Chapter 2
A Nonlinear Approach to Law, State, and Governmental Organisations: The Example of Turkey’s Dynamic Secularism

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ABSTRACT

This chapter attempts to give an answer to a question arising from a project about the legal complications of secularism in Turkey. The question of meta-narrative about how to approach the subject in hand, and through which theoretical premises, automatically leads one to criticise the established arguments of state-centred legal positivism, especially when religion- and society-oriented voices are so loud. In this chapter, the strengths and weaknesses of positivism and its alternatives are analysed in depth. Not a single monist or pluralist theory proves to be absolutely superior in the end. Instead, their harmonisation is needed. Positivism holds the advantage of referring to the power and enforcement capacity of the state. Pluralism, however, is realistic on another ground, as it pays attention to the chaotic nature of socio-legal phenomena and claims that law should never be understood and applied in a linear way or in closed systems. The dialogue on this theoretical spectrum of law merges with the chapter’s starting point where the question of Turkish secularism required the most realistic approach to law and legality in general.

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INTRODUCTION

As academics, we more or less know what kind of general results we may have at the end of our research endeavours. This is simply because our starting points, that is, theories and hypotheses, impose upon us certain methodologies. This fact turns the initial mental phase of any research activity into its most decisive part. By choosing the theory that will guide one throughout their research, one actually limits their questions, methods and findings to a great extent. I was faced with this challenge when I embarked upon a project on Turkish law, specifically one on the Diyanet, the laic Turkey’s state department for religious affairs. It so appeared to me that, for the sake of greater accuracy, I had to first address the problem of theory, compare and contrast my alternatives, and finally decide on the most suitable model. This essay is a product of such an aspiration.

Across legal theories, one fact has become clear to me that theories of different, even opposite, origins and standpoints may well share a commonality of being too systemic. By systemic, I refer to those views that aspire to create and maintain legal systems through linearity. This is not a new discovery but something that is already known and criticised as black-box law. State and other types of positivism fall under this category. What is relatively new and underdeveloped is the use of chaos theory to point at the defects of linear thinking in law. State positivism is not in a simple opposition with other systemic legal theories of religious or secular kind; it is challenged by something more complex and dynamic, namely, chaos. Chaos, the everlasting reality of phenomena including law, is a threat only for those who deny it and only when denied. When accepted as being indisputable and unavoidable, it actually leads to better opportunities for fairness, inclusiveness, and justice above all. Having said that, I must confess that the very notion of ‘chaos’ will sound discouraging to most lawyers, so I will instead employ a more conventional terminology such as plurality, polycentricity and interlegality.

This essay aims to examine alternative legal theories in detail and subsequently to develop the most accurate jurisprudential model for Turkish law on the axis of secularism-and-religion. Such a model may not only shed light on some of Turkey’s socio-legal realities but may also refute overly systemic thinking in law by bringing out the plural nature of the legal world.

INTRODUCING THE DEFINITIONAL PROBLEM

What is law? Is it the Austinian ‘command of the sovereign’ (Campbell, 2005); is it what society does in reaction to or irrespective of the sovereign; or is it what already encapsulates us all in a cosmic hub? The positivist school advocates the first (Hart, 1994); legal anthropologists emphasise the second (Moore, 1978; Merry, 1988); and natural law traditions promote partaking in the third – their envisaged higher order – in a conscious and ethical manner (George, 1999; Porter, 2005). Can law be all of them at the same time, or a combination outside them? The answer is: it is a matter of context and perspective. When one acknowledges that there is a plurality of factors at play, it will be only fair to assess law in a multitude of ways. Determining the context will mean to determine what law is for that particular scenario.

Legal scholars attempt to define law along with its different sources, grounds of application, functions and limits (Kagan, 1995; Galligan, 1995; Reichman, 2008). The diversity of viewpoints has resulted in a vast literature of legal theory. From among the various major legal schools, two are selected in this essay: legal positivism and legal pluralism.

In my view, both of these conceptualisations are problematic as well as useful, albeit for different reasons. Since positivism is an established paradigm both internationally and in Turkey, its