THE STATE AND BAR ASSOCIATIONS IN TURKEY: A STUDY IN INTEREST - GROUP POLITICS

A Dissertation

Submitted to the Department of Political Science and

Public Administration

of

Bilkent University

In Partial Fulfillment of the

Requirements for the Degree of

Doctor of Philosophy

By

A. Ayhan Özman

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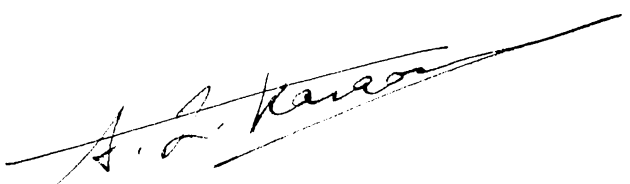

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I certify that I have read this dissertation and in my opinion it is fully adequate, in scope and in quality, as a dissertation for the degree of Doctor of Philosophy in Political Science and Public Administration.

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ABSTRACT

This study focuses on the state - bar association interface in Turkey. Bar associations are among the oldest professional associations in Turkey, dating back to the late Ottoman era. While conducting an historical analysis concerning the institutionalization of attorneyship as a profession, bar associations are analyzed as interest groups.

Throughout the study, the judicio-legal sphere has been taken as the main arena of interface between bar associations and the state. The nature of the Turkish State, its extent of dominance within the judicio-legal sphere, and the institutionalization level of the bar associations have been perceived as the main determinants of the nature of the relationship in question. The study looks at the developments from the Tanzimat (Reform) Period of the late Ottoman period (1839-1876) to the present.

It is concluded that the Turkish State has always had a superordinate position vis-a-vis the bar associations. The dominance of the state in the judicio-legal sphere has shaped the identity and goals of the bar associations, too. In their education and practice, attorneys came to be socialized into the norms of the state. This made bar associations impatient with their subordinate position vis-a-vis the state. Their dissatisfaction grew as bar associations were further

institutionalized; the conflict between the latter associations and the state became more tense.

ÖZET

Bu araştırmanın konusu Türkiye'de Devlet-Baro ilişkisidir. Türkiye'de, barolar, geçmişleri geç Osmanlı dönemine kadar uzanan en eski meslek kuruluşları içinde yer alırlar. Çalışma çerçevesinde, avukatlığın bir meslek olarak kurumlaşmasını konu alan tarihsel analizin yanısıra, barolar çıkar grubu olarak incelenmektedir.

Çalışmada, yargı-hukuk alanı barolar ile devlet arasındaki ilişkinin odaklaştığı temel alan olarak ele alınmaktadır. Türk Devletinin yapısı, yargı-hukuk alanındaki etkinliğinin boyutu ve baroların kurumsallaşma düzeyleri, üzerinde durulan ilişkinin niteliğini ortaya koyan temel belirleyiciler olarak değerlendirilmektedir. Bu çerçevede, Tanzimat Döneminden (1839-1876) günümüze kadar uzanan süreç içerisindeki gelişmeler ele alınmaktadır.

Sonuç olarak, Türk Devletinin barolar karşısında her zaman üstün bir pozisyona sahip olduğu görülmektedir. Ayrıca, devletin yargı-hukuk alanındaki hakimiyeti, baroların kimliğini ve hedeflerini belirlemektedir. Avukatlar gerek aldıkları eğitim, gerekse pratik alanda devletin normları uyarınca sosyalleşmişlerdir. Bunun sonucu olarak, devlet karşısındaki aşağı konumları bir rahatsızlık kaynağı olarak kendini göstermiştir. Söz konusu hoşnutsuzluk baroların kurumsallaşmasına paralel olarak artmış ve devletle olan ilişkilerinin gerginleşmesinde önemli rol oynamıştır.

A NOTE ON ORTHOGRAPY

In general Modern Turkish orthography has been used for words that are now an accepted part of the Turkish vocabulary, irrespective of their origin in Arabic, Persian or Ottoman Turkish. Thus for example Shari'a (Arabic) has been written Şeriat, and Şeyhülislam has been used instead of Şhaykh ül-Islam.

CONTENTS

Chapter One

THEORETICAL AND CONCEPTUAL FRAMEWORK

The Aim and Scope of the Study

Between state and society in every contemporary nation stands a network of interest group associations. Along with political parties, this network of associations is one of the principal features of the socio-political and cultural spheres whereby the interests of different groups in society are defined, represented, and transmitted to the political process.[1] In this respect, the associations in question can be regarded as agents of influence, channels of representation, and the means of political participation.[2]

Along with others, professional associations have been considered as one type of interest group which are defined to be formal organizations set up by people belonging to the same profession, in order to promote their common interests.[3] In sociological terminology, a profession is a cluster of occupational roles in which

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[1] Suzanne Berger, "Introduction," in Organizing Interests in Western Europe: Pluralism, Corporatism and the Transformation of Politics, Suzanne Berger, ed. (Cambridge: Cambridge University Press, 1981), p.10.

[2] Terry M. Moe, The Organization of Interests (Chicago: Chicago University Press, 1971), p.1-2.

[3] Talcott Parsons, Essays in Sociological Theory (New York: Free Press, 1964), p.372.

incumbents perform certain functions, and typically earn a living at a full time job.[4] The member of a profession is trained usually by a formally organized educational process so that only those with the proper training are considered to be qualified to practice the profession. In this regard, the skills of the professional derive from a body of knowledge that is rationally defensible, grounded either in scientific research or in theories that are logically coherent and empirically confirmed.[5] Thus the professional man is a technical expert by virtue of the mastery of a body of knowledge in a given field and skill in its use. In relation to this expertise, the professional has a functional monopoly in his respective field which gives him a distinct characteristic and power. In fact, professional man is usually regarded as having "knowledge mandates" and viewed as proceeding with expertise functionally useful to society.[6] Among other things, professional associations, turn out to be the representatives of this monopolistic power.

The present study focuses upon Bar Associations in Turkey -professional associations set up by attorneys-

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[4] Ibid.

[5] Hence modern professionals are said to engage in "assimilating professional knowledge and training to the characteristics of the scientific model...so as to defend that body of knowledge against competing paradigms and to justify the high status of those who have mastered it." See Richard Abel, "The Rise of Professionalism," British Journal of Law and Society, 6 (1979), p.87.

[6] See Terence C. Halliday, Beyond Monopoly: Lawyers, State Crises and Professional Enpowerment (Chicago: University of Chicago Press, 1987), pp.28-43.

which are among the oldest professional associations in the country, dating back to the late Ottoman period. While conducting an historical analysis concerning the development of attorneyship as a branch of the legal profession and attorneys' socio-political role in the Turkish modernization process, the bar Associations are examined with a view to the critical issue of the relationship between the state and civil societal groups. A study of the profession and the bar associations in this sense is important for the following reasons.

First, although there are studies concerning the political ideologies, identifications, affiliations, government employment, and other aspects of political behavior of incumbents of legal professionals and attorneys,[7] in general the study of bar associations as interest groups has been relatively neglected. As far as the Turkish case is concerned, the bar associations has been a totally neglected topic as most of the studies in interest group politics have concentrated on economic interest groups such as business or labor.

Secondly, though at first sight the case of the Bar associations may seem to lack the grand aura of business and labor, the rather distinct place of legal professionals in general and attorneys in particular both in the Turkish society as well as in other societies due to the functions they perform can be regarded as the most

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[7] In Turkish political science literature there is only one study concerning the attorneys' role in politics. See Mine Tan, Siyasette Hukukçu (Ankara: Türkiye ve Orta Doğu Amme İdaresi Enstitüsü, 1971).

significant point that gives the topic its uniqueness. In fact, the legal professionals, specifically the attorneys have some socio-political functions. These comprise the resolution of disputes among individuals, and between the individual and the state. Besides making the profession to be effective virtually at all levels of the society, the monopoly of the right to enforce the sanctions of the state as well as limiting them directly defines the position of the attorney vis-a-vis the state, specifically for the cases involving the individual and the state. While performing his profession, namely the defence of the individual, the attorney in a sense acts as a catalyzer in the reconfirmation of the status of the individual before the law and thus before the state. In this respect, the attorney inevitably steps in the political sphere.

A final point which gives the topic its uniqueness is the impact of the above mentioned structure of the profession at the associational level. It is this peculiar structure of the profession that largely differentiates the bar associations from other professional associations with respect to their relation with the state. Apart from defending the professional rights of their members vis-a-vis the state, specifically in conflicts relevant to public policy regulating professional practice which constitutes in fact a common theme for most of other associations, the bar associations also engage in a macro perspective on the socio-legal issues. This is true on the grounds of their

professional socialization both during the law education and during performing their profession. Thus the bar associations' influence radiates from the zones of primary concern -professional issues- to broader political and social issues. Among other things, in the Turkish case, the most frequently referred point in this respect is the notion of "justice." Interestingly enough, the bar associations have no clear cut definition, rather it is the notion of justice and other relevant notions- human rights, rule of law, the structure of the secular state and the like that give them an impetus to exist actively in the political arena. Constituting the areas where the state has a monopoly of power, however, the concentration of bar associations on these issues usually situates them in a position of interfering in the authority of the state and at times questioning its legitimacy. In this respect, a study of bar associations and the profession of attorneyship inevitably leads one to study the broader issues of societal change and socio-legal history, which for the Turkish case denotes the phenomenon of Westernization.

Within the framework of the present study, the historical periods of late Ottoman-Turkish Westernization is taken up as the basic point of reference in the analysis of the development and institutionalization of the profession of attorneyship as well as its interface with the state at the associational level.

Secularization which had firstly started to develop in the legal sphere in the nineteenth century, can well

be taken as the most significant component of the Ottoman-Turkish Westernization process. With the development of "secular" courts, previously unknown to the world of Islam, and with the initial efforts of adopting the European legal system during the period, there inevitably appeared a necessity of redefining justice. In a sense, this was the start of a new era during which the Western concept of justice based on a belief in objective truth, was injected into the Ottoman socio-political system. Since attorneyship as a modern profession had constituted a major element of this new adopted legal culture, the bar associations had by definition been the natural by-product of this novel political configuration.(Chapter 2)

One may say that the early Republican era had been a period during which the whole political and social configuration of the country were restructured. Among the efforts of this restructuration, the adoption of the Western (Continental European) legal system, in fact, has perhaps been the most salient feature of Republican Westernization which surely had played an indispensable role and provided a secure base for the continuation of process. Indeed, the mission of protecting as well as promoting this new secular European legal culture with all its implied meanings of "rule of law" was assigned to the Republican legal professionals (the judge, the prosecutor and the attorney) and to the bar associations which were to a large extent been reorganized and molded out of the secular ideology of the new regime. In fact,

such a perspective of the state as viewing the bars as the consolidators of the new regime under its tight control, rather than interest groups working to promote their own interests has been an indicator of the unique character of Ottoman-Turkish political culture, namely the strong state conception.(Chapter 3).

Indeed, the state-bar association relationship during the 1950-1980 and the post-1980 periods had largely carried in itself the signs of this uniqueness. In the political arena there appeared to be bar associations that devoted their efforts to free themselves from to the control of the state while the state elites were eager to extend their authority.

The relationship of the bar associations with the state during the multi-party years also had another aspect which is related to the identity of the bar associations acquired in the early Republican era. As mentioned above with the foundation of the Republic, the mixed legal system that had been inherited from the Ottoman Empire had been restructured, on the model of the Continental European system whose basic characteristics were value naturality, division of functions between law, politics, and economics, and independence and objectivity. A regime which has law so conceived is thought to be legitimate while one that does not is viewed by many, for variety of reasons, to be vulnerable to the charge that it is illegitimate.[8] To a very

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[7] See Max Weber, The Theory of Social and Economic Organization trans. by Talcott Parsons (New York: Free Press, 1964), p.77.

considerable extent, in this context illegitimate means a politicized legal system. In this regard, identifying themselves with the system, that constituted a model for the early Republican elites, the bar associations had been in strict conflict with the state and political elites in the periods involving the signs of politization in the legal system. And from time to time this constituted an important aspect of the struggle of these associations during the 1950-1980 as well as post-1980 periods.

And as a final point, throughout this relationship, perhaps one of the most important point had been the intra-associational transformations that these associations had witnessed, accelerating in 1950s and reaching its climax in the 1980s. It has to be kept in mind that, besides the developments in Turkish political life and the characteristics of the Turkish State, it had been these transformations, that was characterized with the rising professional and socio-political consciousness.(Chapters 4 and 5)

Thus, on the whole, being a period of rising professional and socio-political conciousness on the part of the bar associations, the history of the state-bar associations relationship in Ottoman-Turkish case evinced a basic struggle. The bars intended to abandon their subservient position and took the shape of more powerful interest organizations aiming to control, check and supervise the state policies in line with their

professional interests as well as values and notions deriving from the secular European legal culture.

A Terminological Clarification

In many studies on legal professionals conducted in English language, there appears to be some conceptual problems which usually become sources of semantic confusion. This has largely been the case due to the dissimilarities in the usage of legal terminology by authors studying this specific field. It is therefore a necessity within the framework of the present study to make some remarks on the deliberate choice of terminology for avoiding confusion.

For the Turkish term *avukat* there are various words used in Modern English legal terminology. These are mainly lawyer, attorney, attorney at law, barrister, solicitor and counsellor.[9] Although usually being regarded as synonyms of each other, the meaning of these concepts show some differences whose delineation is quite significant for the purpose of this study.

In fact, the two most commonly used terms lawyer and attorney are not generally distinguished even by the members of the profession themselves. From the American point of view, "...attorney, attorney at law, and lawyer

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[9] Mustafa Ovacık, İngilizce-Türkçe Hukuk Sözlüğü (Ankara: Ayyıldız Matbaası, 1964); Türk Hukuk Lügatı (Ankara: Türk Tarih Kurumu Basımevi, 1965).

are synonymous terms."[10] for all practical purposes. Technically, however, lawyer is a more general term referring to all those practicing law. It is a generic term and used for all persons who on the basis of a certain legal education, have obtained admission to the legal profession. A lawyer is an attorney only when he has a client.[11]

Accordingly, in many of the studies, the authors use the term lawyer to refer to all those in the legal professional. For example, according to David Gold the term stands for "...all who had completed law school or for whom there existed other fairly evidences such as membership to the associations of legal professionals or service as a city attorney...."[12] In the same sense, Dietrich Rueschmeyer, while using the term in the broadest sense in his study where he has compared the socio-political status of the legal professionals, subcategorized lawyers into four branches -- lawyers in the judiciary, lawyers in private practice, lawyers in government, lawyers in private employment -- in order to avoid confusion.[13]

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[10] G. Malcolm, Legal and Judicial Ethics (1949) quoted in Bryan A. Garner, A Dictionary of Modern Legal Usage (Oxford: Oxford University Press, 1987), p.74.

[11] T. M. Bernstein, Careful Writer (1960) quoted in Garner, A Dictionary of Modern Legal Usage, p.74.

[12] David Gold, "Lawyers in Politics: An Emprical Exploration of Biographical Data on State Legislators," Pacific Sociological Review, 4 (1961), p. 85.

[13] Dietrich Rueschmeyer, Lawyers and Their Society (Cambridge: Harvard University Press, 1973), p.30.

In some studies, however the term lawyer is used in a narrow sense, equating it with attorney. The classical and most popular example of this usage can be found in De Toquevilles's *Democracy in America* where he used the term lawyer while explaining the reasons for the multiplicity of attorneys in American political life.[14]

In some cases, this narrow usage of the term seems to have the potential of causing problems for the reader. This is specifically true with regard to the translated texts. H. H. Gerth and C. Wright Mills, translation of Max Weber's *Politic Als Beruf* constitutes a good example in this respect.[15] In the original German text of his work where he delineates the relationship between attorneyship and success in political career Weber makes a distinction between *die universitatgeschalten juristen* and a subcategory *die advocaten.* It is the latter category the members of whom in Weber's opinion are superior in political skills. This distinction is maintained in the English translation but as a distinction between university trained jurists and lawyers instead of attorneys that Weber meant.

In the present study, for the purpose of avoiding terminological confusions due to its dual usage, the term "lawyer" is not employed. "Legal professional" is used

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[14] Alexis De Tocqueville, Democracy in America (New York: Random House, 1966). First printed in 1835.

[15] Max Weber, "Politics as a Vocation," in Essays in Sociology, H.H. Gerth and C. Wright Mills, eds. (Oxford: Oxford University Press, 1962), pp.77-128.

for referring all practicioners of law including the legal scholars. For the Turkish term *avukat*, which means a person with the power of attorney, the term "attorney" is employed.

Approaches to Interest Group Politics

One common theme in many currents of thought in Western political tradition had been the recognition of the idea that a direct relationship between the state and the individual was unrealistic and that conceptual models and should be developed to capture the reality of more or less independent bodies of organized interests and in general of groups capable of autonomous collective action. In fact, when the increasing number and significance of interest groups in linking the society to the state in contemporary democratic regimes are taken into account, such an assertion appears to be valid perhaps more than ever. As a matter of fact, much of the recent theoretical writings in the field of Political Science concerning the relationship between the state and society as well as societal functioning and change has concentrated on interest group politics, specifically focusing on the discovery and definition of appropriate models of interest group-state interaction. Out of these writings have emerged a number of competing models the most notable ones being pluralism and corporatism.

Pluralist Model

For years the study of interest groups has been carried out within the framework of pluralist paradigm. Being one of the societal models which had dominated Western political thought since World War II, the pluralist perspective presumes a multitude of harmonious and interdependent groups in the political process.

Pluralism which substitutes the group for the atomized individual of early capitalism as the basic unit of analysis, is not a novel approach.[16] The existence of various groups and the legitimacy of their action were recognized by the eighteenth century "social contract" theorists like John Locke and James Madison who are in fact taken as the precursors of the doctrine.[17] However, as far as Political Science as a modern discipline is concerned, the origin of the pluralist perspective is a recent phenomenon. It goes back to the early twentieth century and confined to the "Group Theory of Politics" which was formulated by Arthur Bentley, and later elaborated as well as extended by David Truman and Earl Latham.

The ultimate purpose of group theoricians as stressed by Bentley in his well known *The Process of Government*,

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[16] See Theodore Lowi, The End of Liberalism (New York: Norton, 1969), Chapter 2.

[17] For J. Madison, "(the) regulation of the various and interfering intersts forms the principal task of modern legislation and involves the sprit of party, and faction in the necessary and ordinary operations of government." Quoted in Alexander Hamilton, James Madison, John Jay, The Federalist Papers Clinton Rossiter, ed. (New York: Mentor Books, 1961), p.120.

was to fashion a conceptual and theoretical tool for understanding the actual functioning of the political system.[18] Turning away from a merely formal, legalistic, and constitutional approach of a static, descriptive, political morphology which the traditional studies adopted, the so-called group theory aimed at exploring the political dynamics and the process of decision making.

According to Bentley, politics which was conceived as the allocation of social values and resources, could only be understood by examining interest groups, due to their crucial role as real political forces and their potential to effect the decision-making process.[19] Reducing politics to mere group activity, these political scientists looked at politics only in terms of various interests that were involved; the individuals who shared those interests; and the methods adopted for pursuing common interests.[20]

This dynamic approach, evolved originally from the American experience and remained mainly in American academic milieu for the first half of the century,[21] has founded sympathetic echoes in the post-war European political science, too. Everywhere professional academic interest was increasingly directed towards the role played by interest groups in policy formation. Besides

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[18] Arthur Bentley, The Process of Government (Chicago: University of Chicago Press, 1908).

[19] Ibid., pp. 208-209.

[20] Ibid.

[21] See Interest Groups on Four Continents Henry W. Ehrmann, ed. (Pittsburg: University of Pittsburg Press, 1958).

its analytical value in understanding politics and comparing political systems, the reassuring declaration by the proponents of pluralism that all was well within the democratic world was one of the important reasons for the lingering popularity of the pluralist perspective in the post-war democratic regimes.[22]

In the framework of the pluralist model, the number of interest groups is in principle unlimited. This pluralism of groups and the boundaries between them correspond to what may be regarded as the natural divisions in society that is those generated by different roles in the economy and statues in the society. These groups, which are thought to be the prime means by which the mediation between the state and the individual is performed, are assumed to compete with each other on equal terms for membership, resources, access, and influence on governmental policy making. Although some authors acknowledge the advantageous position of some groups in controlling the key resources,[23] the preponderant view within pluralist perspective has been that all the groups, defined to be legitimate and active,

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[22] Noel O'Sullivan, "The Political Theory of Neo-Corporatism," in The Corporate State, Andrew Cox and Noel O'Sullivan, eds. (Cambridge: Cambridge University Press, 1988), p.4.

[23] See E. Schattschneider, The Semisovereign People: A Realist's View of Democracy in America (Illinois: Dryden, 1960); Charles E. Lindblom, Politics and Markets (New York: Basic Books, 1977).

have the possibility of making their interests known at some point in the policy making process.[24]

Accordingly, Truman mentions "the multiplicity of coordinate or nearly coordinate points of access to governmental decisions" and concludes that "the significance of these many points of access and of the complicated texture of relationships among them is great. This diversity assures various ways for interest groups to participate in the formation of policy."[25]

Derived from Truman's and that of other group-oriented scholar's work is the notion of a pluralist state through which competition among interests will come to an equilibrium point defined as what best suits the public interest. That is, competition will produce policies roughly responsive to public interest and thus no single set of interests will be dominant in the political system. Therefore, as emphasized by a student of group politics,

> (P)luralist theory assumes that within the public arena, there will be countervailing centers of power within the government institutions and among outsiders. Competition is implicit in the notion that groups as surrogates of individuals will produce products representing the diversity of

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[24] Robert A. Dahl, A Preface to Democratic Theory (Chicago: University of Chicago Press, 1956), p.15.

[25] David Truman, The Governmental Process (New York: Alfred A. Knopf, 1951), p.45.

opinions that might have been possible in the individual decision days of Athens.[26]

Viewing politics as the interplay of competing groups that try to influence the decision making process, the pluralist theory to a large extent places the state on the political sidelines. The state's position within the political process is reduced to a "neutral arbitrator" or conciliator in the political competition. In fact, within the pluralist perspective, the state is reduced to a black box without any capacity and inclination of acting autonomously.[27] The state only does what it does to be consistent with the societal parallelogram of demands and resources which prevails in civil society. The idea of a passive state and its subordinate position with respect to groups is best represented by Latham:

> The legislative referees the group struggle, ratifies the victories of the successful coalition and the terms of the surrender, compromises, and conquests in the form of statues....Administrative agencies of the regulatory kind are established to carry out the terms of the treaties that the legislators have negotiated and ratified...The function of the judge is not unlike that of a bureaucrat.[28]

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[26] Carole Greenwald, Group Power (New York: Praeger, 1977), p.305.

[27] David Easton, A Systems Analysis of Political Life (New York: Wiley, 1965).

[28] Earl Latham, The Group Basis of Politics (Ithaca, N.Y.: Cornell University Press, 1952), pp.35,38-9.

Within this framework, the only legitimate criterion for the evaluation of the socio-political systems' performance turns out to be whether or not policy-making adequately reflect the interplay of interest groups. In this respect, the entire question of pluralist perspective is a matter of political representation and responsiveness.

Neo-Corporatist Model

The pluralist model of interest representation had many critics. However, it was not until the advent of neo-corporatist theory--a rehabilitated form of corporatism- in the late 1960s that the pluralist orthodoxy finally encountered a challenge. Questioning the group approach to politics and especially its inadequacy in analyzing political dynamics outside the United States, neo-corporatism has been inspired by the reflection upon different kind of a relationship between the state and interest groups which largely distinguished the European world from the United States. In this sense neo-corporatism offers a sharply different vision of reality from that offered by the pluralists.

As Brigitta Nedelman and Kurt G. Meir have pointed out, intentions of neo-corporatist theorization appear to be two fold. First the concept of neo-corporatism considers the conceptual framework of pluralism as empirically inadequate in describing the reality and directs criticisms against the pluralist vision of reality. Secondly, it offers an alternative model,

constructed on the same level of analysis as that of pluralism, which constitute a macro model of political, institutional, and behavioral configurations, focusing on interest intermediation.[29]

Historically, the roots of corporatism goes back to the idea of a hierarchically constituted societal structure associated with the preeminence of the Catholic Church and the estates and the guild systems of feudal times. The theorizing on corporatism was carried out during the nineteenth and twentieth centuries; it was associated with the works of Emile Durkheim, La Tour Du Pin, Othmar Spann and Mihail Manilesco.[30] Being nostalgic for the older values of a natural social harmony where all groups gain more from cooperation rather than conflict and concerned about the political and economic consequences of the pursuit of individual self-interest and mass democracy, the authors within this tradition presupposed a society divided into various corporations according to the functions they performed in the social division of labor. Organizations were created and licensed by the state to represent the interests in each

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[29] Birgitta Nedelman and Kurt G. Meier, "Theories of Contemporary Corporatism Static or Dynamic?" in Trends Towards Corporatist Intermediation, Phillippe C. Schmitter and Gerhard Lehmbruch, eds. (London: Sage Publications, 1979), pp.95-119.

[30] For an analysis of Emile Durkheim's theory, see Frank Hearn, "Durkheim's Political Sociology: Corporatism, State Autonomy, and Democracy," Social Research, 52 (1985), pp.151-177; Timothy V. Kaufman-Osborn, "Emile Durkheim and the Science of Corporatism," Political Theory 4 (1986), pp.638-659.

category and exercise social control over the society enduring order and stability.[31] As far as the actual experiences were concerned, the Italian model under Mussolini had been closest to this corporatist design.[32]

With regards to the modern usage of the term, there appears to be considerable confusion and heterogenity of views. The term sometimes refers to a distinct economic system in which the state directs and controls a predominantly privately-owned business according to the principles of unity, order, nationalism, and success.[33] Sometimes it refers to a form of state which develops alongside parliamentarism in a capitalist society, basing itself on functional representation;[34] And sometimes the term refers to a system of interest group/state interaction.[35] Among these three competing meanings of the term, the latter one has the widespread popularity among scholars and constitutes the most common usage of the term. Like their predecessors in the tradition, the neo-corporatists primarily concerned with the relationship between the state and interest associations. However,

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[31] For details, see Peter J. Williamson, Varieties of Corporatism (Cambridge: Cambridge University Press, 1985), pp.16-74.

[32] Wyn Grant, "Introduction," in The Political Economy of Corporatism Wyn Grant, ed. (London: Macmillan, 1985).

[33] J. T. Winkler, "Corporatism," European Journal of Sociology, 1 (1976), pp.100-36.

[34] Bob Jessop, "Corporatism, Parliamentarism and Social Democracy," in Trends Toward Corporatist Intermediation, Schmitter and Lehmbruch, eds., pp. 185-211.

[35] See Philippe C. Schmitter, "Still the Century of Corporatism," in ibid., p.7-48.

when compared to their predecessors there appeared to be a quite different attitude on the part of the neo-corporatist with respect to the definition of the term. In this respect, the main problem arose from the need to distinguish between the two types of corporatism, namely the one associated with liberal democratic regimes and the one associated with authoritarian regimes. In fact, it had been the latter type which has preoccupied the predecessors of the tradition.[36] In this sense, corporatism was largely defined on the terms of its relation with the authoritarian regimes. Basing his argument on the need of making a distinction between two types and rescuing the term from its authoritarian connotations, Philippe Schmitter had categorized the two types as "state" and "societal" corporatism, the former one involving the state imposing corporatist forms while the latter referring to those voluntary structurations within a framework of a process of pluralist democracy.[37] Later this categorization was taken up by Lehmbruch as "authoritarian" and "liberal" corporatism. It has largely been the liberal form that the neo-corporatists had focused their attention. As Lehmbruch stressed this form found its roots in liberal constitutional democracies where there is freedom of association which enable the

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[36] See Martin M. Ross, "Pluralism and the New Corporatism," Political Studies, 31 (1983), pp.86-88.

[37] Schmitter, "Still the Century of Corporatism," in Trends Towards Corporatist Intermediation, Schmitter and Lehmbruch, eds., p. 20.

interest associations to enter voluntary relationships with the state as well as freely terminate it.[38]

As far as the relationship of the neo-corporatist model to pluralism and the common usage of the term -i.e state/interest association relationship- are concerned, there also appear to be some heterogenity of views as it has been the case for the meaning of the term. In this respect, while some scholars take these two models as polar opposites, in other words as end points on a continuum,[39] some others see neo-corporatism as a kind of pluralism stating that it is no more a "species of textbook pluralism."[40] Still others view the two systems as being totally different models of interest group politics. According to Schmitter who had a great influence among the neo-corporatists, the neo-corporatist model constitutes "an attractive alternative to the pluralist model, suggesting... a different institutional configuration in the relation between specialised interest associations and the political process..."[41]

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[38] Gerhard Lehmbruch, "Liberal Corporatism and Party Government," Comparative Political Studies, 10 (1977), p.92.

[39] Gerhard Lehmbruch, "Introduction: Neo-corporatism in Comparative Perspective," in Patterns of Corporatist Policy-making, Philippe C. Schmitter and Gerhard Lehmburg, eds. (London: Sage Publications, 1983).

[40] Ross, "Pluralism and the New Corporatism," Political Studies, pp.86-102; Charles F. Sabel, "The Internal Politics of Trade Unions," in Organizing Interests in Western Europe: Pluralism, Corporatism and the Transformation of Politics, Berger ed., p.213.

[41] Philippe C. Schmitter, "Introduction," Comparative Political Studies, 10 (1977), p.4.

Indeed, Schmitter's definition which is the most commonly cited definition of corporatism, is based on such a dichotomous view. Schmitter defined the term as follows:

> ...a system of interest representation in which the constituent units are organized into a limited number of singular, compulsory, non-competitive, hierarchically ordered and functionally differentiated categories, recognized or licensed by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and supports.[42]

In this framework, when compared to pluralist model of interest representation, the neo-corporatist model represents a highly different picture of interest group politics. Firstly, as the above definition puts forward in neo-corporatist model, competition is mainly reserved to a small number of very large interest groups, usually peak associations, which have a monopolistic representational power in their respective social category, and in which membership can not be properly regarded as voluntary, since being excluded from their rank directly results with exclusion from key aspects of the policy-making process and thus condemnation to a kind of second class status.

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[42] Schmitter, "Still the Century of Corporatism?," Trends Towards Corporatist Intermediation, Schmitter and Lehmbruch eds., p.13.

Second, the role of interest groups and the process of policy making is highly different in the neo-corporatist framework. In neo-corporatist theory, there appears to be a fusion of the representative role of interest groups with that of implementation. As Cawson points out, "...groups engage in bargaining with the state agencies over public policy outputs, and in exchange of favourable policies the leaders undertake the implementation of policy."[43]

Thus, in corporatism groups become quasi-public bodies engaged in regular cooperative relations with the state and responsible for legitimating and implementing effected policy. According to Leonard Parri this cooperation and bargaining process that take place between interest groups and the state is the most important distinction between pluralist and corporatist models. In Parri's words, it is important that "the number and the nature of the intermediate bodies involved do not affect the neo-corporatist characteristics of the agreement since the essential feature is the presence of the concertation and of the connected stable political exchanges between the public and private actors."[44]

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[43] Alan Cawson, "Corporatism" in The Blackwell Encyclopedia of Political Thought, David Miller, ed. (Oxford: Basic Blackwell, 1987), p.105.

[44] Leonard Parri, Political Stability and Neo-Corporatism, Ilja Scholter, ed. (London: Sage Publications, 1987), p.71 quoted in O' Sullivan, "The Political Theory of Neo-Corporatism," in The Corporate State Cox and O'Sullivan eds., p.8.

In this process, interest associations continue to represent their members' interests but no longer seek to activate or mobilize their membership in support of or in opposition to particular policies. Instead they serve to legitimize those policies which they helped to shape. Thus in neo-corporatism, in exchange for securing certain ends, the participating groups accept joint responsibility for the order and progress of the system as a whole and undertake to help quarantee the ongoing commitment of their members for cooperation.[45]

Finally, the role of state in corporatist model presents high variances in comparison to the pluralist perspective. In fact it presents a different way of conceptualizing the role and the importance of the state.[46] Whether it be state -authoritarian- corporatism or societal-liberal- corporatism, the notion of state has a central place in neo-corporatist theory. The state plays a highly active part both in the formation and the definition of the interests of the groups through the authorization of their existence. Also in contrast to its position in the pluralist model as a neutral arbiter, standing above the groups in the society, the state in the corporatist model actively forms and sustains interest intermediation and interested in the control of the outcomes.

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[45] Colin Crouch, "Pluralism and the New Corporatism," Political Studies 31 (1983), p.457.

[46] Schmitter, "Introduction," Comparative Political Studies, p.4.

Based on the characteristics of the neo-corporatist perspective presented so far, one may argue that it is in a theoretical conflict with the pluralist model with respect to the distinction between the public and the private realms. In this respect, whereas the pluralist model is developed on the idea of a clear distinction between the state and the civil society, in the neo-corporatist model case such a distinction is largely blurred.[47] State continually step beyond the public into the private realm in order to participate in interest group politics; and interest groups acquire a quasi-public role by virtue of the privileged position they hold in policy formation and partly by virtue of the delegated powers they enjoy performing public tasks.

The Statist View: An Alternative to State-Interest Group Relationship

A Statist Critique

The two perspectives delineated above, have to a large extent ignored the state as an independent explanatory variable.[48] When taken broadly and generally, the pluralist perspective totally neglects the state as an actor in politics. A very substantial literature on the topic has been devoted to the issue of the

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[47] John Goldthorpe, "The End of Convergence: Corporatist and Dualist Tendencies in Modern Western Societies," in Order and Conflict in Contemporary Capitalism, John Goldthorpe, ed. (London: Oxford University Press, 1984).

[48] For a detailed analysis of the state in this respect, see J.P. Nettl, "The State as a Conceptual Variable," World Politics, 21 (1968), pp.559-92.

constitution of civil society, the nature of its component values and interests, self organization of groups within it, the impact of public policy on citizen satisfaction, and the formation of public policy during which the groups have the utmost authority in controlling the outcome. Being a society centered approach pluralism ignores the state in favor of focusing on configurations of the social actors.[49]

Neo-corporatism on the other hand, when evaluated with respect to the question of the state, diverges from the pluralist perspective to a large extent. As mentioned above, the state has a central place in the corporatist theory of interest intermediation. Within the paradigm shift from the society-centered to state-centered approaches that took place in the Western social sciences during the 1970s, the studies of neo-corporatism had a dominant place.[50] The students of neo-corporatism place special emphasis on the crucial role of the state as an actor and credit it with initiatives, interests and policies of its own. However there still appears to be

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[49] Philippe C. Schmitter, "Democratic Theory and Neocorporatist Practice," Social Research, 4 (1983), p.898.

[50] Within this context, the state has been brought back in at least five different ways: studies of corporatism; Neo-Marxist state theories; the public choice and property rights perspective in public sector economics; the statist perspective in international relations; and the new right criticisms of the state and its political influences. See John Dearlove, "Bringing Constitutions Back In," Political Studies, 4 (1989), pp.521-39.

some problems concerning the question of the state in the neo-corporatist theory.

Although, neo-corporatism has been credited with calling scholarly attention to many ways in which the structure and action of public authorities affect the identification and organization of interests, it does not say enough about the circumstances and motives under which these authorities intervene and change the ways in which individuals and groups perceive their interests and act collectively to defend them. Thus, it is a quite different thing to place the state in a theory and to have a theory of the state on the other hand.[51] This lack of a theory of the state has been taken as the weakest point in corporatist studies.[52]

"Type of State" as a Determinative Variable

Within the context delineated above, significant contributions have been made to interest group studies by scholars who studied the state and political institutions during the 1980s. The movement to bring the state back into the analysis of politics can be regarded the rediscovery of the role the state plays in shaping public policy, the organization of interests, and the definition of interests.[53] Such a rediscovery of the state within the

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[51] Philippe C. Schmitter, "Neo-Corporatism and the State," in The Political Economy of Corporatism, Grant, ed., pp.32.

[52] O'Sullivan, "The Political Theory of Neo-Corporatism," in The Corporate State, Cox and O'Sullivan, eds., p.19.

[53] Theda Skocpol, "Bringing the State Back In: Strategies of Analysis in Current Research," in Bringing the State Back In, Peter B. Evans,

discipline has in fact led to a growing appreciation for the proposition that "political institutions define the framework within which politics take place."[54] On the whole what the state theory suggests is that assumptions about the bottom-up or society-centered explanations are incomplete. Rather, "the timing and characteristics of state intervention" affect "not only organizational tactics and strategies" but "the content and definition of interest itself."[55] As a result, the structure and apparatus of the interest group system are very much a function of the organization of the state at any given period in its development.

Accordingly, as mentioned by Pierre Birnbaum, within the framework of corporatist theory the capacity of the state as an independent variable, affecting the *type of interest representation* in a country has to a large extent been neglected. Assuming that, the state must always be the same in capitalist societies and not distinguishing between the type of states in capitalist societies, the dominant approach to the state has remained ahistorical and universalistic.[56]

Dietrich Rueschemeyer, and Theda Skocpol, eds. (Cambridge: Cambridge University Press, 1985); Graham K. Wilson, Interest Groups (Oxford: Basil Blackwell, 1990).

[54] James G. March and Johan P. Olsen, Rediscovering Institutions (New York: Free Press, 1989), p.18.

[55] Skocpol, "Bringing the State Back In: Strategies of Analysis in Current Research," in Bringing The State Back In, Evans, Ruechmeyer, and Skocpol, eds., p.23.

[56] Pierre Birnbaum, "The State versus Corporatism," Politics and Society, 4 (1982), pp.477-501.

As many political scientists have come to accept the impossibility of a general theory of a capitalistic state or more specifically its historical forms[57] such an analysis of depriving the state of any particular history of the respective country where it came to existence may yield statements of a descriptive rather than explanatory nature . In fact, such a view point belongs to a broadly Weberian methodological paradigm which sanctions the construction of interest-group politics models of "ideal type" to be used in comparative as well as national level studies, where various elements of the types will be found to be more or less present and occasionally absent. While such an approach may yield interesting descriptions, in the final analysis it carries in itself the danger of comprising differing cases to the type without trying to explain differences. In such a setting, the consideration of the conceptualization of the state within the context of its historical formation appears to be a necessity in interest group studies since the nature of the state by itself effects the structure of interest group politics.[58] Therefore, the "nature" of the

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[57] See Kenneth Dyson, The State Tradition in Western Europe (Oxford: Oxford University Press, 1980); Bernard Badie and Pierre Birnbaum, The Sociology of State, trans. by Arthur Goldhammer (Chicago: The University of Chicago Press, 1983).

[58] Skocpol, "Bringing The State Back In: Strategies of Analysis in Current Research," in Bringing The State Back In, Evans, Rueschemeyer and Skocpol, eds., p. 27. For such an account also see Pierre Birnbaum, States and Collective Action. The European Experience (Cambridge: Cambridge University Press, 1988), p.108.

relationship between the state and civil societal associations is largely bound with the type of state in question. To be more precise, as mentioned above in the text, the pluralist character of a given polity involves a state responsive to civil society. On the other hand, neo-corporatism necessitates a harmonious relationship between the state and civil societal associations, because it is based itself on a bargaining process between the two partners. Within this framework, state societies or societies having a strong state tradition can be regarded as being a fertile ground neither for pluralism nor neo-corporatism.[59]

At this point, it is necessary to pin-point the concepts of autonomy and sovereignty of the state, as the major criteria both for an understanding of the state as such and its position vis-a-vis the civil society. As pointed out by Nettl who had been the pioneer of the state-centric approach, autonomy denotes the characteristic of a state as a "distinct sector" with an independence in managing out its functions, and represents the primary role identification of being a state official in the society. Sovereignty on the other hand connotes the independence of the state in setting and attaining goals for the society. In fact, the notion of the sovereign state focuses exclusively on its

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[59] For such an account, specifically basing itself on British and French experience, see Birnbaum, "The State versus Corporatism," Politics and Society, pp.490-501.

superordinate status vis-a-vis associations.[60] Accordingly, one can come up with polities high or low in stateness, depending upon the extent to which public policy are determined by those who claim to act in the name of general interest, independent of the civil society.[61]

In this respect, whereas polities high in stateness the best example of which is France, the corporate life of the society is expressed through the persona of the state, in polities low in stateness the best examples of which are Anglo-American countries, it is the associations and the local community that perform this function. Accordingly, in Anglo-American world there has been a consequent tendency to view the state and public institutions in a pragmatic and instrumental manner. What is lacking in the latter polities is a strong sense of state which differentiates it from the institutions of civil society, namely a sense that there must be a distinct logic of public institutions. In fact, it is this point which has done so much to color the continental European politics more widely, but which has been peripheral to Anglo-American politics.[62]

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[60] Nettl, "The State as a Conceptual Variable," World Politics, p.562, 564, 565, 582-3.

[61] Ibid., p.276.

[62] See H. Stuart Jones, The French State in Question (Cambridge: Cambridge University Press, 1993), p.7. For an analysis of the state models of France and Britain, see Badie and Birnbaum, The Sociology of State, Chapters 7, 8.

In the same strand of thought, Dyson strongly emphasized the importance of the historical dimension for drawing a framework for understanding the differences between continental Europe and the Anglo-American worlds. In this respect, the concepts of "state societies" and "stateless societies" have been central to his argument. And the existence or nonexistence of the historical and legal heritage of the state has been regarded as the most significant determinant in this respect. According to Dyson, the Anglo-American political tradition is characterized by its "statelessness." However, while referring them as "stateless societies", Dyson does not use the term in the antropologist's sense of a primitive community organized on the basis of clan or blood ties, but in the political scientist's sense of a modern society which lacks "a historical and legal tradition of the state as an institution that acts in the name of public authority...as well as a tradition of continuous intellectual preoccupation with the idea of the state."[63] "State societies" on the other hand, belong to a type of political culture which accords the idea of the state a pivotal role in the political discourse. Thus having a state culture and belonging to a "state tradition," the most significant differentiating characteristic of state societies is the existence of a historical and legal heritage of the state as an institution of public authority acting in the name of the public.

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[63] Dyson, The State Tradition in Western Europe, p. viii.

As far as the Turkish case is concerned, the state had a traditionally determined patronizing position over the (civil) society. While being the principle vehicle for the creation or maintenance of national identity, the public institutions have embodied principles which strongly differentiated them from the institutions of the civil society.[64] As one of the leading students of Turkish politics had underlined: "[E]xperience in statecraft, respect for the state, the importance of the state in the history of the Turkish Republic, endowing it with a degree of political gravitas, absent from most new countries"[65] very well indicates the strong state tradition in Turkish political culture.

When the Ottoman-Turkish experience is concerned with respect to the state-society relations, it presents a largely different picture from that in the West, which makes it particularly necessary to include the type of the state in the analysis of interest group politics in Turkey. There appeared to be mainly three stages that were common to the Western world with respect to the development of the state-civil society relations: (1) The initial phase of estate representation during which the interests of the society coincided with the social system; (2) the period starting with the birth of

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[64] For a detailed analysis of such an assesment as well as a comparison of Ottoman-Turkish state tradition with that of its Western counterparts, see Metin Heper, The State Tradition in Turkey (Walkington, England: The Eothen Press, 1985), pp.1-20.

[65] Andrew Mango, "The State of Turkey," Middle Eastern Studies, 13 (1977), p.265.

liberalism, in which representation was organized on an individual basis and association was entirely voluntary, fragmented and unstable; (3) the period from the end of the nineteenth century to the present which is characterized by the presence of mass parties and by stable organized interest groups with multiple objectives, professional leaders, and bureaucracies.[66] However, it still must be mentioned that within the Western world, all societies did not show the same characteristics with respect to the interest group formation and their role in the political system. Such a distinction is clearly observable between the Anglo-American world and the Continental European countries. In this respect, while in the former the formation of interest organizations were regarded as the manifestations of liberalism, in the latter it had largely been delegation of state authority.[67]

The Ottoman-Turkish case shows a clear difference from this briefly sketched Western historical development. In general, in the Ottoman-Turkish polity one hardly finds well-organized civil societal elements

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[66] See Charles S. Maier, "Fictious bonds...of wealth and law: on the theory and practice of interest representation," in Organizing Interests in Western Europe: Pluralism, Corporatism and the Transformation of Politics, Berger ed., pp. 27-56; Alessandro Pizzorno, "Interests and Parties in pluralism," in ibid., pp. 249-59.

[67] Maier, "Fictious bonds...of wealth and law": on the theory and practice of interest representation," p. 41.

that wielded political influence.[68] First of all in the Ottoman-Turkish polity the state neither faced countervailing forces nor experienced an estate representation through which the interests of the society were transmitted to the state mechanism.[69] The basic political conception underlying Tanzimat was the construction of a direct relationship between the state and the individual. The Tanzimat reforms signified no more than an effort of "saving the state." The establishment of the first bar association in Istanbul had been a product of the reforms within the legal sphere. Such a development was largely due to the need on the part of the Ottoman state to control the profession of attorneyship which had begun to gain a prominent place in the judicial system with the newly accepted European codes. As far as the Republican period

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[68] Şerif Mardin, "Power, Civil Society and Culture in the Ottoman Empire," Comparative Studies in Society and History, 11 (1969), pp. 258-81.

[69] See Metin Heper, "Center and Periphery in the Ottoman Empire with Special Reference to the Nineteenth Century," International Political Science Review 1 (1980), pp.81-105. In fact, as Stande and parliament remained alien to the Ottoman Empire, when invited to the Extraordinary meeting in 1845, the Ottoman local notables were so surprised that they did not know how to respond. Roderic Davison, "The Advent of the Principle of Representation in the Government of the Ottoman Empire," in Beginnings of Modernization in the Middle East: The Nineteenth Century, W. R. Polk and R. L. Chambers, eds. (Chicago, 1968), p.100 quoted in Metin Heper, "Extremely 'Strong State' and Democracy: Turkey in Comparative and Historical Perspective," in Democracy and Modernity, F. N. Eisenstadt, ed. (Lieden: Brill, 1992), p.149.

is concerned, although the mentality of controlling and checking the profession on the part of the state still continued to be the case, specifically after the 1960s it had to face more organized associations having multiple objectives. However, the bar associations did not constitute an exception in the independent status of the state in defining and attaining the goals of the society. Consequently neither pluralism nor neo-corporatism could be developed.

"Type of State", Juridical Sphere, and Legal Professionals

Within the general framework mentioned above, assessing the necessity of the consideration of the type of state for a study focusing on state-interest group relationship, a final point must be mentioned which have ultimate importance specifically for the case of bar associations. This is mainly related to the role of the state within the legal and judicial sphere which is accepted to be a variable related with the degree of stateness in a society. Accordingly, due to the significance of the legal and judicial issues as constituting one of the most significant areas with regard to the interface of bar associations with the state, the extent of the domination of the state on such issues have a strong potential for affecting the nature of the relationship. In fact, the structure of legal and judicial spheres, including the legal profession and

attorneyship has been a significant reflector of the divergent traditions of state in different countries.[70]

In Continental European legal tradition of which Turkey had been a part since the law reform in the early years of the Republic, law has little autonomy of its own, in fact it is largely an emanation of the state.[71] Having been under the influence of the Roman tradition, in these "civil law" countries law had been tightly incorporated into the state in contrast to the "common law" of the Anglo-American countries. The distinction between "public law which pertained to the impersonal abstract character of the state, and private law, which applied to the relations of private individuals,"[72] as well as the establishment of a distinct administrative law in civil law tradition are exemplary in this respect.

However, among other things, the most significant point with respect to the purpose of the present study has been the impact of the incorporation of law into the state on the status and identity of legal professionals in general and attorneys in particular. In fact, it has

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[70] Nettl, "State As a Conceptual Variable," World Politics, p.534.

[71] For example, the decisions of the judges constitute no more than the logical interpretation of law. Thus it is the state which speak through the court in interpreting its own legislation. Conversely, in the Anglo-American tradition, where law has an autonomy, the judges explain the law and develop it. And in a sense law becomes a courtroom game.

[72] Dyson, The State Tradition in Western Europe, p. 115

been in the professional characteristics and the socialization of legal professionals that the extent of the dominance of state can be detected in a legal tradition. Accordingly as Nettl notes, in the Continental European tradition, legal professionals have more or less defined themselves as the servants of the state.[73] The most significant determinant of such an identification is in fact the law education where the legal professionals are socialized. In Continental European tradition, the law education has largely been a path for a governmental career rather than a commercial career as it has been the case for the Anglo-American tradition. In this sense, as Nettl mentions, whereas the self identity of the latter is highly professional, the self identity of the former results from the association with the state.[74]

As being a part of the continental European tradition of law, Turkey does not constitute an exception to the above mentioned framework. In this regard, in a system where the legal and judicial spheres has little autonomy of its own and thus incorporated with the state, there appears to be a potential of conflict between the bar associations and the state. Because any interference on the part of the bar associations in the legal sphere for the sound functioning of which they feel themselves responsible automatically brings them face to face with the state in an area under the latter's tight monopoly or perhaps the raison d'etre.

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[73] Nettl, "State As a Conceptual Variable," World Politics, p.584.

[74] Ibid., p.585.

Chapter Two

EVOLUTION OF ATTORNEYSHIP AND BAR ASSOCIATIONS IN THE OTTOMAN EMPIRE

The Early Roots of The Profession

Attorneyship has been one of the oldest professions. Being intimately connected in all societies with the rise and development of legal systems, the roots of attorneyship goes back to Ancient Greece and Roman times. In Athens, principally it was the right and obligation of each citizen to present his own case in the court. However this was the ideal situation. Even, in such a society where so much of the educational process was directed towards teaching rhetoric, not everyone had the same rhetorical skill. Thus, it was a necessity to have a class of people who would help in the preparation of arguments to be put before the Athenian court. Although, these people were not attorneys in the modern sense of the term, they did to a certain degree constituted a professional class and have been regarded as the precursors of the profession of attorneyship.[1] With the development of Roman Law and its complex legal roles, the profession developed in the Roman city state and matured under the rule of Roman Empire. In Rome, attorneyship became much more important than it has been in Athens as it became common for legal defense to be handled by a

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[1] R. J. Bonner, Evidence in Athenian Courts (New York: Arno Press, 1979), p.11.

third party, even though payment was not supposed to be made for the service. However, although there was much more formal law then had been in the Ancient Greece, the attorneys' court presentations referred little to the rules of law; and attorneys resorted to techniques of persuasion rather than textual interpretation.[2]

It has been with the adoption of Roman law that, the profession emerged in feudal Europe and started to take its place within the European judicial mechanism, although having a quite different developmental path in each country. The formation of the bar associations on the other hand, has been realized late in the seventeenth and eighteenth Centuries in most of the these countries. However, up to the early nineteenth and twentieth centuries, these associations proved to be local bodies and have tended to view their functions as the informal encouragement of collegiality among members and the facilitation of fruitful professional contacts rather than national associations lobbying for their collective interests.[3]

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[2] For further information concerning the historical evolution of attorneyship, see James Davies, Henry H. Foster, C. Fay Jeffery and S. Eugene Davis, Society and the Law (New York: Free Press Glencoe, 1962), Part III; Faruk Erem, Eski Yunan ve Roma'da Avukatlık (Attorneyship in Ancient Greece and Rome) (Ankara: Sevinç Matbaası, 1976).

[3] Richart Abel and Philips S. Lewis, Lawyers in Society, three volumes (Berkeley: University of California Press, 1988), vol.1, pp. 60, 85; vol.2, pp.237, 272; Şinasi Devrin, "Muhtelif Memleketlerde Avukatlık," (Attorneyship in Various Countries) Istanbul Barosu

The rise of the profession in the Ottoman Empire has been more recent. Formally, the origins of the profession and its organizations are linked with the Tanzimat Reform Period(1839-1876) of the nineteenth century.

When the pre-Tanzimat period is taken into consideration, there was a group called *arzuhalcis* who were engaged in writing petitions and letters for the people. In some instances, while writing petitions, these people were in a sense performing a specific function reserved for attorneyship, namely written defense. In this sense, although functioning outside of the judicial mechanism and performing quite a different profession, *arzuhalcis* can to a certain extent be considered as the precursors of the profession in the Empire. *Arzuhalcis* were accepted as performing a kind of public service and thus certain criteria have been determined by the Ottoman state for the practice of the profession, which showed close parallelism with the rules applied for the attorneys during the Tanzimat period, as will be elaborated below.[4]

Besides *arzuhalcis* who were partly functioning as attorneys only in some cases, there are evidences of the presence of some other people who might plead a case in the Ottoman legal system before the Tanzimat era.

Mecmuası, special issue published for the fifteenth anniversary of the establishment of the Republic (1938), pp.300-72.

[4] "İstanbul Arzuhalcilerinin Usul ve Nizamlarına Dair Rüus," (Document Concerning the Procedural Rules of the Ardhaljis in Istanbul) Istanbul Barosu Mecmuası, special issue (1938), pp.375-6.

Therefore, although Islamic law formally conceived no class of specialists in the representation of parties in litigation because litigants were supposed to defend their own cases in the court, a distinct group of court room pleaders existed.

Within the framework of Islamic law, defending others' interest in court was considered formally as an application of the principle of legal representation, *vekalet,* and the general term for the agent as the representative was *vekil*. The *vekil* was given a power of attorney which was filed before the judge hearing the case.[5] However, no specifications had been made concerning the qualifications of the *vekils* in the law.[6] Usually the relatives and friends of the litigants carried out this function. Apart from them the former clerks of the courts as called *muhzir,* who were assumed to have knowledge on the court room procedures, acted as pleaders from time to time. Usually they were preferred by the litigants due to their close relationship with the Islamic Judge, *kadı.* Another group of people who were preferred as pleaders were simply orators. These people were usually small shop-keepers living in the neighbourhood of *kadıs.*[7]

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[5] C. G. Weeramantry, Islamic Jurisprundence (London: The Macmillan Press, 1988), p.77.

[6] For the details of the institution of *wakala* see Mecelle-i Ahkam-ı Adliyye (Ankara: Güzel Istanbul Matbaası, 1959), Articles 1449-1530.

[7] Ali Haydar Özkent, Avukatın Kitabı (Attorneys Book) (Istanbul: Arkadaş Basımevi, 1940), p.51.

As a group, the *vekils* had developed a reputation of chicanery and had a negative image in the society. As stated by Ibn al-Uhuvva, an eighteenth century scholar, the *vekils* were usually hiding the truth from the court with their high degree of oratory and regarded to be liars, their only function being to confuse the minds of *kadıs*.[8] In this regard, they were usually tagged with unflattering names such as *müzevvir, ayak kavafı, kağıt kavafı,* all of which had the connotations of forgery.[9]

When the role of *vekils* in the Ottoman legal system is compared with the three core characteristics of the role of attorneys in the modern sense of the term which

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[8] Coşkun Üçok, "Savcılıkların Avrupa Hukukunda Gelişmesi ve Türkiye'de Kuruluşu," (The Development of Prosecutorship in the European Legal System and its Establishment in Turkey) in Ord. Prof. S. Ş. Ansay Armağanı (Melange to the Memory of Prof. S. Ş. Ansay) (Ankara: Ankara Üniversitesi Hukuk Fakültesi, 1964), p.36.

[9] Ali Haydar Özkent, Avukatlığın Memleketimizde Çok Kötü Tanınması (The Bad Reputation of Attorneyship in Our Country) (Ankara: Hapishane Basımevi, 1938), pp.6-7. However, the negative image of the attorneys was not specific to the Ottoman Empire. In many parts of the world similar phenomena were in effect. In Russia, for example attorneys were labeled with similiar negative names such as: Samuel Kucherov Courts Lawyers and Trials Under the Last Three Tsars (New York: Praeger, 1953). Also in many parts of the western world the legal professionals, of which attorneys has been a part has usually been identified with the interests of the aristocracy and had developed a negative image within society due to performing their services for the powerful and defending the monarchial state. See Alexis de Tocqueville, The Ancient Regime, (New York: Doubleday, 1955), pp.222-3; Fernand Braudel, The Mediterranean and the Mediterranean World in the Age of Philip II (New York: Harper and Row, 1972), pp.383-5.

are (1)specialized knowledge of legal rules, (2)partisan advice to clients not related by kinship, (3)representation of clients in relation both to other parties and to legal authorities,[10] it can be said that the Ottoman *vekils* were far from being attorneys as they have hardly exhibited these characteristics. Thus when the professional features of the modern attorneyship is taken into account, probably there never existed in the Islamic legal system a professional group of people available for hire to serve as representatives in the court.

This lack of professional attorneys has been one of the most important difference between the Ottoman and Western legal systems. The lack of professional attorneys has been a phenomenon inseparable from other aspects of the workings of the courts in the Ottoman Empire, especially practice of *kadı* himself:

Within the Ottoman system, the law which the judges administered was primarily the Sacred law, as given in the Koran and the traditions of Mohammed, but especially as codified by the jurists of the school of Abu Hanifa which Sultan Selim asserted at the sixteenth century to be the compulsory official school in judicial matters in the Empire and as interpreted in collections of the *fetvas* of great jurists. Next the judges applied the *Kanuns* "which were an independent category of law derived

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[10] Dietrich Rueshmeyer, Lawyers and Their Society (Cambridge: Harvard University Press, 1973), p.6.

directly from the sovereign will of the ruler"[11] and the customs and immunities of the regions in which they served.

Within the framework of this Islamic system, the only formal courts in the Empire were the *Şeriat* or Islamic law courts which exercised broad powers of jurisdiction covering all types of litigation.[12] Besides, there were *Cemaat* courts handling the cases within the sphere of private law for non-muslims and consular courts having jurisdiction in trade disputes involving their own subjects and other matters reserved for them by the capitulation treaties.[13]

The judge who administered justice in the Ottoman Empire was the *kadı*. In fact, the *kadı* was much more than a judge in the common sense. First of all in accordance with the classical Islamic legal tradition,

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[11] Halil İnalcık, "Turkey: The Nature of Traditional Society," in Political Modernization in Japan and Turkey, Richard E. Ward and Dankward A. Rustow, eds. (Princeton: Princeton University Press, 1964, p.57.

[12] For an eloboration of Islamic law, see Halil Cin and Ahmet Akgündüz, Türk Hukuk Tarihi (Turkish Legal History) (Istanbul: Timaş, 1990), pp.148-61; Noor Mohammad, "An Introduction to Islamic Law," in Modern Legal Systems Cyclopedia, Kenneth Redden, ed. (Buffalo: William S. Hein and Co., 1985), vol.5, pp.683-90; Hayrettin Karaman, Başlangıçtan Zamanımıza Kadar İslam Hukuk Tarihi (The History of Islamic Law from Past to Present) (Istanbul: Irfan Yayınevi, 1975); Joseph Schacht, An Introduction to Islamic Law (Oxford: Clarendon, 1964).

[13] Coşkun Üçok and Ahmet Mumcu, Türk Hukuk Tarihi (Turkish Legal History) (Ankara; Sevinç Matbaası, 1976), p.330.

the *Şeriat* covered every aspect of life[14] and so the *kadı* dealt at least in principle, with every aspect of life. The *kadı,* in the Ottoman system was the head of districts as called *kazas,* assessed and collected taxes, organized local security and thus, in a sense was the main link connecting the state with the mass of its citizens.[15]

One of the most important characteristics of the Ottoman legal system, and one reason for the lack of professional attorneys was the process of reaching a decision in the *kadı* courts. In every court a single *kadı* sat, with clerks and other subordinates. Cases were presented by the parties and decisions were usually rendered immediately and in a very concise form. This process was informal and arbitrary in the sense that although *kadı's* court was praised and viewed as a major avenue for achieving justice, it could never be clear to the litigants just what had led to the *kadı's* decision. In this regard, although in a limited number of cases the basis of *kadı's* decisions could be identified, in the overwhelming majority of the cases no authority was

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[14] Schacht, An Introduction to Islamic Law, p.64.

[15] İlber Ortaylı, "Osmanlı Kadısı: Tarihi Temeli ve Yargı Görevi," (The Ottoman Kadı: Historical Roots and Judicial Function) Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi, 1 (1975), pp.117-28; Stanford J.Shaw, History of Ottoman Empire and Modern Turkey: Empire of the Gazis: the Rise and Decline of the Ottoman Empire 1280-1808, vol.1 (London: Cambridge University Press, 1977), pp. 193-6.

cited, nor was any explanation of the decision given.[16] Also the legal jurisdiction was quite confusing.[17] The *kadıs* themselves often did not know where to look for legal guidance and, in any case, were not educated enough to use the guides and precedents.[18] In the final analysis, they acted on their own consciences and their sense of equity.[19] Within such an atmosphere of uncertainty as well as under the dominance of monist mechanism, as the *kadıs* being the sole authority, it was impossible to have professional attorneys.

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[16] See Haim Gerber, "Sharia Kanun and Custom in the Ottoman Law: The Court Records of the 17th Century Bursa," International Journal of Turkish Studies, 2 (1981), pp.131-47.

[17] As it has been stated by the commission to redraft a part of civil law "Sacred jurispundance resembles a boundless ocean....and as difficult as it is to draw pearls from the ocean, so great ability and learning are required for a man to find always in the law the neccesary rules for the solution of each question"; W.E. Crigsby, The Medjelle or Ottoman Civil Law (London, 1895), pp.iii-iv quoted in Roderic Davison, Reform in the Ottoman Empire 1856-1876 (Princeton: Princeton University Press, 1963), p.251.

[18] The absence of printing, which was not introduced into the Empire until the eighteenth century, aided further toward making a general use of the decisions of judges as precedents practically impossible.

[19] It is this point which is the crux of Max Weber's concept of *kadı* justice. See Reinhard Bendix, Max Weber: An Intellectual Portrait (Garden City, New York: Doubleday, 1962), p.400.

Beginning in the mid-nineteenth century, the Ottoman state embarked on a wide ranging program of reforms, which had the twin aims of centralizing political authority and modernizing and rationalizing the state bureaucracy. Collectively known as Tanzimat, the reform package extended to military, administrative, educational, and legal spheres. As far as the development of modern attorneyship and bar associations are concerned, the reforms in the last category appears to have utmost importance.

Indeed, during the Tanzimat period, the Ottoman legal system underwent significant changes with the modernization and rearrangement of the laws and the judiciary. However it is important to note that the codification movement during this period, was based on grounds totally different from those in Western European states. While in the latter case, the notion of natural law, rationalism and the desire for the establishment of legal security for the individual informed the codification process, in the Ottoman Empire, the need for the adaptation to the commercial life of West European countries; the desire of Western powers to realize the legal security of their citizens working in the empire; the need for standardized and well organized body of

codes, being in harmony with the requirements of a centralized administration played the same role.[20]

The main steps during the codification process can be summarized as follows: a commercial code (*Kanunname-i Ticaret*) and a penal code (*Ceza Kanunname-i Hümayunu*) based on French equivalents were promulgated in 1850 and 1858 respectively and codes for civil (*Usulü Muhakematı Hukukiye*) and criminal (*Usulü Muhakematı Cezaiye*) procedure also French inspired, followed in 1879. The movement for codification in the Ottoman Empire also produced the Land Code (*Arazi Kanunname-i Hümayunu*) of 1858, which reorganized and explicated prior substantive law pertaining to immovable property in the empire. The issuence of the religious law on transactions (*Mecelle-i Ahkam-ı Adliye*), in 1877, after six years of work by a committee, has perhaps been the most significant step within the codification process. The code gave a clear

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[20] Hıfzı Veldet Velidedeoğlu, "Kanunlaştırma Hareketleri ve Tanzimat," (The Codification Movements and Tanzimat) in Tanzimat I (Istanbul: Maarif Matbaası, 1940), pp.167-9; Hıfzı Veldet Velidedeoğlu, Türk Medeni Hukukunun Umumi Esasları (General Priciples of Turkish Civil Law) (Istanbul: Istanbul Matbaacılık, 1968), pp.63-4; Halil Cin, "Tanzimat Döneminde Osmanlı Hukuku Ve Yargılama Usulleri," (The Ottoman Law and Civil Procedures in the Tanzimat Era) in 150. Yılında Tanzimat (Tanzimat in Its 150th Anniversary), Hakkı Dursun Yıldız, ed. (Ankara: Türk Tarih Kurumu, 1992), pp.14-15; İlber Ortaylı, İmparatorluğun En Uzun Yüzyılı (The Longest Century of the Empire) (Istanbul: Hil Yayınları, 1983), pp.140-2; Ülkü Azrak, "Tanzimat'tan Sonra Resepsiyon," (Reception After Tanzimat) Tanzimat'tan Cumhuriyet'e Türkiye Ansiklopedisi, vol. 3 (1985), pp.603.

and orderly exposition of the law of transactions derived from the *Şeriat* and clarified many controversial points in the Hanefi law.[21]

Reforms pertaining to the reorganization of the court system were also made. Within the framework of the Tanzimat reforms, there appeared to be five different court systems operating in the empire, dispensing justice to different groups according to different methods and different laws. In this respect, enforcement of new secular codes was entrusted to new regalement *(Nizamiye)* courts. These courts were to handle criminal and civil cases among Ottoman subjects, except those matters of marriage, death, divorce,and inheritance which were still cared for *Şeriat* and *Cemaat* courts. A hierarchy of secular courts was formed, ranging from *nahiye* council of elders to *kaza, sancak* and *vilayet* capitals. Besides, trade courts were established which were to handle commercial disputes. These courts were supervised by different governmental authorities. In this respect, The *Nizamiye* courts and trade courts were under the jurisdiction of the Ministry of Justice; The *Şeriat*

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[21] Velidedeoğlu, "Kanunlaştırma Hareketleri ve Tanzimat," in Tanzimat, pp.175-204; Davison, Reform in the Ottoman Empire 1856-1876, p.251; Mumcu and Üçok, Türk Hukuk Tarihi; Stanford J. Shaw and Ezel Kural, History of Ottoman Empire and Modern Turkey: Reform, Revolution and Republic: The Rise of Modern Turkey 1808-1975, vol.2 (Cambridge: Cambridge University Press, 1977), pp.246-7. Also see Sıddık Sami Onar, "İslam Hukuku ve Mecelle," (Islamic Law and Mecelle) in Tanzimattan Cumhuriyet'e Türkiye Ansiklopedisi, vol.3 (1985), pp.580-7.

courts were under *Şeyhulislam*'s office; the *Cemaat* courts were under the foreign office at first and then the prime ministers office; and the consular courts remained under the supervision of the Foreign Office.[22]

Therefore, it can well be asserted that in the Tanzimat period, the traditional Islamic concept of justice of "securing each category of the ruled no less and no more than it deserved according to its function or state in the society" was reinterpreted. It now meant promulgation of secular legislation outside the jurisdiction of the Islamic traditions and autonomous from them.[23] The adaptation of foreign codes and the emergence of secular *Nizamiye* courts soon considerably stimulated the demand for new judicial roles in the administration of justice. Occupations based on specialized knowledge in law proved to be a necessity. At this point, one can detect a similarity between the early development of the institution of attorneyship in feudal Europe, especially in France and Italy, and in the Ottoman Empire during the Tanzimat Period.

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22 See Mustafa Reşit Belgesay, "Tanzimat ve Adliye Teşkilatı," (Tanzimat and the Judicial Mechanism) in Tanzimat I (Istanbul: Maarif Matbaası, 1940), pp.213-20; Cin, "Tanzimat Döneminde Osmanlı Hukuku ve Yargılama Usulleri," in 150. Yılında Tanzimat, pp.24-31; Enver Koray, Türkiye'nin Çağdaşlaşma Sürecinde Tanzimat (Tanzimat Within the Process of Turkish Modernization) (Istanbul: Marmara Üniversitesi, 1991), pp.49-52; Mumcu and Üçok, Türk Hukuk Tarihi, pp. 330-5.

23 Niyazi Berkes, The Development of Secularism in Turkey (Montreal: McGill University press, 1964), pp. p.94-95.

Both in feudal Europe and in the Ottoman Empire, the early development of the institution of attorneyship was the result less of internal social conditions and necessities than the adoption of new codes and diffusion from more developed institutional centres. The Roman law and its complex legal roles grew out of archaic conditions, developed in the Roman city state and matured under the bureaucratic rule in the Roman Empire. It was imposed on the provinces and later conserved mainly in the institutions of canon law, in the contractual forms used by notaries in Italy and France, and in schools of law and rhetorics. It was revived under changed conditions in the reception of the Roman law in continental Europe. Cultural retention and diffusion of this kind are likely to introduce additional complexities into the relations between traditional norms and the more cosmopolitan legal system. It thus adds to the requirement of specialized expertise.[24]

In the Ottoman Empire, the presence of an attorney in legal procedures was made necessary by some of the articles in the above mentioned foreign codes.[25] However

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[24] Rueschemeyer, Lawyers and Their Society, pp.3-4.

[25] In this respect, see "*Usulü Muhakematı Ticariye,*" (Law of Commercial Procedure) in Düstur Birinci Tertip, vol.1, Articles 28,39; "*Usulu Muhakematı Hukukiye Kanunu,*" (Law of Civil Procedure) in Düstur Birinci Tertip vol.4, Articles 16, 41-42; "*Usulu Muhakematı Cezaiye Kanunu,*" (Law of Criminal Procedure) in Düstur Birinci Tertip, vol.4., Articles 249-250.

the most important step in this respect, was taken with the enactment of a regulation known as *Dersaadet Dava Vekilleri Nizamnamesi* (Regulation of Attorneyship in Istanbul), in 1876.[26] It has been with this regulation that the Ottoman State for the first time, formally recognized as well as defined attorneyship as a legal profession.[27] Besides formally establishing the profession, this regulation has also been the first step taken by the Ottoman state to supervise the practice of the profession whose members until then had developed a reputation of chicanery, a point made above. The regulation aimed at improving the quality of the profession by defining and tightening entrance requirements. In this respect, the regulation required those engaged in legal representation before courts to register with the Ministry of Justice and be graduates of law schools.

Paradoxically, at the time, there were no secular law schools in the Empire. Legal education was primarily based on Islamic law and sponsored by *Medreses* and

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[26] For the original text, see "Mehakimi Nizamiye Dava Vekilleri Hakkında Nizamname," (Regulation on Attorneys in Nizamiye Courts) Istanbul Barosu Mecmuası, special issue (1938), pp.374-85.

[27] When first enacted this regulation was only valid in *Dersaadet*, however, with an order enacted in 1877 it became valid for the otherparts of the Empire, too. See "Dava Vekili Nizamnamesinin Taşraya da Teşmili Hakkında İradei Seniye," (Sultanic Order on the Adoption of Regulation on Attorneys to Provinces) in ibid. p.386.

religious schools that confined themselves largely to the recruitment of *kadıs*. Besides, there was a school called *Muallimhane-i Nüvvap*, established in 1854 in Istanbul within the framework of which, law education showed no differences than it has been in the *Medreses*, basing itself on Islamic law. And finally there was a special class in *Galatasaray Sultanisi* which was established in 1875, that taught law courses in French, but could function only for a short period of time.[28] It was in 1879, four years after the enactment of the regulation that the first separate law school *Mekteb-i Hukuk*, attached to the Ministry of Justice, was established.[29] Its major aim was the education of judges and *vekils*. In fact, after the law reforms realized within the framework of Tanzimat, the necessity of the establishment of a secular law school and thus the recruitment of legal personnel had been a point which was continuously emphasized among the reformers for the well functioning of the judicial mechanism.[30] However, due to this late

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[28] Ali Rıza Başaran, İstanbul Üniversitesi ve Hukuk Fakültesi ile İlgili Kanun, Tüzük ve Yönetmelikler (Istanbul: İstanbul Üniversitesi Hukuk fakültesi, 1979), p.3.

[29] This school eventually became the Faculty of Law of the University of Istanbul. See Kenneth Redden, Legal Education in Turkey (Istanbul: Fakülteler Matbaası, 1957), p.10.

[30] See Gülnihal Bozkurt, "Türkiye'de Hukuk Eğitiminin Tarihçesi," (History of Law Education in Turkey) in Hukuk Öğretimi Sempozyumu (The Symposium of Law Education), Adnan Güriz, ed. (Ankara: Ankara Üniversitesi Hukuk Fakültesi, 1993), pp.60-1.

coming character of secular law education, law school graduates in the Empire were very few.[31] This state of affairs forced the Ottoman state to make provisions for an examination, the passage of which substituted for a formal degree in 1885.[32] Although this arrangement, provided some degree of control mechanism concerning the entry to the profession, it prevented the legal service turning into a modern profession as formal education is a sine qua non of a modern legal profession.

Perhaps even more ominous development was the Sultanic decree of 1886, which abolished the requirement of obtaining a licence for *vekils* in the law cases.[33] Thus, by this decree the most important control mechanism was eliminated. And besides the qualified ones, the uneducated and unspecialized *vekils* of the pre-Tanzimat

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31 However, it must be mentioned that, although secular legal training had been available from that time on, still a number of people seeking legal education prefered to study at European law faculties. Such a configuration, could be regarded as an evidence of the influence of Western legal system in the Empire. June Starr, Law as Metaphor. From Islamic Courts to the Place of Justice (Albany: State University of New York Press, 1992), p.38.

32 "Dava Vekillerinin İmtihanına Dair Nizamname," (The Regulation on the Examination of Attorneys) Türkiyede Savunma Mesleğinin Gelişimi (The Development of the Profession of Attorneyship in Turkey) (Istanbul: Yörük Matbaası, 1972), pp.37-40.

33 "Dava Vekaleti Ruhsatnamesi İstihsaline Dair 540 Sayılı İcra Vekilleri Heyetinin Kararnamesiyle Vaz'ı Karagir Olan 18 Kanunsani 337 Tarihli Nizamnamenin Bazı Maddeleri," (Some Articles of the Governmental Decree on the Licencing of Attorneys) Istanbul Barosu Mecmuası special issue (1938), pp. 391-2.

era again started to play an active role in the courts . In the process, the role of most of the *vekils* became only that of relating arguments of the party its grievances and defences to the stylized procedure at court, a job of translation rather than one that could only be carried out by specialized experts, that is the solution of disputes.

However, this dualism in the structure of attorneyship had been totally in harmony with the general characteristics of the Tanzimat period and its aftermath. There was a dualism both in institutions and thinking. *Medreses* continued to exist alongside secular schools, *Şeriat* alongside new laws, *Şeriat* courts alongside *Nizamiye* courts, *kadı* alongside judges, *müftü* alongside governors and the uneducated, unspecialized *vekils* of pre-Tanzimat alongside modernized ones.

Indeed, the development of state law and secular courts during the period reflected, largely a struggle between Islamic and civil bureaucratic reformers. Within the field of law, the views expressed by the two prominent figures of the Ottoman legal history, Cevdet Pasha and Ali Pasha concerning law and judicial reforms during the Tanzimat period can be considered as a striking evidence in this respect. In fact, these two pashas, being strongly devoted to the Islamic and Western traditions of law, respectively, expressed the two distinct views then dominant among those engaged in legal issues. The dispute during the codification of the *Mecelle*, constitutes the most illuminating example for

understanding their point of view. According to Cevdet Pasha, who had been the chairman of the commission responsible for the codification of *Mecelle* and an exceptional member of *ulema* with his closeness to the reforming statesmen, traditions and the preservation of Islamic identity must be given priority during the codification process. On the other hand, Ali Pasha, the grand vezir then, strongly favored the adoption of French Civil Code. As mentioned above, the debate was resulted with the victory of the former, indicating the still powerful position of the Islamic view at least in civil matters.[34]

The Establishment of First Bar Association: Institutionalization of Professional Interests

One of the most important developments concerning attorneyship in the Tanzimat period, has been the establishment of the first bar association, namely *Dersaadet Dava Vekilleri Cemiyeti* (Istanbul Association of Attorneys).[35] The association which was established in

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[34] Velidedeoğlu, "Kanunlaştırma hareketleri ve Tanzimat," in Tanzimat I, pp.199-205. Also see Berkes, The Development of Secularism in Turkey, p.486-9; Davison, Reform in the Ottoman Empire 1856-1876, pp.251-3.

[35] During this period there was a bar association in Istanbul called *Societe du Barraeau de Constantinople* which was established in 1870. However this association was formed by the foreign attorneys working for the *consular* courts in the Empire. Thus Istanbul Association of Wakils is considered as the first "Ottoman" bar association and the year of the first general assembly meeting (1878) of the latter

1876 within the framework of *Dava Vekilleri Nizamnamesi,* has been the oldest professional association in the Ottoman-Turkish history. The major purpose of the association was that of supervising the profession on behalf of the Ministry of Justice. According to the Regulation the Association would act as a bridge between the ministry and the *vekils.*[36] It would enforce the disciplinary procedures and engage in the regulation of the fees of the *vekils.* Besides *vekils* should become members of this association in order to practice their profession.[37] The association, in this sense had been an instrument of the state for controlling the practice of the profession. The Association had 62 members[38] when it

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association is taken as the foundation year of Istanbul Bar Association. For the text of the regulation of *Societe du Barraeau de Constantinople,* see "İstanbul Barosu Derneği'nin Tüzüğü," (The Regulation of Istanbul Bar Association) Türkiyede Savunma Mesleğinin Gelişimi, pp.12-23.

36 In this respect, one can detect a similarity between the Association of Wakıls and the Ottoman guild system, as both of them have been the handiwork of the state rather than the society, see Metin Heper, "The State and Interest Groups with Special Reference to Turkey," in Strong State and Economic Interest Groups, Metin Heper, ed. (Berlin: Walter de Gruyter, 1991), p.13.

37 For details see "Mehakimi Nizamiye Dava Vekilleri Hakkında Nizamname," Istanbul Barosu Mecmuası, Articles 30-40.

38 For a complete list of the members, see Abdurrahman Adil, "İstanbul Türk Barosu ve Tarihi Teşekkülü," (The Istanbul Turkish Bar Association and its Historical Development) Istanbul Barosu Mecmuası, 4 (1930), pp.5-10.

was firstly established and only twelve of its members were Muslim-Ottomans.

Even thirty years after its establishment, the Association of Attorneys, then still the only bar association in the Empire, has appeared to be largely ineffective and in some cases reluctant in defending the interests of the profession. This was due to both organizational and membership characteristics of the Association, on the one hand and the political dynamics of the time, specifically the attitudes of political authorities towards the association, on the other hand.

As far as the organizational and membership characteristics are concerned, it can be said that the association had been immaturely born, both in a quantitative and qualitative sense. In this respect, besides not being many in number and differing in regards to nationality, the members' educational background also varied to a large extent. Being closely related with this heterogeneity of the *vekils* both in terms of religio-ethnic background and professional quality and also with the short history of the profession in the Empire, there was a lack of professional idealism and solidarity among the members of the Association. For example, during the general assembly meetings of the Association, the agenda almost always consisted of routine items like disciplinary and financial matters.[39]

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[39] For details of the discussions during the general assembly meetings, see Özkent, Avukatın Kitabı, pp.77-81.

There had rarely been discussions concerning the problems of the profession, or professional ethics which could be helpful in the socialization of *vekils* to the norms of the profession as well as the Association. The latter kind of activities have been regarded among the most vital functions of such organizations especially in Western Europe.[40]

The ineffectiveness of the Association was also related to the political situation in the empire during the late nineteenth century. Indeed, the year 1876 which corresponds to the establishment of the first bar association, had been a significant date in the Ottoman political history, namely the promulgation of the first Ottoman constitution, known as *Kanun-i Esasi* and paradoxically the starting point of the authoritarian reign of Sultan Abdülhamit II (1876-1909).

As far as the judiciary and the individual rights and liberties were concerned, the 1876 Constitution left little room for criticism. It is true that the Constitution provided clearly the security of judicial tenure, public trial and absence of administrative interference with the courts. The individual rights and liberties were also mentioned, such as individual liberties, freedom from arbitrary punishment, freedom of

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[40] In this respect, the Bar Association of Paris has been a good example. See Fernand Payen, Baro Vazife ve Sanat (Bar Association, Duty and Art) trans. by Ali Haydar Özkent (Istanbul: Arkadaş Basımevi, 1935).

religion, and security of property and domicile. Although the Constitution failed to refer to the right of defence, the emphasis on individual liberties and importance of the individual in this respect, can well be viewed as having been in harmony with the professional position of attorneys in the polity. However, on the whole, the 1876 Constitution created a limited autocracy. The Sultan retained extensive powers: he appointed ministers, members of the senate and most importantly, convoked and promulgated the parliament. He was declared to be caliph, non responsible of his acts and his person was considered sacred. Moreover, he had the exclusive authority to send to exile individuals considered dangerous to the state.[41]

Soon Abdülhamit II started to strengthen his position as sultan - first weakening the constitutional draft, then getting rid of the chief supporters of the constitution, and finally proroguing the chamber sine die, but never abolishing the Constitution. With the strengthening of Abdülhamit's personal rule, the liberal political reform was forced to go underground. However, the reforms both at the cultural and legal spheres largely continued to be in the agenda of the Ottoman state.

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[41] For the original text of the 1876 Constitution, see Şeref Gözübüyük and Suna Kili, Türk Anayasa Metinleri 1839-1982 (The Texts of Turkish Constitutions 1839-1982) (Ankara: Ankara Üniversitesi Siyasal Bilgiler Fakültesi, 1982), pp.27-43.

It is true that, there appeared to be a number of important reforms within the field of law and judiciary during the reign of Abdülhamit II. The reorganization and the expansion of the Ministry of Justice; the reorganization of the court system along more secular lines; the opening of a new law school as mentioned in the text; and the publication of the first law periodical were the most significant ones.[42] However the Sultan did not show the same eagerness and good will with regards to his relationship with the attorneys as a group.

The mentality of the absolutist rule of Abdülhamit II did not constitute a congenial context for the flourishing of the true professional role of attorneys, which in the brodest sense can be thought of as mediating between the established normative order guaranteed by the state on the one hand, and the diverse interests of the individuals and groups in the society on the other hand.[43]

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[42] For the details of law and judicial reforms during the reign of Abdülhamit II, see Shaw History of the Ottoman Empire and Modern Turkey: Empire of the Gazis: the Rise and Decline of the Ottoman Empire 1280-1808, vol.1, pp.246-8; Cin and Akgündüz Türk Hukuk Tarihi, pp.432-42.

[43] The rather implicit contradiction between the professional role of attorneys and the absolute rule can also be observed in France during the reign of Napoleon. Napoleon's famous statement concerning the restriction of oral defense by the attorneys and his order to include a phrase for loyalty to the Emperor into the oath of attorneys can be considered as a crucial indicator in this respect. See Toulemon, Barreau de Paris, (Paris, 1966), p.11 and Garçon, L'Avocat et la Morale, (Paris), 1963), p.61 quoted in Faruk Erem, Sözlü Savunma (Oral Defence) (Ankara: Sevinç Matbaası, 1977), pp.3-4.

Besides, the ideological stance of most of the attorneys who had been among the Western-oriented elites reacting against the traditional bureaucracy and the Sultan,[44] further reinforced the Sultan's negative attitude towards the attorneys as well as to their Association. In fact, the Istanbul Association of Attorneys had always been viewed with suspicion by the Ottoman State. The Sultan was very much disturbed by the meetings and activities of the association, and had fears concerning the potential threat that the Association could pose to his reign.[45] Thus, he tried to diminish its powers whenever possible as it has been the case in the abolition of the requirement of license for the law cases.

Search for a New Identity

The Second Constitutional period (1909-1918) opened up a new era in the Ottoman politics towards political liberalization. The inauguration of the new regime occurred in two stages. The first stage came with the

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[44] Ali Kazancıgil, "Türkiye'de Modern Devletin Oluşumu ve Kemalizm," (The FOrmation of Modern State in Turkey and Kemalism) in Türk Siyasi Hayatının Gelişimi (The Development of Turkish Political Life), Ersin kalaycıoğlu and Ali yaşar Sarıbay, eds. (Istanbul: Beta Yayıncılık, 1986), p.181.

[45] In the defensive statement that the Istanbul Association of Attorneys had made in 1921 in relation to a circular in the name of the Sultan, they mentioned the "psycopathical fears" of the Sultan for enacting the code concerning the abolishment of licence for law cases in 1886. For the original text of the statement, see Özkent, Avukatın Kitabı, pp. 98-103.

revolution of July 1908 by Young Turks, which effected a return the Constitution of 1876. The second stage followed the counter coup of April 1909, the deposition of Abdülhamit II, the accession to the throne of Sultan Reşat.

That the new period would be one of significant political changes quickly became apparent. A more liberal constitution, reducing the Sultan to a constitutional monarch, defining his prerogatives more carefully than in the past and extending the rights and freedoms of the individuals, was created through amending some Articles of the 1876 Constitution.[46]

This rather liberal environment brought new hopes for the Istanbul Association of Attorneys for enhancing their professional interests. Within this post-July 1908 enthusiastic atmosphere, a meeting was held by the Association with the aim of making themselves known to the new government. A new membership list was prepared with 125 members. The major concern was the maintenance of the honor and dignity of the profession. In this respect, making efforts to improve the image of the profession by adopting ethical standards and bolstering

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[46] For a detiled analysis of the Young Turk era, see; Feroz Ahmad, The Young Turks : The Committee of Union and Progress in Turkish Politics, 1908-1914 (Oxford: Oxford University Press, 1969).

their political efficacy so as to be able to get the government enact favorable legislation, appeared to be the most immediate goals.

The new government also seemed to be eager in this respect. As a result, the Ministry of Justice, by taking into account the views of the Association, prepared a detailed draft code. Among other things, the word *Muhami*- then prevalent in Egypt- was decided to replace the word *"Vekil"* as a first step to formulate a new identity for attorneys.[47] Meaning "the one who protects and helps the people," the term could have changed the negative image of the *vekils* in the society. It was used in the proposal of the draft code where the role of *muhamis* was defined as "...not only consisting of conveying the arguments of the parties to the court, which has earlier been the common understanding in respect to *vekil,* but rather as a specialized job, that requires knowledge of law in order to interpret the codes and to help the realization of justice while defending the parties and help solving the disputes."[48]

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[47] The word had also been used as the title of the periodical which had been started to be published in 1911 by the Istanbul Bar Association. Such a development, has been regarded as a "national fest" among the attorneys which has been mentioned in the cover page of the first volume. Ahmet İyimaya, Ankara Barosu'nun Kuruluş Tarihi Üzerine Bir Araştırma (A Research on the Establishment Date of the Ankara Bar Association) (Ankara, 1993), p.8.

[48] For the details of the original proposal, which has been an important document as far as the modifications that the new government aimed to make for the profession is concerned, see Sadi

Besides this terminological change aiming to create a new image for wakils, the draft code included many articles on the legal and ethical standards for the practice of the profession as well as on the association of the profession. In this framework, bar associations which were to be formed in places, where more than ten *muhamis* have been working, were assigned the monopoly of issuing licences to the *muhamis* who wished to practice the profession.[49]

Conceiving the enactment of the code as a necessary step for the development of the profession, the Istanbul Association of Attorneys took an active part for the enactment of the code.[50] In this respect, it conveyed to the Ministery of Justice its views regarding the code.

Soon committees were formed having members both from the Association and the Ministry in order to work on the code. However, in spite of these efforts, the draft code and some others that have been formulated by different groups during the committee meetings, could not be enacted. Only a few codes re-regulating the licence requirement for the practice of the profession and

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Sağnak and Kemal Boralıdağ, Avukatlık ve Baro (Attorneyship and the Bar Association) (Ankara: Yeni Cezaevi Matbaası, 1939), pp.24-5.

[49] Ibid., pp.26-30.

[50] At the time, many articles were published in a periodical called "*Muhamat,*" concerning the advantages that the enactment of this code would bring regarding the Westernization of the country.

regulating the licensing of those uneducated but experienced *muhamis* had been enacted.

However, such a failure of creating a new image for the profession and its associations was in contradiction with the general spirit of the time which has been characterized with serious efforts of modernization in social, political and legal spheres. Under the Committee of Union and Progress program, law and judicial reforms had been initiated with the ultimate aim of achieving secularization and thus reducing the influence of religious law in the Empire. In this respect, apart from the developments concerning the reorganization of religious courts and measures concerning the improvement of law education both with respect to quality and quantity and the promulgation of the Family Regulation (*Hukuk-i Aile Kararnamesi*) which had given many rights to women concerning marriage had been important steps.[51] In fact, through these developments "the same empire that had been so impressive with it's emphasis on the *Şeriat* ultimately evolved in such a way as to prepare the legal

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[51] Bernard Lewis, The Emergence of Modern Turkey (London: Oxford University Press, 1968), p.229. The most important point within the framework of this regulation had been that it allowed women, at the time of betrothal, to write into the written marriage contract that should the husband take another wife, her marriage was immediately null and void.

and judicial foundations for the most secular Islamic state of the twentieth century."[52]

As far as the Code of *Muhamat* is concerned, the reason for its refusal had not been made clear officially. The lack of unity among the jurists of the time, showing itself as a growing tension between the proponents of Islamic and Western legal systems seemed to be an influential factor in this respect. But it should be noted that, even the mere preparation of such a code can be regarded as a positive step for the evolution of the profession; as the work done during the preparation process constituted a basis for the future developments in the field, specifically in the early days of the Republican era.

During the Ottoman era, the final development concerning the profession was totally disappointing: Within the framework of legal order (*Mehakim-i Hukukiyede Vekaletin Serbest Olduğu Hakkında Tamim)* that was enacted in the name of the sultan in 1921, all the standards for the practice of *muhamat* in the law courts were abolished. The reaction of the Istanbul Association of Attorneys to this circular was very impressive. They made a statement in which besides stressing the need for further reform in the fields of law, judiciary and the profession, the policies of the Ottoman state towards the Association were severely criticized:

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52 Carter Findley, "Mahkama," in Encyclopedia of Islam, vol.6 (Leiden, Netherlands: E.J. Brill, 1986), p.6.

> The Association thinks that the authorities which in the past helped in the development of the profession of *Muhamat* has nevertheless always had doubts on whether the Association, promoted the public interest. In fact, they conceived the demands made by the Association a sign of self-interest as well as steps for the monopolization of the profession by the Association and hence they tried to prevent such a monopoly on the part of the Association.[53]

This lack of trust and hostility on the part of the state towards Istanbul Association of Attorneys, then the only well organized bar association, has to be evaluated in a wider context of the state-civil society relationship in the Ottoman Empire.

The Ottoman-Turkish state constitutes a good example of a strong state, highly lacking intermediary structures between the state and the individual -.[54] In its long process of evolution, the Ottoman-Turkish polity was marked by patrimonialism in which "the periphery was almost subdued by the centre. The centre, on its own, set norms of the polity namely justice, or keeping everybody

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[53] For the original text of the announcement, see Özkent, Avukatın Kitabı, pp.98-103.

[54] Metin Heper, The State Tradition in Turkey (Walkington, England: The Eothen Press, 1985).

in his place and protecting the subjects."[55] And specifically with the Tanzimat reforms, perceiving themselves as primarily the servants of the state, the bureaucratic elites "devoted themselves exclusively to the secular interests of the state,"[56] the emphasis always being on general interest.

Being totally alien to a system of representation by the estates, dominant in feudal polities, where all interests represented were special interests, the centre in the Ottoman polity did not face countervailing powers and appeared to have an indiscriminate hostility towards representation of sectional interests.[57] In this regard the social groups were always suspect in the eyes of the state.[58] The state's attitude to the attorneys had not been different.

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55 Ibid.,p.15.

56 See Carter Findley, Bureaucratic Reform in the Ottoman Empire: The Sublime Porte (Princeton: Princeton University Press, 1980).

57 See Şerif Mardin, "Center-Periphery Relations: A Key to Turkish Politics?," Daedalus, 102 (1973), p.293.

58 Metin Heper, "The Recalcitrance of the Turkish Public Bureaucracy to 'Bourgeois Politics': a Multi-Factor Political Stratification Analysis," The Middle East Journal, 30 (1976), pp.485-500.

Chapter Three

THE KEMALIST HERITAGE

The Kemalist Revolution as a Socio-Cultural and Political Force of Change

The year 1923 has been a turning point in Ottoman-Turkish history. After four years of war and foreign occupation, under the leadership of Kemal Atatürk the new republic was established in October 29, 1923 and the process of state and nation building began, giving an end to an almost six hundred years long Ottoman dynasty.

However, the victory of the War of Independence and the triumph of republicanism over the sultanate constituted only the first steps, in the process of Turkish modernization. During the following years, series of reforms have been initiated within legal, educational, social and political spheres, with the ultimate aim of creating a "civilized" society, which would have no ties with the Ottoman past.

In the Turkish revolutionary terminology, the concept of "civilization" had a significant place, due to its diagnostic role with regard to the aims and the program of the revolution. In Kemal Atatürk's view, the ultimate goal of the revolution was "to raise the republican people to a stage of contemporary and civilized society in its truest meaning and form."[1] According to him, as

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[1] Atatürk'ün Söylev ve Demeçleri (Speeches and Statements of Atatürk), vol.2 (Ankara: Türk İnkilap Tarihi Enstitüsü, 1959), p.217.

frequently mentioned in his speeches, the main reason of the backwardness and suffering of the people was due to their distant position to the contemporary world. In this respect, the Turkish people were obliged to be civilized with all their ideas and intellects."[2] What is meant by civilization is Western in essence, which is believed to be the only model for modernization. Here it should be noted that, Westernization within the framework of the Republican revolutionary agenda, is quite distinct when compared to Tanzimat and Meşrutiyet periods. During the earlier periods when Westernization was perceived mainly as "saving the state" without questioning the system as a whole. In the case of Kemalist revolution however, "civilization" involved more than the adoption of some superstructural institutions, or in Kemal Atatürk's words "wearing a European dress", but took more of a shape of a cultural revolution aiming at radical changes in terms of social mentality, life styles and world view.[3] For preserving the existence of the new Republic, the only condition was the elimination of the "antiquated mentality, chained to the past."[4]

Within the framework of Kemalist thought, this kind of a transformation or, in the broader sense, civilization in the above mentioned meaning of the term

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[2] Ibid.

[3] Tarık Zafer Tunaya, Devrim Hareketleri içinde Atatürk ve Atatürkçülük (Atatürk and Atatürkism within the Revolutionaty Movements) (Istanbul: Turhan Kitabevi, 1981), pp.143-7.

[4] Atatürk'ün Söylev ve Demeçleri, vol.2, p.181.

could only be achieved with the guidance of "science," which in Kemal Atatürk's view was the "truest guide in life" and the essence of Western civilization.[5]

This mentality is very much related with the philosophical roots of Kemalist thought. The traditional Ottoman-Islam thought has been alien to the Western philosophical tradition. Although with the Tanzimat period the influence of Western thought began to spread the question was formulated around what could be taken from the West in order to save the state. Thus there did not develop a foundation for a wholesale project of transformation.[6] In this respect the peculiarity of Kemalism comes to the fore as it was based on positivist thought. Reason and science, the basic tenets of positivist thought, constituted a framework for Kemalists, in formulating solutions for national and international problems.[7] This rational and scientific approach has been indispensable, specifically in respect to the profile of the new citizen which the revolution aimed to mould out. In this context, the republican individual was to be a rational and anti-

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[5] Ibid., p.197.

[6] Taner Timur, Türk Devrimi: Tarihi Anlamı ve Felsefi Temeli (Turkish Revolution: Historical Meaning and Philosophical Basis) (Ankara: Ankara Üniversitesi Siyasal Bilgiler Fakültesi, 1968), p. 113.

[7] İsmet Giritli, Atatürk'ün 100. Doğum Yıldönümünde Kemalist Devrim ve İdeolojisi (Kemalist Revolution and Its Ideology in the 100th Birth Anniversary of Atatürk) (Istanbul: Istanbul Üniversitesi, 1981), p.90.

clerical person, approaching all matters intellectually and objectively.

With these concerns, the effort to attain the basic ideal of Westernization has involved an objection to the political and social side of Islam, which was a dominant force both at the state and societal level. Involving the separation of the state from the institutions of Islam and the liberation of individual's mind from the restraints imposed by the traditional Islamic concepts and practices, Westernization accompanied a shift in the basis of political legitimization, symbols of the political community, as well as of the boundaries of the collectivity.[8]

In this respect, instead of an Islamic Weltanschaung, the Kemalists aimed at bringing in nationalism and secularism as the cultural basis of the new society. The "unity of language, culture and ideal"[9] have constituted the main criteria for being a nation in the republican sense of the word, which were manifest in cultural reforms. Relying principally on a linguistic and cultural reconstruction, the Turkish revolution aimed at

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[8] Samuel N. Eisenstadt, "The Kemalist Regime and Modernization: Some Comparative and Analytical Remarks," in Atatürk and the Modernization of Turkey, Jacob M. Landau, ed. (Boulder, Colorado: Westview Press, 1984), p.9.

[9] According to Atatürk, "a nation is a social and political formation comprising citizens linked together by the community of language, culture and ideal." See A. Afetinan, Medeni Bilgiler ve M. Kemal Atatürk'ün El Yazıları (Civil Instructions and the Handwritings of M. Kemal Atatürk) (Ankara: Türk Tarih Kurumu, 1969), p.18.

formulating a nationalist identity which would replace the spiritual commitment once reserved to religion.

An important step in this respect was the language reform, which involved the displacement of Arabic script by Latin script and aimed at the "Turkification" of language, the major goal being the elimination of the Ottoman heritage and replacement of the scholastic mentality of the past with a Western one. Within this framework, Arabic and Persian were eliminated from the school curriculums and words of foreign origin were replaced by those of purely Turkish origin, under the leadership of the Turkish Language Society established in 1932. Also, being a significant part in the creation of a new national identity, nationalist theories of language - such as Sun Language theory, according to which Turkish was the first language on earth, and history - maintaining that the Turks were the initial people and all human achievements were carried out by Turks - were attempted to be exposed under the leadership of the Turkish Historical Society established in 1930.[10]

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[10] For an elaboration of the significance of language reform and the nationalist theories of history within the framework Turkish nationalism, see A. Afetinan, Türkiye Cumhuriyeti ve Türk Devrimi (Turkish Republic and Turkish Revolution) (Ankara: Türk Tarih Kurumu, 1977), pp.188-95; Bernard Lewis, The Emergence of Modern Turkey (London: Oxford University Press, 1968), pp.420-31, 356. As an example of the nationalist interpretation of Turkish history, see Türk Tarihinin Ana Hatları (Basic Features of Turkish History) (Istanbul: Devlet Matbaaası, 1931). The book was published under the auspices of the Ministry of Education.

In relation to the exposition of the nationalist doctrines at the cultural sphere, the role of religion as a factor of national cohesion has also been totally eliminated from the definition of *millet* (nation) which has referred essentially to religious communities in the Empire as well as *ümmet* which before the Kemalist revolution denoted the Islamic community.[11] As mentioned in the Article 88 of the 1924 Constitution, "The people of Turkey, regardless of religion and race" were accepted to be "Turks with regards to citizenship." Thus, the people were to derive their civil status not as members of a religious community but as individual citizens of a state. There was no differentiation by religion, emphasizing the creation of a Turkish nation living on Turkish territory. This connoted the conversion of Turkish Muslims who had a sense of belonging to an international community of Muslim faith to Muslim Turks belonging to Turkish nation.[12]

In the broadest sense, it is important to note the fact that, the Turkish revolution has brought two forces face to face; the forces of tradition which tend to

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[11] It must be mentioned that in the Republican era, the masses "accepted nationalism by identifying it with religion." See Kemal Karpat, Turkey's Politics: The Transition to Multi--Party Politics (Princeton: Princeton University Press, 1959), p.254.

[12] Hamza Eroğlu, "Atatürk'e Göre Millet ve Milliyetçilik," (Nation and Nationalism According to Atatürk) in Atatürk Yolu (The Path of Atatürk) (Ankara: Atatürk Kültür, Dil Ve Tarih Yüksek Kurumu, 1987), pp.131-59; Suna Kili, Atatürk Devrimi: Bir Çağdaşlaşma Modeli (Atatürk Revolution: A Model of Civilization) (Ankara: Türkiye İş Bankası Kültür Yayınları, 1983), pp.230-46.

promote the domination of religion and sacred law and the forces of change- the Kemalists.[13] In this framework the major aim was formulated around the idea of reducing the influence of the religious class in controlling both the state and society.

At the state level, this was realized with the abolition of Caliphate in March 3, 1924. Abolition of the office of Şeyhülislam and the ministry of religious affairs and its replacement by religious affairs and religious foundations which were placed directly under the prime ministers office had been the complimentary steps.[14]

At the societal level, the reflection of the above mentioned aim had been realized under the reforms carried out both at the social and legal spheres. Among the most significant ones were: the elimination of the religious schools from the educational sphere and the establishment of a unified system of national education under the Ministry of Education (March 3, 1924); the prohibition of the wearing of turban and fez and the adoption of hat as the proper headgear (November 25,1925); the replacement of Islamic time and calendar system with the international one; and the measures concerning the

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[13] Niyazi Berkes, The Development of Secularism in Turkey (Montreal: McGill University Press, 1964), p.6.

[14] For a detailed analysis of the abolution of Caliphate, see Seçil Akgün, Halifeliğin Kaldırılması ve Laiklik (Abolution of Caliphate and Laicism) (Ankara: Turhan Kitabevi, no publication date mentioned).

betterment of the social and political status of women in society.[15]

Apart from the above mentioned reforms, however, the reforms that had been made within the sphere of law and judiciary deserves particular attention. In this respect, while constituting a significant aspect of this study due to its being a frame of reference in analyzing the attorneys and their associations, the importance attached to the modernization of law and judiciary within the Kemalist reforms is largely related to their two-dimensional significance both at the state and societal level. In fact, the law and judicial reforms had been a manifestation of the new social and political formation by reformulating the relationship between the citizens as well as between the citizens and the state.

The Reform of Law and Judiciary

The Kemalist reforms within the sphere of law have constituted one of the most significant aspect of the Turkish modernization. Within the framework of the

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[15] For a detailed analysis of Kemalist reforms, see Afetinan, Türkiye Cumhuriyeti ve Türk Devrimi, pp.164-96; Stanford J. Shaw and Ezel Kural Shaw, History of the Ottoman Empire and Modern Turkey: Reform, Revolution, and Republic: The Rise of Modern Turkey, 1808-1975, vol.2 (Cambridge: Cambridge University Press, 1977), pp.384-88; Ayferi Göze, İnkılap Tarihimiz ve Atatürk İlkeleri (Our History of Revolution and Principles of Atatürk) (Istanbul: Fakülteler Matbaası, 1985), pp.447-57; Ahmet Mumcu, Türk Devriminin Temelleri ve Gelişimi (The Bases and Development of Turkish Revolution), 9th ed. (Istanbul: İnkilap Yayınevi, 1984), pp.145-70.

project of civilization, the law reform constituted the major tool in trying to reconstruct the social practices and cultural habits of the new Turkish society, deviating to a large extent from the Tanzimat understanding during which the reforms in the specific field of law were perceived merely as a part of administrative and commercial measures.[16]

Being in line with the revolutionists' desire of secularization and modernization of the institutions, the reforms of law and judiciary opened up a new era as far as of the Ottoman-Turkish legal history is concerned. In this respect, while the Tanzimat Reforms had given an end to a system which was entirely based on Islamic law and initiated a new system based on the coexistence of two totally different systems of law -European vs. Islamic-, Kemalist reforms of law, going a step further, terminated this dualism, and established a legal system based upon the Continental European model.[17]

At the outset of the revolution, the law reform was formulated around the idea of the rearrangement of "the existing legal provisions" in a way which would match the needs of society and the changing order. In this regard,

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[16] Mümtaz Soysal, Anayasaya Giriş (Introduction to Constitution) (Ankara: Ankara Üniversitesi Siyasal Bilgiler Fakültesi, 1969), p. 6-7. For a similiar assesment, also see Hıfzı Timur, "The Place of Islamic Law in Turkish Law Reform," Annales de la Faculte de Droit d'İstanbul, 6 (1956), p.76.

[17] Vakur Versan, "The Kemalist Reform of Turkish Law and It's Impact," in Atatürk and the Modernization of Turkey, Jacob M. Landau, ed., p.247.

the new government almost immediately set about the task of finding a substitute for *Mecelle*. For this purpose, in 1923 two special commissions, *Ahkam-ı Şahsiye Komisyonu* and *Vacibat Komisyonu* were established under the Ministry of Justice and a new draft on Family Law was prepared. However the work of the commissions , which had strong signs of influence of Şeriat and resembled the previous draft prepared in 1917, was not radical enough as far as the Kemalists desire of secularization was concerned.[18] This strong influence of Islamic law was largely due to the dominance of conservative view among the legal professionals of the time. In this respect as indicated by Seyit Bey, then the Minister of Justice, laws were the reflections of the traditions of a society thus in a country where the traditions were reflected in religion the law and religion could not be separated.[19] This line of thinking which in fact was an extension of the view represented by Cevdet Paşa during the Tanzimat era, stood in direct contrast with the idea of total secularization that started to gain significance among the Kemalist cadre. At this point, a choice was to be made between adoption of the Islamic and the Western legal systems. And the solution to this inherent contradiction lied in adoption of the latter course of action.

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[18] Hıfzı Veldet Velidedeoğlu, Türk Medeni Hukukunun Umumi Esasları (General Principles of Turkish Civil Law), vol.1 (Istanbul: Istanbul Matbaacılık, 1968), pp.69-71.

[19] Berkes, The Development of Secularism in Turkey, p.508.

"Superstition and arbitrariness within the sphere of law" has been regarded by Mustafa Kemal as "the most dangerous obstacle within the path towards civilization which must be totally eliminated."[20] And for the realization of the ultimate revolutionist aim of civilization, "the existing provisions of the Turkish law should not fall below the laws of the civilized countries."[21] This view was also strongly evident in a speech given in 1925 by Mahmut Esat Bozkurt, then the Minister of Justice. According to him, the aim of the revolution was the acceptance of the Western civilizations. And all the forces which opposed this aim had to be destroyed. All the laws had to be adopted from the West.[22]

Soon in this framework, an extensive series of legislative activity were undertaken, which soon ended up as one of the most radical law reform of modern times.[23] The new civil code which was virtually a translation of

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[20] Atatürk'ün Söylev ve Demeçleri, vol.1, p.330.

[21] Ibid., p.341.

[22] Mahmut Esat Bozkurt, "Türk Medeni Kanunu Nasıl Hazırlandı?," (How the Turkish Civil Code had been Prepared?) in Medeni Kanunun 15. Yıldönümü İçin (On the Occasion of the 15th Anniversary of the Promulgation of Civil Code) (Istanbul: Istanbul Hukuk Fakültesi, 1944), p.11.

[23] The Turkish law reform has been evaluated as being one of the most significant event in the Middle Eastern history since the acceptance of Islam. See L. Ostrorog, The Angora Reform: Three Lectures Delivered at the Centenary Celebrations of University College on June 27, 28, and 29, 1927 (London: University of London Press, 1927), p.14, quoted in Velidedeoğlu, Türk Medeni Hukukunun Umumi Esasları, p.87.

the Swiss Civil Code of 1912, came into force with slight modifications, on October 4, 1926, promising very radical changes in Turkish society. The promulgation of the new code had been thought to be a significant instrument to "save the Turkish nation from false beliefs, traditions, and fluctuations since the Tanzimat. And in this respect, it had the potential of closing the doors of an old civilization."[24] Abolition of polygamy, introduction of judicial divorce, allowance of Muslims to change their faith were some of the most significant innovations indicating a complete break with the past.

Also the new code of obligations which followed textually the Swiss code of obligations and the new code of commerce borrowing provisions from German, French, and Italian codes, came into force on the same date with the Civil code and totally erased the influence of Islam in these spheres. On July 1, 1926, the new Penal Code came into force, replacing the 1858 French penal code with

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[24] Mahmut Esat, "Türk Kanunu Medenisi Esbabı Mucibe Layihası," quoted in Ferit H. Saymen, Notlu Sistematik Türk Kanunu Medenisi, Borçlar Kanunu ve Alakalı Hususi Mevzuat ile Tevhidi İçtiad Kararları, 5th ed. (Istanbul: Hak Kitabevi, 1957), p.10.

the Italian.[25] By the early 1930s the reforms within the sphere of law have been more or the less completed.[26]

In this regard, the judicial reforms which have been undertaken since the establishment of the Republic, had a great role in encouraging the process of recodification by forming an environment suitable for the application of the new codes. Thus the abolition of the religious courts together with *Şeriat* by the Judicature Reform Act of April 8, 1924, which became effective on May 1, 1924, was the most significant step in this respect. With the abolition of the capitulations, the mixed courts which were responsible for solving the disputes among foreigners living in the Ottoman territories were nullified.[27]

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[25] For a detailed eloboration of the adoptation process of the new codes, see Özkan Tikveş, Atatürk Devrimi ve Türk Hukuku (Atatürk Revolution and Turkish Law) (Izmir: İstiklal Matbaası, 1975); Adli İnkılabın Ana Hatları (The Basic Features of Judicial Reform) (Istanbul: Alaeddin Kıral Basımevi, 1937), pp.9-23; Mustafa Aygün, Özel Hukuk Açısından Hukuk Devrimi (Law Reform from the Perspective of Private Law) (Ankara: Ajans Türk Matbaacılık Sanayii, 1983).

[26] The process of the adoption of Western legal system in Turkey had been regarded as constituting a clear contradiction of the dominance of power as the determinant of expansion or contraction of particular families of law during the world legal history. For the details of such an assesment, see John Schmidhauser, "Legal Imperialism: Its Enduring Impact on Colonial and Post-Colonial Judicial Systems," International Political Science Review, 3 (1992), pp.321-34.

[27] Sıddık Sami, "Lozan Muahedesinin Adli Teşkilatımızdaki Tesirleri," (The Impacts of Lozan Agreement on our Judicial Organization) Mülkiye, 28 (1933), pp.21-4.

French courts were taken as a model in the reorganization of the republican courts. Under the Court of Cassation which was responsible for the review of questions of law, there were courts of first instance, the assize courts for more serious penal cases, the summary courts and the justice of the peace courts.[28]

This sudden launching of a totally secular system of law with so many new codes and the reorganization of the judiciary, had significant connotations for legal professionals. By introducing modern legal concepts and institutions to the legal system, the Kemalist law reform had inevitably resulted with confusion among the majority of the legal professionals and confronted the new government with the responsibility of recruiting the necessary personnel who will carry the republican ideology to the legal system.

Legal Professionals and the Kemalist Regime: A Tentative Relationship

Legal Professionals: A Conservative Reaction

In Mustafa Kemal's view the republican legal professionals had to be one of the most important actors both in the establishment of the new Turkish society and preservation of the new regime. They had to be the true defenders of the republican ideology.[29] However, from the

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[28] Sıddık Sami, "Adliyemizdeki Yeni Temayüller," (New Trends in Our Administration of Justice) Mülkiye, 18 (1932), pp.2-8.

[29] "Atatürk"ün Ankara Hukuk Fakültesi'ni Açış Nutku," (Speech made by Atatürk during the Opening Day of Ankara Law School) in Ankara Hukuk

early days of the republic, it became clear that, they were far away from fulfilling such a mission, as the majority of them seemed to have an ideological stance in favour of the preservation of the old values and the old regime. This anti-revolutionary attitude shared by the majority of the Ottoman-Turkish legal professionals could to a certain extent be explained with the dominant view concerning the professional tendency towards conservatism of the legal professionals stemming from the nature of their profession.

In this respect, while interpreting legal texts or applying laws to specific cases, the legal professionals usually act within the framework of a form of thought and principles that has been formulated by the previous generations. And it can be argued that, their strict limitation by the pre-established rules while performing their profession, which renders them with certain habits of order and formalities, automatically causes a conservative trend in their world views, in a sense making them the servants of the tradition perhaps more than any other section in the society.[30] At the political level, such a trend naturally renders them very hostile to the revolutionary spirit. Thus the ultimate aim

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Fakültesi ve Mezunları (Ankara Law School and Its Graduates) (Ankara: Sevinç Matbaası, 1968), pp.4.

[30] Harold J. Laski, A Grammer of Politics (New Haven: Yale University Press, 1929), p.572. For a similiar assesment, also see Harold D. Laswell, Power and Personality (New York: W.W. Norton, 1948), p.135.

becomes the preservation of the existing order.[31] Also, their close association with governments in power or regimes, due to the public character of the profession, like the institutions of army and education, has been an important aspect that makes the legal professionals supportive of the stability of regimes.[32]

As far as the Ottoman-Turkish case is concerned, besides the conservatism inherent in the profession as discussed above, the infusion of Islam to the legal system and law has been among the most important aspects that explains the anti-revolutionist attitude of especially jurists and judges. Having had a religious education and being the interpreters of the sacred law, these people were largely endowed with an Islamic world view which made them one of the most tradition bound and conservative classes in the Empire. And of course, the Kemalist revolution basing itself to certain Western values was very much alien to their world view.

Moreover, these people, due to their special knowledge and monopoly of interpretation on sacred law had a separate station in society. Constituting a privileged body, they ranked among the highly honored classes in the Ottoman social system,[33] and perhaps the

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[31] Alexis de Tocqueville, Democracy in America (New York: Random House, 1981), pp.322-3.

[32] Emile Durkheim, Professional Ethics and Civic Morals (Glencoe: Free Press, 1958), pp.7-8.

[33] Albert Howe Lybyer, The Government of the Ottoman Empire in the time of Süleiman Magnificient (New York: AMS Press, 1978), pp.220, 225. First printed in 1913.

closest one to the regime in terms of identification with its values. In this respect, the Kemalist revolution very much contradicted with their interests.

As far as the case of attorneyship is concerned, there appears to be a slight deviation. As mentioned above, attorneyship has been a rather new profession which has been imported to the Ottoman judicial system from the West during the Tanzimat period. In this regard, when compared to other legal professionals, attorneys have been much more Western oriented both with respect to their world view and professional commitments. Together with army officials, civil servants and journalists, they have been regarded among the major groups that had played a prominent role during the development of modern Turkey.[34] In this regard, as far as their professional interests and status are concerned the Kemalist revolution would have positive implications since the revolution established a secular and modern Turkey. However, there still appears to be some question marks concerning their attitude towards the Kemalist ideology and Turkish nationalist movement.

The division within the Istanbul Bar Association which resulted in the establishment of Elinikon (Greek) and Armenian Bar Associations is worth mentioning. Also, the ideological stance of some Muslim attorneys in favor of the European powers and their anti-nationalist activities had been significant issues that raise

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[34] Lewis, Emergence of Modern Turkey, pp.455-56.

question marks concerning the position of the bar associations during the Kemalist Revolution.[35]

Besides these points, however, the election of Lütfü Fikri Bey as the chairman of the Istanbul Bar Association constitutes the most illuminating indicator concerning the stance of the attorneys. Being one of the well known attorneys, educated in France, and deputy during the Second Constitutional Era, Lütfü Fikri was very much in opposition to the abolition of Caliphate as well as to the establishment of the new regime and identified himself with the precepts of constitutional monarchy.[36] In his open letter to the Caliph which was published in one of the well known newspapers of the time, Lütfü Fikri briefly mentioned his concerns related to the abolition of Caliphate and accused the new regime. By defining the Caliphate as the most precious spiritual inheritance for the Turks, he interpreted the Kemalist desire for its abolition as a shameful betrayal coming

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[35] Ali Haydar Özkent, Avukatın Kitabı (Attorneys Book) (Istanbul: Arkadaş Basımevi, 1940), pp.111-3.

[36] Lütfü Fikri, "Necmettin Sadık Bey"e Cevabımdır," (My Response to Sadık Bey) Akşam (Istanbul daily), November 15, 1923 quoted in Murat Çulcu, Hilafetin Kaldırılması Sürecinde Cumhuriyetin İlanı ve Lütfü Fikri Davası (Establishment of the Republic and the Case of Lütfü Fikri Within the Process of Abolution of Caliphate) (Istanbul: Kastaş Yayınları, 1992), pp.101-6. For a detailed elaborating of the political standing of Lütfü Fikri Bey, also see the court records of the trial of Lütfü Fikri Bey in the Tribunals of Independence quoted in ibid., pp. 167-271; Lütfü Fikri Bey'in Günlüğü "Daima Muhalefet" (The Diary of Lütfü Fikri Bey "Continuous Opposition") (Istanbul: Arma Yayınları, 1991).

from the Turks themselves.[37] In Mustafa Kemal's view, "the election of such a person who has proudly declared himself as being on the part of the Caliphate as the chairman of the Bar Association by the well-educated and the highly specialized members of the Association constituted a strong evidence of the attitudes of "the outdated legal professionals of the outdated law" towards the Republican world view.[38]

Molding Out the New Profile of the Profession

The Reflections of The Distrust: The Case of the Tribunals of Independence

Regarding the legal professionals as the "greatest and the most deceitful enemies of the republican regime,... aiming to sentence both the principles and the defenders of the revolution,"[39] the Kemalist cadre was very much irritated by the potential harm that this attitude could cause to the new regime. There was an ongoing distrust on the part of the new regime towards the judiciary and its personnel.

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[37] Lütfü Fikri, "Huzur-u Hazret-i Hilafetpenahiye Açık Arıza," Tanin (Istanbul daily), November 10, 1923, quoted in Çulcu, Hilafetin Kaldırılması Sürecinde Cumhuriyet'in İlanı ve Lütfü Fikri Bey Davası, pp.66-72.

[38] "Atatük'ün Ankara Hukuk Fakültesini Açış Nutku," in Ankara Hukuk Fakültesi ve Mezunları, p.3-4. For a similar assessment of Atatürk concerning his reaction towards the legal professionals due to their conservative attitutes, see Atatürk"ün Söylev ve Demeçleri, vol.2, pp.238-9.

[39] "Atatürk'ün Ankara Hukuk Fakültesini Açış Nutku," in Ankara Hukuk Fakültesi ve Mezunları, p.4.

In this respect, the establishment of the Tribunals of Independence which were permanent courts (1920 -1926) aimed to protect the revolutionary government against any reactionary movement and thus eliminate persons that the regime classified as undesirable, can be considered as the significant indicator of the suspicion the Kemalists towards the judiciary and its personnel.

It can be said that, as interpreters of laws and facts, the ideological stance of judges prove to be very influential during the process of conflict resolution due to their potential of being prone to have preconceived political views.[40] As long as the system was an autocracy and Ottomans as a rule were for autocracy, judges were royal to the autocracy as a matter of course, and their conservative interpretations raised no problems. But once Turkey became a Republic, there appeared to be a possibility of the judges remaining autocratic at heart; their legal interpretations could tend to oppose the basic principles of the republic.[41] The parliamentary representatives of the people were to have ultimate authority over the judiciary. Being instruments for the

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[40] For example, in a case study on British judiciary, it has been stated that "The monopoly of the judiciary by anti-trade union judges in Britain has perpetuated a legal framework in which workers' interests have remained threatened during the Conservative Party rule in 1979". See Frank Belloni, "The Labour Community and the British Judiciary," International Political Science Review, 3 (1992), p.270.

[41] Such a distrust was very much evident in a speech of Mustafa Kemal that he made in Eskişehir in 1925, see Atatürk'ün Söylev ve Demeçleri, vol.2, p.254.

consolidation of the Republic, these courts were directly responsible to the Grand National Assembly. And most importantly, all the judges were appointed from among the members of the Grand National Assembly. These people, having different occupational backgrounds including law, had strongly committed themselves to Kemalist values.[42]

Moreover, the negative attitude of the judges towards the attorneys during the cases within the Tribunals of Independence, can be considered as a very questionable issue that must be mentioned. In this respect, although there had not been an article that prohibited the right of defense by an attorney, within the framework of the Code on the Tribunals of Independence (*İstiklal Mehakimi Kanunu*), in many cases the demand of the convict in this regard had been refused.[43] In this respect, while bringing into the agenda the question of the legality of the procedures that were employed during the cases in the Tribunals of Independence, such an attitude can well be interpreted as a manifestation of a rejection of the significance of the mechanism of defense and the role of

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[42]On Tribunals of Independence, see Ergun Aybars, İstiklal Mahkemeleri (Tribunals of Independence) (Ankara: Bilgi Basımevi, 1975).

[43] Mete Tunçay, T.C 'nde Tek-Parti Yönetimi'nin Kurulması (1923-1931) (The Establishment of Single Party Administration in the Turkish Republic 1923-1931), 3rd ed. (Istanbul: Cem Yayınevi, 1992), p.170.

the attorneys together with a distrust towards the group.[44]

Within such an atmosphere of distrust, towards the ordinary jurisdiction and legal professionals, Kemalists were aiming to mold out a totally new profile for the group which would have the necessary qualifications needed for the survival of the new legal system and regime.

Steps Towards Creating "Republican Type" Jurists

Kemalists were eager in reminding the legal professionals their mission and responsibilities by certain warnings and speeches. In a sense this was an effort for the creation of the above mentioned "republican-type" professionals through indoctrination. A clear example of this was the regulation which was sent to public prosecutors in 1928 by Hamdullah Suphi Tanrıöver, than the Minister of Justice. Tanrıöver was warning the prosecutors by calling their attention to their ultimate mission with the following words: "You the republican prosecutors! I once again want to remind you, your primary and most significant responsibility. Don't you ever forget that you are given the mission of

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[44] During one of the cases in the Tribunals of Independence, the attorneys who were present in the court room had been arrested just because of their explanation that they were there to defend the convicts. Perhaps, this has been the most extreme example showing the negative attitude of the judges in the mentioned tribunals towards the attorneys. See Halikarnas Balıkçısı, Mavi Sürgün (Blue Exile) (Istanbul: Remzi Kitabevi, 1971), p.62.

protecting the republic and you have to fulfil this goal in spite of all the obstacles you may face."[45]

Within this framework of the wish to create a new generation of legal professionals some measures were taken by the government. For instance the Turkish translations of some of the Swiss commentaries on the Swiss civil code and Italian commentaries on the Italian penal code were published; some Turkish jurists that have studied abroad, especially in France and Germany were employed in key positions related to judicial affairs; the libraries particularly that of Grand National Assembly acquired numerous volumes on Western law.[46]

Besides these efforts, steps taken in the field of law education for instance the establishment of a new law school in Ankara and the reform of Istanbul Law School. Due to their long term implications these steps deserve special attention here. Since the early days of the Turkish Revolution, the establishment of a law school in Ankara - the capital of the new republic -, had occupied a significant place in the policy agenda of the government.[47] Besides being regarded as a precondition for the consolidation of the new legal system, the new

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[45] Baha Arıkan, "Cumhuriyet Savcısı," (Republican Prosecutor) Cumhuriyet (Ankara daily), November 25, 1964.

[46] Manley O. Hudson, "Law Reform in Turkey," American Bar Association Journal, 13 (1927), p.8.

[47] Such a project of establishing a "revolutionist" law school at Ankara has been an issue for Mustafa Kemal as early as 1921. See Tunaya, Devrim Hareketleri İçinde Atatürk ve Atatürkçülük, p.153.

school's potential of being an alternative to Istanbul Law School in educating republican and revolutionist jurists and the inefficiency of the judicial mechanism in terms of personnel, especially the insufficiency of judges both qualitatively and quantitatively, had constituted the basic motive in the decision to open this new school.[48]

Being a strong indicator of the priority assigned to the issue, Ankara Law school has been established as the republic's first higher institution of education on 5th November 1925.[49] As mentioned by Mustafa Kemal in his speech at the opening ceremonies, the aim of this new institution was "to train a *new* generation with *new* legal principles who will be the *real* scholars of the Turkish republic and leaders of the new Turkish social life".[50]

As a reflection of such a disposition at the institutional level, the newly-established law training center had turned out to be the first and the main

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[48] The Istanbul Law school, with approximately forthy graduates a year, had a rather low capacity for filling the gap in the judicial cadres. Cemil Bilsel, "5 İkinciteşrin ve Mahmut Esat Bozkurt," (November 5 and Mahmut Esat Bozkurt) Ankara Hukuk Fakültesi Dergisi, 3 (1944), p.310.

[49] For the parliamentary discussions concerning the establishment of the school, see T.B.M.M. Zabıt Ceridesi, vol.14 (1341), pp.310-311, 314, 328, 330-331, 334-344. For the details of the historical evolution of the school, see M. Cemil, "Ankara Hukuk Fakültesinin Kuruluşu," (The Establishment of Ankara Law School) Hukuk Aylık Mesleki Mecmua, 1 (1933), pp.1-39.

[50] "Atatürk"ün Ankara Hukuk Fakültesini Açış Nutku," in Ankara Hukuk Fakültesi ve Mezunları, p.4. Emphasis is mine.

example of the Kemalist higher educational policy which was formulated along the idea of the reconstruction of educational institutions in accordance with the aims and needs of the regime.[51] This was clearly observable both at the structural and academic levels.

In this respect, in contrast to the Istanbul Law school, the new law school had very close ties with the government. During the first ten years after its establishment, the law school - its first official name being "A Higher Professional School of the Ministry of Justice" -[52] has been attached to the Ministry of Justice both financially and administratively.[53] In fact, the location of this institution in the capital of the new republic can be considered as a sign of the intention of the government in supervising and controlling it.

Moreover, when the academic staff is concerned, although very few in number at the beginning, all of them were closely identified with the Kemalist world view, being either chosen by the Ministry of Justice from among the jurists that had studied abroad or the ones holding the key positions in the Ministry of Justice, including

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[51] Tuğrul Ansay, "Hukuk Eğitiminde Reform," (Reform of the Law Education) Ankara Hukuk Fakültesi Dergisi, 26 (1969), p.263.

[52] In 1927, as a result of a decision by the Council of Ministers, the name was changed to Ankara Law Faculty. On July 13, 1946, the University of Ankara was founded and the Ankara Law faculty was incorporated into the University as one of its basic Faculties.

[53] See "Ankara Adliye Hukuk Mektebi Talimatnamesinin Mer'iyete Vaz'ı Hakkında Kararname No. 2740," (The Decree on the Entry into Force of the Regulation Concerning the Establishment of Ankara Law School No. 2740) Düstur, Üçüncü Tertip, vol.7, pp.104-107.

the Minister of Justice himself as well as the deputies of Grand National Assembly. Being in line with the general outlook of the new school, there were also significant variances concerning the curriculum when compared to the Istanbul Law school.[54] In this respect, besides the major law courses that were in accordance with the new legal system, various courses on history had been integrated to the new curriculum. Among them, especially the inclusion of the course concerning the history of Turkish revolution deserves considerable attention as being a manifestation of the intention to transmit the official ideology to the new generation of legal professionals.[55]

The establishment of a state dominated school has been the most important step in the path towards creating the "republican type" legal professional who will act as the guardian of the values of the new regime. However, it was not until the reformation of Istanbul Law School

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[54] For a detailed elaboration of the new law-training system with respect to methodology, see M. Emin Erişirgil, "Cumhuriyette Ekonomi ve Hukuk Tedrisatı," (Instruction of Economy and Law in the Republic) Siyasi İlimler, 91 (1938), pp.343-5; M. Emin Erişirgil, "Hukukun Üç Cephesi ve Hukuk Tedrisatı," (Three Faces of Law and Law Instruction) Siyasi İlimler, 82 (1938), pp.588-95.

[55] For the details and a full list of instructors and courses during the early years of the new school, see Hüseyin Cahit Oğuzoğlu, "Ankara Hukuk Fakültesinin Kuruluş ve İlk Yılları," (The Establishment and the Early Years of Ankara Law School) Ankara Hukuk Fakültesi 40. Yıl Armağanı (Melange to the 40th Anniversary of Ankara Law School) (Ankara: Ankara Üniversitesi Hukuk Fakültesi, 1966), pp. 12-37.

under the broader program of the transformation of Darülfünun to Istanbul University, has this process been completed.[56]

Being a part of *Darülfunun* which has been the oldest higher institution of learning with its roots in the Tanzimat period, Istanbul Law school, when compared to the new school, had a rather archaic structure both in its attitude concerning the Kemalist values and in its approach to current developments in the legal system.

This outmoded structuration had its clear reflections in the curriculum of the school. The appearance of the course on Islamic Law in the curriculum which was disregarded by Ankara Law School as well as the negligence of the courses of the History of Turkish Law, History of Turkish Revolution had been significant indicators of the conservativeness of the school.[57]

As mentioned by Reşit Galip Bey, who had undertaken the reformation project of *Darülfunun* in 1933 as the Minister of Education, "*Darülfünun* had showed a strong

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[56] For the details of the transformation process, see Mete Tunçay and Haldun Özen, "1933 Darülfünun Tasviyesi veya Bir Tek Parti Politikacısının Önlenemez Yükselişi ve Düşüşü," (The 1933 Expulsion of Darülfünun or an Avoidable Rise and Fall of a Single Party Politician) Tarih ve Toplum, October (1984), pp.222-236; E. Hirş, Dünya Üniversiteleri ve Türkiye'de Üniversitelerin Gelişmesi (Universities in the World and the Development of Turkish Universities), two volumes (Ankara: Ankara Üniversitesi, 1950).

[57] For a complete list of the courses, see İstanbul Üniversitesi Kuruluş, Tarihçe, Teşkilat ve Öğretim Üyeleri, 1453-1981 (The Establishment, History, Organization and Instructors of İstanbul University) (Istanbul: Istanbul University, 1983), pp.25-6.

detachment towards the Kemalist Revolutions....There appeared to be radical transformations in the field of law, but it just stayed uninterested and indifferent, never trying to adapt itself to these changes...."[58] According to some republican intellectuals, this indifference among the majority of the staff members of Darülfunun, was surely a reflection of their anti-Kemalist and conservative world view, which was regarded as a very dangerous and unacceptable attitude, especially in the case of political science and law schools.[59]

"The education of the future generations could no longer be undertaken by such an institution that closed all its doors to the revolutionary developments."[60] Thus, within the framework of the law dated July 31, 1933, *Darülfunun* was abolished, and left its place to Istanbul University with a brand new outlook. As it has been the case in other faculties of the new University, in the law faculty, most of the academic staff were dismissed and

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[58] The statement by Reşit Galip, Minister of National Education, Hakimiyeti Milliye (Istanbul daily), August 1, 1933, quoted in ibid., pp.312.

[59] Burhan Asaf, "Arkada kalan Darülfünun," (Darülfünun Which Lagged Behind) Kadro, August (1932), pp.47-48. For similiar assesments, also see Burhan Asaf, "Üniversite'nin Manası," (The Meaning of University) Kadro, August (1933), pp.24-28; Şevket Süreyya, "Darülfünun İnkilap Hassasiyeti ve Cavit Bey İktisatçılığı," (The Revolutionary Sensitivity of Darülfünun and the Economy of Cavit Bey) Kadro, February (1933),p.8.

[60] The Statement of Reşit Galip, the Minister of National Education, in Hirş, Dünya Üniversiteleri ve Türkiye'de Üniversitelerin Gelişimi, p.312.

the curriculum had been revised, including the Turkification of the texts and adoption of new courses.[61]

Kemalist Model of Attorneyship and Bar Associations: State Imperative in Effect

Initial Steps Within the Process of Reorganization

Within the climate delineated up to now, the reorganization of attorneyship and bar associations have been among the major issues that was given priority by the new regime. Just as the judicial and legal reforms were regarded as indispensable for the modernization of the new republic, the reorganization of the profession and its associations was viewed as a necessity for a well-functioning judicial mechanism by the Kemalists.[62]

For the realization of this project, institutionalization of the profession both at the legal and societal levels was necessary. As for the former the Ottoman heritage of legal uncertainties concerning the practice of the profession had to be eliminated and attorneyship had to become an integral component of the judicial mechanism. This meant the adaptation of certain regulations concerning the specifications related to the nature and the practice of the profession and its

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[61] For detailed information concerning the instructors who had been dissmised from the Law School, see Mete Tunçay and Haldun Özen, "1933 Darülfünun Tasviyesi," (The 1933 Expulsion of Darülfünun) Yeni Gündem, October (1984), pp.16-9.

[62] Statement made by the Minister of Justice Necati Bey, in the Grand National Assembly, quoted in Sadi Sağnak and Kemal Boralıdağ, Avukatlık ve Baro (Attorneyship and the Bar Associations) (Ankara: Yeni Cezaevi Matbaası, 1939), p.54.

associations. As far as the latter one is concerned, it entailed the reinstitutionalization of the profession as an honorable, earnest and nationalist one, which would give an end to the suspicion inherent both in society and the regime concerning the professional and political role of attorneys as well as their associations respectively.

Nevertheless, account must be taken of the fact that, the urgency attached to the issue, was also largely related with the discomfort caused by the anti-nationalist and anti-Kemalist attitudes of some of the attorneys - especially within the Istanbul Dava Vekilleri Cemiyeti- during the National War of Independence and establishment of the Republic a point made above. Thus, the priority given to the restructuration and reorganization of Bar associations can well be interpreted as the manifestation of the latent aim of forming pro-regime associations which would work in harmony with the new regime.[63]

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[63] Celal Akyürek, "Avukat Nedir," (What is an Attorney) in Türkiye'de ve Amerika Birleşik Devletleri'nde Barolar ve Hukukla İlgili Mesleki Teşekküller Hakkındaki Kongrenin Zabıtları (The Minutes of the Congress on Bar Associations and Professional Associations related with Law in United States and Turkey) (Ankara: Balkanoğlu Matbaacılık, 1957), p.97. In fact, the formation of pro-regime associations on the part of the new government was not unique to Bar associations but included some other professional associations too. See Tarık Zafer Tunaya, Siyasi Müesseseler ve Anayasa Hukuku (Political Institutions and Constitutional Law), 3rd ed. (Istanbul: Istanbul Üniversitesi, 1975), p.493.

In this respect, the Code of Muhamat which came into force on April 7, 1924 has been the first step.[64] Although very concise, it provided a general framework for the actualization of the above mentioned points and formed a basis for further regulations in the field. This new code opened up an era of reformation within the history of the profession. It was informed by the short term goal of giving an end to the dual structure of the bar associations in terms of qualifications of its members, inherited from the Ottoman era. In order to have a better understanding of the model that was aimed to be created by the Code of Muhamat, some its provisions need a more detailed elaboration.

The Process of Nationalization of Bar Associations

The refinement of the existing bar associations along the lines determined within the Code of Muhamat constituted one of the most important aspects of the process of forming the new republican identity of the profession and its associations.

In this respect, according to the Article 12 of the code, within two months after the enactment of the code, committees had to be formed and these committees had to start investigations on whether the members of the bar associations - which were established within the framework of the Regulation of Istanbul Dava Vekilleri (1876) - had the required qualifications foreseen in the

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[64] For the original text of the code, see "Muhamat Kanunu No. 460," (Code on Attornyship No.460) Düstur, Üçüncü Tertip, vol.5, pp.384-7.

code. The ones who had been assessed as non eligible were to be dismissed.

Following the enactment of the code, committees, composed of a top civil servant from the Ministry of Justice, four Judges and four attorneys from the association under investigation, were formed in several cities - Ankara, İstanbul, İzmir, Bursa, Konya, Antalya, Samsun, Adana and Eskişehir - where the bar associations were located.[65] The preconditions which were specified under the Article 2 of the Code of Muhamat had constituted the main criteria for the committees" evaluations. In order to have the right of practicing the profession and thus being a member of the bar one had to be a Turkish citizen, must have the proper law training and practice as specified in the code, and have a reputation that was in line with the honor and dignity of the profession.

Among these criteria, some of which were very similar to the ones that had been put into effect in the former regulation (1876), the requirement of citizenship has been very significant as far as the nationalization of the bar associations are concerned. By giving an end to the cosmopolitan structure of the bar associations, in a way the inclusion of this new criterion had transformed them to a position of providing channels that enhance the sense of citizenship rather than being the mirrors of

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[65] Sağnak and Boralıdağ, Avukatlık ve Baro, p.56.

racial, ethnic or other cleavages in society.[66] Thus, serving as an integrating force among the members, in the long run, this new criterion had the potential of developing a new outlook for the bar associations both interms of defending the professional interests as well as promoting sensitivity towards the national problems.

While carrying out the investigations, apart from the explicitly defined criteria which citizenship formed a part, the committees also employed some moral standards which were related with the past reputation of the attorneys. In this respect, two criteria had been specified: treason which, in the broadest sense implied the anti-Kemalist and anti-nationalist stances during the national War of Independence and violation of allegiance to the professional ethics which denoted unfaithfulness to the clients and employment of illegal means during the practice of the profession.

It has with a view to these criteria that the cleansing of the bar associations had been completed giving way to the dismissal of many attorneys from the

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[66] The elimination of the Jews from the legal profession under the Nazi regime and the proof of "aryan" ancestary as a criteria for becoming a member of the bar associations can be considered as a good example of the bar associations to serve as aggravators of the ethnic conflicts in the society. See Hasan Şükrü, "Beynelmilel Avukatlar Birliği ve Beşinci Kongresi," (International Union of Bar Associations and Its Fifth Congress) Mülkiye, 3 (1933), p.36; Reinhard Bendix, From Berlin To Berkeley (New Brunswick, New Jersey: Transaction Books, 1986), p.116.

profession.[67] In this respect, the "refinement" that has been realized within the Istanbul Bar Association constitutes a striking example in understanding the extent and scope of the project; the latter has ended up with the dismissal of 374 attorneys out of a total of 805.[68]

Having had a quite distrustful relationship with the majority of the legal professionals as well as the attorneys during the establishment of the new regime, for the Kemalists refinement of the bar associations constituted an important step in eliminating the opposition of this group to the new regime. However, when evaluated from the perspective of the bar associations such a refinement has automatically been regarded as an interference in their internal affairs and an attempt towards eliminating their autonomy. This was specifically evident for the Istanbul Bar Association, it being the most institutionalized bar. Such a reaction was very much evident in a telegram of Lütfü Fikri - the head of the Istanbul Bar Association - which he had sent to the Minister of Justice Necati Bey, under whom the project

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[67] Such a refinement - with the same political and professional concerns - had also took place in Italy under the guidance of the Ministry of Justice in 1926. See, Şinasi Devrin, "Avukatlık Mesleği Hakkında Yeni Cereyan ve Temayüller," (New Developments and Trends Concerning the Profession of Attorneyship) Istanbul Barosu Mecmuası, special issue published for the fifteenth anniversary of the establishment of the Republic, (1938), p.318.

[68] Vatan (Istanbul daily), August 26, 1340(1934), August 29, 1340 (1934), quoted in Tunçay, T.C.'nde Tek-Parti Yönetiminin Kurulması (1923-1931), p.82.

had been initiated, before the realization of the refinement. By protesting the interference of the state, Lütfü Fikri strongly criticized the policy of the state and mentioned his discomfort and opposition in a fierce way.[69]

However, although faced with an opposition from the bar, the suspicion inherited from the past experience largely shaped Kemalist policy towards the associations, bringing in the necessity for supervising the profession and it's associations. Perhaps the election of Lütfü Fikri who had an anti-Kemalist attitude as mentioned above, as the head of the bar association for eight consecutive times since 1920,[70] and continuing even after the refinement, had been a significant factor in strengthening this suspicion and shaping the policy agenda of the state towards the bar associations during the 1930s.[71]

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[69] Mehmet Reşit, "Meşrutiyet Muhalefetinden Bir Sayfa: Lütfü Fikri'nin Siyasi Mücadeleleri," (A Page from the Opposition in the Constitutional Era: The Political Struggles of Lütfü Fikri) Hürriyet (Istanbul daily), 2-3 October 1952, quoted in Lütfü Fikri Bey'in Günlüğü, p.189.

[70] Ali Haydar, "Lütfü Fikri Bey'in Ölümü," (The Death of Lütfü Fikri Bey) Istanbul Barosu Mecmuası, 13 (1934), p.4432.

[71] In fact, the state policy towards the bar associations did not constitute an exception to the general trend on the part of the state in controlling other professional associations. In this respect, specifically there appears to be a paralelity between the Chambers of Commerce and Industry and the Bar Associations with respect to their organization and the established state control mechanism, see Ayşe Öncü, "Cumhuriyet Devrinde Odalar," (The Chambers in the Republican

It has been within the framework of this new code that, for the first time in the Ottoman-Turkish legal history, attorneyship has been regarded as a profession, having legally defined rights duties and responsibilities. In this respect, the reintroduction of licensing as being the prerequisite for being able to practice the profession can be considered as the most significant step within the process of the modernization of attorneyship and its reinstitutionalization as a full-blown profession. Having lifted the profession to status longed for since the Ottoman era, the new code had also provisions concerning the organization and authority of the Bar associations. However, although there were significant differences in this respect when compared to the Ottoman era, the new code has shown strong signs of being the extension of the view of closely supervising the professionals through their associations.[72]

In this regard, the establishment of bar associations in places where the number of attorneys were ten or more and membership to these associations in order to be able to practice the profession legally were made compulsory. Apart from constituting a basis for the

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Era) Cumhuriyet Dönemi Türkiye Ansiklopedisi, vol.6 (1984), pp. 1566-70.

[72] For a detailed comparison of the 1876 Dava Vekilleri Nizamnamesi and the Code of Muhamat, see Hamdi Halim, "Cumhuriyet Devrinde Avukatlık Müessesesi," (The Institution of Attorneyship in the Republican Era) Istanbul Barosu Mecmuası, special issue (1933), pp.324-34.

future effectiveness of the bar associations by encouraging an organizational structure covering nearly whole of the country this code established a mechanism for state-wide control of the profession.

As noted, the new code made membership to bar associations as a necessary condition for the practice the profession. In this respect, the candidates were obliged to make their applications for membership to the bar association in order to practice their careers. However, although bar associations have been defined as the official institutions where the applications had to be made, their authority within the process of licensing has been very much limited. The Ministry of Justice came to have a direct control of the process and the associations' authority was limited to the submission of a report to the Ministry of Justice on the assessment of the suitability of the candidates' qualifications for taking a license, the possession of which automatically resulted in membership to the association.

Besides the process of licensing which was an effective means for the Ministry of Justice to dominate the profession, an auto-control mechanism has also been established within the bar associations. The bar associations were ordered to establish disciplinary commissions which would have full autonomy in carrying out disciplinary investigations on members whose reputation were regarded not to be in line with the honor and dignity of the profession. The individual member who was decided to be dismissed from the association had the

right to apply to the courts. Despite this overt increase in the authority of bar associations in controlling their members when compared to the licensing process, there still appeared to be some reservations on the part of the state in enhancing its own authority which became evident in a new code enacted in 1928. Within the framework of this code, the public prosecutors were given the right to initiate disciplinary investigations through disciplinary committees.

Consolidation of the New Model

As elaborated above, the Code of Muhamat had constituted the first step in the restructuration process of attorneyship and bar associations. In this respect, while forming the legal basis of the Kemalist project, aiming to replace the Ottoman identity of the profession and its associations with a republican one, the Code of Muhamat had set out the basic premises of the republican model whose cornerstone had been the state-wide control of the profession. However, despite its significance as a frame of reference for understanding the policy orientation of the new regime concerning the issue, the code seemed to have some shortfalls as far as providing a radical transformation in accordance with the Kemalist task at hand was concerned.[73]

There were gaps in the code; they were gradually tried to be filled. However, the consolidation of the

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[73] Fuad Sedad Peçelioğlu, "Cumhuriyet ve Avukat," (The Republic and the Attorney) Istanbul Barosu Mecmuası, 10 (1943), p.602.

state control and restructuration of the profession were not to be fully achieved till the enactment of Code of Attorneyship (*Avukatlık Kanunu*) in 1938.[74] Apart from being a very detailed one when compared to the previous regulations in the field, the latter has been designed in such a way as to embody the Kemalist premises in the most comprehensive manner.

In this regard, according to Şükrü Saraçoğlu who had been the Minister of Justice then and had a prominent role in the enactment of the 1938 code, the reorganization of the profession within the framework of the mentality of the new regime constituted a necessary component for the full accomplishment of the Kemalist restructuration within the judicial and legal sphere and integration of attorneys to the new system.[75] In fact, the

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[74] For the original text of the code, see "Avukatlık Kanunu No. 3499," (Code of Attorneyship No. 3499) Düstur, Üçüncü Tertip, vol.19, pp. 685-715. There had been many discussions in the parliament during the enactment of the Code of Muhamat in 1924, concerning the substitution of the arabic word *muhamat* with its latin rooted counterpart *avukat* for denoting attorney. Such a change was achieved within the framework of a code (no:708) in 1926 - after two years of the enactment of the Code of Muhamat - due to the conservative reaction within the parliament. Although being a minor aspect within the process of changing the profile of the profession, this sementical change can be considered as a significant indicator of the Kemalist project of modernizing the profession in all respects. For the above mentioned parliamentary discussions, see T.B.M.M. Zabıt Ceridesi, vol.8 (1340), pp.286-7.

[75] "Avukatlık Kanunu Layihası - Adliye Vekilimizin Nutku," (The Draft Code on Attorneyship - The Speech of Our Minister of Justice) Istanbul Barosu Mecmuası, 8-9 (1936), p.347.

invitation of the representatives of the existing Bar associations[76] to a meeting which was held by the ministry for the purpose of discussing the articles of the code before its enactment has been regarded by the minister himself as a manifestation of the integration desired by the new regime.[77] Saraçoğlu mentioned the necessity and significance of such a rearrangement in a speech he had made during the mentioned meeting as follows;

> In every country where a new regime has been established, the reorganization of the attorneyship along the principles of the regime has always appeared to be a necessity. Thus just as the Italian Code of Attorneyship has been drawn up with a view to the requirements of fascism and the German Code had strong signs of national socialism. In this respect, we have tried to prepare this code with the aim of restrenghening the profession along republican, nationalist, secular, statist as well as realist lines, that is of along Kemalist premises.[78]

When evaluated within the above mentioned framework, there appears to be two closely related issues which

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[76] There were representatives from sixteen bar associations as well as from Turkish Attorney's Union See ibid., p.351. For the location of these associations, see Özkent, Avukatın Kitabı, p.134.

[77] "Avukatlık Kanunu Layihası- Adliye Vekilimizin Nutku," Istanbul Barosu Mecmuası, p.347.

[78] Ibid., p.348.

deserve special attention - the first one being the newly recognized "public service character" of the profession which can be regarded to have laid down the legitimization grounds for the second, that is the extension of the state control on the profession and the bar associations.

The Quasi-Public Status of the Profession: Public Service-Private Gain

Under the new code, attorneyship has been regarded as a much valued profession, having a public service character. Within the framework of the code, the dedication to legal knowledge and experience to attain justice were considered as the ultimate aim of the profession. Being viewed as the agents of legal order because of their newly defined role as the legal co-partners of the judge during the settlement of disputes in the court, profession was attributed a public service character having public obligations.

Despite this public status of the profession however, the attorneys were not actually officials of the state apparatus as their incomes consisted of fees paid by the clients, unless, of course, they were employed by the state. In this regard, on the one hand all properly accredited attorneys were to regard themselves as an integral part of the new republic, on the other hand they were a part of the commercial society.

In fact, such a disposition of placing the attorney in a dual position of pursuing a free profession and

performing a public service had been an issue of great debate during the enactment process of the code and afterwards. There were mainly two different views. According to one view, attorneyship had to be organized as a free profession in the full sense of the term. The source of motivation while performing the profession was regarded as entrepreneurial spirit rather than the attainment of justice. Thus in this framework, the code was blamed for its endowment of the profession with special privileges that it did not deserve. The alternative view was the statization of the profession and its establishment as a part of the civil service.[79] Being a reflection of the etatist policies in the economic sphere, this view did not gain much ground as it was mentioned in the proposal of the Ministry of Justice that such a system had been tried in USSR just after the October 17 revolution, but did not work effectively.[80]

The new code was midway between these alternative positions by combining their basic features. The authorities in the Ministry of Justice had analyzed the codes of many countries during the preparation process from which certain points had been integrated to the new code. Among them, however, the German Code of 1878 had

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[79] For an elaboration of the mentioned views, see T.B.M.M. Zabıt Ceridesi, vol.26 (1938), pp.345-351; Ali Şevket Erkün, "Avukatlık Mesleği ve Devletçilik Rejimi," (The Profession of Attorneyship and the Regime of Etatism) Hukuk Dünyası, 1 (1944), pp.44-45, 48.

[80] "Avukatlık Kanunu Layihası ve Adliye Encümeni Mazbatası,(1/962)," (The Draft Code on Attorneyship and the Report of Judicial Counsel) in T.B.M.M. Zabıt Ceridesi, vol.26 (1938), p.2.

been the most influential one and served as a model specifically on disciplinary issues.[81] Although not mentioned officially by the authorities, the code also resembled in some respects the one that had been prepared during the Nazi Regime.[82]

Being defined as a free profession having public service characteristics and a quasi-public status the main characteristics of attorneyship within the framework of the new code can be summarized as follows. The pursuit of attorneyship was free, but at the same time it depended upon admission to the bar by public authority; the attorney was subject to disciplinary authority but, on the other hand, he had no official superior, nor did he have any civil service obligations. He had a public status[83] and yet he was no civil servant. He held that office not by virtue of his duties of service, but instead made a trade of transactions whose pursuit belonged to that office.

With regard to this special status, attorneys were expected to give priority to the interests of the republican regime - widely believed by the Kemalists to

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[81] Ibid.

[82] For the original text of this code, see "Alman Avukatlık Kanunun Son Muaddel Şekli," (The Text of the German Code on Attorneyship with Its Final Amendments) Istanbul Barosu Mecmuası, 10 (1936), p.209-37.

[83] For example, according to the Article 48 of the code, the related articles of the Turkish Criminal Code which are applied to the fellonies committed against the civil servants, are defined to be valid also for the fellonies which are committed against the attorneys during the practice of the profession.

correspond to those of the public - while performing their professional duties, as it had been the case for the civil servants. According to Article 117 of the code, attorneys were forbidden to defend persons accused of acts committed against the basic tenets of the new Turkish state[84] including national unity. Promoting fundamentalism was considered such an act. Communist activities had also been regarded as being among the acts against the state during the initial discussions of the code in the Ministry.[85] However, it has been omitted from the code largely due to the salience of the idea that the inclusion of the word "communism" as being an act committed against the state could have the potential of affecting the Turkish-Soviet relations adversely.[86]

While being regarded as an automatic outcome of the public service label attached to the profession, such a

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[84] These are defined as republicanism, nationalism, populism, etatism, laicism, and revolutionism-reformism in the Article 2 of the 1924 Constitution and accepted as being the basic policy instruments of the Republican Peoples Party in 1935. For the original text of the Constitution, see Şeref Gözübüyük and Suna Kili, Türk Anayasa Metinleri 1839-1980 (The Texts of Turkish Constitutions 1839-1980) (Ankara: Ankara Üniversitesi Siyasal Bilgiler Fakültesi, 1982), pp.111-37. Also see Cumhuriyet Halk Partisi, Program (Ankara, 1935), p.7.

[85] "Avukatlık Kanunu Layihası ve Adliye Encümeni Mazbatası," (I/962), in T.B.M.M. Zabıt Ceridesi, vol.26 (1938), p.38.

[86] Özkent, Avukatın Kitabı, p.168. Such a restriction had also been ineffect under the Nazi regime in Germany. The legal defense of a communist in Germany for example, was forbidden because it was too, considered as of communist activity, see Bendix, From Berlin To Berkeley, p.116.

disposition can be interpreted as having significant connotations at two different levels.

As far as the nature of attorneyship is considered, such a restriction doe not square with the very raison d'etre of the profession - the defence of the accused-. It disregards the professional obligation of the attorneys both to his clients and public. Also, while limiting the freedom of action of the attorney in his choice concerning the cases he would like to defend, the regulation had the potential of affecting the professions" position within the market negatively.

Besides these points, when viewed from a wider perspective, this restriction can also be interpreted as reflecting a dilemma concerning the very identity of the attorneys as formulated by the Kemalists. There appears to be a paradoxical relationship among the roles attributed to the attorney. On the one hand, attorneys are endowed with a public obligation of being the agents of the legal order and keynoters in the attainment of justice and, on the other hand, with a political obligation defined as "to be the guardians of the Republican values and the new regime." However, by putting a reservation for the defense of the acts committed against the regime, the attorney's public obligation has largely been neglected in favor of the political one. In fact, such an approach can be considered as an indication of a shift in the attorney's role from the sphere of justice to politics, of viewing this group of professionals as instruments of the regime.

Here the attainment of justice appears to be the secondary objective; the primary purpose of the judicial system and legal professionals becomes the fulfilment of the needs of the regime.[87]

And perhaps most important of all, the restriction of the right of defense is diametrically opposed to the very concept of justice. Restricting the freedom of the accused to represent certain clients, totally disregards the basic principle that a suspect is innocent until proven quilty.

Control Mechanism of the State

With the 1938 code, the control of the state over the profession was consolidated in the sense that the framework drawn by the early regulations had reached their ultimate recourse, with the recognized quasi-public status of attorneyship, forming the legitimization bases of the whole process. According to the Kemalists, for the profession to be an integral part of the judicial mechanism, the professionals had to be under the direct

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[87] The roots of this conflict about the aim of the judicial mechanism and its professionals - the primary objective of the judicial mechanism being the attainment of justice based on fair and objective procedures, and its being the consolidation of regimes - can be searched in the legal theories of Max Weber and Karl Marx, respectively. For an adequate summary in this respect, see John R. Schmidhauser and 1. Berg, "Toward an Understanding of Mediterranean Legal Culture in the Contemporary World Capitalist Economy," in The Contemporary Mediterranean World, C. Pinkele and A. Pollis, eds.(New York: Praeger Publications, 1983), pp.332-56.

control of the state even as tightly as the civil servants working for the state.[88]

The reflections of such a concern had proved to be very evident and found concrete grounds within the framework of the state-bar association relationship. It became institutionalized along clearly defined lines with the overwhelming presence of the former vis-a-vis the latter, which would in turn leave its marks for the future developments. In fact, underlying such a model was the perception, on the part of the state, of the bar associations as instruments of the state through which it could check and control the profession rather than professional associations as representing the interests of the profession at the official level and working for the development of the profession.

However, as noted above, this tendency did not constitute an exception to the general approach on the part of the state towards other professional associations. In this respect, while the distrust towards the legal professionals forms one specific aspect of the state policy, from a wider perspective, the Kemalist model of the state-society should be taken up from a wider perspective for a better understanding of the mentality which informed of the state control mechanism.

In general, the existence of different professional groups and their associations in society as well as the representation of their interests had been an important

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[88] T.B.M.M. Zabıt Ceridesi, vol. 26 (1938), p.346.

issue within the Kemalist model of society. As compared to the situation in the Ottoman times, under Kemalists, although there appeared to be a much more flexible environment concerning the formation of associations, the mentality concerning the associations" relationship with the state turned out to be more or less the same.[89]

In the Kemalist model, the groups were conceived as equals; the state had to meet their demands in an equalitarian fashion. This was done in the name of protecting the general interest, which was defined by the state itself and which, in the final analysis, has been regarded to be above the sectional interests.[90] In such a setting, the possibility that certain sectional interests can outweigh public interest had brought the issue of state control into the policy agenda. The suspicion towards the associations characterized the Republican state.

In the case of bar associations, the Minister of Justice"s right of tutelage over the profession as spelled out in Article 81 of the 1938 code constituted the major dimension of the state control mechanism. According to the then Minister of Justice, " the control mechanism had been designed in such a way so as to deprive the members of the bar who would not act in

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[89] Sıddık Sami, "Bizde Cemiyet Fikri ve Hayatı Niçin İnkişaf Edemiyor?," (Why the Notion of Society and Social Life Could Not Form in Our Country?) Mülkiye, 22 (1938), pp.6-7.

[90] Afetinan, Vatandaş İçin Medeni Bilgiler (Civil Instructions for the Citizen), vol.1 (Istanbul: Devlet Matbaası, 1931), pp.45-6.

accordance with the honor and dignity of the right to practice their profession."[91] The acts which violated with the aims of the regime also led to the legal professional's losing their right to practice their profession.

As laid down in the mentioned Article, the Minister of Justice, having the right of tutelage both over the attorneys and the administrative boards and heads of the bar associations, could use his powers in the case of attorneys through administrative boards of the concerned bar association and in the case boards and associations through supreme judges. The model had largely been designed as with a view to the disciplinary process, which was no longer to be an auto-control mechanism but was to be achieved through state-control.

The supreme judge was made the final supervising authority over the decisions of the administrative board; the board, among other things was empowered to pass disciplinary measures vis-a-vis the attorneys. The supreme judge was also empowered to adopt certain disciplinary measures vis-a-vis the members of the board, including the head of the bar. In this respect, the minister too, had authority to supervise the decisions of the administrative board in disciplinary matters.

The minister himself was also qranted the ultimate authority to dissolve the administrative board when he observed negligence or abuse of power as regards the

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[91] T.B.M.M. Zabıt Ceridesi, vol.26 (1938), p.350.

board's role in protecting the honor and dignity of the profession. These provisions made it possible for the minister to directly supervise the disciplinary process when he deemed it necessary and interfere in that process.

In the final analysis, there was now a hierarchical relationship both between the judge and the attorney as well as the state and the bar association. Consolidating the dominance of the state in its relationship with the bar associations, such a model reflected an inclination on the part of the rulers to view these associations as instruments of the state.

The model did not give rise to much criticism among the bar associations of the time. The associations largely remained indifferent; they had a rather conformist attitude concerning this policy line on the part of the state. The rationale underlying their position can be explained as follows:

Firstly, the lack of a unified policy line due to the variations among the views of the members of the Istanbul Bar Association, which was the most extensively organized bar association, played a role here. There appeared some views that regarded the model as an interference to the autonomy of the associations. Within this framework, the state control policy was considered as another barrier to the decades-long struggle of establishing autonomous associations which would exercise auto-control. According to another view, the state control mechanism was as an effective means of

supervising the profession. And although it interfered with the autonomy of the associations, state control was necessary for the future development of the profession. Here, the model was viewed as having the potential of eliminating those members who would not act with honor and dignity befitting profession. In the long run such a control by the state would create a new image for the attorneys that would eliminate the prejudice which had been salient both at the state and societal level since the Ottoman era.[92] The appearance of two strictly different approaches has been one of the most significant cause that prevented the bar associations from initiating a counter argument in this respect. Besides, the other measures in the code which were related to the modernization of the profession and the motto of its transformation to a full-blown profession were regarded to be so well organized that, even those who were in opposition for the control mechanism had disregarded the issue.

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[92] For the details of these two contrasting views, see Galip Bektaş, "İstanbul Barosu Yüksek Reisliğine," (To the Presidency of Istanbul Bar Association) Istanbul Barosu Mecmuası, 6-7 (1936), p.249; Ali Haydar Özkent, "Avukatlık Kanunu Layihası Münasebetiyle" (On the Occasion of the the Preparation of the Draft of the Code on Attorneyship) in ibid., pp.246-7; Hamdi Halim Molaçka, "Avukatlık Kanunu Layihası Hakkında Düşünceler," (Views on the Draft Code of Attorneyship) Istanbul Barosu Mecmuası, 8-9 (1936), pp.280-1; "Baromuzun 26.12.936 Tarihli Heyeti Umumiye Zaptı," (The Minutes of the General Assembly of Our Bar Associations Held on December 12, 1936) Istanbul Barosu Mecmuası, 10-12 (1936), pp.306.

Secondly, the prematurity of the bar associations in terms of both organizational and inter-organizational structuration must be mentioned. As far as the former one is concerned, perhaps with the exception of the Istanbul Bar Association, there appeared to be a lack of group identification with the bar associations. This was largely due to the dominance of the state initiative during their establishment and short history of the associations. Many of the associations had been established within the framework of the 1924 Code. The lack of group identification had been one of the most important factors underlying the deficiencies in the process of defining their interests as well as formulating relevant policies and struggling for the realization of their goals.[93] As for prematurity in terms of inter-organizational structuration, the lack of a nation-wide organizational structure[94] and the existence of a loose relationship between the existing bar associations prevented the association from formulating unified policies in their relationship with the state. Being aware of the importance of inter-associational relationship for protecting the interests of the profession and increasing the effectiveness of the

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[93] The lack of a group identity and inter group discipline had also been an aspect of other professional associations during the time. See Sıddık Sami, "Bizde Cemiyet Fikri ve Hayatı Niçin İnkişaf Edemiyor?," Mülkiye, p.7.

[94] In 1939, there appeared to be thirty two bar associations and 1600 attorneys. See "Mesleki Haberler," (News on the Profession) Istanbul Barosu Mecmuası, 13 (1939), p.181.

associations at the official level, the Turkish Attorneys' Union had been established in 1934 in Ankara.[95] However, this union proved to be far from realizing its goals. And it was not until the 1960s - that the bar associations became fully organized both to defend their professional interests within the market as well as to counter the state policies within the sphere of law and justice.

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[95] Ali Haydar Özkent, "Türkiye'de Avukatlık Mesleğinin ve Baro Teşkilatının tarihçesi," (The History of the Profession of Attorneyship and Bar Associations in Turkey) in Türkiye ve Amerika Birleşik Devletlerinde Barolar ve Hukukla İlgili Mesleki Teşekküller Hakkındaki Kongrenin Zabıtları, p.32.

Chapter Four

STATE vs. BAR ASSOCIATIONS IN THE POST-KEMALIST ERA: FROM A UNILATERAL TO A MULTILATERAL RELATIONSHIP

The Democratic Party Rule and the Bar Associations

The Policies Towards the Judiciary and Its Personnel

Turkish politics, during the late 1940s witnessed a major shift with the transition to multi-party politics.[1] The Democratic Party (DP), formed in 1946 by the opposition faction within the Republican People's Party (RPP), won the majority of the seats in the parliament at the first genuinely free elections in Turkish political life held on May 14, 1950.[2] This was the end of more than two decades single-party rule by the RPP.

Although with the coming to power of the DP in 1950 Turkish politics entered a period of relative liberalism, there appeared to be a very clearly observable

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[1] For a detailed analysis of the political developments during the late 1940's, see Kemal Karpat, Turkey's Politics: The Transition To Multi-Party Politics (Princeton, New Jersey: Princeton University Press, 1959); Metin Toker, Tek Partiden Çok Partiye 1944-1950 (From Single Party To Multi Party 1944-1950), 3rd ed. (Ankara: Bilgi Yayınevi, 1990), pp.82-125.

[2] The first general elections, was held on July 12, 1946. However, there appeared a vociferation on the part of the Democrats as the returns from where the Democrats had the lead, were overwhelmingly in favor of the Republican Peoples Party. The government was accused of having changed the election results in the district election boards which were under the supervision of government officials. For details, see Cem Eroğul, Demokrat Parti (Tarihi ve İdeolojisi) (Democrat Party(History and Ideology)) (Ankara: Ankara Üniversitesi Siyasal Bilgiler Fakültesi, 1970), pp.17-9.

authoritarian attitude on the part of the party concerning the sphere of law and judiciary which largely contradicted the party's liberal rhetoric. This, had strong implications in the party's position towards the legal profession; from time to time brought the bar associations into bitter conflict with the government.

As often noted, the overwhelming victory of the Democrats in 1950 was largely due to their successful appeal to the peasantry and to new commercial and industrial middle class, joined by religious leaders who had been very much in opposition to the secularization policies of the RPP.[3] Having such a power base, the rise of the DP, signified the replacement of the earlier Kemalist bureaucratic/intellectual cadre of the RPP by a new political elite. And perhaps, the attainment of power by the representatives of the people as well as the *nouveaux* bourgeoisie was the initial manifestation of the

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[3] In fact, the attainment of power by the DP in 1950 has been regarded as the victory of Islam by some conservative groups. And during the 1950-1960 period, the DP has been harsly critisized due to its anti-secular policies. In this regard, see Tarık Zafer Tunaya, İslamcılık Akımı (The Islamic Trend) (Istanbul: Simavi Yayınları, 1991), pp.205-11; Ahmet N. Yücekök, Türkiye'de Örgütlenmiş Dinin Sosyo-Ekonomik Tabanı (The Socio-Economic Bases of Organized Religion in Turkey) (Ankara: Ankara Üniversitesi Siyasal Bilgiler Fakültesi, 1971), pp.91-7. For a detailed analysis of the electoral base of the DP, see Eroğul, Demokrat Parti (Tarihi ve İdeolojisi), pp.55-62; Bernard Lewis, The Emergence of Modern Turkey (London: Oxford University Press, 1961), pp.316-18; Ergun Özbudun, Social Change and Political Participation in Turkey (Princeton, New Jersey: Princeton University Press, 1976), pp.45-5.

transformation of the bureaucrats from guardians of the state to the instruments of the government.

However, it can well be argued that the rise of a new political party within the system where the established structure of power used to be located in a highly bureaucratized party contained the seeds of a potential confrontation. This specifically became the case when the proclaimed values of the Democrats turned out to be in total contrast with the traditions and values of the Republicans. In fact, this conflict to a large extend determined the political dynamics of Turkey in the 1950-1960 period.

Turkish politics, during the single-party rule of the RPP, witnessed a complete fusion between the bureaucratic and political power. Politics was largely merged within the civil bureaucracy, which in the long run turned out to be a part of the political center of the Republican regime. Consequently, for the civil bureaucrats, the attainment of power by the DP, constituted a threat for their monopoly in the political sphere. On the other hand, since the civil bureaucracy had largely been identified with the RPP, the Democrats totally freed themselves from the bureaucracy as the basis of their institutional strength, and could in the process place the idea of the supremacy of national will as the main criterion for their legitimacy.[4] In fact, what happened in the aftermath of the 1950 general elections was a

[4] Feroz Ahmad, The Turkish Experiment in Democracy, 1950-1975 (London: C. Hurst, 1976), p.44.

power clash between the bureaucrats who had been socialized into the elitist rhetoric of imposing their will on the public for the sake of modernizing the country as they saw fit, and the DP who had been the defender of the motto of the supremacy of the national will.[5] To be more precise, this was the reflection of the decades-long clash between the state and the people which now manifested itself by a constantly growing polarization between the state elites and the "representatives of the people."

However, the consolidation of such a confrontation had shown itself as a shift in the locus of the state. In this respect, the state-centered polity had been replaced with a party-centered polity under the DP rule, meaning the transfer of the institutional mechanism of power from state elites to political elites.[6] On the other hand, a party centered polity connotes a political party largely autonomous from social groups and a civil society without political influence,[7] ironically which

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[5] Metin Heper, "State, Democracy, and Bureaucracy In Turkey," in The State and Public Bureaucracies A Comparative Perspective, Metin Heper, ed. (Conneticut: Greenwood Press, Inc., 1987), pp.136; Also see Metin Heper, Bürokratik Yönetim Geleneği Osmanlı İmparatorluğu ve Türkiye Cumhuriyetinde Gelişimi ve Niteliği (The Development and Nature of the Tradition of Bureaucratic Administration in the Ottoman Empire and Turkey) (Ankara: Orta Doğu Teknik Üniversitesi İdari İlimler Fakültesi, 1974), pp.128-40.

[6] Metin Heper, The State Tradition in Turkey (Walkington, England: The Eothen Press, 1985), p.100.

[7] Ibid.

was also the case during the essentially bureaucratic rule of the RPP.

In fact, the support behind the DP was largely due to the successful mobilization of the population rather than its appeal to a truly liberal and democratic regime which would bring its constraints itself.[8] Schematically, Turkey in the 1950s witnessed a transition to representative democracy where the government is formed by the freely elected representatives of the people. In actual fact, although for the first time the people had elected their representatives through genuinely free general elections, the DP conceived this as an unconditional transfer of authority to itself to carry out the "righteous decision-making" throughout its rule. In the long-term, this meant a limitless exercise of power, regardless of opposition in and outside the parliament, for a four-year term only in the end of which the people would be granted the right to participate in the political system.

Such a disjunction between the party and civil society on one hand, and the anti-RPP attitude of the DP on the other, were to find solid grounds in the repressive policies pursued by the DP, which clearly contradicted the declared liberal rhetoric of the party. The failures in the economic sphere as well as the criticisms by the opposition, soon let the party to adopt repressive policies for the rest of its rule which

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[8] C.H.Dodd, Democracy and Development in Turkey (Walkington, England: The Eothen Press, 1979), p.10.

intensified especially after 1957. The ban on the political activity of the academic staff, the right assigned to the government to oust civil servants without any right of appeal, the adoption of restrictive press laws, the imprisonment of journalists are exemplary in this regard.[9]

As mentioned above, within the framework of the authoritarian attitude on the part of the DP, one of the most severely affected sphere had been the judiciary. In this regard, while being perhaps the strongest manifestation of the DP's absolutist conceptualization of power, the policies concerning the judiciary, had in the long run the potential of bringing the bar associations and the political elites into conflict.

First and the foremost, the establishment of a commission by a decision of the DP parliamentarians on April 15, 1960, to investigate the opposition which according to the DP parliamentarians, in cooperation with the press, had tried to set up illegal and secret organizations and armed political gangs composed of ruffians and ex-convicts, was very significant.[10] In order to facilitate its investigations, the commission at once banned all political activity of the opposition and any

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[9] For the details of the repressive policies on the part of DP, see Cem Eroğul, "The Establishment of Multiparty Rule 1945-71," in Turkey in Transition, Irvin C. Schick and Ertuğrul Ahmet Tonak, eds. (Oxford: Oxford University Press, 1987), pp.113-8; Geoffrey Lewis, Modern Turkey (New York: Praeger, 1974), pp.151-5.

[10] See Tekin Erer, On Yılın Mücadelesi (The Struggle of Ten Years) (Istanbul: Ticaret Postası Matbaası, 1963), pp.394-5.

published reference to the debates in the Assembly. The worst of all, however, the commission had been given powers of search, arrest, and detention.[11] Apart from being an exposition of the extreme hostility of the DP towards the opposition, the establishment of this commission with dictatorial powers had constituted a direct attack on the functioning of the judiciary.

In fact, the dominating stance of the DP towards the judiciary had been a policy issue which made its presence strongly felt since the mid-1950s, in the parties' disposition with respect to judicial personnel, especially the judges.

It is true that this tendency on the part of the DP was grounded in the conception of the "national will."[12] It was, however, also related to the DP's hostility towards bureaucracy, a point made before.[13] In this

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[11] For the original text of the code see "Türkiye Büyük Millet Meclisi Tahkikat Encümeninin Vazife ve Selahiyetleri Hakkında Kanun No. 7468," (Code on the Duties and Rights of the Turkish Garand National Assembly Counsel No. 7468) Resmi Gazete (Official Gazette), no:10491, April 28, 1960.

[12] In this respect, the famous statement by Prime Minister Adnan Menderes, "If I want to, I can even make a wood(read "simpleton") be elected to the assembly" best examplifies the DP's conceptualization of power as absolute.

[13] As far as the financial situation of bureaucrats was concerned, there appeared to be a considerable decrease in their purchasing power during the DP rule. In this respect, there was a fifty percent decrease in the total share of bureaucrats in national income. See Korkut Boratav, "Gruplar Açısından Gelir Dağılımındaki Değişiklikler," (The Shifts in Income Distribution With Respect to Groups) Siyasal Bilgiler Fakültesi Dergisi, 24 (1969), p.206.

regard, having being identified with the earlier bureaucratic intellectual cadre of the RPP, one of the most suppressed groups within the bureaucracy had been the supreme judges. In fact, while showing strong signs of distrust towards this group, supressiveness of the DP rulers towards the supreme judges also implied the rejection of their status as the guardians of justice and, thus of the state.

Within this framework, a law enacted in 1953 reduced the number of years of service required for the retirement of government officials to twenty-five years. Signifying an important step for the government in that it would enable it to retire selected judges, such a measure had carried in itself the potential of opening many judgeships to political appointees. On May 3, 1956, twelve judges were forced to retire by a decision of the minister of justice, to be followed by the retirement of seven judges on June 12, of the same year.[14]

The Rising Role of the Attorneys as Social and Political Actors

The ten-year long DP rule which reached its climax in the first half of the 1950s and experienced a downfall afterwards, had relatively been a static period with respect to the developments directly related to bar associations as well as the latter's interface with the state. However, the significance of the period lies in

[14] Eroğul, Demokrat Parti (Tarihi ve İdeolojisi), p.135.

its drawing a frame of reference for the study of the developments especially during the 1960s.

One of the most significant characteristic of the DP period with respect to attorneyship had been the considerable rise of the professions' role within the political sphere. Such an increase, while to an extent can be related to the nature of the profession, in the Turkish case the structural changes that the country witnessed during the 1950-60 period, had a determining effect.

As far as the nature of the profession is concerned, there appears to be substantial empirical evidence concerning the ambition and career patterns of many attorneys seeking out political appointments as well as their quantitatively dominant position in many western parliaments.[15] In this respect, the relationship between the profession of attorneyship and politics had long been a recognized and discussed issue within the framework of western political science literature.

There is a similarity in the major aims of attorneys and politicians which has been the realization of public

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[15] Frederic Frey, The Turkish Political Elite (Cambridge: M.I.T. Press, 1965), p.395. For the percentages of attorneys in the parliaments of various countries between 1957 and 1969, Mogens N. Pedesen, "Lawyers in Politics: The Danish Folketing and United States Legislatures," in Comparative Legislative Behavior, Samuel C. Patterson and John C. Wahlke, eds. (New York: John Wilet & Sons, 1972), p.28; For some other comparative figures, see David Podmore, "Lawyers and Politics," British Journal of Law and Society, 4 (1977), pp.155-87.

service. The capability to persuade which is a common feature of both attorneys and politicians while performing their professions, is often referred to explain the convergence between the two professions as well as the success of attorneys in politics. On the other hand, the advantageous position of attorneys when compared to other professions like flexible work hours which permits their engagement in political activity and the fact that absence from practice for a time does not appear to involve the loss of either skill or earning power, is what basically motivates attorneys for politics.[16]

Besides these arguments related with the professional characteristics, as far as the Turkish case is concerned, the social, economic and political transformation during the 1950-1960 period which has widened the gaps and inequalities between different economic sectors, social classes and geographic regions, can be illuminative in explaining the rising role of attorneys in politics.[17] The

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[16] For a detailed analysis of the convergence of the two professions, see J.A. Schlesinger, "Lawyers and American Politics, A Clarified View", Midwest Journal of Political Science, 1 (1957), pp.26-39; M. Cohen, "Lawyers and Political Careers," Law and Society Review, 3 (1969), pp. 563-74; H. Eulau and J.D.Sprague, Lawyers in Politics, A Study in Professional Convergence (Indianapolis: Bobbs Merrill, 1964).

[17] For a detailed analysis of the social, political and economic transformation in Turkey during the period, see Emre Kongar, Türkiye'nin Toplumsal Yapısı (The Societal Structure of Turkey) (Istanbul: Cem Yayınevi, 1976), pp.419-94; Gencay Şaylan, Türkiye'de Kapitalizm, Bürokrasi ve Siyasal İdeoloji (Capitalism, Bureaucracy

pattern of uneven development which was largely related to the change in relations of production, in turn produced a heightened perception of interest conflict between various groups and regions competing for larger shares of the benefits of economic growth. It was this changed perception that aggravated the conflicts in the society, between land owners and peasants, among employers as well as between workers and employers. Such a trend, while manifesting itself in the judicial sphere with an increase in the number of cases, has positively effected the position of attorneys in the society due to the strategic importance within the mechanism of conflict resolution.[18]

Within this framework, especially in the villages and towns attorneys were considered to be the representatives of justice - in a sense acting as a bridge between the city and the town - who will show the way for the ones who had a legal problem. Positioning the attorneys among the respected people of the towns, such a trend had its positive effects on the chances of attorneys to be elected in the elections.[19]

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and Political Ideology in Turkey) (Ankara: Türkiye ve Orta Doğu Amme İdaresi Enstitüsü, 1974), pp.81-7.

[18] Ahmet Yücekök, Siyaset Sosyolojisi Açısından Türkiye'de Parlamentonun Evrimi (The Evolution of the Parliament in Turkey from the Perspective of Political Sociology) (Ankara: Ankara Üniversitesi Siyasal Bilgiler Fakültesi, 1983), pp.166-7.

[19] Frey, The Turkish Political Elite, p.181; Kemal H. Karpat, "The Turkish Elections of 1957," Western Political Quarterly, 14 (1961), pp.442-3.

The Bar Associations in a State of Internal Politization: The Rising Professional Consciousness as a Melting Pot

Such a rise in the social and political status of many attorneys had its reflections both on the internal dynamics of the bar associations as well as their relationship with the state.

As far as the internal dynamics were concerned, the 1950-1960 period can best be described as an era when the first seeds of politics have been shown in bar associations. In fact, what happened then was the development of a tendency on the part of many attorneys to view the associations as a way station to politics. In many provinces bar associations served as places where attorneys, having similar political leanings, discussed party politics and their political careers.[20] However, in the long run, such a tendency on the part of some attorneys had some negative reflections on the relationship between the state and bar associations. In this respect, although at the institutional level, none of the associations had organic ties with any of the political parties, specifically the ones some whose members were known to have ideological affiliations with the Republican People's Party, has attracted the reaction of the DP rulers which from time to time damaged the

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[20] Interview with Ercüment Damalı, the DP Deputy during 1954-1957 period, and the member of Sivas Bar Association, on December 4, 1993.

association's strength in defending their professional interests.[21]

Another point which must also be mentioned in this context, is the consolidation of professional consciousness within the bar associations. In this respect, although the above mentioned politization of a number of the members of the associations sometimes caused conflicts between the groups having different political views, the protection of the interests of the profession has always remained to be a unifying factor due to the member's attachment of ultimate priority to professionalism. Individual political interests and the significance attached to the political careers by some members did not cause a decrease in the significance attached to professional norms. And most importantly, there appeared to be a greater sensitivity on the part of the bar associations in assessing their problems,

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[21] In this respect, during the mid 1960s the Ankara Bar Association had decided to organize a ball in order to obtain revenue for the association's charity fund and asked for the support of the DP. Although eventually the party came up with support for the Association, the first reaction of the Prime Minister Adnan Menderes had been very harsh. Regarding the attorneys "on the other side of the camp," he initially rejected to give support to the Association. See "Avukatlar," (Attorneys) Akis, 296 (1960), pp.14-5. In fact such an attitude was not a contradiction concerning the policies of the DP towards other chambers, as during the 1950's the DP governments rewarded those chambers of which supported the party and harassed those chambers which opposed it. See Metin Heper, "The State and Interest Groups with Special Reference to Turkey," in Strong State and Economic Interest Groups: The Post-1980 Turkish Experience, Metin Heper, ed. (Berlin: Walter de Gruyter, 1991), p.15.

specifically questioning their position vis-a-vis the state, when compared to the Kemalist era.

In this respect, the tutelage of the state over the bar associations, which has limited the autonomy of the bar associations has lingered on. However, deviating largely from the Kemalist period when the tutelage of the state over these associations had not been questioned or even discussed, during the 1950-1960 period, it turned out to be a hot issue and considered to be a serious problem by the bar associations, which, must be coped with by the proper regulations.[22] In this respect, the revision of the law on attorneyship had started to be discussed and the first steps had been taken at a meeting held in 1957 in Izmir, with the participation of the representatives from the bar associations all over the country.[23]

Besides the attitudes of the bar associations towards the issues that are directly related to professional interests, their disposition towards developments in the judicial sphere is also an issue that deserves attention. As would be excepted, the most significant group that had been in strict opposition towards the DP rulers' policies towards the judicial personnel had been the bar

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[22] Interview with Metin Nomer, the Member of Ankara Bar Association then, on December 13, 1993.

[23] The appearent relaxation of the government's control on Chambers of Commerce and Industry and the abolishing of the tutalege over them of the Ministry of Economy and Commerce had also been effective in the attitude of bar associations in this respect.

associations.[24] The reaction of the Ankara Bar Association - one of the most organized bar association when compared to others with the exception of Istanbul Bar Association - specifically concerning the compulsory retirement of some of the judges by a decision of the government in 1957, constitutes a good example with respect to the above mentioned points concerning professional consciousness.

With the aim of protesting the 1957 decision in question regarded to be unacceptable as far as the independence of the judges was concerned, the Ankara Bar Association decided to convene an extraordinary general assembly meeting as well as to publish some articles about the issue in the association journal. However, there appeared to be a strong reaction by the DP government against these ambitious attempts on the part of the Ankara Bar Association. In this regard, while the meeting was immediately cancelled, the pages that the articles were to be published appeared to be white.[25]

Although ended up with a total disappointment, as the DP rulers continued to pursue similar policies within the legal and the judicial sphere during the late 1950s, such an attempt on the part of the Ankara Bar Association, while being an indicator of the consolidation of professional consciousness, very well illustrated the

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[24] Rahmi Magat, "Yargıç, Savcı, Avukat İlişkileri," (The Relationship Between Judges, Prosecutors and Attorneys) Ankara Barosu Dergisi, 4 (1970), p.531.

[25] See Ankara Barosu Dergisi, 6 (1957), p.40.

success of Kemalist efforts in moulding out a republican type legal professional who would be the "guardian of justice." The Association's initiatives in question were a harbinger and also can well be regarded as a significant point for the later stance of legal professionals and attorneys towards the 1960 military intervention, as noted below.

1960 Military Intervention, New Constitution and Legal Professionals

As mentioned above, the policies of the DP, which had shown strong signs of the decline of the government's commitment to democratic ideals, soon brought the country to a deadlock. Especially towards the end of the decade, the tendency on the part of the government to reestablish a pre-1950 one-party authoritarianism caused severe conflicts between the opposition and the DP while moving the country towards the edge of violence.[26]

Such an environment of political disorder served as an open invitation to Turkish Armed Forces to step in and

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[26] The repercussions of the law concerning the establishment of the investigation committee led student demonstrations at Istanbul and Ankara Law Faculties. Also there appeared to be riots almost every night on the main boulevards of Ankara, see Ali Fuat Başgil, 27 mayıs İhtilali ve Sebepleri, (The May 27 Revolution and Its Causes) trans. by M. Ali Sebük and İ. Hakkı Akın, (Istanbul: Çeltüt Matbaacılık, 1966), pp.123-8; Walter F. Weiker, The Turkish Revolution, 1960-1961 (Washington, DC.: Brookings Institution, 1963), pp.17-20.

seize power on May 27, 1960.[27] However, rather than having the aim of staying in power and ruling the country indefinitely the ultimate goal of the military appeared to be the reinstitutionalization of a democratic Kemalist state and a return to civilian government as soon as possible.[28] To be more precise the objective was simply one of putting the train back on the tracks, as the guardians of Turkish nation and Kemalist ideals. Such a trend was evident in the message broadcast to Turkish nation on May 27, 1960 by the Armed Forces:

> .....Owing to the crisis into which our democracy has fallen, and owing to the recent sad incidents and in order to prevent fratricide, the Turkish Armed Forces have taken over the administration of the country.

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[27] During the DP rule, the military had been one of the most damaged group. As it had been the case for the civil bureaucracy, they too had material losses. In this respect there appeared to be a decrease in their salary indexes. See Çelik Auroba, "Bürokrat Kesim İçinde Mülki Amirlerin Yazgısı: Göreli Gelir ve Statü Gerilemesi," (The Faith of Administrative Officials within the Bureaucratic Strata: A Relative Decrease in Income and Status) in Türkiye'de Mülki İdare Amirliği (Administrative Officials in Turkey), Kurthan Fişek, ed. (Ankara: Türk İdareciler Derneği, 1976), p.88.

[28] For such an assesment, see Frank Tachau and Metin Heper, "The State, Politics and the Military in Turkey," Comparative Politics, 1 (1983), pp.20-3; Metin Heper, "The State, the Military, and Democracy in Turkey," The Jerusalem Journal of International Relations, 9 (1987), pp.55-6; Ergun Özbudun, The Role of Military in Recent Turkish Politics, Harvard University Center For İnternational Affairs, Occasional Papers in International Affairs, 1966.

> Our armed forces have taken this initiative for the purpose of extricating the parties from the inconceivable situation into which they have fallen and for the purpose of having just and free elections, to be held as soon as possible under the supervision and arbitration of an above party and impartial administration, and for handling over the administration to whichever party wins the elections....[29]

In this regard, an intensive series of projects has been initiated by the National Unity Committee (NUC), a body formed by the intervenors to govern the country till the reestablishment of democracy; within seven months (January 6, 1961) a Constituent Assembly was in operation with the purpose of reviewing the constitution, preparing a new election law and strengthening national unity,[30] and within a total of seventeen months (October 15, 1961), elections for a new civilian parliament were to take place.

Among other things, it must be mentioned that one of the most striking aspect of the 1960 military regime has been the efforts on the part of the intervenors to remain

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[29] For the full text of the declaration, see Weiker, The Turkish Revolution, 1960-1961, p.20-1.

[30] Nurşen Mazıcı, Türkiye'de Askeri Darbeler ve Sivil Rejime Etkisi (The Military Interventions in Turkey and Their Effect on Civil Regimes) (Istanbul: Gür, 1989), pp.93-8.

within law in nearly every stage of their rule.[31] However, due to their obvious lack of relevant knowledge, they usually felt the need of obtaining opinions from the legal professionals[32] which was specifically evident during the process of constitution-making.

Within the process of the evolution of the constitution, there appeared to be four different versions,[33] during the preparation of which the legal professionals had an overwhelming majority. Each of the four versions - the fourth being the final draft - has been the product of different commissions:

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[31] Mümtaz Soysal, Anayasa'ya Giriş (Introduction to Constitution) (Ankara: Ankara Üniversitesi Siyasal Bilgiler Fakültesi, 1969), p. 291.

[32] Walter F. Weiker, Amerikalı, Fransız, Rus Gözüyle 1960 Türk İhtilali (The 1960 Military Intervention from American, French, Russian Viewpoints), trans. by Mete Ergin (Istanbul: Cem, 1967), p. 89.

[33] Yüksek Öğretim Üyelerinden Kurulu Anayasa Komisyonunca Hazırlanan Anayasa Öntasarısı (The Constitutional Draft Prepared by the Commission Consisted of University Professors) (Ankara: 1960) quoted in Kazım Öztürk, T.C. Anayasası: Temel Metinler (Ankara: Türkiye İş Bankası Kültür Yayınları, 1966), pp.21-83; Türkiye Cumhuriyeti Anayasa Tasarısı ve Anayasa Komisyonu Raporu (The Constitutional Draft of the Turkish Republic and the Report of Constitutional Committee) (Ankara: 1961) quoted in ibid. pp.595-609; Siyasal Bilgiler Fakültesi İdari İlimler Enstitüsü'nün Gerekçeli Anayasa Tasarısı (The Constitutional Draft of the Institute of Administrative Sciences of Political Science Faculty) (Ankara: Ankara Üniversitesi Siyasal Bilgiler Fakültesi, 1960);

As a first step, the NUC has appointed a commission made up of Istanbul University law professors.[34] Later, a commission has been formed by some academicians from Ankara University School of Political Science where some legal scholars had taken place.[35] Thirdly, a constitutional committee was formed within the Constituent Assembly, largely composed of legal personalities that had been the members of the above mentioned committees. And finally the Constituent Assembly ratified the Constitutional Committees proposal with minor changes;[36] in the Constituent Assembly, legal professionals had the majority when compared to other professionals.[37]

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[34] Ord. Prof. Dr. Sıddık Sami Onar, Prof. Dr. Hüseyin Nail Kubalı, Ord. Prof. Dr. Hıfzı Veldet Velidedeoğlu, Prof. Dr. Tarık Zafer Tunaya, Prof. Ragıp Sarıca, Prof. Dr. Naci Şensoy, Doç. Dr. İsmet Giritli, later Prof. Dr. İlhan Arsel, Prof. Dr. Bahri Savcı, Doç. Dr. Muammer Aksoy, from University of Ankara School of Political Science, had been invited to the commission. This commission is known as the 'Onar Commission', taking its name from the surname of Sıddık Sami Onar who was a very well known scholar and the chairman of the commission.

[35] Prof. Dr. Turhan Feyzioğlu, Prof. Dr. Süheyl Derbil, Prof. Dr. İlhan Arsel, Prof. Dr. Bahri Savcı, Assoc. Prof. Muammer Aksoy (Head of the Ankara Bar Association in the early 1980's).

[36] For the full text of the 1961 Constitution, see Şeref Gözübüyük and Suna Kili, Türk Anayasa Metinleri 1839-1980 (The Texts of Turkish Constitutions 1839-1980) (Ankara: Ankara Üniversitesi Siyasal Bilgiler Fakültesi, 1982), pp.145-217.

[37] The total number of legal professionals in the Constituent Assembly had been 126 within a total of 297 members. See T.B.M.M Albümü 1920-1973 (Turkish Grand National Assembly Album 1920-1973) (Ankara: Önder Matbaası, 1973), pp.561-71.

As far as the ideological position of the majority of the legal scholars of the time and their viewpoints with respect to the DP rule and the military intervention are concerned, the report issued by the commission on 28 May, 1960, is illuminative:

> The political authority which had to be the representative of state, law, justice, public interest and the ideal of public service and protector of the rights of the public, has unfortunately lost its peculiarity and in its stead, taken the shape of a material force representing and serving the interests of a special class....It is for this reason that, the political authority has broken its ties and contradicted with the army, administration of justice and bar associations, civil servants, universities, press as well as all other social institutions, and adopted a hostile attitude towards the essential and main institutions of the state and the Kemalist principles which have utmost importance in preserving Turkey's position as a civilized country.... At this stage, the ultimate goal is the reinstitutionalization of democracy and re-establishment of the rule of law in the full sense of the term.[38]

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[38] For the full text of the report, see "Anayasa Ön Projesi Hazırlama Komisyonunun Tesbit Ettiği Esaslar," (The Principles Determined by

Justifying the military intervention in terms of the political ideals of Turkish nation the members of the commission had totally reflected the characteristics of the Republican type legal professional which the Kemalist revolution aimed to mould out as mentioned above. However, such an attitude did not constituted an exception to the general trend on the part of the legal professionals of the time which can be evidently seen when the basic principles of the 1961 Constitution are kept in mind. In fact, the constitution can well be interpreted as a statement of what legal professionals regarded was the most appropriate legal and structural underpining for the development of the country in congruence with Kemalism.

Being a systematic statement of the clear intention to maintain Kemalist thought as a political manifesto, the constitution reflected the idea of multi-party democracy in content, which, though not observed in practice, have been present in Republican political thought. The constitution, while giving the government and the political parties maximum manoeuvrability, had the necessary mechanisms, for preventing the accumulation of power in the hands of a single party, which had been the case during the DP period. With its emphasis on the separation of powers between the parliament and the executive for checking the majority's potential tyranny, a new high Constitutional Court in order to check the

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the Committee Responsible for the Preparation of the Initial Constitutional Project) Istanbul Barosu Dergisi, 5 (1960), pp.206-9.

constitutionality of laws, and individual and associational rights and freedoms, the new constitution had the characteristics of being a guarantee of the democratic evolution of the Turkish state and society on the basis of Kemalist principles.[39]

Bar Associations, State and the New Code on Attorneyship: Continuity or Change?

The Establishment of the Turkish Union of Bar Associations: A New Face for the Old Problems

The relatively stable political environment in the aftermath of the 1961 general elections - the RPP had won the majority of the seats in the parliament -, and the spirit of the 1961 Constitution which had defined the Turkish Republic as "a national, democratic, secular, and social state under the rule of law, based on human rights" soon had its reflections for the profession and its associations. As it has been the case in many fields, a rearrangement for the legal framework of attorneyship

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[39] For a detailed analysis of 1961 Constitution, see Bülent Tanör, İki Anayasa 1961-1982 (Two Constitutions 1961-1982) (Istanbul: Beta basım Yayım Dağıtım A.Ş., 1986), pp.9-38; İsmet Giritli, "The Structure and Characteristics of the Turkish Constitution," Annales de la Faculte de Droit d'İstanbul, 10 (1960), pp.257-65; Orhan Aldıkaçtı, Anayasa Hukukumuzun Gelişmesi ve 1961 Anayasası (The Development of Our Constitutional Law and the 1961 Constitution) (Istanbul: Istanbul Üniversitesi, 1982); Server Tanilli, Devlet ve Demokrasi: Anayasa Hukukuna Giriş (State and Democracy: Introduction to Constitutional Law) (Istanbul: Say Kitap Pazarlama, 1982), pp. 143-56;

and bar associations proved to be a necessity.[40] In this respect, the process of preparation of a new law on attorneyship, which had been initiated in 1958 by a decision taken in a meeting held in İzmir, with the participation of the representatives of bar associations, has gained considerable impetus.

The main concern of the bar associations was the enactment of a more liberal law that would replace the former one which had been seen by the inter-ministerial commission after the military intervention as having anti-democratic implications.[41] Certainly, the new constitutional framework, which had given substantial importance to individual and associational rights and freedoms, had been determinative concerning the liberal aspirations on the part of the bar associations.

As far as attorneyship is concerned, the "right of defence" which had been included among the category of the "basic rights and liberties of the "individual" in the Article 32 of the 1961 Constitution, can be regarded as a significant point in this respect. This constitutional emphasis, while manifesting the significance attached to the "individual" within the mechanism of justice at least in ideal terms, can also

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40 Ayşe Öncü, "Cumhuriyet Devrinde Barolar," (Bar Associations in the Republican Era) Cumhuriyet Dönemi Türkiye Ansiklopedisi, vol.6 (1984), p.1572.

41 "Yeni Avukatlık Kanunu kabul edildi ve Resmi Gazete'de yayınlandı," (The New Code on Attorneyship has been Ratified and Published in the Official Gazette) Istanbul Barosu Dergisi, 43 (1969), p.221.

well be considered as an implicit indicator of an elevation in the professional role of attorneys as the sine qua non of the judiciary.

On the other hand, the public professional organizations were for the first time given constitutional recognition and status within the framework of the 1961 Constitution. According to the Article 122 of the Constitution, public professional organizations were to be established by law; their bodies were to be elected by themselves from among their own members, and administrative authorities did not have the right to remove from office or temporarily suspend their elected bodies without a court decision. The regulations, administration and activities of professional associations could not be against democratic principles. It can be stated that the inclusion of the public professional organizations in the constitution had its implications for the future developments concerning bar associations and had constituted a factor that legitimized and guarantied their long term existence.

Within this framework, having in mind the basic idea of cacthing up with the spirit of the time, the first steps with respect to the preparation of the new law had been taken in 1963 in a meeting held under the leadership of the Ankara Bar Association, where the major principles of the new law has been defined and the three largest Bar Associations namely Ankara, Istanbul and Izmir, had been assigned the duty of preparing a draft code.[42] However due

[42] Ibid., pp.222-3.

to the disputes between the bar associations and the Ministry of Justice concerning the main lines of the draft, nothing came out of this initiative and it has been nullified. Later in 1966 another draft has been prepared, this time by a commission consisting of some deputies and the representatives of the Ministry of Justice and bar associations. Finally, on April 7, 1969 that a new law on attorneyship has been enacted, which based itself - with little modifications - on the draft prepared by the latter commission.[43]

Being a very detailed code, consisting of 217 articles, 17 of them being provisional, the new code constituted a significant frame of reference for the development of the profession and its associations. The first aim of the new code was to define both the criteria for gaining certification as an attorney as well as the general lines with respect to the functioning of bar associations, which had been quite similar to the former code. Secondly and most importantly, the new code founded the Turkish Union of Bar Associations (TUBA), which deserves special attention due to its determinative function with respect to the state-bar associations relationship.

Having the status of a public professional organization as defined by Article 122 of the Constitution, TUBA has been established as a peak

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[43] For the original text of the code, see "Avukatlık Kanunu No. 1136," (Code on Attorneyship No.1136) Resmi Gazete, no: 13168, April 7, 1969.

organization for all the bar associations in Turkey. Designed to have a supervisory role, one of the most striking aspects concerning the establishment of the TUBA, has been its assignment with the duty of checking and controlling the profession. Accordingly the TUBA has been backed up ultimately with certain powers which, under the former code had been fallen under the direct authority of the Ministry of Justice. In this respect the TUBA has been defined as the authority of approval and appeal for the bar associations with regard to the following matters: entry to the profession, licensing, admittance of apprenticeship, temporary or permanent disbarment, disciplinary issues, establishment of bar associations, preparation of income schedules for attorneys as well as certain regulations required by law.

At first sight, the establishment of the TUBA with the mentioned powers at its hand, seemed to be giving a liberal tone to the code, serving as a sign of the promulgation of a self-regulative and autonomous status to the bar associations. However, the still continuing tutelage of the Ministry of Justice, which signified the control of the Ministry over the bar associations, caused a total disappointment in this respect. In fact, within the framework of the new code, all the decisions of the TUBA, on the above mentioned issues - with the exception of the authority of licensing - were subjected to the approval of the Ministry, in order to be put into practice. And most importantly, the Ministry of Justice was given the right to dissolve the respective organs of

the individual bar associations as well as TUBA which did not abide by the decisions of the Ministry.

In this regard, although the TUBA was defined to be autonomous with respect to its internal organizational procedures - the most significant indicator of which was the non-interference principle on the part of the Ministry to its electoral process - such a control mechanism had a strong potential of reducing the association into a sub-branch of the Ministry.[44] In fact, in essence the model that was constructed with the new code appeared to have no difference from the former one. As it has been the case in the former code, the state had the full authority over the decisions of the bar associations. Only this time, rather than dealing with each and every bar association separately during its process of checking and controlling the profession, the state had to face the TUBA, through which it could dominate the profession and the bars. What happened was largely a reenactment of the former code under a liberal cover.

Being regarded as having an authoritarian stance, the domination of the Ministry over the bar associations as well as TUBA, caused considerable discomfort and criticism on the part of the bar associations. The main argument in this regard was based on the apparent contradiction between the Article 122 of the Constitution and the control mechanism developed by the new code. As

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[44] Faruk Erem, "Baroların Bağımsızlığı," (The Independence of Bar Associations) Istanbul Barosu Dergisi, 9-10 (1969), pp.417-21.

mentioned in a speech given by the then chairperson of the Ankara Bar Association, Rahmi Magat, in the opening of the first general assembly of TUBA, "the respective articles of the new code has very much signified an old fashioned world view. In this regard, while hampering the independence of the bar associations, it has very much contradicted the liberal spirit of the 1961 Constitution."[45] On the other hand, according to Magat, such an arrangement was inevitable consequence of the negligence of the ideas proposed by bar associations during the code-making process. As a matter of fact, the code largely reflected the basic points that had been made by the proposal of the Ministry of Justice.[46] There appeared to be quite an indifferent attitude on the part of the commission towards demands of the representatives of the bar associations.[47]

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[45] "Türkiye Barolar Birliği 1. Genel Kurul Toplantısında Ankara Barosu Başkanı Rahmi Magat'ın Yaptığı Konuşma," (The Statement by Rahmi Magat - the head of Ankara Bar Association - During the 1st General Assembly of TUBA) Ankara Barosu Dergisi, 5 (1969), p.805-6.

[46] "20 Haziran 1969 Tarihinde Ankara Barosu Genel Kurul Tolantısında Ankara Barosu başkanı Rahmi Magat'ın yaptığı Konuşma," (The Statement by Rahmi Magat - the head of the Ankara Bar Association - During the General Assembly of Ankara Bar Association on July 20, 1969) Ankara Barosu Dergisi, 4 (1969), p.602.

[47] In this respect, the statement made by İsmail Tekinel, commission member, during the parliamentary debates is quite illuminating: "It is for sure that rather than specialists of the issue - referring to the members of the bar associations - the views of the deputies are important as they are the ones who have the right to decide." See T.B.M.M. Tutanak Dergisi, vol.32 (1969), p.100.

Another related argument concerning the status of TUBA vis-a-vis the state, had to do with the principle of separation of powers emphasized by the new Constitution. In this respect, the control exercised by the Ministry of Justice on bar associations had been regarded as the dominance of the executive over the judiciary. Such an argument was directly related with the self-perception of the attorneys as an organic part of the judicial mechanism which had been a part of the professional identity that was formed during the Kemalist era. The majority of the attorneys regarding themselves as the defenders of the rule of law had considered the code as totally contradicting with the prerequisites of its ultimate practice namely separation of powers.[48]

Concerning the independence of the bar associations, one of the most significant issues that caused intensive criticism, has been the prevention of the bar associations and TUBA from any kind of political engagement. Such a ban on the activities of the associations was another manifestation of the implicit intention on the part of the state for their pasification. As mentioned by Faruk Erem, a well known legal figure of the time and the then chairperson of the TUBA this attitude was due to the fearful tendency on the part of the government to preclude any possibility of the rise of the TUBA as an effective interest group which

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[48] Kemal Sarıibrahimoğlu, "Neden Özerklik," (Why Independence) Ankara Barosu Dergisi, 5 (1971), pp.623-4.

would have the potential of challenging its policies.[49] In fact, the very establishment of the TUBA, one of its major aim being the establishment of coordination and enhancement of cooperation between the bar associations had carried in itself the seeds of such a potential. Having the ideal of unifying the bar associations under a single voice in their relationship with the state, the TUBA in the long run had signified the formation of strong and effective bar associations which caused discomfort and suspicion on the part of the state.

On the other hand, according to Erem, the desire of the state to form politically neutral bar associations was an impossible dream. This was largely due to the closeness of the attorneys to social and political issues in practising their profession as well as their increased political role especially during the 1950s.[50]

Within this framework, as mentioned by Faruk Dereli, the then head of the Istanbul Bar Association, the course of action that restricted bar associations from any kind of political activity was not in harmony with the self-identification of the bar associations, since besides the professional issues, they regarded themselves highly responsible concerning political issues. In this regard, they felt themselves obliged to help the state in solving

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[49] Faruk Erem, "Baroların Bağımsızlığı," Istanbul Barosu Dergisi, p.420.

[50] Faruk Erem, "Kamu Niteliğinde Serbest Meslekler'in Geleceği ve Avukatlık," (The Future of Free Professions Having a Public Character and Attorneyship) Ankara Barosu Dergisi, 5 (1974), p.876.

the problems of the country as well as preserving the Kemalist ideals and the principle of the rule and supremacy of law.[51]

Besides, as far as the interconnection between the professional and political spheres are concerned, in the case of the bar associations there always appeared to be a high potential of an intermingle. Thus, the mentioned restriction in a sense signified a limitation with regards to the activities concerning professional issues which could hamper the competence of the bar associations in protecting the professional interests.[52]

The Social Security Rights of the Attorneys: A Paradoxical Issue

One of the most enduring conflicts, between the state and bar associations during the enactment process of the new code had been the issue of the extension of social security rights to the attorneys. The problem that caused extensive reaction on the part of the bar associations in this respect had to do with the Article 117 of the new code. Having formally put an end to the years-long practice of charity fund system which had been left to the authority of the respective bar association and constituted the basic source of security for the

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51 "Avukatlık Kanunu'nun Kabulü Hakkında İstanbul Barosu Başkanı Faruk Dereli'nin Türkiye Barolar Birliğinde yaptığı Konuşma," (The Statement by Faruk Dereli - the head of the Istanbul Bar association - on the Enactment of the Code of Attorneyship in TUBA) Istanbul Barosu Dergisi, 7-8 (1969), p.384.

52 Faruk Erem, "Sermaye - Serbest Meslek - Avukatlık," (Capital-Free Profession - Attorneyship) Yargı, 20 (1977), p.3.

attorneys, the Article initiated a different mechanism in this respect: the attorneys from then on would be compulsorily subjected to the Social Security Code which defined the basic lines of the security procedures with respect to old age and death. Moreover, the attorneys who would not pay their monthly social security premiums were to be expelled from the profession. Such a strict arrangement of course clashed with the interests of the majority of the attorneys.

Accordingly, the main conflict especially during the enactment process of the code, revolved around the financial inability of most of the attorneys to pay their social security premiums. In fact, most of the attorneys were even unable to pay the premiums of the charity funds, which were much less than the amount required under the new code.[53] However, such an argument had totally been disregarded by the head of the parliamentary commission and the representatives of the Ministry of Justice during the discussions. According to the chairman of the commission, the amendment of the article was out

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53 See " Ankara barosu Başkanı Rahmi Magat'ın 9 mart 1969 Günü Ankara Gazeteciler Cemiyetinde Düzenlenen Basın Toplantısında Yaptığı Konuşma," (The Statement by Rahmi Magat - the head of the Ankara Bar Association - During the Press Conference held in Ankara Journalists Association on March 9, 1969) Ankara Barosu Dergisi, 2 (1969), pp. 428-9; "Ankara Barosu 31. Genel Kurul Toplantısında Ankara Barosu Başkanı Oktay Çubukçugil'in Yaptığı Konuşma," (The Statement by Oktay Çubukçugil - the head of the Ankara Bar Association - During the 31st General Assembly of the Ankara Bar Association) Ankara Barosu Dergisi, 1 (1969), p.197; For a similar assesment, also see T.B.M.M. Tutanak Dergisi, vol.32 (1969), p.391.

of question, as it would constitute a denial of the basic and indispensable characteristic of the social state, the ultimate aim of which was defined to be the realization of social justice within the framework of the 1961 Constitution. Regarding this new arrangement as a first step taken by the state in this respect, the chairperson had accused the bar associations of refusing to initiate of the project of nation wide expansion of the social security system.[54] While opening the way for a financial crisis and discomfort among the majority of the attorneys as mentioned above, such an attitude on the part of the commission was a strong manifestation of both the indifference of the state towards the associations for the sake of implementing its defined policies as well as the insufficiency with regard to the bargaining power of the bar associations and necessitates the questioning of their strategies of interaction and influence vis-a-vis the authorities during the enactment process of the code.

It must be mentioned that the attainment of close ties with the parliamentarians had been regarded by the bar associations as one of the most effective ways for the realization of their interests and demands.[55] In this respect, from time to time they had even been the strong defenders of a corporatist system in the Durkhemian sense of the word as to propose a parliamentary system in which

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[54] Ibid., p.389.

[55] "Ankara Barosu 35. Genel Kurul Duyurusu," (The 35th General Assembly Declaration of the Ankara Bar Association) Ankara Barosu Dergisi, 1 (1973), p.147.

the representatives of the professional associations had to take place and represent the interests of these associations.[56] As far as the former one is concerned, the case of the social security issue had been an illuminative test case for evaluating the success of bar associations in influencing the authorities. In this respect, the stance of the attorney-parliamentarians during the enactment process of the code deserves attention. Paradoxically, there appeared to be a total divergence between their views and those of the bar associations. Most of the attorney-parliamentarians were in a position of strongly defending the respective articles of the code. As being among the minority who could afford to pay the social security premiums, such a trend among the attorney-parliamentarians had constituted both a manifestation of the priority given to private interests rather than that of their associations as well as the absence of unification and harmony between them and their associations with respect to the interests.

However, besides this detachment towards the interests of the bar associations, there also appeared to be an indifferent attitude on the part of the attorney parliamentarians towards the interests and welfare of some other groups in the society, namely that of the workers. The rather privileged position of the attorneys in the social security system with regards to the

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[56] Kemal Sarıibrahimoğlu, "Güvenlik Mahkemeleri Gerekli mi?," (Are Tribunals of Independence Neccesary?) Ankara Barosu Dergisi, 5 (1972), p.775-6.

retirement procedures - the attorneys were given the right to get their retirement pensions on the bases of the premiums that they would pay in the last three months before the retirement date - as compared to the workers under the new arrangement may have been the reason for this attitude on their part; they were interested in enhancing their own interests only. To be more precise, what happened during the enactment process was a total indifference on the part of the attorney-parliamentarians both towards their parliamentarian identification which involves the protection of the interests of the whole public as well as bar association identifications.[57]

As far as the former one is concerned, such an attitude, has been harshly criticised by the worker unions. As mentioned in a declaration of TURK-İŞ (Turkish Federation of Trade Unions) that were very much in opposition towards the enactment of the code, "...the attorney-parliamentarians who had been unable to get unified even in matters that had ultimate importance for the general interest and welfare of the country, due to their different ideological commitments, totally

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[57] Attorney parliamentarians in general had been regarded as constituting a group who are much more sensitive to protecting certain interests in the society rather than of their own when compared to other professional groups in the parliament, due to their professional experience which involves the defense of cases. See Maurice Duverger, Siyasal Partiler (Political Parties), trans. by Ergun Özbudun (Ankara: Ankara Üniversitesi Siyasal Bilgiler Fakültesi, 1970), p.174; Mattei Dogan, "Political Ascent in a Class Society, French Deputies 1870-1958," Political Decision Makers, Dwain Marwick, ed. (New York: Free Press of Glencoe, 1961), p.70.

disregarded their party identifications, when their own interests were involved."[58] Having regarded such an attitude as being not in conformity with the principles of rule of law, TURK-İŞ had accused the attorney-parliamentarians for acting against the interests of the workers.[59] In fact, according to a well known journalist of the time, what one observed during the enactment process of the code was no more than a division within the parliament between the attorney-parliamentarians who acted independently of the party line and the others: "... during the discussions the political parties were out of the platform, leaving their place to a strange co-operation...."[60]

Although most of the bar associations were totally against the enactment of the code, and the approach of the attorney parliamentarians largely opposed their interests, such a stance on the part of the attorney-parliamentarians had been considered by the workers as the handwork of the bar associations. And from time to time brought the workers and the bar associations face to face during the early 1970s which largely contradicted with the ideological stance of many of the associations.

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[58] "Avukatlık Kanunu," (Code on Attorneyship) Türk-İş Dergisi, 5 (1969), pp.8-9. For similar assesments, see also "Maden İş Sendikaları Federasyonu Bildirisi," (The Declaration of Maden İş Federation of Labor Unions) in ibid., p.11.

[59] Ibid.

[60] Nadir Nadi, "Bizden Veto," (Veto from Us) Cumhuriyet (Istanbul daily), April 6, 1969; see also, Nadir Nadi "Tepkiye Devam," (Keep Up With Protest) Cumhuriyet, April 13, 1969.

This posture had specifically been a source of discomfort especially for the bar associations in big cities which had closely identified themselves with the interests of the working class. Such an assessment, came out clearly in the words of the then chairperson of the Ankara Bar Association, who had invited the workers and the attorneys to unite under the same camp: "... I myself could see no reason for the negative attitude of workers towards the attorneys who are in a position of being the natural ally of the working class....In fact, both of them are strongly in need of a cooperative relationship...for coping with the degenerated order brought about by the coalition of politicians and employers...."[61]

A Broadened Field of Interface: Bar Associations vs. the State in 1970s

Bar Associations in Perspective: A General Assessment

Being an important component of the expansion of the boundaries of pluralism in Turkish society, the Turkish political scene had witnessed a proliferation of interest group activity especially during the late 1960s and 1970s. During the period in question, there appeared to be an increase in the number of interest groups as well as their membership, and the type of organized activities

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61 Kemal Sarıibrahimoğlu, "Başlıca Problemlerimiz," (Our Major Problems) Ankara barosu Dergisi, 4 (1972), p.567.

they sponsored multiplied.[62] The bar associations did not constitute an exception to this general trend. In fact, the 1970s signified a period of dynamism on the part of the bar associations. There appeared to be a significant transformation of their previous preoccupation with narrow professional issues into an interest in broader and political ones. As mentioned by the chairperson of the Ankara Bar Association in early 1970s "the bar associations no longer define themselves as professional associations solely engaged with licensing issues and routine works, but as effective interest groups who would have a significant role mainly in shaping the state policies concerning legal as well as judicial issues."[63] Such a trend, had carried in itself a high potential of an involvement on the part of the bar associations into the political sphere both due to their perception of legal and judicial issues from a broader perspective as well as the apparent politization within the judiciary.

Besides defining themselves as the guardians of justice and thus carrying the ultimate responsibility of the realization for certain reforms within the legal and the judicial sphere such as the establishment of higher educational institutions for recruiting judicial

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[62] For a detailed analysis in this respect, see Robert Bianchi, Interest Groups and Political Development in Turkey (Princeton: Princeton University Press, 1984).

[63] Rahmi Magat, "Baroların Çalışmaları," (The Works of Bar Associations) Ankara Barosu Dergisi, 1 (1971), p.3.

personnel[64], the bar associations also regarded themselves as the indispensable elements and guardians of democracy in Turkey.[65] Although, having its roots in the Kemalist process of socialization, such a viewpoint on the part of the bar associations has largely been a product of the 1961 Constitution which defined the public professional associations as the quarantee of the democratic order.[66]

Being in total harmony with the framework drawn for them by the 1961 Constitution, the bar associations' conception of democracy was pluralist. Within this framework, they attached ultimate significance to the existence of different interest groups in the society and regarded their participation in the decision-making

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[64] For the details of the reform proposals in question, see Atilla Sav, "Başlarken," (While Starting) Ankara Barosu Dergisi, 1 (1971), p.3-4; Rahmi Magat, "Adaletin Gerçekleşmesi," (The Realization of Justice) Ankara Barosu Dergisi, 5 (1970), p.747; Yekta Güngör Özden, "Hukuk Devrimi," (Law Reform) Ankara Barosu Dergisi, 2 (1971), p.213-5; "Türkiye Barolar Birliği Başkanı Faruk Erem'in 1976-77 Adalet Yılı Başlangıcı Nedeniyle Yaptığı Konuşma," (The Statement by Faruk Erem During the Opening Ceremonies of the Judicial Year 1976-77) Türkiye Barolar Birliği Bülteni, 39 (1976), pp.5-7; "Türkiye Barolar Birliği'nin Türkiye Cumhuriyeti Temel Kanunlarında Yapılması Gerekli Değişikliklerle İlgili Görüşleri," (The Views and Proposals of TUBA Concerning the Reformation of Basic Codes of the Turkish Republic) Türkiye Barolar Birliği Bülteni, 7 (1976), pp.1-6.

[65] Teoman Evren, "Çağrı," (Invitation) Ankara Barosu Dergisi, 1 (1977), pp.3-4.

[66] Kemal Sarıibrahimoğlu, "Sorunlarımız," (Our Problems) Ankara Barosu Dergisi, 4 (1971), p.507.

process as the sine qua non of a democratic regime.[67] Such a conceptualization of democracy, constituted a justification ground for their self-identification with the political system, and formed a frame of reference for the main issues that were in the agenda of the bar associations.

The 1970s also signified a period during which the Kemalist identity of the bar associations had came quite clearly. One of the most significant characteristics of the bar associations had been their strong commitment towards the republican regime which had been regarded by them to be the "holy heritage" of Kemal Atatürk. The principles of Kemalism were considered to be the major guide-lines that must be respected in the path towards civilization.[68] Being in line with such an attitude bar associations' strong support towards laicism deserves attention. Especially the Ankara Bar Association had been very sensitive in this respect and started disciplinary investigations for some women members who had insisted on wearing turbans in the late 1960s.[69]

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[67] "Türkiye Barolar Birliği Yönetim Kurulu Duyurusu," (Declaration by the Board of Administrators of TUBA) Türkiye Barolar Birliği Bülteni, 1-2 (1979), pp.3-4.

[68] In this respect, see Kazım Akdoğan, "Avukatlık Mesleği," (The Profession of Attorneyship) Ankara Barosu Dergisi, 2 (1977), pp.266-8.

[69] See Yekta Güngör Özden, "Değerli Türk Hukukçuları," (Honorable Turkish Legal Professionals) Ankara Barosu Dergisi, pp.871-3; "Türkiye Barolar Birliği Kararı no:318/4," (Decision of TUBA no: 318/4) Ankara Barosu Dergisi, 3 (1973), pp.607-13.

As far as the internal dynamics of the bar associations during the period are concerned, there appeared to be a high degree of politization among some members of the associations; the politicization in question had been a part of the process initiated during the DP rule with the transition to multiparty politics and on the other a reflection of the politicization that Turkey witnessed during the 1970s. This was specifically evident in the bar associations that had been located in the big cities. For example, in the mid 1970s, the Istanbul Bar Association witnessed certain groupings among its leftist members competing to capture the administration of the Association.[70]

However on the whole, the politicization did not have its effects on all aspects of the functioning of the associations which as mentioned above had a Kemalist world view. And furthermore, the priority given to the judicial, legal and professional issues acted as a unifying factor among the members. The professional consciousness and sensitivity towards the issues in the legal and judicial spheres had reached its ultimate recourse. Being gathered under the umbrella of the TUBA in their relation vis-a-vis the state, they became a unified force.

The general characteristic of the bar associations during the 1970s, can be summed up as the internalization of the role of protecting Turkish democracy and Kemalist

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[70] Interview with Osman Ergün, the member Istanbul Bar Association, on March 10, 1994.

principles; the main target has been defined as the protection of the rule and the supremacy of law[71]. Accordingly, the significance of the independence of the judiciary, the protection of human rights and liberties, the freedom of thought and the supremacy of the 1961 Constitution, constituted the major points that had been frequently stressed. Showing a very defensive attitude, any attack to these ideals led to a conflict between the state and bar associations as will be delineated.

The Deterioration of the Judicial Mechanism: Bar Associations in Defence

The Reappearance of the Signs of Distrust Towards the Legal Professionals: A Return to 1920s

In the 1960-1970 period, Turkish politics witnessed significant changes. The social and structural changes caused by economic development including a high degree of rural immigration and urbanization, and the liberal atmosphere created by the 1961 Constitution had their reflections at the political life. The result was the proliferation of different political ideas, particularly on the left. For the first time under the republic, a Marxist party had been organized (the Workers' Party of Turkey) and entered the parliament in the general

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[71] For the views of the bar associations in this respect, see "13 Nisan 1976 günü Türkiye Barolar Birliği Başkanı Faruk Erem Tarafından Siyasi Parti Başkanlarına Yollanan Mektup Metni," (The Letter by Faruk Erem - the head of TUBA - Which Was Sent to the Political Party Leaders on April 13, 1976) Türkiye Barolar Birliği Bülteni, 36 (1976), p.1.

elections of 1965.[72] Organized labor made significant gains among industrial workers, partly as a result of the law authorizing the right to strike (1963). Towards the end of the decade, university students, began to join the leftist movement. University students became politically active and the first signs of a political polarization appeared.[73] The position Ankara and Istanbul Law Faculties has been quite striking in this regard. The two schools had been the most striking cases where the leftist student organizations had been established and became politically active. Specifically the students in Ankara Law Faculty had constituted the main body who had devoted themselves to a revolutionary struggle and usually acted as a motivating force for other students.[74]

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[72] In fact, during the 1961-1980 period, Turkish politics had withnessed the proliferation of political parties representing all shades of opinion on the political ideological spectrum ranging from the Marxist left to militant nationalism. For a detailed analysis, see Muzaffer Sencer, Türkiye'de Siyasal Partilerin Sosyal Temelleri (The Social Bases of Political Parties in Turkey) (Istanbul: May Yayınları, 1974), pp.256-421; Sabri Sayarı, "The Turkish Party System in Transition," Government and Opposition, 13 (1978).

[73] Some of the students joined the federation of Idea-clubs encouraged by the Labor Party of Turkey, some others, less in number joined other organizations established by the right-wing Republican Peasant National Party. For a general assesment of the student radicalization during the decade, see Özer Ozankaya, Üniversite Öğrencilerinin Siyasal Yönelimleri (The Political Tendencies of University Students) (Ankara: Ankara Üniversitesi Siyasal Bilgiler Fakültesi, 1966); Jacob M. Landau, Radical Politics in Modern Turkey (Leiden: Brill, 1974), pp.29-44.

[74] Alev Er, Bir Uzun Yürüyüştü 68 (The Long March of 68) (Istanbul: Afa Yayıncılık, 1988), pp.85.

Soon there appeared to be a deteoriation in the political situation marked by a rising violence, fragmentation of political parties and a weak government. In the face of continuously rising violence, especially on the part of the leftist militant groups, on March 12, 1971 the military coup by communique took place, forcing the government to resign.

The Grand National Assembly and the government were largely held responsible by the military for dragging the country into anarchy and social unrest. In this regard, the main issue on the political agenda soon after the coup had been the enactment of a series of constitutional amendments which were to strengthen the hand of the government in governing the country and dealing with dissident violence-prone groups. In this respect, the liberal character of 1961 Constitution - which had granted extensive individual rights - underwent profound changes.[75] The prohibition of civil servants to be members of trade unions, the prolongation of the period of detention from seven to fifteen days, and the authorization of the executive with the power to enact decrees having the force of law had been the most striking amendments in this respect.[76]

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[75] For the full text of the amendments, see Gözübüyük and Kili, Türk Anayasa Metinleri 1839-1982, pp. 145-217.

[76] For a detailed analysis of the amendmends, see Mümtaz Soysal, Anayasanın Anlamı (The Meaning of Constitution), 4th ed. (Istanbul: Gerçek Yayınevi, 1977), pp.92-100, 287-90; Münci Kapani, Kamu Hürriyetleri (Public Freedoms), 6th ed. (Ankara: Ankara Üniversitesi Hukuk Fakültesi, 1981), pp.127-36.

The bar associations which had always regarded the 1961 Constitution, as a masterpiece with a potential to raise the country to the stage of contemporary civilization, were totally opposed the amendments. As mentioned in a declaration made by the Ankara Bar Association, the restrictions brought on the rights and freedoms were far from constituting solutions to the problems of the country.[77] Moreover, according to the Ankara Bar Association, the political environment that was hoped to be created by the amendments was designed in such a way as to prevent the emergence of public consciousness but serve to the interests of certain power blocks in the country. The bar associations were also dissatisfied with respect to the procedural aspects of the issue. In this respect, being very much in contradiction with the preparation process of the 1961 Constitution, there appeared to be an indifferent attitude on the part of the government towards the views of the bar associations and the TUBA -which had carried in themselves the ultimate responsibility of solving the problems of the country- had been an issue of criticism.[78]

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[77] "Ankara Barosu'nun Anayasa Değişiklikleri Konusundaki Görüşleri," (The Views of Ankara Bar Association on the Constitutional Amendments) Ankara Barosu Dergisi, 1 (1973), pp.186-7. Also see "Türkiye Barolar Birliği'nin 1961 Anayasasının Kabul Ediliş Yıldönümü Nedeniyle 9 Temmuz 1978 Günü Yayınladığı Duyuru," (The Declaration of TUBA on July 9, 1978, for the Anniversary of the Enactmnet of the 1961 Constitution) Türkiye Barolar Birliği Bülteni, 49 (1978), p.9.

[78] Ibid.

It seems that besides aiming to create a strong executive and to limit basic rights and liberties at the individual level, the process of amendment also carried in itself the signs of a distrust towards the ordinary judiciary. This was specifically evident in the additions made to the Article 136 of the 1961 Constitution within the framework of which the State Security Courts had been established.[79]

According to the new version of the Article, these courts had been authorized to deal with offences against the indivisible integrity of the State with its territory and nation, the free democratic order, or against principles of the republic and offences directly involving the internal and the external security of the country. These courts were to be composed of both civil and military judges and public prosecutors, whose term of office were to be three years. As far as the appointment of the staff is concerned, that authority had been given to the Council of Ministers in case of the civil personnel and to the military for the military personnel.[80]

The establishment of the State Security Courts and the procedures these courts were to follow caused

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[79] "T.C. Anayasasının 30., 57., 136., 138., 148. Maddelerinin Bazı Fıkralarının Değiştirilmesi Hakkında Kanun No. 1889," (Code on the Amendment of Articles 30, 57, 136, 138, 148 of the Constitution, No. 1889) Düstur Beşinci Tertip, vol. 12.

[80] "DGM'nin Kuruluş ve Yargılama Usulleri Hakkında Kanun No. 2845," (Code on the Establishment and Civil Procedures of the State Security Courts No.2845) Düstur Beşinci Tertip, vol. 22.

intensive criticisms both on the part of the bar associations as well as many legal professionals of the time. Largely resembling the Tribunals of Independence of the early Republican era which had signified the existence of a complete distrust towards the ordinary judiciary and its personnel, the establishment of the State Security Courts had been regarded as a backward step for the Turkish judicial system. According to a well known legal scholar of the time,

> ...It had been a great misfortune for the legal professionals who had witnessed the era of Tribunals of Independence, to find themselves at the same point again, after half a century... And moreover, the Tribunals of Independence had been established on a temporary bases just to prevent some events endangering the very existence of the newly formed Republic. Where as the State Security Courts had been designed as constitutional institutions having a permanent character which makes the over all picture even worse.[81]

As it has been the case for most of the amendments which were made after the coup, the bar associations were in total opposition towards the establishment of the new courts too. "The unconstitutionality of the project" constituted the main argument of the TUBA.

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81 Hıfzı Veldet Velidedeoğlu, 12 Mart Faşizmin Felsefesi (The Philosophy of March 12, Facism) (Istanbul: Evrim Yayınları, 1990), p. 71.

The main argument made by the TUBA was that such a practice would pave the way for enlargening of the maneauvering sphere of the executive in interfering with the judicial affairs which surely contradicted the constitutional principle of the independence of the judiciary. Having the potential of leading to politicization within the judicial personnel of these courts in the long run, the dominance of the executive especially within the process of appointments courts, had been regarded as to cause a deterioration in the functioning of these courts as judicial organs in the full sense of the term. In other words, according to the TUBA, rather then acting as independent organs of the judiciary, these courts would be the emanations of the executive. The following declaration of the TUBA makes this point clear: "The reason for our Associations' negative stance with respect to the State Security Courts is neither due to an ideological fanatism nor partisanship. The reason is our strong desire to prevent political authorities from dominating justice."[82] On the whole the decision establishing the State Security Courts, was regarded to be the final step which would put an end to the efforts to consolidate the Turkish democracy.[83]

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82 "Türkiye Barolar Birliği'nin Devlet Güvenlik Mahkemeleri Hakkındaki Basın Bülteni," (The Press Declaration of TUBA on State Security Courts) Türkiye Barolar Birliği Bülteni, 39 (1976), p.9.

83 "Türkiye Barolar Birliği'nin 25 Nisan 1971 tarihli Duyurusu," (Declaration by TUBA on April 25, 1971) Türkiye Barolar Birliği Bülteni, 5-6 (1971), pp.1-2.

Another important point that was strongly stressed by the TUBA was the contradiction of such a project with the constitutional principle of the guarantee of "natural judge." This principle prohibits the establishment of extraordinary tribunals having the jurisdiction of removing a person from the jurisdiction of the natural judge. The Article 32 of the 1961 Constitution expresses this principle.[84] However, while constituting one of the arguments put forward by TUBA that showed its opposition with respect to the establishment of State Security Courts, also manifested a disregarded attitude and opposition towards the mentality of the constitutional amendments that had been realized in 1971. In fact the, principle of "natural judge" had been replaced by the principle of "legally designated court" stating that "no one could be put on trial in a court other than the legally designated one within the framework of laws" which had constituted the legal framework of the establishment of the State Security Courts.[85]

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[84] For an overall evaluation of the issue, see "Ankara Barosu Yönetim Kurulu'nun Devlet Güvenlik Mahkemeleri hakkındaki Görüşleri," (The Views of Ankara Bar Association Board of Administrators on the State Security Courts) Ankara Barosu Dergisi, 6 (1976), pp.1148-54; "Türkiye Barolar Birliği'nin Olağanüstü Genel Kurul Bildirisi," Extraordinary General Assembly Declaration of TUBA) Türkiye Barolar Birliği Bülteni, 39 (1976); Teoman Evren, "İhtisas Mahkemeleri," (Specialized Courts) Ankara Barosu Dergisi, 3 (1978), pp.425-30.

[85] For a detailed analysis of the above mentioned principles, see Bülent Tanör, Türkiye'nin İnsan Hakları Sorunu 1 (The Problem of Human Rights in Turkey 1), 2nd ed. (Istanbul: BDS Yayınları, 1991), pp.287-292.

With these points in mind, during the process of the establishment of State Security Courts, TUBA started a campaign in order to prevent the actualization of the project. According to the TUBA, the best solution lied in the realization of a judicial and legal reform, instead of the establishment of these extraordinary courts which would damage the prestige of the Turkish judiciary.[86] In this respect, while trying to convince the public opinion, the TUBA made recourse to the president of the Republic in order to stop the enactment of the law.[87] But the result was a total disappointment. One of the most important point that must be mentioned in this respect was the position of the attorney parliamentarians during the enactment process of the law. As it has been the case during the parliamentary debates concerning the social security rights of the attorneys noted above, there appeared to be an indifferent attitude on the part of the attorney parliamentarians towards the stance of the bar associations. While being an indication of the ineffectiveness of bar associations to effect the law making process through their parliamentarian members, such a detachment was regarded as a betrayal towards the profession and its ideal of protecting the rule of law and democracy.[88]

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[86] Kemal Sarıibrahimoğlu, "Güvenlik Mahkemeleri Gerekli mi?," (Are State Security Courts Necessary?) Ankara Barosu Dergisi, p.775-6.

[87] Faruk Erem, "DGM'nin Durumu," (The Position of State Security Courts) Cumhuriyet, December 18, 1976.

[88] Velidedeoğlu, 12 Mart Faşizmin Felsefesi, pp.149-150.

Besides the establishment of extraordinary courts however, there also appeared to be other issues which had signified a complete distrust of the executive towards the judiciary and their system of justice during the 1970s. While manifesting itself as a dominating attitude on the part of the executive towards the judiciary as it had been in the case of State Security Courts, such a distrust had also shown itself as a complete detachment both on the part of the government towards the decisions of the judiciary. The most significant example of such an attitude had been the resistance of the government in applying the decisions of the Council of State -the court of the last instance for reviewing decisions made by the administrative courts. This stance had not been in line with the Article 132 of the Constitution which stipulated that the legislative, executive and the administrative authorities were obliged to act in conformity with the court decisions. However, governments, largely viewed these decisions as obstacles which reduced their effectiveness in governing the country; the latter resorted to legal covers and made use of the loopholes in the rules and regulations.[89] According to the then head of the Justice Party and Prime Minister Süleyman Demirel "It was impossible for the government to rule the country within an atmosphere which was characterized by the existence of a Constitutional

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[89] See Cahit Tutum, "Türk Personel Sisteminin Sorunlarına Genel Bir Yaklaşım," (A General View on the Problems of Turkish Personnel System) Amme İdaresi Dergisi, 13 (1980), p.103.

Court stronger than the National Assembly and a Council of State stronger than the government...."[90] Bar associations considered such a mentality as one opposed to the rule of law. Regarded to be "...a symptom of the bankruptcy of the Turkish state...and a serious attack on the rights of the individual...'[91] by the then head of TUBA, this very issue caused a total discomfort on the part of the bar associations. For the first time in the bar associations history, a fully organized protest was made under the leadership of the TUBA. March 4, 1977 was declared as "Condemnation Day" and the attorneys were requested not to show up in court.[92] Although, this act caused no significant change of course on the part of the government, it at least served as a warning and showed the authorities the concern of the bar associations concerning the judicial issues and their influence upon members.[93]

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[90] Tercüman (Istanbul daily), January 11, 1976.

[91] "Danıştay'ın 108. Kuruluş Yıldönümü nedeniyle Türkiye Barolar Birliği Başkanı Faruk Erem'in Yaptığı Konuşma," (Speech by Faruk Erem - the head of TUBA - During the 108th Anniversary of the Council of State) Türkiye Barolar Birliği Bülteni, 7 (1976), p.12.

[92] "4 Mart 1977 Kınama Günü ile ilgili Duyuru (1977/41-2)," (The Circular (1977/41-2) Concerning The March 4, 1977 Condemnation Day) Türkiye Barolar Birliği Bülteni, 8 (1977), p.1.

[93] Such an attempt had largely been welcomed by the majority of the Attorneys all over the country. Only some attorneys from Erzurum Bar Association had not confirmed the a decision and been harsly criticized. See, Hıfzı Veldet Velidedeoğlu, "Bir Tek Söz Bekledim," (I Longed for a Word) Cumhuriyet, March 5, 1977.

Another act which was organized by the Istanbul Bar Association for protesting the overall policies of the government in the legal and the judicial sphere, including the State Security Courts, the non-execution of the court decisions by the government, and the violation of the Constitution, took place on April 17 of the same year. On this occasion, all bar members marched in Istanbul demanding "respect for law." Blaming the Nationalist Front government[94] for aiming to bring fascism into the political arena, the head of the Istanbul Bar Association explained the rationale of their protest in as follows:

> ...The march that has been organized by the Istanbul Bar Association is a warning concerning the anti-democratic practices of the government. Our bar is prepared to put on a struggle with all its might in order to preserve the rule of law and democracy in the country. The ones who aim to bring fascism to the country will never succeed. We, as the members of the Istanbul Bar Association will always stand against them and do whatever is necessary for protecting our country.[95]

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[94] At the time, the Justice Party (Right-of-Center), the National Salvation Party (Religious) and the National Action Party (Ultra nationalist) had been the coalition partners.

[95] "İstanbul Barosu Başkanı Mehmet İkizler'in Yaptığı Açılış Konuşması," (Opening Statement by Mehmet Ali İkizler - the head of the Istanbul Bar Association -) Istanbul Barosu Dergisi, 1-2-3-4 (1976), pp.14-5.

While receiving an overwhelming support from the individual bar associations all over the country, the protest created a wide range of public opinion. Many people in Istanbul had attended the march. The press, with the exception of some rightist newspapers which harshly blamed the Bar associations for their anti-governmental stance,[96] also regarded the march as a positive step. However, what was most striking about the protest was extensive support that it had received from various interest groups including the Istanbul Medical Association, the Association of the Teachers Union of Turkey(TÖBDER), Association of Technical Personnel Union of Turkey(TÜTED), and several Chambers of Engineers and Architects in Istanbul.[97]

The Attacks on the Right of Defence and Professional Freedom

Being a significant part of the deterioration that the Turkish judicial system witnessed during the 1970s, the attacks on the right of defense, constituted the most problematic issue with regards to the state-bar association relationship.[98] In fact, the reason for this confrontation lied in the fact that, besides being very

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[96] Exemplary is the article; Bedii Faik, "Yürüyen Baro," (Bar Association on the Road) Tercüman, April 18, 1976.

[97] "Yürüyüşün Etki ve Tepkileri," (The Effects of and Reactions to the March) Istanbul Barosu Dergisi, 1-2-3-4 (1976), p.10.

[98] For an eloboration of the right of defence and its significance for the judicial mechanism, see Zeki Hafızoğulları, "Genel Çizgileriyle Savunma Hakkı," (General Features of the Right of Defence) Ankara Barosu Dergisi, 1 (1994), pp. 20-32.

much in contradiction with the rule and supremacy of law which as noted above constituted the most significant ideal for the bar associations, the restrictions concerning the right of defense had also their direct effect on the professional rights and liberties of the attorneys.

First, although the right of defense had been included among the basic rights of the individual in the 1961 Constitution, there appeared to be serious limitations concerning the issue. The most urgent problem in this respect had been the rule about the "secrecy with regards to the evidence" which largely prevented the attorneys from performing their profession and the right of defense. The Article 82 of the Council of State Act[99] and the Article 54 of the High Military Administrative Court of Appeals Court Act,[100] totally prohibits the right of the attorney. It also deprives the accused of the right to examine the documents related with the case. Also, according to the Article 88 of the Criminal Procedures Act,[101] if the disclosure of certain documents was deemed harmful for the security of the country by the

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[99] For the full text of the code, see "Danıştay Kanunu No. 571," (Code of the Council of State No. 571) Düstur Beşinci Tertip , vol. 4.

[100] For the full text of the code, see "Askeri Yüksek İdare mahkemesi Kanunu No. 1602," (Code on the High Military Administrative Court No. 1602) Resmi Gazete, no. 14251, July 20, 1972.

[101] For the full text of the code, see "Ceza Muhakemeleri Usulü Kanunu No. 1412," (Code of Criminal Procedures No. 1412) Meri Kanunlar, vol. 1.

highest authority in a governmental department, then it was impossible for the attorney or accused to use those documents even if they were related with the case.[102] This secrecy concerning the evidence which had left its footprints on the judicial mechanism during the 1970s regarded by the bar associations as a factor which had "...deteriorate the equality of the state and the citizen behind the court in favour of the former...."[103]

A second problematic issue which attracted the reaction of bar associations since the early 1970s was the rule of secrecy during the police interrogations.[104] Although there were no legal restrictions in any of the codes as it has been the case with regards to the secrecy of evidence as noted above, the accused particularly in the criminal cases was prohibited from contacting his attorney during the police interrogation and while he was under detention.[105] Constituting an integral part of the

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[102] For the details of similiar practices in Germany, see Faruk Erem, "Avukat Croissant Olayı ve Verilen Hüküm," (The Incident of the Attorney Croissant and the Final Judgement) Ankara Barosu Dergisi, 2 (1979), pp.6-10.

[103] "Ankara Barosu Başkanı Teoman Evren'in 40. Genel Kurul Toplantısında Yaptığı Konuşma," (The Statement by Teoman Evren - the head of the Ankara Bar Association - during the 40th General Assembly) Ankara Barosu Dergisi, 1 (1978), p.148.

[104] "Türkiye Barolar Birliği'ince Cumhurbaşkanı, Meclis Başkanı ve Genel Kurmay Başkanına Gönderilen Rapor," (The Report of the TUBA Submitted to the Presidency of the Turkish Republic, the Presidency of the Turkish Grand National Assembly, and the Presidency of the General Staff) Ankara Barosu Dergisi, 3 (1980), pp.423-7.

[105] Concerning this issue, the TUBA has received many complaints from the attorneys. See "Burdur Barosuna Bağlı Bazı Avukatların

limitations which was brought on the right of defense and freedom to claim rights, such a practice was regarded by the TUBA as being totally in contradiction with the principle that "defense must start as soon as conviction starts."[106]

Besides the argument concerning the negative effects of such a practice on the individual's right of defense many of the attorneys regarded the issue as a policy choice on the part of the police to camouflage torture which was said to be an integral part of the police interrogations during the period.[107] In fact, there appeared to be many complaints on the part of the

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Müvekkileri ile Görüştürülmemeleri no:1976/ 40-5," (The Prohibition of Contact Between the Attorneys of Burdur Bar Association and Their Clients no:1976/40-5) Türkiye Barolar Birliği Bülteni, 36 (1976), p.13; "Istanbul Barosuna Bağlı Bazı Avukatların Müvekkilleri ile Görüştürülmemeleri no:1976/37-7," (The Prohibition of Contact Between Some Members of Istanbul Bar Association and Their Clients 1976/37-7) Türkiye Barolar birliği Bülteni, 37 (1976); "Ordu Barosuna Bağlı Bazı Avukatların Müvekkileri ile Görüştürülmemeleri, no:1976/40-12,"(The Prohibition of Contact Between Some Members of Ordu Bar Association and Their Clients no:1976/40-12) Türkiye Barolar Birliği Bülteni, 40 (1976), p.21.

106 "Türkiye Barolar Birliği'nin Sakarya Toplantısında Sunulan Bildirisi," (Declaration of the TUBA Submitted in the Sakarya Meeting) Türkiye Barolar Birliği Bülteni, 41 (1977), p.3.

107 For such an assesment, see "Türkiye Barolar Birliği 11. Genel Kurul Bildirisi," (The 11th General Assembly Declaration of the TUBA) Türkiye Barolar Birliği Bülteni, 47 (1978), pp.14-5; "Türkiye Barolar Birliği'nin 30 Nisan-2 Mayıs 1977 Tarihinde İzmir'de Yapılan Olağanüstü Genel Kurul Toplantısında Sunulan Bildirisi," (The Declaration of the TUBA Submitted in the Extraordinary General Assembly in Izmir on April 30 - May 2, 1977) Türkiye Barolar Birliği Bülteni, 42 (1977), p.14.

attorneys who had regarded it to be an urgent problem with must be coped with. Especially during the mid 1970s, the subjection of the accused to torture as well as ill treatment had turned out to be a very hot issue which caused a conflictual relationship between some of the bar associations and the state. The Ankara Bar Association had been very sensitive regarding the issue, as it appeared to be the first association which had declared its critical views concerning the problem, by denouncing the state authorities for "committing the greatest crime of the human race and in the process causing a deterioration within the justice system."[108]

There appeared to be considerable amount of ill treatments and attacks by the police directly towards the attorneys, too. This had been true particularly in the case of the attorneys who defended political criminals political criminals. Here, the police was largely hampering the professional freedom of attorneys.[109]

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[108] In this respect, see "Ankara Barosu Bildirisi: Yetkililer İşkence İddialarına Cevap Vermelidir," (The Declaration of the Ankara Bar Association: The Authorities Should Respond The Claims of Torture) Yeni Halkçı (Ankara daily), November 30, 1973; Yekta Güngör Özden, "İşkence Devlete Kötülük, İhanettir," (Torture is Treachery and Doing Evil to the State) Ankara Barosu Dergisi, 2 (1974), p.355.

[109] There appeared to be many applications to TUBA on the part of attorneys in order tc to take measures for preventing such a situation, see "1977/42-11 Sayılı Dilekçe," (Petition, no:1977/42-11) Türkiye Barolar Birliği Bülteni, 42 (1977), p.18; "1977/45-8 Sayılı Dilekçe," (Petition, no:1977/45-8) Türkiye Barolar Birliği Bülteni, 45 (1977), p.14; "1978/48-13 Sayılı Dilekçe," (Petition, no:1978/48-13) Türkiye Barolar Birliği Bülteni, 48 (1978), p.23.

There seemed to be one basic reason for this state of affairs. First, in the eyes of state authorities attorneys who defended political criminals were no longer professionals but attorneys of certain ideologies. In fact, the attorneys who were defending the political criminals, seemed to be identified with the views of their clients. It was claimed that, rather than being professionals performing their professions in the court room, they mirrored with the views of their clients that they had represented.[110]

Besides this rather micro perspective however, such an attitude on the part of the state authorities can well be regarded as having its roots in the general attitudes of the attorneys towards the system. Thus, it can be regarded as a manifestation of the distrust towards the attorneys due to their largely negative stance with regards to the policies of the governments and the conflictual relationship between the governments and the bars.

Bar Associations as "Outsider Groups"

As noted above, there appeared to be a discomfort on the part of the bar associations towards the decisions and practices of the governments in the legal and the judicial sphere particularly since the coup by

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[110] For a general evaluation of the role of attorneys with respect to political cases, see Faruk Erem, Siyasi Davalarda Müdafilik (Defence in the Political Cases) (Ankara: Sevinç Matbaası, 1971).

communique of 1971. The governments were always accused of being incapable of bringing peace and quite in the country[111] but instead causing a deterioration in government.[112] What happened during the period was the total politicization of the echelons of the state, as there appeared to be a continuing effort on the part of the governments to politicize the bureaucracy in order to make them completely subservient to themselves.[113] Also the relative exhaustion of Kemalism which began as early as the 1950s, seemed near completion.[114] Although, Kemalism still was the dominant ideology, it became a cover for other ideologies, ranging from extreme rightist to leftist ones.

Parallel to the developments, the bar associations - basically maintains their Kemalist orientation and

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[111] Teoman Evren, "Anarşi," (Anarcy) Ankara Barosu Dergisi, 1 (1978), pp.3-4.

[112] For an evaluation of the discomfort on the part of the bar associations with respect to the politicization within the echelons of the state, see "Türkiye Barolar Birliği 9. Genel Kurul Toplantısında Ankara Barosu Başkanı Nejat Oğuz'un Yaptığı Konuşma," (The Statement by Nejat Oğuz - the head of the Ankara Bar Association - During the 9th General Assembly of TUBA) Ankara Barosu Dergisi, 1 (1976), pp.3-5.

[113] It was specifically during the period of Nationalist front governments (1975-1977) that bureaucracy had been extremely politicized. See Metin Heper, "Recent Instability in Turkey: End of a Monocentrist Polity," International Journal of Turkish Studies, 1 (1980).

[114] Frederic Frey, "Patterns of Elite Politics in Turkey," in Political Elites in Turkey, George Lenczowski, ed. (Washington D.C.: American Research Enterprise for Public Policy Research, 1975), p.10.

undertaking into themselves the ultimate responsibility of warning the authorities for preserving the Kemalist heritage - had usually been in opposition with governments' policies specifically in matters related to the legal and judicial spheres, in particular rule and supremacy of law.

In fact, when the state-bar association relationship during the 1970s is compared to the previous decades, it can be said that there emerged a more conflictual relationship between the bar associations and the state. Although there appeared to be a continuity with respect to purely professional matters like the supervision of the state over the bar associations through the tutelage of the Ministry of Justice[115] or the state policies towards the judges as it has been the case during the DP period, during the 1970s, bar associations, involved themselves in broader issues, too. Such diversification of concerns on the part of the bar associations had the potential of being regarded by the governments as an interference to the functioning area of the state by bringing into the agenda the questioning of its effectiveness in coping with the problems specifically the realization of justice over which the state had the monopoly as well as democracy which had still been evaluated as an end in itself- that of finding the "one

[115] In this respect, throughout the 1970s the enactment of a new code on attorneyship had always been on the agenda of bar associations.

best way" rather than of satisfying group interests.[116] In this respect, opposition and defensive attitudes on the part of the bar associations, while from time to time, had caused the formation of an hostile attitude on the part of the state elites-which had been largely replaced by their political counter parts- towards some attorneys, also caused a detachment towards the associational interests by the state authorities.

Although the 1970s had signified a period of dynamism and increasing political consciousness on the part of the bar associations, they acted as an "outsider group" as their interest group activities took the shape of public campaigning and protest, rather than an "insider" one having direct access to ministers and civil servants.[117] This was due to the disinterestedness and hostility on the part of the authorities.

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[116] Heper, "The State and Interest Groups with Special Reference to Turkey," in Strong State and Economic Interest Groups: The Post-1980 Turkish Experience, Heper, ed., p.19.

[117] Terminology has been adopted from, Wyn Grant, "Insider Group, Outsider Group, and Interest Group Strategies in Britain," unpublished paper (1977), cited in Graham K. Wilson, Interest Groups (Oxford: Basic Blackwell, 1990), p.92.

Chapter Five

STATE vs. BAR ASSOCIATIONS IN THE POST-1980 PERIOD: A POLITICS OF PARADOX?

The Bar Associations in the Early 1980s

During the early 1980, Turkey had been under the pressure of a multi-faced crisis. Besides the economic instability - which was characterized by a sharp increase in inflation rate, the balance of payments deficits, industrial slow-downs, foreign debt problem -,[1] democracy was also in trouble. Increased street violence and civil strife due to the ideological fragmentation and polarization within all the echelons of the state and society, including organized labor, professions, civil bureaucracy and even the security services, as well as lack of a capable government, constituted the most critical issues which had to be solved in order to attain political stability.[2] In fact, the parliament had been under a situation of a total deadlock even failing to

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[1] For a detailed analysis of the economic crisis during the mentioned period, see Peter Wolf, Stabilization Policy and Structural Adjustment in Turkey, 1980-1985 (Berlin: German Development Institute, 1987); Yakup Kepenek, Gelişimi, Üretimi ve Sorunlarıyla Türkiye Ekonomisi (Turkish Economy with Its Development, Production, and Problems) (Ankara: Savaş Yayınları, 1983), Chapter 6; Bilsay Kuruç et. al., Bırakınız Yapsınlar Bırakınız Geçsinler; Türkiye Ekonomisi 1980-1985 (Laissez Faire Laissez Passez; Turkish Economy 1980-1985) (Ankara: Bilgi Yayınevi, 1986).

[2] For a detailed elaboration of the factors that gave way to the political crisis see C. H. Dodd, The Crisis of Turkish Democracy, (Walkington: The Eothen Press, 1990), Chapter 2.

elect a president of the Republic for six months.[3] And, it is surprising that Prime Minister Süleyman Demirel of the Justice Party, who had formed a minority government that avoided confronting the parliament, "even seemed to prolong the deadlock over the presidency in order to prevent the conduct of other legislative business."[4]

Under these conditions where the state was incapable of maintaining order and administering the law, Turkish political life witnessed the third coup d'etat of its history. It was in September 12, 1980 that a temporary abandonment of democracy took place, with the seizure of the power by the Turkish Armed Forces which again had the ultimate aim of reconstructing the political system thus restructuring democracy as it had been the case during the previous military interventions of 1960 and 1971.

In the military's view, politicians had miserably failed in their task of governing the country in a rational and civilized way. The political parties and their leaders were regarded to have the ultimate responsibility for the major sources of emerging terrorism, chaos and the erosion in public authority.[5]

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[3] For an elaboration of the parliamentary problems in late 1970s, see Turan Güneş, Araba Devrilmeden Önce (Before the Car Crashed) (Istanbul: Kaynak Yayınları, 1983), pp.23-30.

[4] Metin Heper, The State Tradition in Turkey (Walkington, England: The Eothen Press, 1985), p.124.

[5] İlter Turan, "Political Parties and the Party System in Post-1983 Turkey," in State, Democracy and the Military in Turkey in the 1980s, Metin Heper and Ahmet Evin, eds. (Berlin: Walter de Gruyter, 1988), p.68.

Having totally lost their trust towards the governments in solving the problems of the country as well as accusing the political parties and constitutional institutions for keeping silent, the military had explained the rationale of the intervention as both to maintain the national unity and territorial integrity of the Republic which was claimed to be undermined by treacherous ideologies as well as by direct attacks initiated by internal enemies, and to reconstruct the Atatürkist state.[6] Accordingly, defining the military as the most passionate guardian of Atatürkist thought, General Kenan Evren, the Chief of the General Staff, the head of the National Security Council which stayed in power until the general elections of November 6, 1983, and the president of the republic between November 1982-November 1989, underlined the fact that:

> ... Turkish Armed Forces would never allow the Turkish Republic to be taken over by the traitors....For them the most important thing was not the general welfare of the nation but the interests of their political parties. The sole raison d'etre of the Turkish Armed Forces is to defend this country as an indivisible whole against its internal as well as external enemies, and to see to it

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[6] Dodd, The Crisis of Turkish Democracy, p.50.

that this country will always be secure and its citizens happy and well-cared for.[7]

It must be mentioned that, the 1980 military intervention had enjoyed broad popular support from the general public. This was largely due to the military's short term goal of giving an end to the rising violence and terror in the country. Being alienated from politicians and politics of the seventies, many groups, looked to the military as a final hope for peace and order.[8]

Bar Associations did not constitute an exception in this regard. In a letter signed by Atilla Sav, the head of Turkish Union of Bar Associations (TUBA) then, and sent to General Evren just after the intervention on December 12, 1980, the bar associations had made their views known regarding the intervention. Declaring their strong commitment towards democratic regime and its institutions, bar associations thought that the intervention had to be evaluated within the framework of the conditions that Turkey faced in the late 1970s. In fact, although at the theoretical level they seemed to be against the coup d'etat in the name of a well functioning democracy and the rule of law, they still declared their

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[7] Frank Tachau and Metin Heper, "The State, Politics, and the Military in Turkey," Comparative Politics, 16 (1983), p.29.

[8] For detailed information concerning the views of different groups in Turkey towards the military intervention, see Nurşen Mazıcı, Türkiye'de Askeri Darbeler ve Sivil Rejime Etkisi (The Military Interventions in Turkey and Their Effect on Civil Regime (Istanbul: Gür Yayınları, 1989), pp.186-222.

trust to the military specifically due to the short-term goal of the intervention of eliminating the terror from which many attorneys had also suffered.[9]

Such a viewpoint had also been expressed by one of the attorneys during the fourteenth General Assembly meeting of the TUBA as follows:

> ... Before the intervention what was on the political and social scene had been a chaos growing day-by-day and threatening the country with a total destruction. In such a situation of the Turkish state facing extinction, I would surely be on the side of saving the state first, rather than choosing the supremacy of law. In this respect, we must be on the side of the military for the sake of putting an end to violence which had affected many of our members during the 1970s and then think of reconstructing the rule of law which constitutes a most holy concept for all of us.[10]

In addition to the belief in the military's short term goal, such a viewpoint on the part of the bar associations with respect to the 1980 intervention inherently had its roots in the long-term goal of

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[9] "Devlet Başkanı Sayın Orgeneral Kenan Evren'e Sunulan Mektup Metni," (The Letter Submitted to the President of the Republic General Kenan Evren) in Türkiye Barolar Birliği XIV Genel Kurul Tutanağı (The 14th General Assembly Minutes of TUBA), 16-18 Mayıs 1981, Ankara, pp.22-3.

[10] Türkiye Barolar Birliği XIV Genel Kurul Tutanağı, p.37.

reconstructing democracy and reinvigorating Atatürkism and the Atatürkist state. Assuming the military rule as a transitionary period, the bar associations were very much interested in a return to the democratic regime as soon as possible.[11]

During the interregnum(1980-1983), the entire country was put under martial law; all political parties were permanently banned; almost all associational activity was stopped; three of the four labor confederations were closed and their leaders were put on trial and convicted; and, labor lay-offs, collective bargaining, strikes as well as lockouts were suspended. The bar associations were rather tolerant to these developments due to their belief in the temporary suspension of democracy in the name of saving the country from ruins.

However, as far as some other practices of the military rule were concerned, there appeared to be some problems and from time to time the bar associations displayed strict opposition to the military. The bar associations gradually became very much bothered with respect to the policies pursued by the military in the field of law and judiciary.

The limitation of freedom to claim rights of the accused, the restrictions regarding attorneys face-to-face contact with the accused, and the claims concerning torture had been the major issues that were particularly

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11 "Devlet Başkanı Sayın Orgeneral Kenan Evren'e Yollanan Mektup Metni," in ibid., p.22-3.

criticised by the bar associations.[12] In fact, in addition to the criticisms of the bar associations, some of these practices had also drawn the attention of international organizations; the issue of torture of the accused had been given priority. Though, the military regime admitted that only a small number of cases of torture had occurred,[13] both the bar associations as well as Amnesty International constantly attempted to show that torture was adopted as a consistent policy by the Turkish police.[14]

Another issue that attracted the attention of bar associations was the legislations enacted during the period in question. The bar associations were rather uncomfortable with respect to the substance and form of the laws as well as the preparation process. Regarding themselves as specialists within the field of law, thus experts, whose views must be taken into consideration during the preparation of laws and regulations at least with respect to form, most of the attorneys came into

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[12] For a detailed disscussion of these points see, Türkiye Barolar Birliği XVI Genel Kurul Tutanağı (The 16th General Assembly Minutes of TUBA), 13-15 Mayıs, 1983, Antalya, p.81-6; Also see "Ankara Barosu Başkanı Muammer Aksoy'un Konuşması," (The Speech by Muammer Aksoy - the head of the Ankara Bar Association -) in Türkiye Barolar Birliği XIV. Genel Kurul Toplantı Tutanağı, 16-18 Mayıs, 1981, Ankara, pp.2-9.

[13] Dodd, The Crisis of Turkish Democracy, p.55.

[14] In fact, the existence of torture had always been a point of criticism during the 1980s. In this respect, see Bülent Tanör, Türkiye'nin İnsan Hakları Sorunu 1 (The Problem of Human Rights in Turkey 1) (Istanbul: BDS Yayınları, 1991), p.33-39.

opposition with the military due to the military's giving shortshrift to them and other jurists.[15] Soon the same concerns on the part of the bar associations appeared on the agenda in relation with the new 1982 Constitution.

The 1982 Constitution and the Bar Associations

General Framework of the Constitution: The Views of the Bar Associations

It had been with the 1982 Constitution that the military prepared the legal framework in which the state would be strong, capable, and autonomous vis-a-vis the civil society. In fact, the basic goal of the framers of the new constitution had been to bring the state back in.[16] In many of his public speeches, besides blaming the politicians for their incapability in governing the country,[17] General Evren held the 1961 Constitution responsible for the chaotic situation Turkey faced before the intervention. According to Evren "...the 1960 Constitution had been a luxury for the country. There had been many missing points, of which some wicked people

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[15] "Devlet Başkanı Sayın Orgeneral Kenan Evren'e Gönderilen Mektup Metni," in Türkiye Barolar Birliği XIV Genel Kurul Tutanağı, p.22-3.

[16] For an elaboration, see Tachau and Heper, "The State, Politics, and the Military in Turkey," Comparative Politics, pp.28-32.

[17] The most significant manifestation of viewing the pre-1980 politicians as potential threats for the recurrence of violance and political paralysis on the part of the military had been the adoption of the constitutional provision which banned the leading political figures as well as some politicians from active involvement in politics. The total number in this respect had been 723, out of which 242 has been banned for ten years and 481 for five years. The bans were lifted later in a special referendum held on September 6, 1987.

took the advantage. In fact, such acts led both to the Communique of March 12, 1971 as well as the military intervention of September 12, 1980."[18]

With such discontent concerning the 1961 Constitution on the part of the military, the Consultative Assembly which on October 23, 1981 had started the work on the drawing up of the 1982 Constitution, appointed a committee composed of fifteen members under the chairmanship of Professor Orhan Aldıkaçtı. The Committee completed devising the draft Constitution on July 17, 1982. After its approval by the Consultative Assembly, the draft was approved by the National Security Council that functioned as the upper legislative body with final authority) with certain amendments and became the law of the land following the referendum in November 1982.

When compared to the previous constitution, one of the most significant points that had been the focus of criticisms was the way in which the 1982 Constitution was prepared. The Constitution was prepared without feedback from the civil society. In fact, the 1981 Consultative Assembly in contradiction with the 1960 Constitutive Assembly of 1960 had not been constructed on an

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[18] Türkiye Cumhuriyeti Devlet Başkanı Orgeneral Kenan Evren'in Söylev ve Demeçleri(12 Eylül 1980 - 12 Eylül 1981) (The Speeches and Statements of the President of the Turkish Republic) (Ankara: Başbakanlık Basımevi, 1981), p.67. Also see Kenan Evren, Zorlu Yıllar I (Hard Years I) (Istanbul: Milliyet Yayınları, 1994), p.363; Kenan Evren, Kenan Evren'in Anıları (The Memoirs of Kenan Evren), vol.3 (Istanbul: Milliyet Yayınları, 1991), p.207.

associational basis.[19] In the Consultative Assembly, the views of the bar associations as some other associations had not been represented. In order to fill such a gap, the Constitutional Committee had welcomed comments and suggestions from universities as well as several professional organizations, including the Confederation of Employer's Associations(TISK) and the Confederation of Workers' Union(TÜRK İŞ). Perhaps paying slightly more attention to the views of the TISK and TURKIŞ, the Committee largely ignored the other views.[20]

Such an indifferent attitude by the assembly had been the focus of criticism for the bar associations, as they considered themselves among the primary group whose views must be seriously taken into consideration specifically during the making of a new constitution. In this regard, the bar associations held special meetings; the attorneys discussed the draft constitution and prepared an alternative constitution. Moreover, the associations let the Consultative Assembly know the points they did not agree within the draft by submitting a report to the Assembly on July 17, 1982.[21] The bar associations' result

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[19] For the details of the preparatory process of the 1982 Constitution see Bülent Tanör, İki Anayasa 1961-1982. (Two Constitutions 1961-1982) (Istanbul: Beta Basım yayım Dağıtım A.Ş., 1986), pp.99-107; Burhan Kuzu, 1982 Anayasasının Temel Nitelikleri ve Getirdiği Yenilikler (The Main Characteristics of the 1982 Constitution and Its Novelties) (Istanbul: Filiz Kitabevi, 1990), pp.24-30.

[20] Dodd, Crisis of Turkish Democracy, p.78.

[21] See Türkiye Barolar Birliği XVI Genel Kurul Başkanlık Raporu ve Yönetim Kurulu Çalışma Raporu (The 16th General Assembly Presidential

was a total disappointment, none of the points in the report had been taken into account in the preparation of the final text of the constitution.

As far as the substance of the 1982 Constitution was concerned, one of the most striking aspect had been the extension of the rights of the president as well as those of the executive. According to the bar associations the most dangerous aspect of such an arrangement was the deterioration of the balance of power between the executive and the judiciary in favor of the former. In other words they had suspicions concerning the protection of the independence of the judiciary vis-a-vis the executive within the framework of the new constitution.

The most significant argument in this respect, had been the extension of appointment powers of the president of the Republic in the field of judiciary. Whereas under the 1961 Constitution the president was authorized to appoint only two members of the Constitutional Court out of fifteen, under the new constitution he was given the right of appointing all the members(Article 146). In the same way, the president had been given the right to appoint one fourth of the judges of the Council of the State(Article 155), who were previously appointed by the Constitutional Court, the Council of State and the Council of Ministers. Perhaps the most significant point which had been stressed by the bar associations in the said report had been the selection method of the members

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Report and Board of Directors Working Paper of TUBA) 13-15 Mayıs, 1983, Antalya, pp.44-63.

of the Supreme Council of Judges and Public Prosecutors. This council is responsible for the admission of judges and public prosecutors of the courts of justice and administrative courts into profession, their appointments, transfer, promotion and removal from office. Under the 1961 Constitution, the members of the council were elected by the plenary session of the Court of Cassation. According to the 1982 Constitution, the president of the Republic was given the power to appoint the members of the Council from among the candidates nominated by the Court of Cassation and the Council of State. The same constitution involved the government in the judicial sphere, too. The Minister of Justice himself was made the president of the Council, and the under-secretary of the Ministry was made an ex-officio member of the Council(Article 159). According to the bar associations, the above arrangements had contained the seeds of a potential politization of the judiciary.

Another important area with regards to 1982 Constitution which was underlined by the bar associations, had been the limitations put on the "Fundamental Rights and Duties." Although the 1982 Constitution recognized all the basic rights and liberties which are found in liberal democratic constitutions, the manner in which the rights were regulated was more restrictive than it had been the case in the 1961 Constitution.[22] In fact, what constituted the

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[22] Ergun Özbudun, "The Rule of Law under the Constitution of 1982," in Perspectives on Turkish Democracy, Ergun Özbudun, ed. (Ankara:

main argument of the bar associations had been this restrictive style. According to attorneys, the circumstances under which the rights and liberties would be the subject of restrictions were specified in such a detailed form and numerously that in the final analysis this damaged the core, and, thus the content of the rights and liberties.[23]

The bar associations specifically referred to the limitations on the free exercise of individual rights and liberties with the purpose of maintaining national security and public order. One of the most often mentioned criticisms in this respect had been the article on "Personal Inviolability, Material and Spiritual Entity of the Individual" (Article 17). According to the bar associations the restrictions within the framework of certain circumstances to personal inviolability were so heavy that the article had a strong potential of being a legitimization of death penalty on the one hand, and seemed to open the way for the security forces to violate the material and spiritual entity of the citizens on the other.[24]

Turkish Political Science Association, 1988), p.198.

[23] This point had been elaborated by the head of the Istanbul Bar Association, Turgut Kazan, who had been a member of the Basic Rights Commission, formed by TUBA for the purpose of evaluating the basic rights within the framework of the draft constitution and preparing the said report. See Türkiye Barolar Birliği VI. Olağanüstü Genel Kurul Tutanağı (The Minutes of the 6th General Assembly of TUBA), 2-4 Ekim 1982, Ankara, p.33.

[24] Ibid., p.38.

Finally, the bar associations focused on some of the provisions related to the protection of rights. Exemplary has been the "Freedom to Claim Rights"(Article 36), according to which "Everyone had been given the right of litigation either as plaintiff or defendant before the court through lawful means and procedure." Although being very much in favor of such an article, its silence on the "duty of the state authorities to appoint an attorney for the accused who lack the necessary financial means," as it has been the case in some Western constitutions, had been considered to be an important weakness for the Turkish judicial system.

On the whole the new Constitution proved to be far away from what the bar associations expected it to be. According to them, the 1982 Constitution signified a reaction towards the 1961 Constitution and the political system that the latter had aimed to set up in Turkey. In this respect, as mentioned at a press conference that organized by TUBA, "...with all its limitations on the rights and liberties as well as with some of its articles which had strong signs of a distrust towards the judiciary, even aiming to pacifize it, the 1982 Constitution has been a retrogression for Turkish democracy...."[25]

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[25] See "Türkiye Barolar Birliğinin 14. Kuruluş Yıl Dönümü Nedeniyle Yapılan Basın Toplantısı Metni," (The Text of the Press Conference held for the 14th Anniversary of TUBA) in Türkiye Barolar Birliği XVI. Genel Kurul Başkanlık Raporu ve Yönetim Kurulu Çalışma Raporu, 13-15 Mayıs, 1983, Antalya, pp.34-43.

The 1982 Constitution and the Public Professional Associations

Perhaps the single most important difference between the Turkish Constitutions of 1961 and 1982 had been that "the latter opted for a much less participant and pluralistic version of democracy compared to the former." The different approaches of the two constitutions to interest group politics constituted one of the best starting point to detect this contrast. In this respect, even the 1961 Constitution which has been known as the most liberal one, failed to adopt a purely liberal and pluralistic view of organized interests; its successor had been designed to put them under much stricter governmental controls.[26]

The system designed by the new constitution concerning the organization and representation of interests in the society had been one of the most debated issues that attracted wide range of attention both among professional associations as well as other organized interest groups. The system was based itself totally on a mechanism which would enable the state to strictly control the organized interests. In fact, the 1982 Constitution carried in itself the desire for creating a

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[26] Ergun Özbudun, "The Post-1980 Legal Framework for Interest Group Associations," in Strong State and Economic Interest Groups The Post 1980 Turkish Experience, Metin Heper, ed. (Berlin: Walter de Gruyder, 1991), p.41. For the comparison of the basic characteristics of the two constitutions, see Mümtaz Soysal, "Temel Nitelikleriyle 1961 ve 1982 Anayasaları," (The 1961 and 1982 Constitutions with Their Basic Characteristics) Anayasa Yargısı, (1984), p.9-20.

strong and capable state which would be the "guardian" of the society. As mentioned above what on the whole was envisaged in the new constitution was a depoliticized society.[27] In such a system, while politics were reserved for the parliament, society was expected to preoccupy itself largely with matters of private concern. Such an attempt of depolitization of the society found its best expression in the articles regulating the organized interests. Besides, the private associations and the employers' and the workers' unions, the public professional associations form a part of the organized interests in questions.[28]

Article 135 of the Constitution provides the basic legal framework for the relationship of these bodies with the state. While assigning a dominant role for the state by endowing it powers to interfere in the functioning of the associations, the Article implicitly regulates the state-association interface and, among other things, aims at the pacification of these groups.

The first point that should be made in this respect, has been the limitation brought to the activities of these associations. The public professional bodies were to engage neither in activities outside the aims for which they were established nor in political activities.

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[27] İlkay Sunar and Sabri Sayarı, "Democracy in Turkey: Problems and Prospects," in Transitions from Authoritarian Rule: Southern Europe, Guillermo O'Donnell, Philippe C. Schmitter, and Laurence Whitehead, eds. (Baltimore: The John Hopkins University Press, 1986), p.184.

[28] In this respect, see Articles 33, 51, 52, 53, 54 of the Constitution.

They were also required not to take any joint action with political parties, labor unions, and other associations. Such a ban on the political activities of the public professional bodies can be regarded as the most clear manifestation of the distrust on the part of the framers of the Constitution towards the pluralistic model of politics. In fact, the "necessity" of such a separation between political and associational spheres of activity was also clearly expressed in the speeches of General Evren. Evren believed that each and every institution should act in its own sphere of activity and politics should be reserved only for political parties. Neither the associations nor the political parties should interfere each others space.[29]

What was most shocking for the bar associations was the mechanism designed the state supervision of public professional associations. The Constitution subjected the public professional associations to the administrative and financial supervision by the state. At the request of the state authority designated by law, the responsible organs of the public professional bodies which had not acted in accordance with the mentioned limitations, could be dissolved by a court order. And moreover, with the purpose of safeguarding the existence and independence of the Turkish state, indivisible integrity of the country and nation, peace of the society, and preventing the activities threatening the fundamental characteristics of the state as defined in the Constitution, the highest

[29] Evren, Kenan Evren'in Anıları, vol.3, p.313.

representative of the state in the localities could remove the responsible organs of these bodies from power.

Being evaluated as a strong indicator of the desire of the pacification of public professional bodies, these arrangements had been regarded by the bar associations to be a part of the project of creating a strong executive to govern the country. In this respect, the Article was viewed by the bar associations to be an act of moving away from pluralism and planting the seeds of totalitarianism into the regime in its stead.[30]

Other than these provisions which are directly related to the relationship of these associations with the state, there was another important development concerning the inner functioning of these associations. This development was that the civil servants regularly employed in the public bureaucracy would no longer be required to become members of their respective public professional bodies. According to the bar associations, this was in contradiction with the raison d'etre of the public professional associations as defined in the Constitution. The public professional associations are defined as public bodies established with the objectives of meeting common needs of the members of a given profession, facilitating the latters' professional activities, ensuring the development of the profession in keeping with the common interests, and safeguarding professional discipline and ethics in order to provide

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30 Türkiye Barolar Birliği XVI. Genel Kurul Toplantısı Başkanlık Raporu ve Yönetim Kurulu Çalışma Raporu, p.67.

for integrity and trust in relations among its members and the public. The initiation of the practice of voluntary membership for some professionals would surely make the realization of some of these objectives partly impossible. As was pointed out by the bar associations, as there would be now some non-member attorneys some of the disciplinary measures and ethical rules which the bar associations developed for ensuring the integrity and trust, would not be applicable to everybody in the profession. This would surely have the potential of damaging the image of the profession in addition to the emergence of a double standard within the profession.[31] Furthermore, in the long run, due to the high probability of leading to a decrease in membership as well as a deterioration in integrity, such a system would have negative effects on these associations' relationship with the state in protecting their interests.

The Bar Associations and the Motherland Party Governments, 1983-1989

Some Perceptions on Liberalization and the Rule of Law

The General Elections held on November 6, 1983, that heralded a transition of the Turkish political life from military to civilian rule, had been the first step towards the restoration of democracy in the country. With the prohibition of some newly formed parties which were in fact the continuation of some of the pre-1980 political parties, only the Nationalist Democratic party,

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[31] Ibid., p.73.

the Populist Party and the Motherland Party had been allowed to contest in the said elections. Among these alternatives the centre-right Motherland Party, established by Turgut Özal -- Under-secretary of the Prime Ministry in the Demirel government before the intervention and Deputy Prime Minister during the early phases of the 1980-1983 interregnum -- came to power, having garnered 45.2 percent of the votes.[32] This clear victory for the Motherland Party also signified the beginning of a new era during which in Prime Minister Özal's words, "... a new, harmonious, and an industrialized Turkey would be created."[33]

Defined to be a liberal, anti-state, and anti-bureaucratic party and formed by a group of people from the business world and civil bureaucracy and having in itself four inclinations of liberals, religiously-oriented, nationalists and social democrats,[34] one of the most significant characteristic of the Party's Programme was its emphasis on the free market model for economic development. The radical restructuration of the economy

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[32] For an analysis of the parties that participated in the 1983 elections, see Üstün Ergüder, "Post-1980 Parties and Politics in Turkey," in Perspectives on Democracy in Turkey Ergun Özbudun; ed., pp.126-33. Also see Turan, "Political Parties and the Party System in Post-1983 Turkey," in State, Democracy and the Military Turkey in the 1980s, pp.73-6.

[33] Turgut Özal, "Preface," in The Programme of the Motherland Party, 1983, pp.3-4.

[34] See Üstün Ergüder, "The Motherland Party," in Political Parties and Democracy in Turkey, Metin Heper and Jacob M. Landau, eds. (London: I.B. Tauris, 1991), pp.152-69.

in question, was in total correspondence with the division of labor between the state and political elites that had been envisaged by the 1982 Constitution. In fact, while being an attempt of revitalization of the state, the Constitution had also automatically led to a redefinition and reformulation of the role of the President and National Security Council on the one hand, and the government on the other.[35] In this respect, as mentioned by one of the leading scholars of Turkish politics "The Third Turkish Republic turned out to be a compromise between the state and the political elite. The state and politics were now two different spheres and each had its own executive..."[36] Leaving the political, specifically the economic issues under the responsibility of the political elites, from then on the state elites were made responsible only for the internal as well as external security of the country and preservation of the modernistic features of the polity.[37] Such a pacified statue of the state elites in politics, had very much suited to the Motherland part programme which had been moulded out with the idea of the realization of a liberal

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[35] Kemal Karpat, "Military Interventions: Army-Civilian Relations in Turkey Before and After 1980," in State, Democracy and the Military: Turkey in the 1980s, Heper and Evin, eds., p.154.

[36] Metin Heper, "The Executive in the Third Turkish Republic, 1982-1989," Governance 3 (1990), p.306.

[37] Karpat, "Military Interventions: Army-Civilian Relations in Turkey Before and After 1980," in State, Democracy and the Military: Turkey in the 1980s, Heper and Evin, eds., p.154.

revolution.[38] Emphasizing the need for a decrease in the role of the state, what the Motherland Party aimed was a total restructuration both at the economic and political spheres.[39] In this respect, policies like privatization which had been initiated with the motto of extending ownership to a wider bases and making people to participate to decision making process;[40] extension of the power of local administrative units;[41] and the free market economic model, all had the potential of strengthening civil society. Thus, "The programme of MP did carry within it the seeds for the pendulum to swing from the state through political party to society."[42]

However, the possible consequences noted here were hardly attained. In the final analysis, instead of a liberal political and economic order, a ruler-dominated

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[38] Metin Heper, "The State and Debureaucratization: The Case of Turkey," International Social Science Journal, 126 (1990), p.610.

[39] For a detailed analysis of the views of Mr. Özal in this respect, see Anavatan Partisi Genel Başkanı Turgut Özal'ın 6 Kasım 1983 Seçimi Öncesi Basın Mensuplarıyla 25 Ekim 1983 Tarihinde TRT'de Yaptığı Açık Oturum (The Television Programme of the Head of the Motherland Party, Turgut Özal with the Journalists Held Before the November 6, 1983 Elections on October 25, 1983) (Ankara: Semih Ofset, 1983).

[40] In this respect see, "Başbakan Turgut Özal'ın Basın Toplantıları (7 Ocak 1984 - 30 Kasım 1987) Altıncı Basın Toplantısı Metni," (The Press Conferences of Prime Minister Turgut Özal (January 7, 1984-November 30, 1987): The Text of the Sixth Press Conference) (Ankara: Başbakanlık Basımevi, 1987), p.5.

[41] The Programme of Motherland Party, 1983, p.34.

[42] Metin Heper, "The State, Political Party and Society in the Post-1983 Turkey," Government and Opposition 25 (1990), p.325.

government emerged between the state and civil society. In fact, what Turkish politics witnessed during the 1983-1989 period was the rule of governments which had been very much isolated from the civil societal elements and in turn often dictating their policy preferences towards the civil societal groups as had been the case for bar associations.[43]

However, in addition to the this general orientation of the Motherland Party rule with respect to civil societal groups which surely had its impact on the bar associations, too, there also appeared to be another basic feature that had its effects on the position of the bar associations vis-a-vis the state, which was the governments' views and attitudes concerning the supremacy of law.

As noted above, Özal's rule concentrated first and foremost at achieving a liberal economic order within the framework of which Turkey would be competitive in the international markets. In fact, throughout the 1980s, Prime Minister Özal's overriding aim had been to turn Turkey into a powerful trading and industrial country. In this respect, measures had been introduced to liberalize foreign trade and capital and foreign exchange transactions and to encourage industrial investments. However, contrary to their enthusiasm concerning the economy the governments did not appear to be showing the same sensitivity towards preservation of the rule of law

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[43] Ibid. p. 330-1

in the country, despite the fact that explicit reference had been made to it in the program of the Party.[44]

Besides the constantly changing legal rules, many laws had been enacted which lacked constitutional validity during the period in question.[45] In fact, Özal's attitudes and views concerning law and its application proves to be a very illuminative point for understanding the general atmosphere of the period with respect to the supremacy of law in the country, as Özal has been a very influential figure at all the echelons of the party and administration.[46] Özal's declaration concerning the debate

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[44] In the Article 3 of the Motherland Party Program following points had been made concerning significance of the rule of law in the country; Justice is the foundation of the state.
Ensuring and distributing the justice are among the most important tasks of the state.
Justice guarantees that the civil rights and freedoms. It also guarantees that the freedoms are not used against the public interest.
Equality before the laws is essential.
In order to establish a national unity and togetherness, and to ensure confidence in the State, it is essential that the justice should be implemented evenly among the citizens.
Justice should be swiftly fulfilled; the penalties must be effective and detterent.
It is essential that the legal bodies function independently and objectively.

[45] Between the 1983-1989 period thirty seven of the laws that had been enacted were nullified by the Constitutional Court.

[46] According to Heper, Özal's distrust of people especially of the ones who were not close to him, made Özal to conduct his administration by individual decisions where governmental decisions were required, and by governmental decrees where laws were necessary.

on the date of local elections in 1988 with his following words "No harm can be inflicted by violating the Constitution only once" had perhaps been the best indicator of Özal's disregard towards the rule of law.[47] In fact, for Özal law and logic represented the same thing. According to him if one had the necessary logic for solving the problems than there appeared to be no need for a four year education of law.[48] Özal had been criticised due to his view of seeing the state as a commercial entity and the codes as documents preventing this entity from doing its job properly and efficiently.[49] Thus, there always appeared to be an inherent conflict between economic liberalization and the rule of law. Even after being elected as the President of the Republic on October 30, 1989, Özal had several times been criticized by the bar associations on the grounds of his disregardful attitude both towards the legal rules, thus the supremacy of law, as well as towards the bar associations that had always defined themselves to be the defenders of the rule of law.[50]

See Heper, "The State and Debureaucratization: The Case of Turkey," International Social Science Journal, p.612.

[47] For an elaboration of Mr. Özal's stance with respect to rule of law, see Hasan Cemal, Özal Hikayesi (The Story of Özal) (Ankara: Bilgi Yayınevi, 1989), pp. 115-8.

[48] Yavuz Gökmen, Özal Sendromu (The Özal Syndrom) (Ankara: Verso Yayıncılık, 1992), p.52.

[49] Ibid., p.116.

[50] See, for example, "Türkiye Barolar Birliği Başkanı Av. Önder Sav'ın Cumhurbaşkanı Turgut Özal'ın Sözleri ile İlgili Demeci - 9.12.1990," (The Declaration of Önder Sav - the head of TUBA -

Not surprisingly, the bar associations had always constituted an opposite camp for the Motherland Party governments, due to the former's strong belief in the inviolability of the rule of law and justice, and had warned the governments whenever necessary. The report prepared by the TUBA on the details of the measures which had to be applied by the government for the preservation of the superiority of the rule of law constituted a good example for showing the sensitivity of the bar associations in this respect.[51]

The 1980s has been regarded as the most conflictual period as far as the relationship of the bar associations with the state is concerned. The interface of the bar associations with the Motherland Party governments during the 1980s can well be analyzed within the framework of two different areas of interaction. The first one, which had largely been the case during the years 1983-1986 had been the codification process, in other words the legal restructuration of the profession. This period is important due to the fact that it gives certain clues concerning the policies of the post-1983 governments towards the attorneys. On the other hand, especially in

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Concerning the Statement of the President of the State Turgut Özal - December 9, 1990) Türkiye Barolar Birliği Yönetim Kurulu Çalışma Raporu (The Working Paper of the Board of Directors of TUBA) 11-12 Mayıs 1991 Mersin, pp.114-5.

[51] "Hukukun Üstünlüğünün Sağlanması Konusunda Hazırlanan Rapor," (The Report on the Realization of the Rule of Law) in Türkiye Barolar Birliği XX Genel Kurul Başkanlık Raporu (The 20th General Assembly Presidencial Report of TUBA), 27-28 Mayıs, Giresun, pp.29-75.

the late 1980s, the second one had been the issues related to the inner mechanism of the bar associations and the Ministry of Justice's position in this respect. As being the case for the developments within the codification process, the experiences of the bar associations during their relationship with the Motherland Party governments, showed a strong parallelism with the above delineated general understanding and view point of the governments with respect to law and its status in the society. Thus, an analysis of this relationship has utmost importance in understanding the details of the policy preferences of the Motherland Party governments in the legal and judicial spheres.

The Formation of a State-Dominated Profession

Arrangements concerning the public professional associations in the 1982 Constitution soon required certain amendments in specific codes that regulated the organization, administration, and activities of these associations. Showing great variances when compared to the 1961 constitution both in substance and form, the framework drawn by the new constitution had to be reflected in the codes in order to harmonize the legislation in the country.

As far as the bar associations are concerned, this new legislative process had carried in itself the seeds of a potential of discomfort and dissatisfaction. Having a totally negative stance towards the system designed for public professional bodies by the new constitution,

the bar associations largely stood in opposition for the amendments which would soon have their impacts at the specific field of attorneyship. Moreover, for these associations who had even reacted the code enacted in 1969, which included some minor points that hindered their independence when compared to the new amendments, such a development clearly signified a back step in their professional history and symbolized the end of a decade-long struggle for improving the Articles of the 1969 code.

Within the framework of the new legislative process, the first step had been the enactment of the Authority Code Concerning The Public Professional Associations - No. 2767- on December 28, 1982, according to which the Council of Ministers had been given the power to enact regulations with the force of law concerning the activities, election and disciplinary procedures as well as administrative and financial control of public professional bodies.[52] Accordingly, the Council Ministers had enacted two different regulations with the force of law on the reorganization of attorneyship and bar associations during 1983,[53] which in one year time - May

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52 "Kamu Kurumu Niteliğindeki Meslek Kuruluşları Hakkında Yetki Kanunu No. 2767," (The Autorization Code on Public Professional Organizations No. 2767) Resmi Gazete, no:17914, December 30, 1982, .

53 See Kani Ekşioğlu, "Avukatlık Yasasında Son Değişiklikler," (The Latest Amendments on the Code of Attorneyship) in Cumhuriyet Dönemi Türkiye Ansiklopedisi, vol. 6 (1984), pp.1577-8.

8, 1984 - had been unified under the Code on Amendments of Certain Articles of Code on Attorneyship - No. 3003.[54]

Being the main document reorganizing certain points on attorneyship and bar associations after the military intervention, the new code largely reflected and solidified the Article 135 of the Constitution. In this respect, the code can be described as an extended version of this article which had clarified and defined certain points specifically for attorneyship and state-bar association relationship.

Within the framework of the code in question, bar associations had defined to be under the strict control of the Ministry of Justice:

Accordingly, the ministry had been given the right to demand the public prosecutor in the respective province to bring a suit against the bar associations for dissolving the responsible organs in case of their engagement with activities other than stated under the code as well as for implementing decisions which has not been approved by the Ministry.

Another very important point which had the potential of hampering the independence of the bar associations had been the power given to the Ministry as an auditing authority. In this respect, according to the code, each

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[54] "1136 Sayılı Avukatlık Kanununun Bazı Maddelerinini Değiştirilmesi, Bazı Maddelerine Fıkralar Eklenmesi Ve Kanuna Geçici Bir Madde Eklenmesi hakkında Kanun No. 1238," (Code on the Amendment of Certain Articles of Code on Attorneyship No. 1136, Addition of Paragraphs to Certain articles and Addition of a Temporary Article to the Code) Resmi Gazete, no:18402, May 15, 1984.

and every bar association as well as the TUBA were to be checked and controlled by the inspectors of the Ministry periodically, for the detection of the degree of their compliance to the administrative and financial procedures as defined in the code.

Besides, being different from these rather conventional areas of control some of which were also present in the codes on attorneyship during the early Republican era and to a lesser extent in the previous code, a totally new issue over which the ministry had given the authority to control has also been included in the new code. Accordingly, both the bar associations as well as the TUBA were required to obtain the permission of the Ministry of Justice in order to attend or be represented in any international meeting or congress. In fact, as far as the previous meetings that the bar associations attended at the international level are concerned, they were largely related to professional issues which served for the development of the profession. In this sense, within the framework of the requirement of such a permission the ministry had also partly been authorized to interfere with the activities related solely with professional issues.

A final point which must be made concerning the extension of state control on attorneyship and bar associations, is related to the issue of the prohibition of attorneys from performing the profession. According to the related Article of the Code, the ministry was given full authority to decide in this respect if the

disciplinary commission fails to decide in two months time. Besides the transfer of the authority to the Ministry of Justice, the inclusion of "the acts against the personality of the Turkish state" as a new criterion for the prohibition of the Attorneys from performing their profession was an issue of discussion by the bar associations. According to the bar associations, such an arrangement was an attack towards the honour of the profession. In fact, such an argument was based on the self perception of the majority of the attorneys as the guardians of the Turkish State and the defenders of the Kemalist principles.[55]

Another widely discused issue concerning the Article was its clash with the universal principles of justice as well as human rights. According to the Article the legal procedures for the prohibition of the attorney from performing his profession were to start as soon as he was accused of the acts that was defined to be incompatible with the nature of attorneyship. At this point, the final decision of the court, proving or disproving the accusation would lose its significance. Thus, an attorney who was declared as non guilty at the end of the trial could well have been prohibited from performing his profession months before the final decision. In the final

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55 Türkiye Barolar Birliği XVIII. Genel Kurul Başkanlık Raporu ve Yönetim Kurulu Çalışma Raporu (The 18th General Assembly Presidential Report and Board of Directors Working Paper of TUBA), 11-12 Mayıs 1985, Bursa, p.42.

analysis, such a practice would surely cause moral and material damages for the attorneys.[56]

While having strong similarities with the practice initiated by the Code that had been enacted in 1938 which after the Military intervention of 1960 had been declared of having anti-democratic provisions, such a measure constituted a step of reinitiating the supervision of the state on bar associations in a most strict and direct way.[57]

As should by now be apparent this new legal restructuration had constituted one of the most widely discussed issues within the professional circles. During the seventeenth General Assembly meeting of the TUBA, the Code has been regarded as a document prepared solely for facilitating the state's control on bar associations rather than protecting the interests of the profession and its associations. What the code signified for most of the attorneys was no more than a step taken by the state to enable itself to arrange its relationship with bar associations in an authoritarian framework. In this regard, the Code had been seen as an attack of the state on the honor of attorneyship as well as the independence of its associations. And the Code had the latent aim of a

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[56] Ibid., p.43.

[57] Atilla Sav "Barolar ve Türkiye Barolar Birliği," (Bar Associations and the Turkish Union of Bar Associations) in Cumhuriyet Dönemi Türkiye Ansiklopedisi vol.6, p.1581. Also see, Atilla Sav, "Geriye bir adım," (A Step Backwards) Cumhuriyet, October 31, 1984; Turgut Kazan, "Avukatın İşten Yasaklanması," (The Prohibition of the Attorney from Performing the Profession) Cumhuriyet, June 30, 1984.

complete incorporation of the bar associations to the state apparatus.[58] However "...neither the bar associations were the organs of the state nor the attorneys were civil servants...."[59] Thus for many, this new legal framework was a total mistake.

Having these points in mind, just after the enactment of the Code, the TUBA started a campaign against the code. In the final stage, a suit had been brought to the Constitutional Court by the Populist Party for the annulment of the code.[60] The Constitutional Court nullified the only article concerning the prohibition of the attorneys from performing their professions.[61] However it must be mentioned that, before the annulment, many attorneys had been banned from performing their professions. In this respect, specifically the case of an attorney from Malatya Bar Association, who had at the same time been the Head of the local branch of the

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[58] Türkiye Barolar Birliği XVII Olağan Genel Kurul Tutanağı (The Minutes of the 17th General Assembly of TUBA), 18-19 Şubat 1984, Ankara, p.16.

[59] Ibid.

[60] According to the Article 150 of the 1982 Constitution, only the President of the Republic, Parliamentary Groups of the party in power and of the main opposition party, and a minimum of one-fifth of the total number of the members of the Grand National Assembly of Turkey have the right to apply for the annulment of laws to the Constitutional Court.

[61] See Anayasa Mahkemesi Karar Dergisi, 21 (1985), p.99. Also see Türkiye Barolar Birliği XVIII. Genel Kurul Başkanlık Raporu (The 18th General Assembly Presidential Report of TUBA), 11-12 Mayıs, Bursa, pp.103-113.

opposition party in Malatya attracted widespread attention.[62]

On January 1, 1986 another "Code on the Amendment of the Code on Attorneyship, No.3256" had been enacted.[63] However, consisting of only four articles, this code was also far from solving the mentioned problems of the bar associations. In fact, the tutelage of the Ministry on the bar associations still continued to be the issue.

The legal restructuration of the profession and its associations during the Motherland Party governments, specifically between 1983-1986, had perhaps been the most unfavorable period in the professional history of attorneyship. Apart from the content of the codes such an assessment is specifically true as far as the relationship between the bar associations and the Ministry of Justice during the preparatory process of the new legal framework is concerned.

The strategy of the state towards the bar associations, can be described as those of a total pacification and ignorance. When compared to the preparatory stages of the previous codes, even the one enacted in 1939, the pacification of the bar associations reached its climax during the time.[64] In this respect, as far as the former code, enacted in 1984, was concerned,

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62 Tanör, Türkiye'nin İnsan Hakları Sorunu 1, p.332.

63 "1136 Sayılı Avukatlık Kanununda Değişiklik Yapılmasına Dair Kanun No. 3256" (Code on the Amendments of the Code on Attorneyship No. 3256) Resmi Gazete, no:19004., January 30, 1986.

64 See Türkiye Barolar Birliği XVII. Olağan Genel Kurul Toplantı Tutanağı, 18-19 Şubat 1984, Ankara, p.118.

although at first stages of the preparatory process, the TUBA was asked by the Ministry of Justice to prepare a report which would include the views of the bar associations. Later the Institute of Public Administration for Turkey and the Middle East was given mandate in this respect. None of the points that had been mentioned by TUBA had been included in the code. Although, being harshly criticised by the TUBA, such a stance on the part of the Ministry continued to be the case during the preparatory stages of the latter Code. Neither consultation nor bargaining took place between the Ministry and the bar associations. Describing the code-making process during the 1980s as a shame for all the bar associations in Turkey, the representatives of the bar associations which had gathered for the ninth extraordinary meeting of the TUBA, criticised the authorities of the Ministry of Justice. The following words of one of the attorneys from Izmir Bar Association had been exemplary in this respect: "It is quite surprising and shameful that, just a few bureaucrats who for sure have close connections with the political authorities and lack the knowledge on the issue, dare to prepare a code concerning our profession without even consulting us."[65]

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[65] Türkiye Barolar Birliği IX. Olağanüstü Genel Kurul Tutanağı (The Minutes of the 9th Extraordinary General Assembly of TUBA), 4 Haziran, 1988, Ankara, p.31.

The Bar Associations and the Motherland Party Governments in the Late 1980s: Towards a "Commercialization of Justice"?

One of the most significant debates among the bar associations during the late 1980s, had been the tendency on the part of the government towards a "Commercialization of Justice," as the bar associations called it. What made the bar associations to come up with such a view point had been the establishment of the "Fund for Strengthening Justice Organization" in July 1988, with the aim of providing a financial base for the services of justice in the country.[66]

The initiation of the sale of certain services within the judicial mechanism which earlier were free of charge and regarded to be public a service such as the provision of the records of previous convictions as well as certain application forms and files, came to be the points of controversy. In fact, while being regarded as an attack towards the equality of the citizens before the law, such a practice was criticised on the grounds of damaging the honor of the Turkish judicial system. The following quotation is exemplary with respect to the views of the bar associations in this respect:

> The sale of certain judicial services which were previously financed by the taxes and fees, constitutes a practice that totally contradicts with the concepts of public

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66 "Adalet Teşkilatını Güçlendirme Fonu Kurulmasına Dair 3454 Sayılı Yasa," (Code on the Establishment of the Fund for Strengthening Justice Organization No.3454) Resmi Gazete, no: 19832, June 4, 1988.

service, honor of the judicial system, and the constitution. The commercialization of justice would surely cause a deteoriation in the image of the state in the future and lead to a significant chaos within the judicial sphere that would adversely affects the equality of the citizens.[67]

Another controversial point was related to the supervision of the fund. The functioning of the Fund outside the consolidated budget and jurisdiction of the High Court of Accounts, had been the focus of attention. In fact, as it has been the case for other funds which had been established during the Motherland Party governments, the fund in question had designed to be under the control of the High Board of Supervision which had been affiliated to the Prime Ministry. According to the bar associations while being in contradiction with the principle of unity of the budget, such an arrangement had the potential of causing certain problems in controlling the expenditures to be made within the framework of the Fund.[68] The negative effects of the fund on the independence of the judges and judiciary had also been underlined. The addition made to the Article .64 of the Budget Code within the framework of which "The

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[67] Türkiye Barolar Birliği IX. Olağanüstü Genel Kurul Tutanağı, 4 Haziran, 1988, Ankara, p.5.

[68] See "Sosyal Demokrat Halkçı Parti Genel Başkanlığına Yazılan Mektup Örneği," (The Letter Sent to the Social Democratic Populist Party) in Türkiye Barolar Birliği XX. Genel Kurul Başkanlık Raporu, 27-28 Mayıs, 1989, Giresun, pp.149-150.

members of the Constitutional Court, High Court of Appeals, Council of State, judges and public prosecutors were ordered to be given housing credits from the Fund in appropriate amounts that would be determined by the High Planning Council" had been a focus of criticism, too. According to the bar associations, while being a serious attack of the state towards the independence of Justice this article had been the most significant indicator of the institutionalization of bribery in the Turkish judicial mechanism by the state.[69]

On the whole, according to many attorneys, the establishment of the mentioned fund had constituted no more than a pathological reflection of the liberal economic policies on the field of judiciary.[70]

Another problematic issue during the period had been the negative stance of the Ministry of Justice towards the bar associations. Although there appeared to be a very high degree of professional consciousness both with respect to purely professional issues as well as to problems related with the above mentioned developments

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[69] Ibid., p.8.

[70] In this respect, some suits had been brought to the Council of State concerning the sale of certain forms during 1990-1991 by the bar associations. For a detailed technical discussion of the issue, the views of some legal professionals and decisions of Council of State see "Görev Anlayışımızın Kilometre Taşları," (The Basics of Our Understanding of Duty) İstanbul Barosu 1990-1992 Dönemi Yönetim Kurulu Çalışma Raporu (The 1992-1993 Working Paper of the Board of Directors of Istanbul Bar Association), pp.19-31; Türkiye Barolar Birliği XXI Genel Kurul Başkanlık Raporu (The 21st General Assembly Presidential Report of TUBA), 11-12 Mayıs, Mersin, 1991, pp.33, 115.

within the judicial and legal spheres on the part of the bar associations, it largely could not been effective and even get curbed. Although the bar associations did not constitute an exception in this respect as "there was hardly any pluralistic or institutionalized (neo-corporatist) give-and-take between the weighty social groups and the government,"[71] during the period, the attitude of the party towards the legal and judicial issues as described above made the situation worse for the bar associations when compared to other groups in the society.

The most significant characteristic of the 1980s with respect to the state-bar association relationship had been the bar associations' loss of monopoly over the professional issues. This has been largely related to the application of the above mentioned codes in such a way as to enhance the interests of the Ministry rather than the profession of attorneyship and its associations.[72]

One of the most significant indicator here has been the paradoxical stance of the Ministry concerning the entry of judges - who had been retired from judgeship or wanted to continue their career as attorneys then on - to the profession of attorneyship. As one of the most effective tools for the creation of a well-functioning profession as well as preservation of its honor and

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[71] Heper, "The State and Debureaucratization: The Case of Turkey," International Social Science Journal, p.610.

[72] Interview with Burhan Karaçelik, the vice-president of the TUBA, on July 19, 1994.

dignity, the licensing process had constituted an issue of high priority for the bar associations since their establishment. In fact, before submitting their decision to the Ministry of Justice as being the final authority within the framework of all the codes on attorneyship, the bar associations had always acted very sensitively in evaluating the qualifications of the potential members of their associations who had made an admission for entry to the profession. Being in contradiction with the previous experiences however, where the bar association's decisions was largely approved by the ministry, during the 1980s, there appeared to be many disputes between the two, specifically with regard to the cases mentioned above. Although the professional records of many of the applicants were not in accordance with the desired standards that the bar associations had put forward for the candidates, the ministry had approved their admission. According to a deputy chairman of the TUBA, such a stance while being a manifestation of the ministry's negative perception of the attorneyship and non respectful attitude towards the right of defence, had also indicated their distorted view point concerning legal professionals, within the framework of which judgeship had been regarded as a much more honorable profession than attorneyship. As in many of its decisions, the ministry had been on the side of the judges who had not been regarded eligible for practicing

the profession of attorneyship by the bar associations due to their professional records.[73] In one of its decisions the ministry had blamed the respective bar association for perceiving their profession as much more honorable than judgeship because of the latters' disapproval of the admission of a judge who had many penalties in his professional record, and evaluated such an assertion as contradicting the codes.[74]

Another very important issue of conflict had been the ordinance issued by the Ministry of Justice on April 7, 1988, which one year later had constituted the basis for an order of the Ministry, by which the attorneys were prohibited from receiving the orders of the offices of execution concerning distraint. From then on the offices of execution was sent their orders directly to the debtor which, according to the bar associations would create certain problems with regards to the execution of the act of distraint due to the elimination of the attorneys from the process. According to the Head of Istanbul Bar Association, Turgut Kazan, such a decision on the part of the Ministry while signifying a very well proof of the distrust of the Ministry towards the attorneys, had the potential of creating distortions in the system of the actualization of debt payment, as it carried in itself

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[73] Ibid.

[74] "Ankara 1 No'lu İdare Mahkemesi'ne 11. 12. 1985 gün 1984/973 esas 1985/773 sayılı kararın bozulmasına ilişkin sunulan dilekçe metni," (The text of the Petition submitted to the Ankara Administrative Court No. 1 on the cancellation of the court decision No. 1985/773 dated December 11, 1985), p.2.

the involvement of Mafia within the process. In fact, calling it "the ordinance of Mafia," the Ministry had largely been accused of establishing a very secure basis for the employment of Mafia by the lenders for the repayment of the debts.[75] Although, the ordinance had been withdrawn by the Ministry in a very short period of time largely due to the unfavorable public opinion engineered by the Istanbul Bar Association, the issue represents a good example of the nature of conflicts between the two institutions as well as the stance of the Ministry towards the bar associations.

Another point on which the struggle between the Ministry and the bar associations again manifested itself during the period in question, had been the issue of women attorneys' attire, some of whom had insisted wearing "türban" while performing their profession in the court room. Being very much in contradiction with the ideological position of the bar associations and most of the attorneys, such a standing on the part of some women attorneys had been regarded as a disciplinary issue which had to be coped with, as it was the case during the

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[75] For the views of Turgut Kazan as well as information concerning the issue, see "İstanbul Barosundan Tepki," (Reaction from The Istanbul Bar Association) Günaydın (Istanbul daily) November 4, 1989; "Çek Senet Mafyası Teşvik Ediliyor," (Check Vaucher Mafia Incited) Güneş (Istanbul daily) November 4, 1989. Also see "Görev Anlayışımız ile İlgili Bazı Örnekler," (Some Examples With Respect to Our Conception of Duty) İstanbul Barosu 1988-1990 Dönemi Yönetim Kurulu Çalışma Raporu, (The 1988-1990 Working Paper of the Board of Directors of Istanbul Bar Association), pp.41-4.

1970s. However, the stance of the Ministry of Justice towards the issue showed great variance when compared to the 1970s. Nearly all the decisions of the bar associations, requiring the initiation of disciplinary procedures for the members that dress up in the Islamic way, had been disapproved by the Ministry.[76] In fact, such a configuration between the Ministry and the bar associations can well be regarded as the manifestation of a recent political controversy between the Kemalists and fundamentalists, the former insisting on the Western dress code, and the latter defending the right of the choice of Islamic outlook as a democratic right. The reflection of such a debate on the administrative levels of the state was largely related on two interrelated factors: the stance of the Motherland Party governments vis-a-vis the fundamentalist world view on the one hand, and the policies of the party with respect to the bureaucracy on the other.

As far as the former one was concerned, many of the widely known members of the Motherland party had been the ex-members of the National Salvation Party of the 1970's which was banned after the military intervention of 1980. In fact, Özal himself occupied a place in Turkish politics somewhere between the religious right of the National Salvation Party and the more secular Justice

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76 Interview with Burhan Karaçelik, the Secretary of the TUBA, on July 19, 1994.

Party.[77] In this respect, the policies of the party had largely been a driving force for the fundamentalists. Thus, the utilization of Islam as a unifying factor for the society had found secure grounds within the policies of the party.[78]

As far as the Motherland Party's policies towards civil bureaucracy was considered, what happened during the party rule can well be regarded as a total challenge of position of career bureaucrats, specifically the ones at the top ranks of the administration and their replacement by those who had been sympathetic to the party's world view. In this respect, Islamists had also been given the opportunity to have a dominant place in the bureaucracy. Regardless of its effects on the issue of "türban" and some others professional issues, the politization of the civil bureaucracy especially the personnel of the Ministry of Justice, had always been a point of criticism for the bar associations.

In this respect, the decision that had been taken by the Ministry to remove the president and the Board of Istanbul Bar Association from office in early 1990 constituted perhaps the most significant development during the period in question. The decision of the Ministry to commence a trial was taken on the grounds

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[77] Ergüden, "The Motherland Party," in Political Parties and Democracy in Turkey, Heper and Jacob M. Landau, eds., p.155.

[78] For an evaluation of the pro-Islamic policies of the Motherland Party, see Binnaz Toprak, "The State, Politics, and Religion in Turkey," in The State, Democracy and the Military Turkey in the 1980s, Heper and Evin, eds., pp. 131-4.

that Istanbul Bar Association has refused to disbar one of its members.[79] In order to understand the roots of the conflict, the details of the case needs further elaboration.

On November 27, 1986, the Board of Directors of Istanbul Bar Association had decided the continuation of the membership of one of its members who had been sentenced to eight years of heavy imprisonment for violating the Article 141 of the Turkish Penal Code.[80] This decision had been criticised by the Ministry of Justice and one year later the Board of Directors was forced to change their decision and disbar the member. However, on the occasion of a case which had been brought by the member to the administrative court for his reacceptance to the profession, the Istanbul Bar Association had decided to change its decision and declared the previous decision for the disbarment of the member as null and void. And as a result, the Ministry decided to initiate a case against the Istanbul Bar Association demanding the removal of the president and the board of directors of the Association from office. This act which the ministry had instituted against the Istanbul Bar Association had no legal basis. The Ministry only had the power to dissolve the bar associations

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[79] "Davaname, Sayı 1990/268," (Petition to the Court, No. 1990/268).

[80] Within the framework of Article 141 of the Turkish Penal Code, associations with the purpose of establishing communist, anarchist, dictatorial, or racist regimes or of destroying or weakening national sentiments were ordered to be banned.

either because of their engagement in politics and activities that had not been defined in the code or because of the bar associations' defiance of a decision by the Ministry for which the latter had authority. In this case, however, none of these mentioned conditions were present. The Ministry had the final authority only for disciplinary issues and for the decisions concerning the admission of a member to the profession. In this respect, although the ministerial authorities regarded the annulment of a decision concerning the disbarment of a member as an act of accepting him to the profession, such a view point was regarded to be totally contradictory with the principles of administrative law by the scholars specialized in that field. According to a report which had been prepared by the Administrative law professors on the request of the Istanbul Bar Association, the act and thus the view point of the Ministry was irrelevant, as the ministry's authority of dissolving a bar association had been limited only with the issues that had been defined by law.[81]

In the light of the above mentioned points, Istanbul Bar Association regarded the case as the most serious

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[81] See Lütfi Duran, "Av. Alp Selek'in Durumu hakkında Mütalaa," (Opinion Concerning the Position of the Attorney Alp Selek) 5 Ocak, 1990, Istanbul; Ülkü Azrak, "Istanbul Barosu Yönetim Kurulu'nun 11.4.1989 tarihli kararının Adalet Bakanlığı'nca onaylanmadığının bildirilmesi karşısında ortaya çıkan hukuki sorun," (The Legal Dispute Arised with the Istanbul Bar Associations Administrative Board's Disapproval of the April 11, 1989 dated Decision of the Ministery of Justice) 17 Ocak, 1990, İstanbul.

step that had been taken by the Ministry for curbing the independence of the association. In this respect, according to the association what had motivated the Ministry in initiating such a case had been the fact of viewing the Bar Associations as a potential threat for realization of certain decisions and actions of the ministry.[82] As mentioned by the Head of Istanbul Bar Association Turgut Kazan, the criticisms and protests on the part of the Istanbul Bar Association with respect to the policies of the Ministry which had been regarded in violation of the supremacy of law, had been the main reason in this respect.[83]

It must be mentioned that, besides the unfavorable spread of public opinion that the case had led in Turkey,[84] there also appeared to be a strong discomfort

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[82] "İstanbul Barosu Vekillerinin Cevap Layihası, Dosya No. 990/368," (The Draft of the Response of the Attorneys of Istanbul Bar Association, File No. 990/368), p.6. Also see "Türkiye Barolar Birliği Başkanı Avukat Önder Sav'ın Gazeteciler Cemiyetindeki Basın Toplantısında Yaptığı Açıklamalar, 25.7.1990," (The Explanations of Önder Sav - the head of TUBA - at the Press Conference held in Journalists Association on July 25, 1990) p.2.

[83] "21.2.1990 Günü Gazeteciler Cemiyeti'nde İstanbul Barosu Başkanlığınca Yapılan Basın Toplantısı Metni," (The Text of the Press Conference Organized by the Istanbul Bar Association at the Journalists Association on February 21, 1990) p.2.

[84] During the period in question there appeared to be many articles published on the issue in various newspapers. Among them exemplary are, Uğur Mumcu, "Baro Olayı," (The Bar Association Event) Cumhuriyet (Istanbul daily), February 22, 1990; Yazgülü Aldoğan, "Hukuk Emirden Üstündür," (Law is Prior to Order) Günaydın (Istanbul daily), February 22, 1990.

among the international community of legal professionals. The stance of the International Bar Association - a federation of 124 Bar associations and law societies from 75 countries representing over 2.5 million lawyers - and the CCBE - the Council of the Bars and Law Societies of the European Community, representing 300,000 lawyers - is exemplary in this respect.

In the letter that the head of the CCBE, sent to the Minister of Justice, the views of this organization was summarized as follows:

> The issue, as we see it, is merely that a decision by legitimately established representatives of the profession should be frustrated by an act of the government and, moreover, that the representative body of the profession should be dissolved by such an act is wholly unacceptable to the members of the European legal profession. My European colleagues and I cannot but regard this conduct as contrary to the fundamental rights of the profession and wholly incompatible with even the minimum standards to which any community should adhere.[85]

Urging the government and the Ministry of Justice to respect the independence of the profession and withdraw the case as soon as possible, the IBA has shared the same point of view with that of CCBE. As mentioned in a letter

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[85] For the full text of the letter see 1988-1990 Dönemi İstanbul Barosu Yönetim Kurulu Çalışma Raporu, p.20.

that had been sent to Özal who was the President of the Republic then, the IBA had considered the act of the Ministry as violating the Concluding Document of the CSCE Conference, which stated that "The independence of the legal practitioners will be recognized and protected, in particular as regards conditions for recruitment and practice."[86]

The case had been dismissed due to the cancellation of the Article 141 of the Turkish Penal Code,- which had been the reason of the dismissal of the member from the Istanbul Bar Association -, by the Code on Prevention of Terror, adopted by the Motherland Party government in spring 1991. While leaving a very negative mark on the relationship of the Ministry and the bar associations, such an act of bringing a law suit against the bar association by the Ministry had perhaps been the most striking indicator of the paradox of Motherland Party governments whose motto was that of liberalization.

[86] For the full text of the letter, see ibid., p. 25.

Chapter Six

CONCLUSION

The present study has focused on the bar associations in Turkey from the perspective of the relationship between the state and interest group associations. While examining the historical evolution and thus the institutionalization process of bar associations by giving reference to the development of the profession of attorneyship, the study, necessarily extended itself to the examination of the judicio-legal issues which constitute the main sphere of interface between the bar associations and the state.

It was possible to categorize the historical development of bar association-state relationship into five different periods, each signifying a different stage of institutionalization both for the bar associations as interest groups as well as their interface with the state. While making it possible to show the links between the development of bar associations, their goal setting, their goal achievement, their policies, as well as their position vis-a-vis the state and the shifts in the judicio-legal and political milieu of different periods in Ottoman-Turkish history, such a categorization has important implications for evaluating the points of continuity and the change in the historical evolution of the relationship, its nature and the institutionalization of the associations.

In the light of the present study, the Ottoman period, specifically the era starting with Tanzimat reforms can be labelled as a period of early institutionalization. The period mainly witnessed the legal formation of bar associations in the polity. However, during the period, the Bar Association of Istanbul, then the only bar association, established in 1876, has largely remained immature both qualitatively and quantitatively. In this respect, the religio-ethnic and educational heterogeneity among the members of the association on one hand and the novel formal recognition and definition of attorneyship as a legal profession on the other have been the main factors that prevented the bar association from developing professional idealism and solidarity. Although in the early twentieth century, there appeared to be a dynamism in terms of defending and formulating the professional interests, the Istanbul Bar Association in the Ottoman period had usually been not very active in this respect. Mostly engaging in routine matters like disciplinary procedures and financial matters, the Association was far from being an interest group association during the nineteenth century and stayed no more than a supervisory body, with the major purpose of checking and controlling the profession on behalf of the Ministry of Justice.

The Kemalist Era has been the second stage in the historical evolution of bar associations. The period is significant in terms of institutionalization the associations. It was an era during which the

associational and professional identification of the bars developed for the first time. The newly enacted codes defined the rights, duties and responsibilities of the profession. A new type of professional who would have no links with the mentality of the Ottoman past was created. The Kemalist cadre tried to mould out a new profile for the bar associations based on the values of Western legal and political culture. In fact, what has happened during the period was a total restructuration both at the professional as well as at the associational levels and thus the creation of pro-regime associations under the tight control of the state. In fact, although the bar associations still elicited an immature and passive portrait vis-a-vis the state in terms of formulation and defense of their interests, it was during this period that the seeds of the future bar associations were thrown.

The 1950-1980 period that constitutes the third stage in the process of associational development, can be regarded as the period of consolidation. It has been mainly during this period that the image of the bar associations as institutionalized interest groups was consolidated. During the 1950s what had been experienced by the bar associations was an activation in their internal dynamics rather than a rise in their involvement in the political system as interest group associations which turned out to be the case during the 1960-1980 period. Being a reflection of the newly developed multi-party politics as well as the extension of the socio-

political role of attorneys, first seeds of politics have been sown into the bar associations which for the most part transformed them into arenas where party politics were discussed. Besides such a development, which had its long term effects as a rise in the sensitivity towards socio-political issues, the extension of professional idealism as well as solidarity among the bar associations had been other important characteristics of the period. The 1950s had characteristics of a preparatory stage for the formation of a dynamic portrait of the bar associations throughout the 1960s and 1970s.

It was during the late 1960s and 1970s that the bar associations completed their institutionalization process. The most significant development here had been the establishment Turkish Union of Bar Associations, the peak association for all the bar associations in Turkey. The establishment of the TUBA re-provoked a debate, namely the problem of their autonomy vis-a-vis the state. The legal status of TUBA that involved the tutelage of the Ministry of Justice over the Association, always constituted the basis of their critical attitude towards the state during the recent decades.

Besides the intensification of the issue of autonomy, what basically distinguished the bar associations of the 1970s from the early stages had been the visible extension of their issue spectrum. In this respect, they had a critical stance towards the state and political elites, specifically with respect to the latters' attitudes on judicial and legal issues as well as

preservation of democracy and the rule of law that in the final analysis led to a sharp rise in the conflict between the state and the bar associations.

The 1980s had been a stage of strict opposition of the bar associations towards the state. Having completed their institutionalization process during the 1960s and the 1970s, in the 1980s, the bar associations were now fully institutionalized interest groups with well defined professional and socio-political consciousness. It was also during the 1980s that the bar associations were put under strict control and supervision of the state both within the framework of the 1982 Constitution and the codes enacted in this respect. Being placed under the strict administrative and financial control of the Ministry of Justice, that made the bar associations critical of the state more than ever.

Besides the issue of autonomy, however, it was also the violations in the sphere of law that had its effects on this conflictual relationship during the 1980s. As perceived and often declared by the bar associations, the late 1980s signified a period of crisis in the judicio-legal sphere. In fact, what best described and largely differentiated the 1980s from other periods in the history of bar associations had been the mutual and fervent opposition between the bar associations and the state, even reaching to a stage of perceiving each other as enemies. While the bar associations directly criticised and attacked the state for its policies concerning the judicio-legal as well as professional

sphere, the state in turn tried to repress and control them whenever possible.

In its broadest sense, the historical evolution of the bar associations presented unmistakable signs of an potential conflict in their relationship with the state. In fact, often the relationship turned out to be a struggle of the bar associations intending to maximize their influence for influencing the state policies in line with their interests and values and an effort on the part of the state to maintain its autonomy and to minimize interference in its affairs. These attitudes on the part of the state and the bar associations towards each other can be explained in terms of some interrelated factors. The unique position of the Turkish state vis-a-vis civil society, its dominance in the judicio-legal sphere, and the institutionalization level of the bar associations constitude the main points that deserve attention in this respect.

One of the most striking points which has been common to all the stages in the historical evolution of bar associations has been the continuity in the negative stance of the state towards the associations. The case of bar associations does not constitute an exception. The state in the Turkish context, has been aloof from the "squabbles" of particular interests and undertook into itself the duty to pursue a Rousseanian general will. While protecting its autonomy, as a distinct sector, that is managing its functions independently, the state has also been sovereign in the sense of defining and trying

to attain the goals for the society. Accordingly, the state in Turkey appeared to be a very active and dominant participant in all aspects of the political process, thus having a superordinate position vis-a-vis the bar associations. Any group having the potential of challenging the state was closely controlled by the state. This had been the case for the bar associations, too. In fact, it has been this unique characteristic of the Turkish state that has prevented Turkish interest group politics from displaying the characteristics of neither pluralism nor different versions of corporatism - state and societal.

As far as pluralism is concerned, it needs a state that is responsive to civil society. The state acts as an arbitrator among the conflicting demands presented by the interest groups in determining official policy. The state's ability to act on its own initiative is downgraded. While the interest groups shape the state action, the state elites lack the capacities and inclination to distance themselves from the pressures and constraints applied by the interest groups. With the mentioned characteristics of the Turkish state, as constituting a good example of a strong state and thus having its capacities and traditional will in keeping all the civil societal elements at bay, pluralist politics has never flourished in Turkey.

As for neo-corporatism, it necessitates a harmonious relationship between the state and interest groups as basing itself on a bargaining process between the two. In

neo-corporatist type of interest group politics, the basic point is to reconcile the general and the sectional interests which bases itself on a process of regular consultations between the interest groups and the state elites for the making of public decisions. As already mentioned, such a state of affair is also alien to the Turkish experience. Instead of satisfying their interests, the interest groups turned out to be actors who presumably serve the general interest which is determined by the state elites themselves.

In the Turkish case the interest group politics has not shown the characteristics of state corporatism, either. In contrast to some arguments which are based on the existence of a state corporatist form of relationship between the interest groups and the state, especially in the early Republican era[1] there appears to be enough evidence of differentiating the period from the cases of state corporatism. As also indicated by Metin Heper, the most significant point in this respect has been the "differentiation of the state from the interests".[2] In fact, during the Republican period, there was an absence of an alliance between the state and the interest groups, in contrast to the Italian case under the rule of Mussolini - a perfect example of state corporatism -

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[1] Exemplary is Taha Parla, Ziya Gökalp, Kemalizm ve Türkiye'de Korporatizm (İstanbul: İletişim Yayınları, 1989).

[2] Metin Heper, "The State and Interest Groups with Special Reference to Turkey," in Strong State and Economic Interest Groups, The Post-1980 Turkish Experience Metin Heper, ed. (Berlin: Walter de Gruyter, 1991), p.20.

where there appeared to be a fundamental interdependence between the state and the groups in question.[3] In fact, in the Turkish case, the state as rather than being a fusion of interests, has always been above them and thus acting as a guardian over the civil society.

Secondly, besides the unique position of the state vis-a-vis the civil society as mentioned above, what is significant in the framework of the state-bar association relationship has been the policies of the state in the judicio-legal sphere. They constituted one of the most significant area of interface between the state and the bar associations.

In fact, it was the extent of dominance of the state in this specific field that primarily determined the nature of its relationship with the bar associations. As being a variable closely related to the degree of stateness in a polity, the incorporation of law into the state had a two-sided impact on the state-bar association relationship. First, this situation left little room for the bar associations either to bargain with the state or be effective in terms of judicio-legal issues. And there existed neither pluralist nor institutionalized give and take between the state and the bar associations. Rather than having direct access to ministers and civil

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[3] Peter J. Williamson, Varieties of Corporatism A Conceptual Discussion (Cambridge: Cambridge University Press, 1985), p.83. For the Spanish case under the rule of Franco as being another example of state corporatism, see Joe Foweraker, "Corporatist Strategies and the Transition to Democracy in Spain," Latin American Research Review 20 (1985), pp.61-95.

servants, the activities of the bar associations often took the shape of campaigning and protest. Secondly, it eventually made the bar associations as eager as the state to be dominant in the field, a legacy of their socialization along statist lines dating back to the Kemalist era.

From time to time each side viewed the other as a threat to its own ability to act independently. This became specifically the case where there appeared to be deviations from the ideal model, as perceived by the bar associations which was based on the division of labor between law and politics. Any "interference" in the legal sphere by the bar associations constituted a ground for conflict.

Another aggravating factor in the ongoing conflict between the bar associations and the state has been the very institutionalization of the bar associations. The bar associations evolved into cohesive and continuously functioning organizations that ideally presumes regular human and financial resources, a stable membership, immediate operational objectives associated with philosophies that are broad enough to endow them with a potential to bargain with the governments over the application of specific legislation or the achievement of particular concessions. However, rather than producing the desired changes in their overall level of interest group power over state policies, such a change in the institutionalization level of bar associations largely served to intensify the conflict in their relationship

with the state. As has been the case for any institutionalized association the bar associations not only worked to achieve the goals laid down for it, but they also embodied certain values that brought them face to face with the state. These primarily denoted the values deriving from the secular European legal and political culture that were introduced by the Kemalist Revolution. Having a significant place in shaping the policies of bar associations, these set of values, too brought bar associations into conflict with the state.

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