Freedom of Defence and Bar Associations

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Having been synonymous with "*cruelty" or "brute force*" in the earliest times of human history, the *"freedom to claim rights"* is now a freedom which is granted and regulated first by constitutions and then by laws and which can only be used within this framework.

Obtaining the freedom to enforce a right through an independent and impartial judiciary came as a result of a legal enlightenment that has progressed and been achieved gradually. The main contributors to the freedom to seek enforcement of a right, in terms of its use and protection through judicial means, as well as the attainment of justice through the implementation of law, are lawyers - the honorable representatives of the profession of seeking right who devote their knowledge, time and experience to the service of justice and the use of those seeking right.

For this reason, the legal profession is both a public service, and at the same time an inseparable and inevitable part of legal protection, since it is a *"sine qua non"* element of judicial activity.

As has been stressed in international conventions, like the European Bar Associations Code of Conduct for Lawyers (adopted by the representatives of twelve Bar Associations on 28 October1988) and the Recommendation on the Freedom of Lawyers adopted by the Council of Ministers of the European Union, and in the Basic Principles on the Role of Lawyers (also known as the "Havana Rules," adopted at the eighth meeting of the United Nations General Assembly), in a society based on the principle of the rule of law, the function of the lawyer is *"not limited to carry out legal representation within the limits set by laws, but it is also of invaluable importance for the realization of justice and for those subject to trial whose rights and freedoms they are to defend."*

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Within the meaning of Article 1 of the Turkish Advocacy Code, a lawyer "*is a constitutive part of the judiciary and represents freely the independent defense.*" The terms "*independence*" and "*freedom*" emphasized in the article mean "*freedom as autonomy*" from the point of defense. When examined from a historical and legal perspective, defense, which is essentially a fundamental human right, has to be free

and autonomous. Here "*freedom*" is, without doubt, *"freedom from something"* as defined by the doctrine, and thus is a "*negative freedom"* implying a dislike for interference- the absence of external constraints on the individual.

Norman P. Barry, a British political scientist, refers to thinkers in his book "An Introduction to Modern Political Theory" by suggesting that *"negative freedom"* is important only when it makes a contribution to a value, and this value is autonomy.

"Freedom as autonomy," referring to the scope of the alternatives open to someone, as well as the required conditions for the achievement of certain objectives, is something more than a concept of freedom understood to be the absence of limitations. "*Freedom as autonomy,"* as in the case of extreme positive theories of freedom, demands the existence of institutions offering wide facilities that can translate abstract preferences into real opportunities, rather than the restriction of, or disregard for, subjective choices of individuals by the government.

On the other hand, Bar Associations, in fact belong to, or should belong to, *civil society*.

The regulation defining *"lawyers as the constitutive part of the judiciary and their free representation of the independent defense,"* in Article 1 of the Turkish Advocacy Code, and the obligation laid upon official and private bodies specified in Article 2/3 of the same Code to assist lawyers in the performance of their duties, means no restriction of any individual subjective choice by the governments, as well as the institutionalization of wide facilities which convert these abstract preferences into broad opportunities.

Molierac, who is one of the masters of the legal profession, expressed the freedom and autonomy of the defense concisely with these words: *"While performing our duties, we adhere to nobody; not to the client, not to the judge and nor to the government. We do not claim that there are people below our level. However, we do not recognize a hierarchical seniority either. There is no difference between the one who is the most junior and the one who is the most senior or the one with a reputable name. The lawyers did not have any slaves; but did not have any owners either."*

On the other hand, Bar Associations, while they are semi-official bodies joined to the state in their actual form as regulated by the Turkish Constitution of 1982, in fact belong to, or should belong to, *civil society*.

Civil society is an analytic concept related to perceiving the relationship between the state and society from a perspective of mutual dependency. As far as the State is concerned, this analytical approach focuses on the separate entity of the state from society and the nature, degree and result of such autonomy. From the point of society, the concept discusses the possibility of the existence of a social sphere which has an inner dynamic for development peculiar to itself, with institutionalized structures relating to the methods of established decision-making and conflict-resolution and independence from the state.

In the early literature from John Locke to Thomas Hobbes, from Adam Ferguson, David Hume and Adam Smith of the Scottish Enlightenment to Hegel and Marx, from De Tocqueville to Gramsci, and even to Habermas in our time, the concept of *civil society* has been conceived and defined in very different ways. Yet *civil society* can be defined as an entity which is the most effective safeguard against the abuse of political power by the state and the opposition relying on their legitimate origin, against despotism and totalitarianism contributing to the introduction and establishment of democracy, based on the philosophical ground in which the state is understood, not as an entity, but as its derivative, relatively independent from the state with its own development principles and institutional structures.

From this perspective, while the bar associations are part of the *civil society*, they are not among the *non-governmental organizations*. Although it is difficult to talk about a literal comparisson, Bar Associations are institutions called *"mediating structures"* by the Anglo-Saxons.

Peter L. Berger, Professor of Boston University, and at the same time Director of the Institute Economic and Cultural Studies, points out in his article published in Yeni Forum Magazine (1989) that democracy is the most practical way of preserving the mediating structures, and the latter are the protectors *per se* of the democracy.

As clarified by Professor Berger, mediating structures that exist in developed and developing societies are, like cooperatives, trade unions, professional associations or perhaps like family, religious institutions and local structural agencies, are related to, and linked with, values and identities cherished by the people.

Mediating structures not only protect people from alienation and from fear of losing one's identity and affinity - the cost paid for modernity - they also draw the attention of the political powers to the values of the people.

Without a doubt, unlike structures whose function is to maintain the *status quo* and reduce the speed of change of the society, the community and the family, bar associations as mediating institutions do exist to disrupt the *status quo* for the better good.

In contrast to authoritarian and totalitarian regimes, mediating structures are part of that societal basis that allows the institution and improvement of liberal democracy. Actually, totalitarian regimes are not only unable to tolerate the relative independence of the mediating structures, they want to control them, reduce their number and to incorporate them into the government.

Without a doubt, unlike structures, which simply there are, and as such whose function is to maintain the *status quo* and reduce the speed of change of the society, the community and the family, which are defined on the basis of the bonds that hold people together such as language, culture, history and geography, bar associations as mediating institutions do exist to disrupt the *status quo* for the better good.

In order for the bar associations to be able to perform this function, it is essential that the established, the accustomed, the known and the

easy be questioned, including interpersonal and social relationships and skills, and they have to be organized in such a way that all the above may be abandoned when needed.

For the purposes of ensuring the performance of these functions by bar associations, Article 76 of the Turkish Advocacy Code requires not only that *"Bar Associations shall be responsible for improving the legal profession, ensuring honesty and integrity between lawyers and clients and among lawyers themselves, protecting the order, morality and dignity of the profession and satisfying the needs of the lawyers"* but also entitled them to *"protect and defend human rights and the rule of law"*.

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In order for the bar associations to perform their duties and their power, the member lawyers should take responsibility for their own contributions, conduct and performance, as well as the goals of their bar association. For this reason to fulfil their responsibility to the bar association, the lawyers should "*do something for the association*" without asking "*what does the association do for them?*" When they do so, and as long as they work hand-in-hand with their own organization and thereby with the synergy produced in this way, it is obvious that bar associations and legal profession will become a community that can create high values.