

THE CONCEPT OF LEGAL CULTURE

With Particular Attention to the Turkish Case

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ABSTRACT

This article describes the concept of legal culture. After taking up a discussion on whether law can be transferable or not, which is seen as a product of the culture of a given society, the concept of legal culture and its different perceptions by various scholars constitutes the subject of the paper. Since there has not been much done in the field of legal culture in Turkey up to now except for a few studies, this is a crucial area for exploration and will be accomplished by scrutinizing the sociological, economical, and political implications of Turkish law.

ÖZET

Bu makale, asıl olarak hukuk kültürü kavramının ne olduğunu ortaya koymaya çalışmaktadır. Makale, belirli bir toplumun kültürünün ürünü olarak görülen hukukun, bir başka kültüre aktarılıp aktarılamayacağı tartışmasına değindikten sonra, hukuk kültürü kavramını ve bu kavramın çeşitli düşünürlerce el alınışını konu edinmektedir. Türkiye’de, hukuk kültürü alanında bugüne kadai bir kaç çalışma dışında çok fazla çalışma yapılmaması dolayısıyla konu ve kavram hakkında düşünmek, dahası, değişen hukukun toplum üzerindeki sosyolojik, politik vb. yansımalarını araştırmayı ve bu ilişkiyi sürekli olarak takip etmeyi gerekli kılmakta ve bu bakımdan da hukuk kültürü kavramı önem arz etmektedir.

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Anahtar Kelimeler: *Hukuk kültürü, hukuk sistemi, hukuk resepsiyonu, Avrupa Birliği üyelik süreci.*

INTRODUCTION

The law in Turkey has been changing very fast due to EU membership process. However, it seems that the connection between law and society, the relations between law and other societal institutions are avoided in this process. As far as it is known, there has been very little academic work done on the topic up until now in Turkey. Therefore, this article intends to deal with the issue at a theoretical level.

What is certain is that not only has a series of laws been amended, but what is uncertain is whether the culture behind that law is transferable or not. Especially when human rights are in question, this aspect of the issue is unavoidable. However, as it can be seen in the Turkish political scene, this process is very tender and various groups in society practice a range of conflicts to overcome.

One of the most continuous legal debates is whether rules that are products of a specific culture can be transformed or not. However, even if rules (or standards) can be transformed, it is important to touch, *inter alia*, on the legal culture of a given society in socio-legal research, since the implementation of those rules would be attained or not within a specific culture. Therefore, I shall ask what is legal culture? What does this concept include? Is it measurable sociologically? Is it a concept, or as some scholars claim, a “paradigm or a methodological approach?”¹

Is it impossible to develop a concept of legal culture... “to indicate a significant explanatory variable in empirical research in sociology of law?”² Can we have indicators to measure it empirically?³ What is it then, when one states that law is not obeyed in a country and having an idea on the legal culture

¹ Reza Banakar and Mark Treves, “Studying Legal Cultures” in Reza Banakar and Max Treves (Eds.), *Theory and Methods in Socio-Legal Research*, Hart Publishing, 2005, 239.

² Roger Cotterrell, “The Concept of Legal Culture”, in David Nelken, (Ed.) *Comparing Legal Cultures*, Dartmouth Publishing, 1997, at 14.

³ Some claim that it is possible. See Erhard Blankenburg, in *Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany*, DIA, 1997 (discussing the indicators, such as litigation rates, legal aid, training of legal professionals etc).

of that country may save a life?⁴ Where does this idea stem from? Is this an observation or an idea, or just a reductive way of looking at reality?

Before dealing with legal culture, first a discussion on important threshold question needs to occur, namely whether law is transferable or not. International law rules (not only in the field of human rights, but also in other fields, such as IPR law, trade law, etc.) along with domestic changes, or reforms as they are called, have been recognized by the Turkish state as a positive response to EU negotiations and international diplomacy requirements. In this regard, only the influence of the EU seems to create a transition that can be identified as a very large transplant in the legal system of Turkey in general and in the human rights law in particular. Thus, one shall put the finger on the theory of legal transplant (or reception of law).

I. Legal Transplant

In the theory of legal transplant (transfer, reception, or transformation-whatever it is called), there are different opinions on the subject. Thibaut, a German legal thinker, claimed, following the natural law theory at the beginning of the nineteenth century, that law is a product of human reason, and it can, thus, have the common elements in different countries. Accordingly, legal transplant would then be possible. On the other hand, Friedrich Karl von Savigny, another German legal theorist, took the opposite point of view in his reply to Thibaut. According to Savigny, law reflects the culture of a given society, and thus reception in another culture is not possible, because law is a product of that society and of its particular attributes or idiosyncrasies, like other institutions such as language, family, religion and so on.⁵ These contested opinions between two thinkers was taken up and evaluated by Professor Cahit Can who in his unpublished thesis, stated that Savigny's position in terms of reception was conservative and aimed at providing an instrument to delay the revolutionary influences of his time. Thibaut, in this sense, was regarded as progressive, since his idea was found to be supportive of the bourgeoisie revolutionary movement on-going at that time.⁶

⁴ David Nelken, "Using the Concept of Legal Culture," Center for the Study of Law and Society Jurisprudence and Social Program University of California, Berkeley, 2004, *available at* <http://repositories.cdlib.org/cslls/20> (last visited Oct 31, 2007).

⁵ For detailed information about the contested opinions of Savigny and Thibaut, *see* Ali Acar, "Friedrich Karl von Savigny'nin Hukuk Anlayışı" (The Legal Analysis of Friedrich von Savigny), *Erciyes Üniversitesi Hukuk Fakültesi Dergisi* (Erciyes University Law Review), 2006, Vol. 1, 65-88.

⁶ *See* Can, Cahit, *Hukuk Sosyolojisi ve Tarih Açısından Resepsiyon* (unpublished thesis), Ankara University, Ankara, 1982.

In the contemporary era, these two contested opinions are somehow shared by various scholars. Alan Watson, known as a legal historian, follows the Thibaut opinion but with different justification. In his book, *Legal Transplant – An Approach to Comparative Law*, Watson gives a large number of examples in order to prove how Roman law was transplanted into different countries, especially by Scotland. William Ewald, in his critiques of the Watson understanding of legal transplant, defines the perception of law and of the reception of some scholars as opponents or adherents of mirror theory. Mirror theory basically states that law reflects or mirrors the social, economical, and political relations of a given society.⁷ This idea can also be found in writings of a famous sociologist - Durkheim. The very basic interpretation of his theory is that in societies which have organic solidarity, the penalties or law will be remedial and individual.” On the other hand, in societies where mechanical solidarity is in force, penalties in the legal system will be revengeful and collective⁸. However, Durkheim’s opinion is more holistic.

In the theories of legal transplant, one common element exists in that all scholars’ opinions focus on private law reception rather than public law -- some do so on purpose. For example, Savigny, in his book on Roman law,⁹ clearly defines his aim that he focuses on private law. Ewald, in his article, makes a distinction between private and public law by referring to the books and articles of Watson, which he says they don’t make a distinction between two fields of law.¹⁰

Moreover, there is no specific theory on the reception of international law and more specifically of international human rights laws. This is maybe because of the characteristic of international law, since its status is arguably indefinite and lacks enforcement mechanisms. However, when we look at the rules, standards, and covenants in human rights and/or other fields, such as international trade law it can be seen that they are somehow subjected to reception by the rest of the world countries, because in order to exist in and to be recognized by the international community, adopting these rules seems to be a requirement. It is particularly true for EU membership with the standards set

⁷ William Ewald, “Comparative Jurisprudence (II): The Logic of Legal Transplant”, 43 American Journal of Comparative Law 503 (1995).

⁸ Emile Durkheim, “Types of Law in Relation Types of Social Solidarity” in Vilhelm Aubert (Ed.), *Sociology of Law, Selected Readings*, Penguin Modern Sociology Readings, 1969, 17 et seq.

⁹ Friedrich Karl von Savigny, *System des heutigen Römischen Rechts* (System of Present Day Roman Law), Erster Band, 1840(b) Berlin, 2 and 331.

¹⁰ Ewald, 1995, *supra* note 7.

by the Copenhagen criteria and the *acquis*.¹¹ On the other hand, these norms may or may not be implemented in a specific culture.

II. Legal Culture in general

The concept of “culture” is among the key, vague, broadest¹² and most controversial concepts of social sciences, which range from sociology to anthropology from philosophy to law.¹³ Therefore, the definition may differentiate, depending on different social sciences and also on different approaches within a particular social science.¹⁴ According to one scholar, “culture consists of learned behaviours, attitudes and values;” thus, legal culture also encompasses the same components that concern legal issues.¹⁵ Wallerstein criticizes this use of the concept and then alleges that it is an ideological usage, after giving almost the same definition which is “when we talk of traits which are neither universal nor idiosyncratic we often use the term ‘culture’ to describe the collection of such traits, or of such behaviours, or of such values, or of such beliefs. In short, in this usage, each group has its specific culture.”¹⁶

Coming to the concept of legal culture; “sociologists have found the concept useful for analyses of the ethics and practices of legal organizations. Anthropologists, using a more holistic approach, have characterized the legal cultures of entire societies.”¹⁷ When the concept of legal culture is in use in the sociology of law, scholars agree neither on the definition nor on the methods to

¹¹ Manfred Nowak, “Human Rights ‘Conditionality,’ in Relation to Entry to and Full Participation in the EU,” in Philip Alston (Ed.), *The EU And Human Rights*, Oxford University Press, 1999.

¹² Immanuel Wallerstein, “Culture as the Ideological Background of the Modern World System”, *Theory, Culture & Society*, SAGE, London, Vol. 7, 1990, 31.

¹³ Edgar F. Borgatta and Rhonda J.V. Montgomery (eds.) “Culture”, *Encyclopedia of Sociology*, 2 ed., 2000, 562-572.

¹⁴ For the different definitions in anthropology, see David Levinson, Melvin Ember (eds.), “Culture,” *Encyclopedia of Cultural Anthropology*, Vol. 1, 1996, pp. 291-298; Alan Barnard and Jonathan Spencer, “Culture,” *Encyclopedia of Social and Cultural Anthropology*, Routledge, 1996, 136-142; Julius Gould and William L. Kolb (eds.), “Culture,” *A Dictionary of the Social Sciences*, The Free Press, 1964, 164-168.

¹⁵ Volkmar Gessner, “Global Legal Interaction and Legal Cultures,” *Ratio Juris*, Vol. 7 No. 2, July 1994, 132.

¹⁶ Wallerstein, *supra* note 11.

¹⁷ J. L. Gibson and G. A. Caldeira, “The Legal Cultures of Europe”, 30 *Law & Society Review* 55-56 (1996).

research or to measure it. The concept is deemed to be vague and open-ended.¹⁸ Besides, some scholars accept different term(s). Therefore, trying to define legal culture is very complex and difficult.¹⁹

Another scholar, Lawrence Friedman, as a strong supporter of using the concept of legal culture, shares almost the same definition and uses the concept of legal culture by insisting on determining some indicators to measure it. To him, legal culture means “the idea, values, attitudes and opinions, people in some society hold with regard to law and the legal system.”²⁰ In another definition of the concept, he changes this description slightly. Accordingly, the legal culture “refers to ideas, values, expectations and attitudes towards law and legal institutions, which some public or some part of the public holds.”²¹ He claims that legal culture is measurable by some indicators.²² In order to do so, he divides the definition into two sub-terms: internal and external legal culture. Internal legal culture refers to the attitudes and behaviors of legal professionals, while external legal culture refers to those of lay people.²³ This division is reminiscent of von Savigny, the German legal theorist, as Professor Cotterrell tells us. According to von Savigny, the consciousness of law of (lay) people in modern times is represented by legal professionals. When Savigny uses the term “technical” (technische) element of law, its meaning seems to be similar to that of Friedman’s internal legal culture, and by using the term “political” (politische) element of law he meant the same as the external legal culture of Friedman. By the technical element of law, Savigny wanted to refer the law which is in the hands of legal professionals. By the political element of law, he refers to the law which lives in the consciousness of people, in their behaviors and so on.²⁴

¹⁸ Cotterrell, *supra* note 2, at 14; Marina Kurkchian, “Researching Legal Culture in Russian: From Asking the Question to Gathering the Evidence” in Reza Banakar and Max Treves (eds.) *Theory and Methods in Socio-Legal Research*, Hart Publishing, Oxford, 2005, 261.

¹⁹ David Nelken, “Comparing Legal Cultures: An Introduction,” in David Nelken (ed.) *Comparing Legal Cultures*, Dartmouth Publishing, Sudbury, Mass., 1997, 13-15.

²⁰ Lawrence M. Friedman, “Is there a Modern Legal Culture,” *Ratio Juris*, Vol. 7, No. 2 July 1994, 118.

²¹ Lawrence M. Friedman, “The Concept of Legal Culture: A Reply” in David Nelken (Ed.) *Comparing Legal Cultures*, Dartmouth Publishing, 1997, 34.

²² Friedman, 1994, 122.

²³ Lawrence M. Friedman, *The Legal System: A Social Science Perspective*, Russell Sage Foundation, New York, 1975, 194 and 223.

²⁴ Friedrich Karl von Savigny, *Vom Beruf Zeit für Gesetzgebung und Rechtswissenschaft* (From the Profession, Time for Legislation and Jurisprudence), 3d ed., Heidelberg, 1840 (a), 12.

Conversely, Roger Cotterrell refuses to use the concept of legal culture but prefers to use the term “legal ideology” instead. As he shows in his critiques of Lawrence Friedman, the definitions of legal culture, he claims, are ambiguous and insufficient to measure legal consciousness, attitudes and behaviors of society as a whole. Because “legal culture does not appear as a unitary concept, but indicates an immense, multi-textured overlay of levels and regions of culture, varying in content, scope and influence and in their relation to the institutions, practices, knowledge of state legal systems and its theoretical framework is inapplicable for the empirical researches.”²⁵ According to him, “like legal culture in Friedman’s formulation, *legal ideology* can be regarded not as unity but rather as an overlay of currents of ideas, beliefs, values and attitudes embedded in, expressed through and shaped by practice.”²⁶ Otherwise, Friedman’s definition reduces the meaning of law to the state law only, he claims. However, to Cotterrell, not just in old societies or in tribal communities but also in the modern (western) societies, the law is also pluralistic. There are other forms of law different than state laws. Therefore, he wishes to use the term legal ideology rather than the term legal culture. Then, Professor Cotterrell remarks that “the concept of legal ideology can be considered to be tied in a relatively specific way to legal doctrine and can be regarded,” he goes on, “as made up of value elements and cognitive ideas presupposed in, expressed through and shaped by the practices of developing, interpreting, and applying legal doctrine within a legal system.”²⁷ However, why the concept of legal ideology is necessarily linked with legal doctrine and with legal professionals is not clear. How is it different than legal culture if the legal professionals are the bearers of the legal ideology²⁸? Does this concept assume that legal professionals and people in society necessarily interrelate with each other, or that they affect each other? Is it really so in every society? If so, how?

In another theory, Hayrettin Ökçesiz brings an important expansion to the discussion. In his theory, he combines the natural requirements with the requirements of the human condition, then defines the characteristics of legal culture. In his attempt to examine the concept of “sovereignty,” he suggests a “seven triplets” framework²⁹ to analyze the concept. In this framework, the

²⁵ Cotterrell, *supra* note 2, at 17.

²⁶ *Id.*

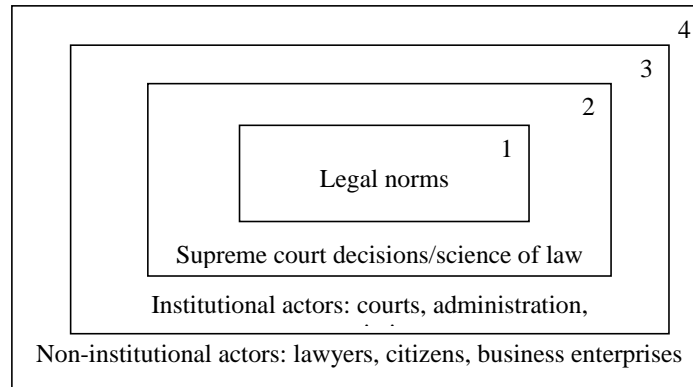
²⁷ *Id.*, at 21.

²⁸ *Id.*, at 22.

²⁹ Hayrettin Ökçesiz “Hukuk Kültürünün Yapısını “Nomos-Physis” (Toplum-Kültür-Doğa) Çerçevesinde Yedi Üçzlü Bir Kurguyla Açıklama Şemasında Egemenliğin İrdelenmesi” (Examination of Sovereignty in the Framework of the Structure of Law Culture “Nomos-Physis” (public-culture-nature) with a Seven-triplet Organization (*available at* www.anayasa.gov.tr/eskisite/anyarg20/h_okcesiz.pdf) (last visited Oct. 31, 2007).

structure of legal culture can be analyzed under seven triplets. Seven triplets means: 1) three identities: human, individual and person; 2) three integrities: biological, spiritual and psychological; 3) three fundamental necessities: freedom, security and equality; 4) three components of idea of law: equality, security and freedom; 5) three dimensions of law: norm, fact, value; 6) three dimensions of rule of law: equality, security and freedom; 7) three fields of politics: private sphere, public sphere and official sphere. All three dimensions which are related to security, freedom and equality seem to combine natural and cultural necessities and therefore constitute the characteristics of law. Professor Ökçesiz's theory gives the impression that it is normative; since the theory does not encompass historical explanations, it thus seems to be far from being an analytical tool for socio-legal research. Of course, this does not reduce the value and importance of the theory. It is worthy to think about how the theory can be used as an analytical tool to research on legal culture.

Along with other scholars, Volkmar Gessner demonstrates more a comprehensive framework to research legal culture.



Field 1: Legal-theoretical and legal dogmatic comparison

Field 2: Legal comparison

Field 3: Comparative implementation research

Field 4: Comparison of legal systems/legal culture³⁰.

³⁰ Volkmar Gessner, "On the Methodology of Comparing Legal Phenomena" in Volkmar Gessner, Armin Hoeland, Csaba Varga (eds.) *European Legal Cultures*, Dartmouth, 1996, 245; Gessner, Volkmar. "Teaching Legal Culture", Unpublished Course Notes, Onati International Institute.

In this construction, he defines all the components of legal cultures. We can then reach a result that combines all the indicators. His construction also gives an answer to Cotterrell's criticisms to Friedman. According to Professor Gessner, the legal culture embraces several components, from norms to courts, from judges' to lawyers', from NGOs to lay people's values, attitudes, consciousness, established and learned behaviours concerning law. This framework is not restrictive and gives an opportunity to grasp national and international components and their interaction, such as the effects of international rules and/or institutions, NGOs, organizations. Also it does not necessarily and strictly put a value into the framework. In one sense, this means that these components, i.e. the actors, may clash with one another or cooperate, depending on the connections to the other conditions in society.

The courts and especially the high courts constitute an important part of his framework. Although Professor Gessner does not mean that the high courts are the only institutions to research or to measure the legal culture, nevertheless the high courts' decisions play an important role in showing the general outlook of legal culture in this construction, but again this is not the only way to get this view. This last point is important to take into consideration while researching the internal legal culture (if there is one) in Turkey in the terms of Friedman, but it requires combining different effects on and interrelation of courts.

Remembering that Friedrich Karl von Savigny stated in the 19th century that the legal consciousness of the people, which they had before the modern era, began to be represented by the legal professional in modern societies by the division of labor and also since people began to forget their own laws.³¹ Although this claim does not totally reflect that fact, nevertheless it has some important indication in the modern times. This is particularly true in a society where the modern type of positivistic law is imposed to change or develop the society. In this respect, it can be observed that this law brings its experts or professionals with itself and law becomes a tool in the hand of these experts. Therefore a new class or professional group of people emerged in the society to deal with law. This is precisely applicable to Turkish example. It is not rare that judges many times declared that they are the guardian of the Republic of Turkey.³² However, it is not claimed here that there is a homogenous group of people, but yet there are people who can direct the main orientation.

³¹ Savigny, *supra* note 9, at 12. For the emergence and power of American legal professionals, see Michael Ariens, "Modern Legal Times: Making a Professional Legal Culture", *Journal of American Culture*, Vol. 15, Issue 1 March 1992, 25–35.

³² See, e.g. Osman Arslan, President of the Turkish High Appeals Court (Yargıtay), *Adli Yıl Açılış Konuşması* (2007-2008) (Opening Speech for the 2007-2008 Judicial Year) (Sep. 6, 2007), transcript available at [www.yargitay.gov.tr /content/view/187/1](http://www.yargitay.gov.tr/content/view/187/1) (last visited Oct. 31, 2007).

III. Western Oriented Legal System in Turkey- What about Legal Culture?

As mentioned above, the legal system of a country is considered to be within its legal culture. For that reason, I shall touch on the legal system of Turkey in its very basic sense. However, the legal system and its norms, *inter alia*, cannot be regarded as if they constitute the whole legal culture of a society. Of course the characteristic of norms and system take an important place in the legal culture,³³ however, it does not show how that system functions or the linkage between norms and society.

As is well known, the Republic of Turkey in its establishment period turned to face the West. Hence, a western-oriented legal system was designed for the new republic from Western Europe. Many laws were adopted from European countries. For example, the Civil Code of Turkey was enacted in 1926, based on Swiss Civil Code. The Penal Code was passed by Parliament in 1926, based on the Italian Penal Code. Many other laws were also based on the Western countries' laws. With these legal transplants, the legal system was aimed to unify the country because in the Ottoman period, ethnic groups that were not Muslim had their own legal system, including dispute settlement mechanisms. So, under a uni-national system, many legal systems could not be valid anymore, thus a unique western legal system was adopted.

CONCLUSION

In this article, I tried to engage in the concept of legal culture generally. I attempted draw attention to the Turkish case, while the law and legal system has been in a transition, since Turkey is in the process of preparing for EU membership and trying to harmonize its law with that of EU.

As Katharina Pistor³⁴ claims, adopting the rules in international law is not so important if there is not a sufficient institutional base to implement them in the receiving state. So the important aspect of the transplanting of any kind of legal issue relies on the implementation. Therefore, opinions, values, attitudes, behaviours, etc, of legal professionals as well as the executors and also of the whole society shall be ready to adopt that transplanted law. Otherwise, it is inevitable to have (culture) mismatches. And in this respect, socio-legal studies play an important role in grasping the whole legal culture of a society.

³³ Zeki Hafizoğulları, "Bir Kültür Ürünü olarak Hukuk Düzeni" (Law Regime as a Culture Harvest), Ankara Üniversitesi Hukuk Fakültesi Dergisi (Ankara University Law School Journal), 1996, Vol. 45, No. 1-4, 3-21.

³⁴ Pistor, Katharina, "Standardization of Law and its Effect on Developing Economies", 50 American Journal of Comparative Law 97 (2002).

It is well known that the EU requires impact assessment analysis when a candidate country tries to harmonize its law with the *acquis communautaire*. However, this analysis focuses only on the economic impact of legislation in question. Therefore, reducing the task of sociology of law or socio-legal studies just to impact assessment analysis, as was done by the EU and acknowledged by Council of Ministers of Turkey³⁵ will not be enough; it may even be harmful. Although it is stated in the Regulation that social, economical, environmental, commercial aspects of any piece of legislation shall be taken into account by the public administration, it is not realistic since those public administrations have to do this job in 30 days (Article 7 of the Regulation). Besides, it not known who will do this task and how? This Regulation seems to be another product of top-to-bottom process and thus, it lacks the implementation capacity.

It can be suggested here that although the characteristic of the legal system is western-origin theoretically in Turkey, however, whether its practices or its culture is the same can be disputed based on the fact of whether it contains the same traits or not. Under the process of EU membership, many laws have been amended in order to harmonize with those of EU. Since the process functions again in a top-to-bottom way, it is unavoidable to undergo new tissue mismatches in the legal system.

For those reasons mentioned above, it is very important to deal with socio-legal studies; legal culture in this sense has a central role and importance in a society.

³⁵The Regulation on Principles and Procedures of Drafting any Kind of Legislation, published in the Official Gazette Nr. 26083 and dated 17.02.2006.