

HERBERT SPENCER'S EVOLUTIONARY THEORY OF JUDICIAL AND EXECUTIVE SYSTEMS

Herbert Spencer'da Yargı ve İnfaz Sistemlerinin Evrimsel Teorisi

“Try to fit a hand with five fingers into a glove with four. Your difficulty aptly parallels the difficulty of putting a complex conception into a mind not having a proportionately-complex faculty.” Herbert Spencer

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Abstract: Herbert Spencer was known as a philosopher, sociologist, biologist, anthropologist and classical liberal political theorist of the Victorian era. He was also regarded as a theorist of natural rights from the law discipline perspective. In his huge volume of works, called synthetic philosophy, he pointed out the historical stages of the whole social institutions and as one of the fundamental institutions he focused Judicial and executive systems and its' evolutionary progression, as well. Of the law controversies surrounding our century is the debate whether punitive law systems or restorative law systems provide Justice. Therefore Spencer's intellectual influences and contributions for modern law are important. Because what he

Özet: Herbert Spencer, bir filozof, sosyolog, biyolog, antropolog ve Viktorya döneminin klasik liberal anlayışını temsil eden bir siyaset teorisyenidir. Ayrıca hukuk disiplini açısından doğal haklar kuramcısı olarak kabul edilir. “Sentetik felsefe” isimli geniş çaplı eserlerinde, tüm sosyal kurumların tarihsel aşamalarına dikkat çeker ve temel kurumlardan biri olarak yargı ve infaz sistemlerinin evrimsel olarak ilerlemesine de odaklanır. Bilindiği gibi, yüzyılımızın hukuk tartışmaları arasında cezalandırıcı hukuk sistemlerinin ya da onarıcı hukuk sistemlerinin adaleti sağlayıp sağlamadığı yer almaktadır. Bu bağlamda Spencer'ın fikirleri ve modern yasalara katkıları önemlidir. Çünkü Yargı Sistemlerinin 'sosyal evriminin sonunda' Spencer'ın beklediği, aşırı kurallar ve cezalar

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Makale Geliş Tarihi: 18.09.2020, Makale Kabul Tarihi: 11.11.2020

expects 'at the end of the social evolution' of Judicial Systems is not extensive rules and punishments. According to him, law requires stability. And he thinks industrial type societies are the peaceful and the progressed one. When societies gets this stable status, having voluntary cooperation, fulfillment of contracts and implied assertion of equality in human's rights. And the consensus of individual interests becomes the chief source of law. For him, Modern Law that supports the general welfare passed from successive stages in the course of social evolution. Then in the course of civilization, legislative power has become a kind of general guidance. This article is concentrating on evolution of Judicial and Executive systems and then questioning, if human being accepts punitive law systems again, could it be read as retrogression of Judicial and Executive systems

Keywords: Philosophy of Law, Sociology of Law, Social Evolution, Laws, Executive and Judicial Systems,

değildir. Ona göre hukuk istikrar gerektirir. Bu anlamda endüstriyel toplumların barışçıl ve gelişmiş toplumlar olduğunu düşünür. Toplumlar sanayileşme ile istikrarlı bir duruma kavuştuğunda, gönüllü işbirliği, sözleşmelerin yerine getirilmesi ve insan haklarında eşitlik hali sağlanır. Bireysel çıkarlar konusunda ortak akıl gelişerek, hukukun ana kaynağı haline gelir. Nitekim genel refahı destekleyen modern yasa, toplumsal evrim sürecinde birbirini takip eden aşamalardan geçmiştir. Nihayetinde medeniyet sürecinde yasama gücü insanlık için bir tür yol göstericilik haline gelmiştir. Bu makale, yargı ve infaz sistemlerinin evrimi üzerine yoğunlaşmakta ve insanlık, cezalandırıcı hukuk sistemlerini tekrar kabul ederse, bu durum yargı ve infaz sistemlerinin gerilemesi olarak okunabilir mi sorgulamaktadır. **Anahtar Kelimeler:** Hukuk Felsefesi, Hukuk Sosyolojisi, Sosyal Evrim, Kanunlar, Yargı ve İnfaz Sistemleri

Introduction

Spencer was a liberal philosopher who powerfully followed early utilitarian ethics, and becomes a dominant personality in the intellectual life of the Britain. He was one of the main supporters of evolutionary theory.¹ His effort was to improve a scientific absoluteness in social area and it was very controversial.²

Although he has a lot of illustrations and analogies in his works and makes his thoughts complicated, his method was functional. "He viewed societies, like individuals, as having survival needs with specialized organs emerging and persisting to meet these needs. And he defined "social health" by how well these needs are being met by various specialized "social organs." ³ He pointed out the historical stages of the whole social institutions and as one of the fundamental institutions, he focused Judicial and executive systems and its' evolutionary progression, as well.

Spencer, in the fifth volume of his book "*Principles of Sociology*", the parts named "Judicial and Executive Systems" and "the laws" explains how the laws formed and the justice is organized in human history. Going back to primitive nomadic communities, he initially questions what kind of necessities forced people to migrate and emphasizes some causes such as climate and land problems or internal/external wars. Therefore for Spencer, the judicial body being at first identical with politico-military body and the evolution of judicial systems is revealed in several ways.⁴

According to Spencer, with the results of immigration, people's responsibilities within the community continued to force them to accept guidance of their ascendants. The migrants took social arrangements

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- ¹ William Sweet, 'Herbert Spencer', St. Francis Xavier University, Canada, *Internet Encyclopedia of Philosophy*, <http://www.iep.utm.edu/spencer/> > Date of Access 17.06.2016.; See, also, Topçuoğlu, Hamide, *Hukuk Sosyolojisi*, Ankara Üniversitesi Hukuk Fakültesi Yayınları, No:174, Cezaevi Matbaası, İstanbul, 1969, pp.520-528; See Duncan, David. (ed.) *The Life and Letters of Herbert Spencer*. London: Methuen, 1908.; See Spencer, Herbert. (1904). *An Autobiography*. 2 vols. New York: Appleton and C.O. ;<http://oll.libertyfund.org/people/herbert-spencer> > Date of Access 20.06.2016.; Haines, V. (1992). Spencer's philosophy of science. *British Journal of Sociology*, 43(2), 155.
 - ² Haines, V. (1992). Spencer's philosophy of science. *British Journal of Sociology*, 43(2), 155.
 - ³ Turner, Jonathan H., Beeghley, Leonard, & Powers, Charles H. (2002). The emergence of sociological theory (5th ed.) Belmont, CA: Wadsworth Thomson Learning, pp. 54-89.,<https://www.suz.uzh.ch/dam/jcr:00000000-36d7-41d4-ffff-ffff9b49d30e/Turner.pdf> > Date of Access 20.06.2016.; See Herbert Spencer's Four Theories of Social Evolution. Robert G. Perrin *American Journal of Sociology* 1976 81:6, 1339-1359
 - ⁴ Spencer, *The Principles of Sociology*, Political Institution, 'Judicial and Executive Systems', pp. 492-503

from their parents and continue to hold the irrational information that inherited from them. For Spencer, this situation tells us that the first laws were built in this context with customs everywhere.⁵

Spencer gives various examples of history to make remembered how primitive people made their lives suitable to their ancestors. The imitation of previous ancestors was a general consent of the governments. With historical examples, he explains both moral and political conditions of human beings that had taken both the civil and criminal laws from their customs and brought them verbally in the nature of reduced laws for next generations. Thus, Spencer emphasizes that the imitation tendency in human nature is also effective in law making. According to Spencer, from the first stage of communities to their modern times, demanding Justice shaped gradually. In the beginning family-feuds or duels used for the self-protection, but transgressed to request protection by principal chief or king and then after a long time transgressed protection by the state.⁶

By virtue of these reasons, Spencer essentially emphasizes that the shaping of systems according to traditions continues in the long stages of progress, and greatly affects the judicial administration. For instance, in Europe even all the kingdoms held by customs, and then timely it becomes written law. Subsequently even the issues such as commercial law developed in modern times continue from the decisions phase in accordance with the customs they were previously followed.⁷

Pursuant to Spencer's idea, in the times he witnessed, the custom still continues to be a viable complementary factor in law because the decisions of the judges have become precedents for their successors and have been established by subsequent judges by parliament.⁸ Thus, he says that in the process of civilization, a comprehensive change can never be completed, even though the written law tends to replace the use of custom.

Almost every phases of his theory, he claims a set of functions, central to the evolution of Law.

- First revisits the major events of the world history.
- Second, retells, emphasizing the role of the authorities obeying ancestors influences to them.

⁵ Spencer, *The Principles of Sociology*, Political Institution, 'Laws', p. 513

⁶ Spencer, *The Principles of Ethics*, introduction by Tibor R. Machan (Indianapolis: LibertyClassics, 1978). Vol. 1. , p. 78; See Bell, D., & Sylvest, C. (2006). International Society In Victorian Political Thought: T. H. Green, Herbert Spencer, And Henry Sidgwick. *Modern Intellectual History*, 3(2), 207-238.

⁷ Spencer, *The Principles of Sociology*, Political Institution, 'Judicial and Executive Systems', p. 502, Spencer, *Social Statics*, p. 47

⁸ Spencer, *The Principles of Ethics*, Vol. 1., p. 217

- Third, he makes an interpretative claim about how powerful our unconscious behavior to maintain our old traditions to control of modern times and its systems of governing and ordering communities.

I-Judicial System and Executive Systems' Evolution

According to Spencer, written or unwritten laws are the rules of the dead against the living that means it has been formulated from the ancestors. Therefore, the past generations stay to practice through present generations by transferring their ancestors' nature physically and mentally. In addition to the authority of power, they maintain their continuity with special habits and lifestyles and remain an established force in public or written public behavior. Similarly, the old laws are much more effective than the new ones, even if the new laws have been amended in the advanced civilization stages. Spencer thinks that these clear facts in order to indicate that in the modern communities there is also an implicit worship of an ancestor.⁹

Then Spencer asks: What is the law? What did our ancestors impose? And he states that his aim in asking this question is to prepare the way to show that our unconscious adaptation to the knowledge or principles dictated by the dead (ancestors) is combined with conscious compliance with our own rational laws in our century.¹⁰

From that point, he devotes to explaining the historical and social evolution of these assumptions. I will try to make it clear by referring only some of his historical examples. He uses lots of illustrations from historical background.

Spencer calls ancestors as ghosts. He states that using the will of the ancestors is a method of searching for a dead man's or a derived God's embodied authority, as in today's law-fed practices, a law that is added to the laws transmitted by the dead.

Obtain information and advice from ghosts means an imposing figure. He mentions some illustrations such as the Veddahs who seeks help from the souls of their ancestors; or just like the Scandinavian theologians who believe that in their dreams their ancestors tell them where to hunt or what would happen. He also repeats that supernatural instructions were given among the Hebrews, too. These are believed as the information derived from those spirits.¹¹ Spencer defines this sort of information and advices to accept the tendency as the special guidance of the dead. He explains it as general

⁹ Spencer, *The Principles of Sociology*, Political Institution, 'Laws', p. 514; See, also, Topçuoğlu, Hamide, *19. Yüzyıl Sosyologlarında Hukuk Anlayışı*, Ankara Üniversitesi Hukuk Fakültesi Yayınları, Ajans- Türk Matbaası, 1961, pp, 108-110

¹⁰ Spencer, *The Principles of Sociology*, Political Institution, 'Laws', p. 515; Spencer, *The Man versus the State*, with Six Essays on Government, Society and Freedom, p. 90

¹¹ Spencer, *The Principles of Sociology*, Political Institution, 'Laws', p. 518

guidance of an inherited code; it can also be observed in a transformed way in modern times. He gives such another example that in addition to following a verbally declared desire of a dying parent, their children take into account what the dying parent will want or recommend.¹² He emphasizes that this imaginary order has become a complementary law in practice.

Spencer describes similar beliefs and usages. Because he thinks that still in other communities with regard to fear and confidence, distinguished man melt the soul of the God in himself as a more advanced guidance form that resulted in becoming a supernatural guidance in judicial matters.

He expects that these examples will serve to introduce and interpret what the peoples of history have produced like law. He continues the illustrations, and says the laws are also “a spread from the Supreme God, according to Hindu mythology” and with the Greeks as well. He reminds us the tradition in which laws were enacted from the mountain where Jupiter was said to have been buried by an ancient king of Crete, and Homeric poems refer to the production of laws from this special divine commands. Besides, he gives examples of nobles claiming that “the king had brought him law-inspired capitulos by God. Spencer uses all these examples to describe the laws and law practices that have evolved in similar ways in human history in different geographies.¹³

According to Spencer; the ghosts of parents and chiefs accompany these benefits that are regarded as tactics from the elders and distant ancestors. The imaginations of older ones are consciously attributed to supernatural beings. As said by Spencer, traditions later known as God and the words have become foremost on the basis of laws and legal structure, both in the form of this legislation, then embodied in the form of impositions of the living dead. Therefore, he thinks that in the early stages of social evolution, there is no distinction between divine law and secular law.¹⁴

Spencer looks into more examples showing that the moral obligations and the rules of maintaining ordinary affairs are a mixture of sacred and secular arrangements. For instance Egyptian wall sculptures, inscriptions, and papyrus, expressing the commitment of the present to the past, illustrate the universality of religious sanction for codes of conduct.¹⁵ In addition to the so-called special orders in Hebrew societies the religious arrangements that regulate the feasts include numerous

¹² Spencer, *The Principles of Sociology*, Political Institution, ‘Laws’, p. 515; Spencer, *The Principles of Ethics*, p. 200

¹³ Spencer, *The Principles of Sociology*, Political Institution, ‘Laws’, p. 525; Spencer, *Social Statics*, Introduction, p. 44; Spencer, *The Principles of Ethics*, p. 85

¹⁴ Spencer, *The Principles of Sociology*, Political Institution, ‘Laws’, p. 530; Spencer, *Social Statics*, Introduction, p. 35, 50, 215

¹⁵ Spencer, *The Principles of Sociology*, Political Institution, ‘Laws’, p. 515; See, for example, Wilkinson, M. (1993). Egoism, Obligation, and Herbert Spencer. *Utilitas*, 5(1), 69-86.

instructions for the purification, the daily behavior of the priests, the variety of dishes and the ways of cooking; instructions for fallow-appropriate farming, regulations on mixed cereals, captivity, instructions for the management of male and female ones, and payment of wages for hired workers; instructions on commercial transactions, land and house sale; it shows that the rules of living up to the smallest details, with prudent laws describing the quality of clothing and the shaping of fringes and beards, have a divine origin equal to the highest codes of conduct.¹⁶ For Spencer, that means recognizing the original identity of the structures.

II- Authorities of Power in Systems

Spencer indicates that the law thus created gains stability. This is because it has a rigidity that allows men to suppress supernatural sanctions to a higher degree than any rule that has a naturally accepted origin. Thus, they tend to make super natural sanctions established social arrangements; as a matter of fact, nobody would dare to take into account old forms of governance, legacies, and regulations as regards the legislative authority is used only for matters that are not specified in advance.¹⁷ As stated by Spencer, we see this in the past understanding of authority as highly insistent which we believe that every legislator must be bound by oath to protect it. It is clear that the need for obedience, as the origin and quality of these political arrangements and laws, which our ancestors thought was good for us. Therefore, the obligation to adhere to this authority becomes primary. These structure limits are necessary even for the new lawmaker due to these high authorities' power, directly or indirectly.

Furthermore, Spencer emphasizes that disloyalty and rebellion to the rule and the state are the first in the degree of guilt in historical development. He indicates that in South Africa, In Peru, Mexico, and Japan, if the offense is committed against the state, the entire family of the criminal is punished. Among the Merovingians there is a law of abolition up to the ninth generation if the children of a particular rebel do not swear allegiance. Also another example is about Hebrew traditions that introduce of himself as "a jealous God" and declared that criminal's children until third and fourth generation have punishment.¹⁸

¹⁶ Spencer, *The Principles of Sociology*, Political Institution, 'Laws', p. 518

¹⁷ Spencer, *The Principles of Sociology*, Political Institution, 'Laws', p. 527; Spencer, *The Study of Sociology*, Objective Difficulties, p. 103; Spencer, *Social Statics*, p. 23; See, also, Elwick, J. (2003). Herbert Spencer and the Disunity of the Social Organism. *History of Science*, 41(1), 35-72.

¹⁸ Spencer, *The Principles of Sociology*, Political Institution, 'Laws', p. 532; Spencer, *The Study of Sociology*, Objective Difficulties, p. 110

Spencer ascribes while feudal times were often regarded as the most abusive of crimes, at times where it was the most imperative to maintain authority. In the feudal times, for example, slaves' crimes were often severely punished by death.

According to Spencer, at this evolutionary stage of law; betrayal and rebellion are considered an extremely serious crime. For instance, for the Peruvian people, "the most common punishment was death because it is accepted that a criminal is punished for breaking the Inca's order, not for the crimes he committed. In Japan, most crimes are punishable by death, a punishment less than the audacity of attempting to violate sacred laws in relation to serious crimes; beyond the guilt of disobedience to the empire. Some crimes result from damaging the property to which their subjects and services are wholly or partially owned. Likewise, abuse of a slave and thus making him less valuable were regarded as aggression towards his master. This is why, in cases where people have poor relations with the rulers of the damage done by one person to another, there arises a notion that made the property of the monarch injury. An extreme form of this view was the abandonment of allegiance to the king, it means claiming that he "wounded the king or royal members". In European law, it was largely punished as an act against the state. It was the same in Rome: Whoever, if convicted for disturbing the public peace, pays the crime with his life. These are some of the countries' early arrangements.¹⁹

Similarly, in European history, as authority expands and strengthens, Spencer emphasizes that the crime of disregarding authority is a priority over individual guilt.

The 'peace of the king' was a privilege that greatly increased the penalty for injustice. The increase in small and local jurisdictions, as well as the strengthening of a central authority implied by these changes, has seen the crime of law and disobedience as a type of humiliation terminated with a special fine.

Spencer also reminds us that the doctrine in which the rebellions were the main crime in the Japanese and Peruvian administrations of the last periods. Disobey to orders would be punished regardless of the cause or the nature of disobeying orders, even action which is quite innocent in itself could met with death.²⁰

For Spencer, conformity to traditions, which are part of the law in the early stages of social evolution, that is to say, is often a duty of

¹⁹ Spencer, *The Principles of Sociology*, Political Institution, 'Laws', p. 533; Spencer, *Social Statics*, p. 123, 352; *The Man versus The State*, p. 95; See, also, Maitland, Frederic William, and H. A. L. Fisher. *The Constitutional History of England: A Course of Lectures*. London: Cambridge University Press, 1963

²⁰ Spencer, *The Principles of Sociology*, Political Institution, 'Laws', p. 534; Spencer, *Social Statics*, p. 12, 41, 51, 160

obedience to ancestors in general, even if insignificant or absurd. We insist on the duty of obedience to the special orders given by the priests in verbal expressions or constitute a complementary source of law, later. Spencer mentions similar arrangements no matter from which power it grows, obedience was primary and becomes law. Specific religious sanctions; special conflicts of deceased leaders; the arrangement derived from the will of the sovereign man also has similar law effects. Therefore Spencer says “we have the germ of the law”²¹ Spencer emphasizes that where administrative mechanisms are weak, the law is established informally, and become as an applied social task and administered by revenge.

III-Evolution of The Laws and Penalties

According to Spencer, considering all the laws that inherited from the chiefs of the community and strengthened by divine sanction in the establishment of a certain political authority, that means all kinds of laws have a religious base and quality. He emphasizes that there is a differentiation between the sacred and the secular in some forms of societies. Spencer indicates the Greeks, as an example of this progress, describing the state of things exhibited in Homeric poems, then historic Athens, the great impersonal authority called “Laws, stood out separately as both guidance and sanction; it was separate from religious duty or special sympathy.”²²

Spencer emphasizes that during the primitive period, president, king or high priest were God dressed as representative of the holy power. However, it later considered that there was a distinction between the separation of religious and political authorities and the violation of divine rules and the violation of human rules. The concept of crimes against one's neighbor is secondary legal regulations. However, the idea of a crime against society or society was at first a real criminal trial. It became a process that there was public and private law. That is to say it has become distinction between sin against the individual and sin against the state.²³

Again, among the Hebrews, although there was a strict theocratic order in their social systems, this indicates that a significant amount of the change was visible. According to Spencer, Mishna (Jewish Law) contains many detailed civil codes, which are clearly due to the increasing complications of relationships. After the some steps of social

²¹ Spencer, *The Principles of Sociology*, Political Institution, ‘Laws’, p. 524; Spencer, *The Man versus The State*, The Coming Slavery , p. 33

²² Spencer, *The Principles of Sociology*, Political Institution, ‘Laws’, p. 525; Spencer, *The Man versus The State*, The Proper Sphere of Government, p. 206

²³ Spencer, *The Principles of Ethics*, Vol 2, pp. 25, 30, 58, The Right of Free Belief and Worship, p. 88-89, 93

evolution the rules raised from a human authority.²⁴ By accumulating such rules, a collection of human laws separated from divine laws is produced. As stated by Spencer, in the Christianized Europe, where local religions replaced an established religion, the process of differentiation was intervened with a single religious authority. The local religious authorities starting from this step acquired a superior power.²⁵ Pursuant to that; the kings' attitude towards religious authority actually caused the confusion and secularity of the structures, as well as the confusion of political and religious legislation. The Church, which gained superior power, interpreted various civil offenses as crimes against God, and even those to be addressed with a divine arrangement. The subsequent social evolution various advances made against both sacred and secular laws were ended simultaneously with religious atonement and civil punishment.

According to Spencer, the laws are partly due to the ancestors' inheritance, partly by the special imposition of the dead, partly by the average will of undiscovered life, and partly by the will of the present and the human emotions that respond to them. All of these laws mix with varying proportions under different circumstances.²⁶

Based on Spencer's idea, this shows us that the equality between the laws enacted by the will of the administrators and the laws derived from the reconciliation of individual interests persists. Consequently, the old way of maintaining that authority indirectly provides social welfare, those who provide social welfare by being independent of authority are in the modern form, essentially nothing but elaboration.

Spencer defends that individual interests, consensus (common sense) initiated by the law, prevent from the political authority. As the political authority evolves, although the laws take the form of orders, they interpret that the basic social order principles that were initially accepted were compulsory only because they were accepted as personal imposition, but as the survival of the individual interests, the obligation derived from the consensus at later stages.

“Returning from this somewhat parenthetical discussion, we might here enter on the development of laws, not generally but specially; exhibiting them as accumulating in mass, as dividing and sub-dividing in their kinds, as becoming increasingly definite, as growing into coherent and complex systems, as undergoing adaptations to new conditions.”²⁷

²⁴ Spencer, *The Principles of Sociology*, Political Institution, 'Laws', p. 526 ; Spencer, *The Principles of Ethics*, Vol. 1. p. 290

²⁵ Spencer, *The Principles of Sociology*, Political Institution, 'Laws', p. 527; Spencer, *The Principles of Ethics*, Vol. 1. p. 299

²⁶ Spencer, *The Principles of Sociology*, Political Institution, 'Laws', p. 531; Spencer, *The Principles of Ethics*, Vol. 1. pp. 196, 214

²⁷ Spencer, *The Principles of Sociology*, Political Institution, 'Laws', p. 536

Again, he continues to show that the decline of the power of political authority and the encouragement of an increasingly free population of the industry is re-dominated for a long time. He restores this primitive source of law, the common mind of individual interests. He also emphasizes that in its original form, the type of law that will emerge has a character that is radically separated from the types of laws considered so far.²⁸ Thus, both in the sacred laws and the laws of human beings are inequality as the most important basic principle common to human authority. No personally be in the form of a new legislation or a law created in the collective wisdom of individual interests in the most basic principles of equality.

Spencer continues its inquiries and gives like the evidence "lex Talionis"²⁹ questions the law. Indeed, to equalize a loss of "eye for an eye and tooth for a tooth" principle, the principle of retaliation, according to Spencer, it is the idea of primitive justice everywhere; it is based on an effort to achieve a certain balance.³⁰

It literally tells us that there are many examples of equalization efforts in history. For instance, in Ethiopia, the murderer was given to the victim's family, the closest of the relatives would kill him with the same kind of weapon. According to Spencer, in such cases, it is not important that in this primitive justice, it insists that the losses between families or tribes be compensated after this primitive procedure, as long as mutual injuries are equalized, the guilty persons or sufferers are not the same. He continues with historical facts, says that this principle was applied in the form of property rather than life against life. For example, it tells families among the societies in Chile, that they also equalize their losses but that they poured things to each other when combined with gifts or payments. We see an alternative between getting revenge or compensation at a very early stage. Spencer tells that an example North American breed of Indian horses or other valuables of acceptable as compensation. As in these few cases, according to Spencer, the different alternatives recognized in primitive Europe remind us of a significant difference. Due to the increasing class discrimination in primitive Europe, equal compensation rates among members of each class were no longer equal among members of different classes.³¹

However, for Spencer, it is important to note that the relatively weakening of the king or aristocratic authority and the relative strengthening of public authority revive a partially suppressed law

²⁸ Spencer, *The Principles of Sociology*, Political Institution, 'Laws', p. 532 ; Spencer, *The Principles of Ethics*, Vol. 1, p. 91

²⁹ See the history of the law of abstinence, <https://www.britannica.com/topic/talion>> Date of Access 20 March 2019.

³⁰ Spencer, *The Principles of Sociology*, Political Institution, 'Laws', p. 528; Spencer, *The Principles of Ethics*, Vol. 2, p. 205; Spencer, *The Man versus the State*, with Six Essays on Government, Society and Freedom, p.197

³¹ Spencer, *The Principles of Sociology*, Political Institution, 'Laws', p. 530

derived from the common mind of individual interests, and thus the type of law that is constantly being replaced by all other laws. Because the main tasks of the courts of justice now are to implement a government that requires that all members of society be treated in the same way when they conflict with each other, without accepting the principles recognized before states emerge.³² Although equalization of punishments and injuries is no longer allowed and the government has done to apply compensation or compensation, the government reserves the punishment of its perpetrators. Because pursuant to the doctrine that all men are equal before the law, the same punishment is applied to the attackers of each classes.

On the other hand, in terms of unfulfilled contracts or controversial debts, the purpose of those settled in the district courts of the important events tried to protect the rights and obligations of citizens regardless of wealth or rank. However, the sympathy for individual demands and the common mind of the individual interests that accompany it lead to the post-dominance of such a law that provides direct social order. The authority, divine or human authority by insisting on obedience provides the social order. Statutory regime of rejection and social contract derived from the growth of the personal law regime, once impersonal, leaving its place to the derived law.³³ Therefore, the first implies an inequality formulated by compulsory co-operation, while the other implies an equality formulated by voluntary co-operation.³⁴ Though Spencer did not accept the theory of social contract, he stressed that in the historical process, societies have supported this idea in order to achieve this status change, which means public desire instead of status authority or absolute one or more than one.

He takes into account the change from the laws of divine origin into the laws of human origin is a differentiation that apparently reflects the will of the ruling power as judge sanctions. The latter tend to absorb more and more of the former during social evolution. However, necessarily, as the militancy continues, absorption remains incomplete; because obedience to a provision will continue to be necessary in some cases.³⁵

At this point, Spencer emphasizes that it is very important to understand this issue correctly, so he goes on to explain two aspects of this change in social evolution. One is about emotions that accompany this change, and the other is about theories that accompany.

³² Spencer, *The Principles of Sociology*, Political Institution, 'Laws', p. 535; Spencer, *The Man versus The State*, pp.220, 226, 229, 245, 345.

³³ Spencer, *The Principles of Sociology*, Political Institution, 'Laws', p. 534-535; Spencer, *Social Statics*, pp. 81-82

³⁴ Spencer, *The Principles of Ethics*, Vol 1., pp. 70, 101-104, 137, 266

³⁵ Spencer, *The Principles of Sociology*, Political Institution, 'Laws', p. 537; Spencer, *The Man versus The State*, pp. 31, 75, 97

Indeed, according to Spencer the statement, part of ancestral traditions inherited, partly impositions special of the dead, partly from the average will of undiscovered life and partly available from the living will, caused them stems from the feeling that answer. Although they are different, they mix at varying proportions under different conditions.

Spencer indicates that when an individual human being accepted as an absolute authority; the law is not a source other than this authority that will judge. Therefore, actions are perceived as inappropriate or inappropriate to this authority. Implementation of the authority in this form, when transferred the form of government becomes in legal terms, and that authority gives you the power to enact according to the people's demands. For Spencer, individual interests of the common mind, provides a guarantee for the law a derived demand.³⁶ Thus, this guarantee is for the basis of political authority and acceptance, as well.³⁷

He considers all of these ideas and emotions are important because they will be the justification of a law that will arise from the conditions of harmonious social cooperation in accordance with the developed industrial state. He thinks that the final form of transition from the laws of personal authority to the laws of common mind has become the search for a practical ethical system. Ethics derives from the ethics of regulating the relations of the individual and the individual with the other individuals and society, this is what he calls the last form of laws.³⁸

In my opinion, Spencer expects punitive laws to evolve into the form of conciliatory ethical practices. In summary, according to Spencer, the first state of law; human being believe that because the ideas are conveyed, the emotions are glorified and taught, and the parents who are taught in the same way have to be transmitted to their children in a strict tradition. Before any political organization is established, the inferences of the dead constitute the rules of conduct, which are valued by the public. An ongoing process after death occurs when chiefs comply with the ghosts. In addition, during the unification of war-affected societies, such chiefs become kings, the commands to be remembered and the ghosts become partially established and predetermined norms and partly attached to the rules of divine conduct.

The living legislator, who is able to legislate only on matters that are not approved, is limited to orders transmitted from these authorities. Where he is regarded as divine will start providing their

³⁶ Spencer, *The Principles of Sociology*, Political Institution, 'Laws', p. 533; Spencer, *The Principles of Ethics*, Vol 1., p. 51

³⁷ Spencer, *The Principles of Sociology*, Political Institution, 'Laws', p. 533; Spencer, *The Man versus The State*, pp. 43-44

³⁸ Spencer, *The Principles of Sociology*, Political Institution, 'Laws', p. 534; Spencer, *The Principles of Ethics*, Ways of Judging Conduct, pp. 47-63

savings. Indeed, his ability becomes similar to the divinity. Therefore, what is common in the early stages of societies is that the prescribed rules of conduct, whatever their kind, have a religious sanction. Sacrifices, public duties, moral implications, social ceremonies, life habits, industrial arrangements, and even dressing patterns are based on the same basis.³⁹

Therefore, the stages in which the nature type is too weak for a harmonious social cooperation is the maintenance of invariable rules of conduct, which are necessary for social stability. Therefore, implicit obedience or disobedience becomes the most criminal offense. Betrayal and rebellion, whether against the divine or the human ruler, bring serious punishments exceeding others. Breaking the law is punished for implicit arrogance, not for the actual crime of the act committed. Disrespect for state authority continues to form the essential element of a transformation in a legal process in the later stages. In expanding and complicated societies, forms of activity and relationship that are not specified in the sacred law emerge and are free to make rules-making arrangements. Such arrangements accumulate, divine commandments are not, people's collective mind of origin where uncovered a community of law.⁴⁰

This is human law that does not have the sanctity of the laws of God, although it has acquired authority because it respects the people who make it and the generations that endorse it. But he departs from divine law.⁴¹ However, in societies that remain predominantly militant, these two groups of laws remain similar in that they possess an individually derived authority. They obey reason, a divine rule builder will of a legislator or a human will or sometimes express the will of an oligarchy.

But the industrialism of a population, which has independent political power progression, humane origin laws in the common sense part, resulting from the manager's authority begins to dominate. As long as the type of military society is organized within the framework of the principle of compulsory cooperation, the law that has to maintain compulsory cooperation and may take into account the individual interests of those who form the mass and maintaining inequality continues because of coercion of authority. However, with the principle of voluntary cooperation, the nature of the society, the fulfillment of contracts and the claim of equality in individual rights are gradually

³⁹ Spencer, *The Principles of Sociology*, Political Institution, 'Laws', p. 535

⁴⁰ Spencer, *Social Statics*, The Right to Ignore The State, p. 206; The Limit of State- Duty, p. 274

⁴¹ Spencer, *The Principles of Ethics*, Vol 1, p. 49, 76

increasing, and the basic needs and the reconciliation of individual interests become the main source of law.⁴²

IV-Conclusion

Finally, according to Spencer, the legal systems of these successive stages are accompanied by the emotions and theories that are appropriate to them, and that the current theories are now aligned with the existing compromise between militancy and industrialization. For him, this is the step towards the ultimate theory, so that law has no other basis than what they have earned as the sustainer of the conditions that will complete life.

It seems that Spencer expects the evolving law and the sphere of law to gain a conciliatory form. He speaks of a new form that will contribute to the maintenance of life by reconciling basic needs and individual interests. He hopes that the dissolution of punitive legal systems will result in such new legal systems. In fact in modern times, we still punish human body by our jailing systems due to consequence's of the conditions, at least we try not to punish curable crimes and sending them to the rehabilitation implementations. From that perceptive his expectation became a reality of law systems partly.

On the other hand, in fact the Anglo Saxon Law System still feeds and forms itself from customs and judicial decides, and it still use liberal utilitarianisms' ethics; but all these stages and regulations are not suitable for every community around the world. Although he gives many illustrations from the history, we can analyze different result by the anthropology of our era. However Spencer's approaches are consistent, the perspective of British perfectionism and enlightenment's expectations mostly affects his thoughts. But the expectation of restorative law systems is a great hope for the whole human being of our century, too. Otherwise trying to build much more punishment is an absolute retrogration of human being.

As known, there were the philosophers who accept the evolution of creatures and humans in the Islamic world and its history of philosophy as well. The theory of biological evolution was presented for the first time by a zoologist, al-Jaahiz, in the ninth century⁴³ and followed by other Muslim thinkers such as al-Biruni, Ibn Tufail and Ibn Khaldun.⁴⁴ Ibn Khaldun is a significant example because of his thoughts

⁴² Herbert Spencer, *The Man versus the State*, with Six Essays on Government, p. 6, 60-65, 82-86; See, also, Spencer, *The Principles of Ethics*, Vol. 1., pp. 76, 96, 97, 103, 274; Spencer, *The Principles of Ethics*, Vol. 2., pp. 63, 79, 97-98, 104, 121, 135, 140, 154, 206

⁴³ Bayrakdar, Mehmet, Al-Jahiz And The Rise Of Biological Evolution, <http://dergiler.ankara.edu.tr/dergiler/37/772/9842.pdf> > Date of Access 27 July 2019

⁴⁴ Sultan Shah, Muhammed, Pre-Darwinian Muslim Scholars' Views on Evolution, http://pu.edu.pk/images/journal/uoc/PDF-FILES/%2811%29%20Dr.%20Sultan%20Shah_86_2.pdf > Date of Access 20 January 2019

of social change in his Umran science. His scientific understanding was also presented in the 14th century, before Spencer and Darwin. Both Ibn Khaldun and those western philosophers agree that social change is a necessary item of human societies that lead societies to move from simple states to more complex ones. And the evolutions' form is cyclic in both Spencer's and Ibn Khaldun's thoughts.

In addition, Ibn Khaldun argues the law and executive system of Islamic societies in his famous work *Muqaddimah*. His writing starts with the principles of historiography and science; continues ethics, politics, economics and law. When the law and executive system is concerned, the concept of "wazi" points to a very important idea in his perspective. Because Ibn Khaldun insistently emphasizes that even the punishment in Islam does not aim at the persecution. Therefore, he gives various examples of the answers to explain the reasons of the five fundamental provisions of Islamic jurisprudence and the reasons of Islamic Criminal Law issues, known as *Maqasid al-Shari'a*. In this context, the concept of wazi' is especially important in terms of pointing to the love and the fear of Allah created by religion in human conscience. With this concept, Ibn Khaldun wants to underline that the Muslim who internalize Shari'a will not need any more human laws. With the strong religious convictions, Ibn Khaldun emphasizes that the peak of Islamic justice was during the prophet Mohammed times and there was a great voluntary obedience and this form of religion and its systems were perfect. And after prophet, though other administrators' tried to be close his principles, some of them and their relationship with the principles was weakening. Besides, according to his approach, if the administrative or legal system built by excessive law and pressure, it's absolute oppression. In this regard, Ibn Khaldun's concept of wazi', as a meaning of voluntary obedience and belief, peace and justice approach has revealing materials for the liberal point of view of law understanding and law of human rights.⁴⁵

As a conclusion, although relativity is a reality of the ethics of different faith's, there are some sufficient approaches when the law and executive systems are concerned, and the expectation of evolutionists is that the evolution of humans would provide a morally and voluntary supports to the restorative law understanding. Therefore further investigations about the evolution of the law around the world and different systems of law can be conducted comparatively.

⁴⁵ Ümütlü, Y. Ayşe, İbn Haldun'un Düşüncesinde Vazi Kavramı, 5. Uluslararası Dini Araştırmalar ve Küresel Barış Sempozyumu, Mardin, 2019

BIBLIOGRAPHY

a. Primary Sources

- Spencer, Herbert, (1851). *Social Statistics*. John Chapman, London
<http://oll.libertyfund.org/people/herbert-spencer>, Accessed on June 06th,2016
- Spencer, Herbert. (1898). *Principles of Sociology*. London: Williams and Norgate
<http://oll.libertyfund.org/people/herbert-spencer> Accessed on June 06th,2016
- Spencer, Herbert, (1873). *The Study of Sociology*. Henry S. King&Co. London
<http://oll.libertyfund.org/people/herbert-spencer>, Accessed on June 06th,2016
- Spencer, Herbert. (1897). *Principles of Ethics*. Liberty Fund, Inc. Indianapolis
<http://oll.libertyfund.org/people/herbert-spencer> Accessed on June 06th,2016
- Spencer, Herbert. (1884). *The Man Versus the State*, with Six Essays on Government, Society and Freedom, Liberty Fund, Inc. Indianapolis
<http://oll.libertyfund.org/people/herbert-spencer> Accessed on June 06th,2016
- Spencer, Herbert. (1867). *First Principles*. New York: A.L. Burt,
<http://oll.libertyfund.org/people/herbert-spencer> Accessed on June 06th,2016
- Spencer, Herbert. (1904). *An Autobiography. 2 vols*. New York: Appleton and C.O.
<http://oll.libertyfund.org/people/herbert-spencer> Accessed on June 06th,2016

b. Secondary Sources

- B. Malinowski. (1931). Descriptive Sociology or Groups of Sociological Facts classified and arranged by Herbert Spencer. *Nature*, 127(3209), 655-657.
- Bayrakdar, Mehmet, Al-Jahiz And The Rise Of Biological Evolution, <http://dergiler.ankara.edu.tr/dergiler/37/772/9842.pdf>, Accessed on February 03th, 2020
- Bell, D., & Sylvest, C. (2006). International Society In Victorian Political Thought: T. H. Green, Herbert Spencer, And Henry Sidgwick. *Modern Intellectual History*, 3(2), 207-238.
- Duncan, David. (ed.) *The Life and Letters of Herbert Spencer*. London: Methuen, 1908.

- Elwick, J. (2003). Herbert Spencer and the Disunity of the Social Organism. *History of Science*, 41(1), 35-72.
- Encyclopedia of Britannica, <https://www.britannica.com/topic/talion>> Date of Access 20 March 2019.
- Farrelly, L. (1991). Herbert Spencer: Traces of man. *Eye*, 1(3), 64-69.
- Haines, V. (1992). Spencer's philosophy of science. *British Journal of Sociology*, 43(2), 155.
- Leslie, J. (2006). Herbert Spencer's Contributions To Behavior Analysis: A Retrospective Review Of Principles Of Psychology. *Journal of the Experimental Analysis of Behavior*, 86(1), 123-129.
- Maitland, Frederic William, and H. A. L. Fisher. *The Constitutional History of England: A Course of Lectures*. London: Cambridge University Press, 1963
- Perrin, R. (1976). Herbert Spencer's Four Theories Of Social Evolution. *American Journal of Sociology*, 81(6), 1339-1359.
- Sultan Shah, Muhammed, Pre-Darwinian Muslim Scholars' Views on Evolution, http://pu.edu.pk/images/journal/uoc/PDF-FILES/%2811%29%20Dr.%20Sultan%20Shah_86_2.pdf, Accessed on February 03th, 2020
- Tilman, R. (1999). Herbert Spencer and the Political Economy of Mean-Spiritedness Revived. *Journal of the History of Economic Thought*, 21(2), 137-143.
- Topçuoğlu, Hamide, *19. Yüzyıl Sosyologlarında Hukuk Anlayışı*, Ankara Üniversitesi Hukuk Fakültesi Yayınları, Ajans- Türk Matbaası, 1961
- Topçuoğlu, Hâmide, *Hukuk Sosyolojisi*, Ankara Üniversitesi Hukuk Fakültesi Yayınları, No:174, Cezaevi Matbaası, İstanbul, 1969
- Turner, Jonathan H., Beeghley, Leonard, & Powers, Charles H. (2002). *The emergence of sociological theory* (5th ed.). Belmont, CA: Wadsworth Thomson Learning, pp. 54-89.
- Ümütlü, Y. Ayşe, İbn Haldun'un Düşüncesinde Vazi Kavramı. 5. Uluslararası Dini Araştırmalar ve Küresel Barış Sempozyumu, Mardin, 2019
- Wilkinson, M. (1993). Egoism, Obligation, and Herbert Spencer *. *Utilitas*, 5(1), 69-86.
- William Sweet, 'Herbert Spencer', St. Francis Xavier University, Canada, *Internet Encyclopedia of Philosophy*, <http://www.iep.utm.edu/spencer/>> Date of Access 17.06.2016