

## The unique nature of state's activity to regulate audio-visual media

A. Vahap Darendeli<sup>1</sup>

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### **Abstract**

*It is observed that there are very important changes in the State organization and functions in our age. In the State organization, structures different from the institutions in the classical structure are being established in the form of Independent High Councils. Along with being different from regulations on the right to freedom of speech and right to information as well as the functions of other high councils that regulate the market economy, the organizational structures and functions of audio-visual media high councils, which have a different regulation function than the written and internet media, are unique in this respect. Moreover, non-state and transnational actors continue to become the fundamental regulatory bodies in terms of problems of modern States. In this context, the following conviction prevails; the State being as the most significant kind of political organization cannot be contented with only regulating the freedoms, it also needs to ensure their exercise, in other words, the State has positive obligation on the rights. Therefore, concerning the audio-visual media regulations, it must be considered normal, as part of the principle of the administration's integrity, that some exceptional authorities be delegated to Central administration of the modern State and other organs, along with the high councils.*

**Keywords:** Independent Regulatory and Supervisory Supreme Councils, Audio-Visual Media, Regularity Powers and Difficulties, Positive Obligation

### **Introduction**

Freedom of expression and freedom of information (media), which are basically human rights, are considered as freedom against government bodies that can traditionally control and forbid expression. However, commercialized, expanded and complicated media ownership rates and advertisement rules are subject to interventions of non-governmental actors and groups in this matter. Audio-visual media, which is included in another category than printed media and internet media, is regarded as a regime where governmental intervention is intense and administrative power of the government is dominant. Thus, intervention and positive obligation of the government and government bodies in this regime require a unique nature. Nowadays, international law is rapidly globalized and existence of a powerful, efficient and democratic governments in audio-visual media might be a precondition for realization of freedom of expression and information.

Therefore, concept of State and law enforcement power of administration are firstly addressed in the first section, then general structure of audio-visual media Services and regime is outlined in the second section, which is followed by the third section where regulatory and supervisory supreme councils, their reasons for being and functions are discussed, regulatory power and difficulties of supreme councils in audio-visual media are presented in another section, and finally, positive obligation of the State and exceptional power of the Central administration in audio-visual media whose unique features are tried to be put forth are included in the last section.

<sup>1</sup>Dr. (Hâkim), Adalet Bakanlığı Yüksek Müşaviri. e. R.T.Ü.K. Üyesi

In this study including how positive obligation in audio-visual media assumed by the State through supreme councils or the other bodies is regulated nationally and internationally and what kind of principles and standards are based for these regulations, jurisprudence standards of European Court of Human Rights (ECtHR) and national courts are also taken into consideration.

## 1. State and audio-visual media services

### 1.1. Concept of state

#### 1.1.1. Concept of State in General Terms

State is a concept which realizes social peace and whose being is always perceived but which does not have a tangible nature. Even though legal nature of the concept outweighs, it is frequently used in political discourse (Atay, 2012: 2). It is included in constitutions which are the main legal texts, and is within public law, administrative law, law of nations and international law's area of interest. Within this framework, each field of law describes State according to itself and by addressing it according to their own criteria. Undoubtedly, concept of "state" is important for international law. State is the principal person of the international law. Therefore, concept of State representing the principal person of a field of law should be described by this field of law within this framework (Çınarlı, 2016: 15).

However, international law does not have an official text clearly describing "concept of law". Besides, some documents include definition of concept of State and constitute a reference for international law even though they do not have an official nature. The most important one of those is "Montevideo Convention on the Rights and Duties of States" dated 1936 which is shortly referred as "Montevideo Convention" and has not entered into force until now as only two States ratified it. In accordance with Article 1 of Montevideo Convention, the State should possess the following four qualifications: "A permanent population", "a defined territory", "government", and "capacity to enter into relation with the other States".

In this regard, a definition made according to a theory known as "three elements of statehood" of George Jellinek in the doctrine comes to the forefront. According to this theory, a State exists with population, territory and government elements (Jellinek, Cited by; Gözler, 2016: 133).

In Duguif's view, State is a user of a nation's will and concrete form of a nation which is represented by a government and has sovereignty (Hakyemez, 2004: 6).

In public law, State is described as "a political organization which has settled into a specific territory and is composed of a group of people administrated by a superior power that has coercive authority" (Kapani, 1998: 35).

On the other hand, it is known that the origin and functions of the State are also discussed in philosophy, art and epistemology as in the fields of law. Accordingly, while it is seen that first age philosophers focused on occurrence of a State at the beginning, they addressed the intervention area of the State within the scope of freedoms in the later years. Thus, it is frequently brought to agenda to what extent the status of a State has intervention area towards persons in freedom right equation plane. In this regard, opinion stating that State, the most important political organization form, cannot content itself with defining the borders of freedoms but it should also aim at ensuring exercise of them, so State has also positive obligation in front of rights prevail (Kaya, 2017: 6).

In line with this, it is observed that there are highly important changes in the organization and functions of the State in this era. In the globalized world, restriction of governmental rights of States and regulatory powers of non-governmental actors constitute important issues of international law (Beris, 2006: 1279. In the explanations regarding changes in government perception, international relations and contemporary political scientists include definitions such as complex government, multifactor governance, territorial and functional sovereignty and communal sovereignty. In addition, it is acknowledged that powers of nation States are shaped with the existence of various authorities and State authority basically maintains its Central role (Sunay, 2007: 308-341).

In State's organization, it is resorted to establish different structures (independent supreme councils) rather than institutions included in the classical structure of the State. In this new period, the State is becoming a structure which does not do/act in many sectors but arranges sectors within the framework of the rules by defining the general rules of the game. Besides, non-state and transnational actors maintains their regulatory structures within the modern States' problematic areas. For example, as a regulatory International organization, the "World Bank" ,with very small amounts of Capital, is able to grant loans at commercial interest rates in order to complete private debts and inter- governmental proceedings of the States (Chris and Khrister, 2006).

#### *1.1.2. Concept of state in the constitution of 1982*

As in all constitutions, the Constitution of 1982 clearly defines the basic features of the State authority. Accordingly, "The Republic of Turkey is a democratic, secular and social State governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble" (Article 2). "The State of Turkey", with its territory and nation, is an indivisible entity (Article 3). Sovereignty belongs to the Nation without any restriction or condition. The Turkish Nation shall exercise its sovereignty through the authorized organs, as prescribed by the principles set forth in the Constitution (Article 6).

According to these regulations, "sovereignty" belongs to an "indivisible entity" consisting of all people called as Turkish Nation and living in this territory. Therefore, it is another "personality"; in other words, "group of people" than people living in the territory. In this context, "the State of Turkey" stating all people living in the territory is a legal entity.

Besides, in different articles of the Constitution (art. 29/4, art. 46/1, art. 82/1, art. 128/1, art. 161/1), "the state and other public corporate bodies" statement is included. From this statement, it is understood that the State is a public entity. The State is a legal entity in the form of group of people. The state has another legal entity apart from people (citizens) forming it. People compromise bodies of State's public entity and carry out procedures on behalf of the state. In terms of administrative law, State's public entity is called as "central administration" or "general administration". Administration is regulated as an extension of an executive organ within execution. Public administration which is one of the important parts of the administrative law refers to organization of state's activities called as public Services and law enforcement.

Fundamental aims and duties of the state are identified in the Article 5 of the Constitution as follows: to ensure national security, to safeguard public order, public Services and law enforcement. In this regard, state's function in audio-visual media Services consists of regulation and inspection of public broadcasting in one with the public service duty, and regulation and inspection of commercial (private) broadcasting in line with the law enforcement duty.

## *1.2. Law enforcement power of the state (administration) in audio-visual media services*

### *1.2.1. Law enforcement power of the state (administration) in general terms*

Even though the objective of all communities is to ensure public order, it is not realized all the time. State inspects behaviours and activities of individuals and communities through law enforcement activities and may restrict their fundamental rights and freedoms when needed. The objective here is to ensure public order. This kind of arrangements and practices constitute administrative law enforcement of the state. State performs its law enforcement power through administrative body by allowing in relevant areas, obligating to notify, on one hand, and establishing rules for the activities in this area, implementing these rules and applying sanctions when contradictory activities are in question, on the other hand. State performs its administrative law enforcement power by allowing in relevant areas, obligating to notify, on one hand, and establishing rules for the activities in this area, implementing these rules and applying sanctions when contradictory activities are in question, on the other hand. Administrative sanction power, which is recognized to ensure that regulations and decisions taken are in parallel with extension of law enforcement power of the administration, is clearly observed in independent administrative authorities (Gözübüyük and Tan, 2007: 494).

### *1.2.2. Law enforcement power of the independent administrative authority in audio-visual media services*

#### *1.2.2.1 Legal basis and scope*

Legal basis of the state's intervention in audio-visual media is the private law enforcement power granted to RTÜK (Radio and Television Supreme Council) which is an independent administrative authority. In France example that we inspired for administrative law principles, independent authorities are regarded not as legal entities established to implement a specific public service but public institutions established to perform kind of private law enforcement power.' (Gözübüyük and Tan, 2007: 288).

Regulations, practices, inspection duty and application of sanction power of the independent administrative authority in audio-visual media Services are included in the law enforcement power of the State in this regard.

It is necessary to put forth historical process of audio-visual media in order to correctly understand this private law enforcement force which is performed by the State through independent administrative authorities. Because conditions leading to emergence of audio-visual media independent administrative authorities and phases that radio and television broadcasts have gone through are extremely important. These phases have reached to today's situation after Turkey has gone through similar historical processes and important changes like France that we inspired in legal terms.

#### *1.2.2.2 Historical process*

States mainly aimed at controlling radio and television broadcastings after they understood political and social effect of these broadcastings during the processes pursuant to especially World War I.

The first process out of those is the phase which started with the establishment of the first State radio and where audio-visual activities were directly and absolutely under the power of the State.

In this phase (1936-1963), radio activities were carried out within the scope of hierarchical power of the Ministry of Transport, Prime Ministry and Ministry of Tourism in Turkey. The second phase started with the establishment of TRT (Turkish Radio and Television Corporation) with Law No. 359 in 1963 in Turkey and the establishment of ORTF (the Office de Radiodiffusion-Television Française) in 1964 in France. In this phase which can be regarded as an interim period between autarchy of the State and full freedom, State monopoly maintained its existence in radio and television broadcasting. Lastly, the third phase includes private sector understanding depending on competition and establishment of regulatory and supervisory institutions since 1980 (Aküzüm, 2017: 2).

Communication theories naming today as new media era classify these phases as follows:

- "Paleo-television": preliminary phase of public or State monopoly,

- "Neo-television": the second phase after monopoly was abolished and public and commercial sectors competed each other and "broadcasting" and "narrowband broadcasting" (e.g. thematic channels) existed together,

- "Post-television"; the third and last phase which emerged after digital technologies were combined and personalised, and where users use technologies through mobile technology or internet (Karol, Council of Europe CDMC 2008)

In the new phase, the State narrowed its field of activity by privatising broadcasting organizations with deregulation policies or allowing new commercial broadcasting organizations to be active in the sector, and preferred to regulate and supervise the broadcasting field through autonomous and independent supreme councils and with extremely flexible laws within the scope of general principles such as public interest, pluralism, fairness rather than being present in audio-visual media sector itself (Öztekin, 2007: 56).

In this context, this process having led to regulatory supreme councils, changing the role of the State during this process and new State perception and putting forth the areas regulated by independent administrative authorities having emerged as a result of this perception are seen highly important in terms of understanding the unique nature of the state's activity to regulate audio-visual communication, which is the purpose of this study. However, before passing to this subject, the main theme of the study, we believe that it is necessary to include audio-visual media Services and legal regime.

## **2. Audio-visual media services and legal regime**

### *2.1. Concept of audio-visual media services*

Concept of audio-visual media Services was firstly defined in EU Directive regarding broadcasting and a similar definition "radio and television broadcast service" was included in Law No. 6112 on the Establishment of Radio and Television Enterprises and their Media Services, which is the national broadcasting regulation considered as transposition of the Directive. It is observed that the same concept is regulated as "radio and television activities" in the Constitution of 1982. In this regard, it is considered that the definition of the concept in "Directive on Audio-Visual Media Services" including the original definition of the concept is sufficient to explain the concept. Accordingly, 'television broadcasting' means Services which are under the editorial responsibility of media service provider and which aim at providing programs through electronic communication networks in order to inform, entertain and train the general public (Council Directive

of ECC, 1989).

## 2.2. audio-visual media services

In audio-visual media sector in which competitive private sector understanding is dominant, it is observed that public broadcasting has maintained its presence along with commercial broadcasting after State monopoly has been abolished in Turkey and western countries. In other words, there is a dual structure where both private sector and public broadcasting providing public Services exist together.

### 2.2.1 Public service area of audio-visual media services

Concept of public service which is one of the important concepts in administrative law and audio-visual media law is defined as “activities carried out in a private law order by public legal entities or private entrepreneurship under the control and inspection of public legal entities in order to meet a social need whose fulfilling includes a public interest” in the doctrine (Giritli et al., 2001: 773).

Public Service Broadcasting is traditionally considered as an activity carried out by a public agency both in Europe and Turkey. Public agency here means agencies which are established with public Capital, possess incomes depending on public power and benefit from certain privileges.

In some countries, it is observed that public broadcast is conducted through allocated channels of private broadcastings as well as conducting public broadcast by public agencies as a public service. However, the truth is that public broadcast maintains its efficiency regarding at least legal arrangements whether public broadcast is conducted as an independent State channel or commercial channel. Regulation in the Article 133 of the Constitution of 1982 shows that public broadcast is a constitutional public service (Article 8-1 of Law No.6112 of Radio and Television Supreme Council in Turkey).

### 2.2.2. Commercial side of audio-visual media services

Freedom of audio-visual Communications is, on one hand, right of anyone to broadcast under determined circumstances; on the other hand, right of the public to reach objective and speed news and opinions in various environments. From this aspect, the subject of the freedom is broadcasters (media service providers, platform operators and infrastructure operators) in the former situation whereas the subject of the freedom is audience in the latter.

Constitutional basis of the abovementioned freedom is as follows: Article 48 of the Constitution of 1982 stating “Everyone has the freedom to work and conclude contracts in the field of his/her choice. Establishment of private enterprises is free”,

Article 167 stating “The State shall take measures to ensure and promote the sound and orderly functioning of the markets for money, credit, Capital, goods and Services”, and,

Article 133 stating “Radio and television stations shall be established and operated freely in conformity with rules to be determined by law”.

Legal basis of the freedom of establishment and operation of audio-visual organization is Article 19-(1a) of Law No. 6112 on the Establishment of Radio and Television Enterprises and their Media Services stating that “A broadcast licence may be granted to joint stock companies estab-

lished in accordance with the provisions of the Turkish Commercial Code for the purpose of exclusively providing radio, television and on demand broadcast service”.

### *2.3. Legal regime of audio-visual media services*

Legal regime, which audio-visual media Services are subject to, is discussed both in Turkey and in the other modern countries. Traditional and common approach and practice arising from these discussions draw an exact line between press and audio-visual media while evaluating differences between them and agree that these are included in different regulatory and supervisory categories. In this approach, it is also acknowledged that audio-visual media regime has some shortcomings comparing to press legal regime which has the constitutional guarantee set out in all modern constitutions. Because it is an exceptional situation that arrangements regarding audio-visual media freedom realized with radio and television are included in constitutions (Yılmaz, 2006: 6-7).

Accordingly, differences of audio-visual media legal regime are as follows:

#### *2.3.1. In terms of freedom of expression*

In accordance with Article 26 paragraph 1 of the Constitution of 1982, “Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities” and it regulated audio-visual media Services realized through radio and television in terms of freedom of expression. Accordingly, no matter which tools are used to make a remark and for freedom of expression, it is within the scope of the first sentence of the Article 26 paragraph 1 of the Constitution.

However, the Constitution points another legal regime than the first and second sentences with the third sentence of the first paragraph of the Article 26 stating “this provision shall not preclude subjecting transmission by radio, television, cinema, or similar means to a system of licensing”.

Thus, the first and second sentences of the first paragraph of the Article 26 of the Constitution show the negative situation of freedom of expression meaning that the State cannot interfere; on the other hand, the last sentence shows another regime explaining the active status of the State in which it can interfere.

#### *2.3.2. In terms of freedom of establishment and operation*

Under “Administration” section of “the Executive Power” chapter of the Constitution of 1982, Article 133 regulates that “Radio and television stations shall be established and operated freely in conformity with rules to be determined by law”. Before the amendment of the relevant provision of the Constitution, Article 133 was named as “Radio and Television Administration” as a natural result of State monopoly. However, after the amendment of Article 133, commercial media Services and public broadcasting have been regulated with “institutions of radio and television” title under the same section.

When the first paragraph of the Article 133 of the Constitution and the first paragraph of the Article 26 are evaluated together, it is revealed that there is a freedom as audio-visual media Services are under close control and supervision of the State (administration) (Yılmaz, 2006: 19).

### 2.3.3. *In terms of constitutional licensing system*

The fact that audio-visual media Services are dependent on licensing leads to extension of discretion of law-makers regarding arrangement of this field. In this regard, the State has built a licensing regime in which State's administrative powers are dominant in audio-visual media Services through legislative power with the exception of administrative licensing necessity.

In all audio-visual media regimes, broadcasting service is carried out depending on a prior permission or general permission of the administration. Prior permission condition is unexceptionally accepted for broadcasting service to be carried out by using frequency. It is not possible to maintain a broadcasting service with only notification without prior permission or without permission. Hence, in one decision of European Commission of Human Rights, it was not found the fact that broadcasting without licensing is dependent on sanction contrary to the Article 10 of European Convention on Human Rights (Bellis, hudoc, application 1997).

European Court of Human Rights States that "the third sentence of Article 10 of European Convention on Human Rights envisaging a licensing system for audio-visual broadcasting service is to make it clear that States are permitted to regulate by means of a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects" (www.echr.coe.int, 12.11.2017).

### 2.3.4. *In terms of content arrangements*

All the arrangements in audio-visual media sector must be developed in line with general interest objectives such as pluralism, impartiality, cultural and lingual diversity, social participation, protection of consumers and minorities in media because quality content demand of audience and demands of media service providers regarding commercial communication cannot be negligible in audio-visual media Services. Besides, ensuring freedom of thought, expression and information are the most basic expectations in democratic societies.

According to jurisprudence of ECHR, tools used to explain an opinion and the way of explanation are preserved under the Convention, and action and content of expression are considered within the scope of freedom of expression and information. According to ECHR, direct, speed and sudden effect of radio and televisions can be subject to different arrangements regarding supervision of content, can be regulated with administrative procedures without ruling, and sanction can be applied (Darendeli, 2013: 370-375).

### 2.3.5. *In terms of judicial security*

In accordance with Article 28 of the Constitution, while the press shall not subject to prior permission and shall have judicial security, it is observed that audio-visual media Services do not have the same security. For example, even though publications in the press (suspension of periodical publications) are suspended by the decision of a judge as a principle, the Constitution of 1982 does not envisage judicial security for suspension of audio-visual media Services.

In addition, European Court of Human Rights point out in its judgments that editing, characterization, explanation and interpretation possibilities of broadcastings in radio and televisions are more limited than the press (www.hudoc.echr.coe.int, 24.01.2017).

Within this framework, it is stated that freedom in audio-visual media Services regime is limited and there is an organized and controlled freedom; therefore, preventive regime exists here

contrary to freedom of the press which is subject to suppressor regime as a principle (Kabaoğlu, 1998: 286-289). In other words, audio-visual media sector is a sector where interference of the State is intense and editing, controlling, permission and applying sanction powers of the administrative body and **administrative jurisdiction** are dominant. However, the press is considered as an area within **jurisdiction** where criminal law and civil law are dominant and activities can be carried out without receiving permission from the administration.

### 3. Regulatory and supervisory supreme councils and their regulation functions

#### 3.1. Regulatory and supervisory supreme councils

##### 3.1.1. Supreme councils in general terms

Since 1980, public agencies, also known as "independent administrative authorities", which are rapidly increasing, have their own nature within the classical administrative organizational structure, and are organized as supreme councils, regulatory institutions or regulatory and supervisory institutions, have emerged. These agencies first emerged in the USA (Akyılmaz at all, 2016: 369). These agencies are generally named as "Independent Regulatory Agencies" in the USA; "Quasi-Autonomous Non-Governmental Organizations" in UK; and "Independent Administrative Authorities" (Les autorités administratives indépendantes) in France. These agencies mostly also named as independent administrative authorities in administrative law doctrine, and law-makers adopted the concept of "regulatory and supervisory agencies (Atay, 2006: 263).

Regulatory and supervisory supreme councils are defined as "public legal entities which attach particular importance and sensitiveness to social life, perform activities to regulate, supervise and direct fundamental rights and freedoms and economic and social sectors or areas, whose decisions are not affected by any authority, which have special security like decision-making bodies, Financial autonomy and autonomous budget" (Ulusoy, 2003: 5).

##### 3.1.2. Classification of Regulatory and Supervisory Councils

Independent administrative authorities in Turkish administrative law doctrine can be analysed under three categories according to their functions. The first one is those related to regulating market economy. Agencies working on Capital market, competition, banking, telecommunications and energy can be example for these independent administrative authorities. The second category is administrative authorities performing activities to ensure that the administration acts in accordance with principles of the State of law. Ombudsman institution can be an example for this category. Thirdly, supreme councils aiming at guaranteeing fundamental rights and freedoms which are the subject of this study can be classified as Radio and Television Supreme Council and Personal Data Protection Authority in Turkey. Therefore, regulatory and supervisory agencies engaging in activities, especially in audio-visual media Services, and aiming at guaranteeing freedom of expression and information have particular importance and special status (Saygın, 2016: 413).

Those regulatory and supervisory supreme councils which are active in audio-visual media sector are as follows: FCC in the USA, OFCOM in UK, CSA in France, AGCOM in Italy and RTÜK in Turkey.

### 3.2. Regulatory and supervisory supreme councils in audio-visual media sector

#### 3.2.1. Reasons for emergence

One of the reasons for being of regulatory and supervisory supreme councils is a new relation needed between fundamental rights and freedoms and changing functions of the State (administrative authority) in media sector. This necessity is clearly observed in audio-visual media sector. Because it was seen that classical administrative body was not speed and efficient in protection of individuals and even some entrepreneurs from big companies or different companies acting parallel (Tiryaki, 2002, 169-204).

On the other hand, the level that technology has reached in relation with fundamental rights and freedoms shows that technology has expanded fundamental rights and freedoms. Hence, technology has expanded the meaning of freedom of the State, differentiated tools for freedom of expression, and by going further, created a new freedom called as freedom of audio-visual media.

As a result of these effects of technology, administration of audio-visual media sector by classical administrative bodies caused vulnerability risk; therefore, independent administrative authorities were established (Yıldırım, 2009: 151).

#### 3.2.2. Functions of audio-visual media supreme councils

The main functions of independent administrative authorities arranging different sectors of economy including audio-visual media are as follows: making arrangements in the fields of their activity and developing regulatory rules in this regard, monitoring and inspecting whether market actors act in accordance with regulatory rules or not, applying sanctions when it is identified that rules are not followed, and conducting research to improve markets (Turkish Industry and Business Association, 2002: 179).

In line with this, the main functions of the independent administrative authorities in audio-visual media are as follows: ensuring pluralism and diversity in radio and television sector and guaranteeing freedom of expression and information. Audio-visual media independent administrative authorities also identify the following points as fundamental legal arrangement areas while arranging radio and television Services:

- Administrative and financial structures of broadcasters;
- Structures, duties and powers of regulatory and supervisory public authorities;
- Conditions and procedures for granting license to broadcasters;
- Prevention of focusing (monopolizing) in broadcasting area;
- Technical infrastructure and its allocation and operation;
- Broadcasting principles related to content, content control and sanctions to be applied to agencies acting against broadcasting principles;
- International agreements regarding cross border broadcasts.

As is seen, regulatory supreme councils, which have extensive powers from frequency allocation to identification of broadcasting principles that should be followed by broadcasters, have highly important mission for existence and continuity of a pluralist and competitive radio-television sector protecting public interest (Öztekin, 2007: 59).

### 3.2.3. *Impartiality and independency of audio-visual media supreme councils*

As is seen above, impartiality and independency of the supreme councils having extensive powers and functions in media sector also gain importance. Now, most of the European countries have transferred arrangements in radio and television sector to independent administrative authorities, namely regulatory supreme councils. The scope of inspection mechanisms in many countries are quite similar and administrative independency of regulatory authorities are generally guaranteed through an assignment system.

For example, it is stated that in the case that area of responsibility of independent administrative authorities in France are directly related to fundamental rights and freedoms, there is a tendency to grant authority to legislative power whereas members of the government are granted authority if it is related to economy (Ulusoy, 2004: 142).

Functional independency of independent administrative authorities is related to being free in their procedures and actions, evaluations and reaching results. In this regard, functional independency means that departments under executive power do not have any power like invalidating or banning and suspending on the procedures and actions of these agencies (Akıncı, 1999: 105).

Financial independency means that administrative authorities have their autonomous budgets and are not subject to economic restrictions and bans in any case. The inevitable result of independency requires the relevant administrative authorities to be impartial. Regulatory councils have to be fully impartial and autonomous while using their power. In this regard, it was prohibited in many countries for council members and their relatives to perform income-generating activities in media sector and to be a shareholder in any broadcasting in order to ensure impartiality of these councils.

### 3.2.4. *RTÜK as an independent regulatory and supervisory supreme council*

In accordance with Article 133 of the Constitution, the Radio and Television Supreme Council (RTÜK) is an autonomous and impartial independent administrative authority whose members are elected by the Plenary of the Grand National Assembly of Turkey. In addition to election of members, Article 133 of the Constitution States that “the Radio and Television Supreme Council (RTÜK), established for the purpose of regulation and supervision of radio and television activities, is composed of nine members” and it brings concrete indicator for the definition of area of duty and power of the council. The conclusion is that the relevant article of the Constitution grants regulation and supervision of radio and television activities exclusively to RTÜK. Therefore, it is not possible to grant regulation and supervision of radio and television activities to another administration in line with the Constitution (Yılmaz, 2006: 12).

In a study presented as a report in the international conference titled “Independency of regulatory councils” and organized by Turkish Economic Association, independency of the councils was examined. Accordingly, it was concluded that RTÜK has the highest independency index among regulatory and supervisory councils in Turkey. It is understood that RTÜK is placed on the top in terms of independency as execution does not have any role in electing members, members elect the president of the council, it is difficult to dismiss the president and members and it has strong sources of income (Şanlısoy and Özcan, 2006: 123-124).

It is also stated in “Report of the State Supervisory Council” that Turkey received the highest score with 0,76 in comparison with independent authorities between Turkey and 17 European

countries by means of the same index, and Turkey was followed by Italy, Luxembourg, Ireland and UK (report of state supervisory council, 2010)

#### 4. Regulatory powers and difficulties of supreme councils in audio-visual sector

##### 4.1. In general terms regulation power of supreme councils

Within the framework of rules envisaged by constitutional orders, the extent of administrative regulation power of supreme councils in audio-visual communication sector varies from country to country. Even though law establishes audio-visual communication system with a detailed arrangement, regulatory power of the administration is inevitable. Because the main need of the administration in rapidly changing audio-visual communication environment is flexibility, and it can be ensured through flexibility in legal arrangements. It is recommended that administration should be granted power to adopt the system to changing conditions within the scope of flexible rules rather than determining strict rules. "For example, it was stated that even though power to identify what broadcasting activity is subject to laws, it is inevitable to grant power to the administration about identification criteria in order to ensure that technological innovations find a place in the system." (Yılmaz, 2006: 249).

##### 4.2. Regulation power of RTÜK in Turkey

As audio-visual media freedom means exercising fundamental rights and freedoms in Turkey, arrangements can only be made by law in this field. In accordance with Article 13 of the Constitution, "Fundamental rights and freedoms may be restricted only by law". In addition, the last paragraph of Article 26 titled freedom of expression and dissemination of thought States "The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law". Therefore, the main tool for arranging audio-visual media sector is law.

On the other hand, according to the last paragraph of Article 90 of the Constitution, "International agreements duly put into effect have the force of law". Thus, in addition to national Law No. 6112 on RTÜK, provisions of "European Convention on Transfrontier Television" (Official Gazette of Turkey, number: 21571) are also regarded as law in hierarchy of Turkish norms.

However, it is stated in the doctrine that it is inevitable to grant regulatory power to executive body as it is not possible and logical to include all the details regarding fundamental rights and freedoms as is the case with audio-visual media sector (Güran, 1969: 403-404).

The basis of the regulatory power of RTÜK is Article 124 of the Constitution of 1982. Accordingly, "The Prime Ministry, the ministries, and public corporate bodies may issue by-laws in order to ensure the implementation of laws and regulations relating to their jurisdiction, as long as they are not contrary to these laws and regulations". In this regard, RTÜK may also issue by-laws related to its own area of responsibility as a public legal entity. Although it is defined as by-law in the Constitution, RTÜK also carry out regulatory procedures such as "announcement", "general announcement", "notification", "general notification".

##### 4.3. Boundaries of regulatory power

As explained above, supreme councils may exercise their regulatory powers within the framework of boundaries set out in laws. These laws refer to laws on establishment of the relevant

supreme councils as well as the other laws granting authority to the councils. As is known, principle of "legality of administration" is valid in administrative law required by the principle of the State of law. This principle refers to "domination of law on administration and its activities" in a broad sense. Therefore, as regulatory power is a secondary power exercised within the framework of law, scope of legal arrangement cannot be narrowed or expanded (Günday, 2003:41).

Nevertheless, it is pointed out that it is not possible to define exact criteria which can explain the relation between law and regulatory procedures in terms of boundaries of regulatory power of supreme councils in practice (Kuzu, 1987: 65-67). Thus, during the judicial review of constitution of operation of RTÜK based on the relevant regulation, the court revoked the relevant arrangement as the supreme council does not have such a legitimate power (Kurban-Sözeri, 2012 TESEV Raporu Seri-3).

#### *4.4. Difficulties in regulation*

##### *4.4.1. Changes as a result of digitization and convergence*

Convergence, which can be defined as providing any kind of Services in the same communication environment, leads to changes in descriptions of communication environments and emerge of non-existent communication environments by bringing communication sectors together.

In addition, it is stated that frequency restriction problem will be solved and legal basis of interference of the State bodies in a form of restriction of the number of broadcasters in audio-visual communication sector will be eliminated with the technological development observed in the recent years, especially development of digital compression technologies.

On the other hand, while discussions regarding arrangements of audio-visual communication and telecommunications affected by parallel and digital compression techniques as well as demand for smoothing of regulation and supervision systems, it is also claimed that there is no need for administrative regulation and supervision anymore (Levy, 1999 cited by Yılmaz 2006 s. 83)

Re-definition of audio-visual media environments whose meaning has changed due to technological developments up to now requires arrangements in the structure and functioning of the broadcasting sector.

For example, as a technical requirement, television broadcasting sector should be divided into two main groups as content producers and infrastructure operators transmitting this content, and should be arranged accordingly (Akalin, 2011: 113). Hence, provisions regarding platform operators and infrastructure operators and their obligations, which are not regulated in repealed Law No. 3894, are included in Law No. 6112 (Article 29 of Law No. 6112).

##### *4.4.2. Technical arrangements and standardizations of United Nations and Regional Organizations*

Spectrum management, planning and frequency allocation considered as limited natural resources are currently realized through national and international organizations. Global frequency planning is made by taking into consideration national needs of member States within the framework of technical arrangements of organizations like ITU (International Telecommunication Union) of United Nations and CEPT (The European Conference of Postal and Telecommunications Administrations). In line with these arrangements, provisions of international conventions (Stockholm 1961 and Geneva 1989) signed before ITU are binding for member States. Allocations of

channels 49- 60 in Region 1 to IMT Services are defined in the final agreement signed at the end of WRC 15 conference of ITU and ratified by Turkey. In line with this decision which is binding for RTÜK and Republic of Turkey, it is considered necessary to revise broadcasting frequency plans with Information and Communication Technologies Authority (Report of Radio Television Suprime Council of Turkey, 2017: 29-30).

#### 4.4.3. *Standard setting functions and recommendations of European Council*

There is no doubt that legal framework in "European Convention on Transfrontier Television" of Council of Europe regulating audio-visual media sector and ratified by Turkey, and its additional protocols put frontiers to arrangements in terms of domestic law.

"European Convention on Transfrontier Television" is regarded as one of the two main documents related to direct arrangements in audio-visual media among international resources of audio-visual media law.

There is no doubt that as a part of national law, this convention is binding for all State bodies including law-makers. In addition to this Convention, Council of Europe of which Turkey is a member has Standard setting function and the following recommendations:

aa. Recommendation Rec (2000) 23 of the Council of Europe on the independence and functions of regulatory authorities for the broadcasting sector.

bb. Recommendations of Audio-visual EUREKA, European Audio-visual Observatory, regarding "Digital Plans and Justifications" published in IRIS (Tanja Kersevan Smokving, 2013-1 IRIS Plus s. 33).

#### 4.4.4. *Standard setting functions and recommendations of European Union*

"Audio-visual Media Services Directive of European Union" is one of the most important

international documents regulating broadcasting among EU member States. The other regulations of the European Union are as follows:

- Directive regulations including recommendations for frequencies to be objective, transparent and non-discriminatory" (Directive 2002/21/EC of 7 March 2002 (Framework Directive)

- Closure criteria regarding "Information Society and Media" chapter within the scope of EU negotiations process

- Recommendations of European Regulators Group for Audio-visual Media Services (ERGA)

#### 4.4.5. *Compliance with Principles and Commitments of the Organization for Security and Co-operation in Europe (OSCE)*

Representative on Freedom of Media was established in 1997 by OSCE in order to improve freedom of expression. In the work of the Representative, "observing media developments" and "helping participating States abide by their commitments to freedom of expression and free media" are included (Benedek and Matthias, 2016 s. 157-158).

#### 4.4.6. *National Public Order and National Security Concerns*

In the globalization world, subjects and activities that State hold within its own regulation and

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supervision area in the face of risk of transformation of the world into a single-nation communication society are limited.<sup>53</sup> On the other hand, transnational audio-visual media activities are becoming more efficient and needs of nation States for public order and national security are increasing. In this regard, States are in charge and authorized to take measures also for security of the society in audio-visual media sector through supreme councils.

For example, in accordance with Article 26 paragraph 2 of the Constitution of 1982, national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation set out in restriction of exercising of freedoms are used as criteria to permit audio-visual media Services. Besides, the relevant criteria (national security and public order) are also used to revoke the permission in case of violation of national security requirements after the permission is granted. Amendments with Decree-Laws during the State of emergency in Law No. 6112 can be example of that (Tekinsoy, 2011: 306).

## 5. Positive obligation of the state in audio-visual media

### 5.1. Concept of positive obligation

The State cannot content only with acknowledging rights in ensuring these rights, also avoids from actions preventing to exercise these rights. The State should also perform necessary intervention in preventive attitudes of the other individuals or groups, for example, preventive attitudes of the majority towards the rights of minority. All of these points require the State to mobilise effective mechanisms by eluding passive structure. In the light of these, based on the idea that classical rights do not ensure efficient protection, the State is granted an obligation (Kaya, 2017: 6).

According to dictionary of Turkish Language Association, obligation means “compulsory action or necessity, liability, commitment, requirement to do an action” (tdk.gov.tr, 22.11.2017) Positive obligation requires the State to take an active role in line with this dictionary.

In the doctrine, positive obligation is defined as measures that should be taken by the State in order to ensure efficiency of human rights in social reality, to prevent violation of fundamental rights by the third parties and to ensure that individuals can benefit from the rights effectively (Çimrin, 2017: 14).

ECHR makes a distinction between substantial obligations (related to development of legal and administrative framework) and procedural obligations (related to ensuring that practice is in line with legislation in force). Procedural obligations include establishment of an effective legal system in order to ensure that rights regulated in European Convention on Human Rights can be used in practice, taking necessary measures to exercise rights and protection of holders of rights from interventions of the third parties (Kombe and François, 2008: 16).

In judicial decisions of Turkey, it is underlined that balancing between freedom of expression and the other rights of officials that should be protected is important for the State in terms of positive obligation. For example, it is stated in the relevant decision of Criminal Chamber No. 18 of the Court of Cassation that “Acting against provisions of both the Constitution and the Convention might mean acting against positive and negative obligations of the State. Therefore, competent authorities shall not prohibit announcement and dissemination of the statement and subject it to sanctions unless necessary within the scope of negative obligation and shall take necessary measures and protect balance for actual and effective protection of freedom of expression within

the scope of positive obligation (Criminal Chamber no. 18 of the Court of Cassation, 2016-18082).

### *5.2. Positive obligation of the state in audio-visual media services*

Freedom of expression and freedom of information (media), which are basically human rights, are considered as a freedom against government bodies that can traditionally control and forbid expression. However, commercialized, expanded and complicated media ownership rates and advertisement rules have made intervention of the State necessary. Because regulations which will guarantee the respect of officials and groups such as media owners, infrastructure operators and platform operators to freedom of expression due to their horizontal effects are important. Within this framework, States have positive obligations to protect citizens from restrictions and violations of natural persons, institutions and organizations or non-governmental actors (Tanyıldızı, 2017: 119-176). Some of the obligations can be classified as follows:

#### *5.2.1. Developing pluralist and competitive environment*

Modern media operations might have communication infrastructures, production and transmission by expanding through new investments, merging and integration and may tend to monopoly. This situation has negative effects on pluralism, democracy, freedom of expression and full operation of competition in the free market. Therefore, it is considered that arrangements to ensure that free market conditions are established, diversity and pluralism can function effectively and efficiently in audio-visual media are necessary (Demirbilek, 2011: 42).

Hence, Article 167 of the Constitution of 1982 States that "The State shall take measures to ensure and promote the sound and orderly functioning of the markets for money, credit, Capital, goods and Services; and shall prevent the formation of monopolies and cartels in the markets, emerged in practice or by agreement". In addition, Article 37 of Law No. 6112 States that "Taking required precautions in the field of broadcast Services, in order to guarantee the freedom of expression and information, diversity of opinions, competition environment reserving the duties and powers of the Competition Authority and pluralism and prevent concentration and protect the public interest" is among duties and powers of the Supreme Council.

#### *5.2.2. Raising awareness of audience (Promoting media literacy)*

Media literacy is defined as a power of audience to assess messages transmitted by media from a critical point of view and know and use of new media. At this point, it seems that commitment of regulatory supreme councils is to cooperate with Ministry of National Education and the other institutions in order to spread media literacy so that all tiers of society are included (Article 37-r of Law on RTÜK). In addition, another requirement of the other positive obligation of RTÜK is to establish and develop a protective Symbol system named smart signs (Saygın, 2016: 431). According to Article 24 of Law No. 6112, "Media service providers inform viewers vocally or in writing about the contents of program Services by using a protective symbol system. The procedures and principles of the protective symbol system are established by the Supreme Council".

Besides, media service providers also have commitments towards audio-visual media sector to raise awareness and sensitiveness, conduct activities to give awards, develop national and international policies regarding the sector, follow technological developments and prepare projects.

## 6. Regulatory power and limits of the central administration in audio-visual media

After the main duties of regulatory supreme councils to regulate and supervise audio-visual media sector and their regulatory power in this regard are explained, it is deemed necessary to explain the powers of the State through the other administrative bodies in general terms because the Constitution and positive law grant some exceptional powers to the Central administration in audio-visual media sector.

Similar powers are also granted in French and the other European Council member States' legal regimes, too. For example, according to Article 27 of French Law on Freedom of Communication, general principles in certain matters are determined by decrees issued by the Prime Minister. According to Article 6 of the relevant law, decisions of CSA including measures to ensure efficient usage of frequencies are submitted to the Prime Minister and the Prime Minister may ask the Council within 15 days to take another decision. In UK, the relevant Ministry has authority to give instructions to OFCOM about certain cases, and OFCOM is obliged to perform these instructions (Office of Communications Act (OFCOM), 2003, Cited by Yılmaz, 2006: 183).

### 6.1. Regulation powers granted to the central administration pursuant to the announcement of the state of emergency

Being effective from the date of 21.07.2016, decree-laws issued during the State of emergency include provisions making important changes in the legislation related to audio-visual media, and regulations restricting or halting fundamental rights like shutting down some media service providers have been made. In these regulations made with decree-laws No. 668, 680, 687 and 690 respectively, it is seen that authorities are granted to the Central administration and the other bodies apart from the supreme councils, as well as important changes in regulatory and supervisory powers of the supreme councils.

The relevant powers are exceptionally transferred to National Intelligence Organization and the General Directorate of Security regarding license applications of media service providers in accordance with Article 19 of Decree-Law No. 680; to executive body, to the commission to be established in accordance with paragraph 4 and to the relevant minister in accordance with Article 2 (1) b of Decree-Law No. 668; to the Ministry of Finance with the additional paragraph added with Article 11 of Decree-Law No. 687, and to the Ministry of Health and the Advertising Board of the Ministry of Customs and Trade in accordance with Article 60 of Decree-Law No. 690.

### 6.2. Regulatory powers granted to the central administration during ordinary periods

#### 6.2.1. Powers Granted to the Prime Minister of Republic of Turkey by Article 7 of Law No.6112

With Article 7 of Law No. 6112, it is regulated that in evidently required by national security or in situations where it is highly likely that public order will be seriously disrupted, the Prime Minister or the minister to be appointed by the Prime Minister can impose a temporary ban. This power is allocated to the Prime Minister only in situation where it is required to protect national security or public order (Keskin and Oruç, 2016: 195/212).

Even though the title of the relevant article is "Broadcasts in time of crises", when the regulation in the article is assessed as a whole, it is understood that the Prime Minister can exercise this power not only during crises but also whenever the circumstances occur (Yılmaz, 2013: 8).

There is a similar regulation in Article 23 of Law No. 2954 on Turkish Radio and Turkish

Corporation (TRT) regulating public broadcasting in Turkey and accordingly, "The Prime Minister or the minister to be appointed by the Prime Minister can impose a ban on news or broadcasting where it is evidently required by national security" (Sunay, 2017: 1226-1227).

#### 6.2.2. Powers Granted to Ministry of Transport and Information and Communication Technologies Authority by Electronic Communications Law No. 5809

As explained above, it is observed that regulatory powers regarding categories of Services to be provided through terrestrial frequencies, necessary infrastructure and platform operation in satellite and cable broadcasting are also granted to the Ministry or independent administrative authority authorized by special laws apart from RTÜK. Accordingly,

- in accordance with Article 37-J of Law No. 6112, frequency planning power in line with the Electronic Communications Law No. 5809 and the relevant legislation

- in accordance with Article 29-(I) of Law No. 6112, authorizing platform operators, and infrastructure operators transmitting broadcast Services to provide broadcast Services

- in accordance with Article 6 and 48 of Law No. 5809, powers of Information and Communication Technologies Authority

#### 6.3. Effects of powers granted to the central administration on audio-visual media regime

Even though the powers granted to the Central administration and explained above do not have any current or active effect on functioning of audio-visual media regime in practice, they may lead to important consequences especially during the periods of the State of emergency when this article was written. As is seen above, the Central administration is also granted to some powers apart from the supreme council (RTÜK) in radio and television Services.

In addition, it is understood that exclusive regulation power of the supreme council (RTÜK) is not reduced in decree-laws issued during the State of emergency. On the contrary, it is stated that regulatory power of the Supreme Council is transformed into an effective sanction regime to ensure deterrence (Darendeli, 2017: 115-164).

It is more appropriate to say that regulations made in order to re-establish the public order in audio-visual media sector are limited, they should be assessed in line with the measures taken during the period of the State of emergency and they will find their actual place in line with constitutional judicial review pursuant to legislative process.

On the other hand, transferring some exceptional powers to the other bodies of the State in line with the positive obligations of the State is a natural result of the will to ensure cooperation between the State bodies and institutions included in the constitution and to establish an effective audio-visual regime.

It does not seem legally possible to grant tutelage to the State (central administration) regarding procedures of RTÜK and similar supreme councils. However, we believe that it is not harmful to grant a limited approval power to the executive body and central administration regarding regulatory procedures of RTÜK and it complies with the principle of administration integrity.

## Conclusion

Audio-visual media sector is a field where regulation, supervision, permission, and sanction application powers of the administrative body on which intervention of the State is dense and

administrative judicial system is dominant. In this regard, a permission system in which administrative powers of the State are dominant in audio-visual media Services with regard to administrative permission requirement has been built by the State through the legislative body.

Supreme councils aiming at guaranteeing fundamental rights and freedoms, especially regulatory and supervisory councils involving in audio-visual media Services, have a special importance and separate place in the classification of independent administrative authorities.

Apart from having different functions to regulate freedom of expression and information from the other supreme councils regulating market economy, audio-visual media supreme councils which have different regulation function than the press and internet media have unique organizational structures and functions. Hence, according to the Report in the relevant section of the study, the will of the law-maker which has granted a constitutional guarantee to the Radio and Television Supreme Council, the administrative authority with the highest independence index among the supreme councils and shaped it with a separate law is another evidence that this field is a unique one.

Regulation power of the audio-visual media supreme councils which are changing rapidly within the boundaries of the Constitution and establishment laws in the field is inevitable. Relation between the law granting regulation power to the supreme council and the Constitution and preferred method in exercising this power have importance in terms of the scope and limits of the regulation.

It is observed that audio-visual media supreme councils encounter some national and international difficulties in regulating their fields. Undoubtedly, they also have positive obligations to prevent interventions of non-governmental actors or groups in exercising rights, develop pluralist and competitive environment and raise awareness of audience.

On the other hand, transferring some exceptional powers to the other bodies of the State in line with the positive obligations of the State is a natural result of the will to ensure cooperation between the State bodies and institutions included in the constitution and to establish an effective audio-visual regime. Granting these powers to the Central administration especially due to national security, relations with the other countries, compliance with international commitments and public security can be appropriate in terms of compliance with the principle of administrative integrity.

However, the fact that regulatory supreme councils, whose objectives are to ensure freedom of expression and information and to develop competitive, speed, dynamic, information economy and high technological society, established common regulation methods with sector representatives, non-governmental organizations and universities will undoubtedly bring great contribution to place and improve the principle of the State of law and global values in democratic and modern Turkish audio-visual media

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