen bu ilişkisinin, aşiret ilişkilerinin bir toplumsal örgütlenme ilkesi olarak kalmasına yol açtığını söylemek mümkündür. Bu nedenle, bir yanda, aşiret ilişkilerinin siyasal örgütlenmenin merkezileşmesi süreci sonucunda Osmanlı hukuk, iktidar, güç ve

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yapılanmayı ifade etmek için kullanılmıştır.

siyasal (ahlak yaşantısına ait) yapıları ortaya çıkarken, aynı aşiret ilişkileri temelde aynı kalmış ve toplumsal örgütlenmenin ana prensibini (hem merkezde hem de merkezden uzak olan yerel düzeyde) belirlemeye devam etmiştir. Bu nedenle Osmanlı merkez yapılanmasında ve onun *reaya*'sıyla olan ilişkilerinde en temel sorun olarak genel, kozmik bir düzeni ifade eden *adalet* sorununun ortaya çıkmış olması bir tesadüf olmaktan uzaktır.

17. yüzyıldan başlayarak bu ayrılmanın yarattığı sorunlara bir çözüm olarak önerilen ve giderek derinleşen Osmanlı modernleşmesinin sadece ülkeyi yöneten seçkinlerle sınırlı kalması ve bunun aşağıdan yukarıya değil de yukarıdan aşağıya dayatılan bir düzen yaratmasının nedenlerini burada aramak gerekecektir. Aslında çözüm olarak önerilen modernleşme, sosyal etikteki yapılar değişmeden kaldığı için bir çözüm olamamış ve Osmanlı Devleti Batı'dan gelen modernleşme ve kendi toplumunda aşağıdan gelen aşiretçilik arasında sıkışarak ortadan kalkmıştır. Osmanlı'nın yıkılmasıyla kurulan yeni Türkiye Cumhuriyeti ise Osmanlı modernleş(tir)me projesini aynen devraldığından bu çelişkinin Cumhuriyet Türkiye'sinde de sürdüğünü söylemek yanlış olmayacaktır. Bununla birlikte, çağdaş Türkiye'nin hukuk açısından içinde sıkışıp kaldığı ve aşması gereken güçlükler azalmışa benzememekte, tersine artmış görünmektedir. Bunun en başlıca nedenini, Türkiye'de henüz aşiret ilişkileri aşılmadan ve modernleşmenin gerektirdiği insan tipi (siyasal hak ve sorumlulukların konusu olan vatandaş) oluşmadan Cumhuriyetin, modern hukuksal prensiplerin üstüne bir de post-modern hukuksal prensiplere uyum sağlama zorunluluğunda (Batının giderek bütünleşen dünyanın tek egemeni olmasından kaynaklanan) aramak gerekir.

Anahtar Kelimeler: adalet ve hukuk, siyaset ve yasa, ahlak, devletin adalet yönetimi, kabile adaleti, İslam adaleti, laik adalet, postmodern toplumunda adalet

Öyle görülmektedir ki, toplumsal ilişkiler kipinin değişmesindeki en önemli faktör, ben'in ve onun toplumsal varoluşunun (diğeri ile olan toplumsallığının) zeminini yaratan 'ben ve öteki' toplumunun kendi dışlarındaki varoluşla kurdukları ilişkilerin niteliğinde meydana gelecek bir değişmedir.