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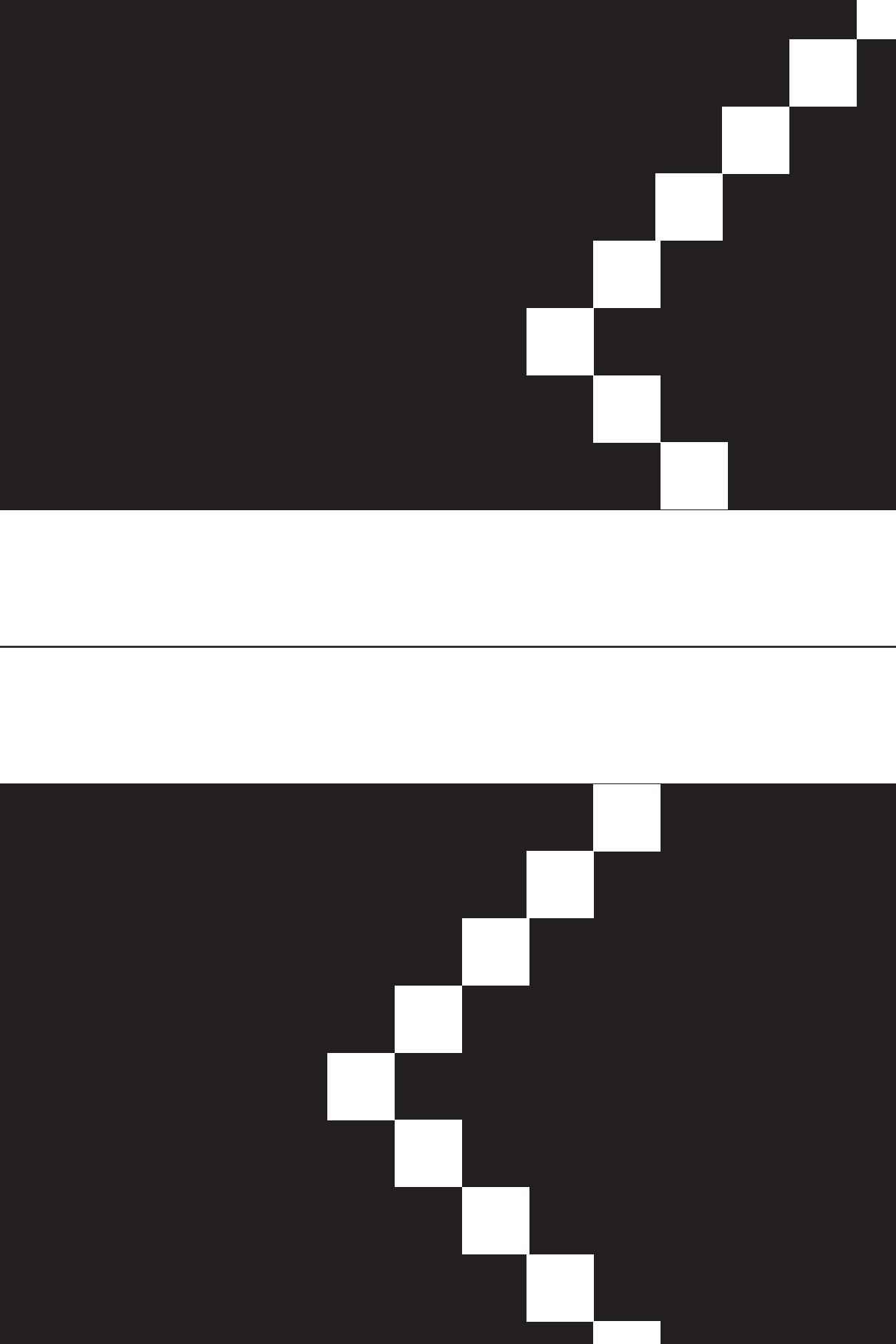

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PEER REVIEWED ARTICLE

# How Did a Safeguard for Disadvantaged Groups Turn into the Weapon of Oppression?: Normative Distortion of the Article 216 of the Turkish Penal Code*

Dr. İlker Gökhan ŞEN** & Dr. Kasım AKBAŞ***

* This essay received the "Excellence in Human Rights Research Prize in Turkey" from the Raoul Wallenberg Institute of Human Rights and Humanitarian Law in April 2012. While an update of the facts and cases in this past 6-year period would have been useful, even un-updated the article confirms that the authoritarian use of justice has always been and will be one of the main challenges to the rule of law in Turkey. The central arguments of this work remain intact, relevant, and unfortunately confirmed by the post-15-July governmental crackdown on freedoms, democracy and the rule of law in Turkey.

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ABSTRACT

This study deals with the fallacious use of the Article 216 of the Turkish Penal Code. This norm, which was created to protect vulnerable and disadvantaged groups in a society, has turned into a legal tool to oppress those who should be under protection. An examination to the causes of this situation calls for a holistic reflection on diverse subjects such as; the universalist-cultural relativist controversy on human rights, concepts of indeterminacy of norms and hate speech in international and domestic law. The status of freedom of speech in terms of the said article will be tackled at the end of this study, which will lead to a relatively new concept: the normative distortion.

## 1. The Importance and the Framework of the Study

The notion of human rights rests on the assumption that there are certain rights and freedoms, which are valid for everyone. In this context, the concept of "everyone" -while connoting that these rights are not historically, or sociologically relative- also requires to accept that rights and freedoms have the same meaning everywhere and shall be applied with the same content.

The idea of human rights as a transcendental concept brings a string of problems including certain key issues, which are under debate in the relevant literature. In the first place, one may ask the question; "Who decides the rights which are valid for everyone?" In fact, this question stems from the criticisms, which assert that "the human rights" is a product of western-centric political thought. Since the last decade of the 20thCentury, it is argued, the human rights discourse has become an operative tool in the manipulation of the third world.[1] Secondly, the preceding question boils down to the ambivalent status of human rights vis-a-vis the cultural relativity. The contemporary rhetoric of human rights is value-oriented, in that, it is in defense of the "values." However, the concept of value is itself a historical and social concept. In other words, "value" takes its meaning in its own social and cultural context. The claim of universality of human rights involves the premise that certain values are universal. These questions have been widely discussed in the literature (Goodhart, 2003; Donnelly, 2007; Sen, 2004).[2]

Interlinked with the above said discussions, we may ask whether the exact same legal norms regulating the same rights and freedoms mean identical and applied in the same manner regardless of place. By this study, we consider this problem as an important, actual, and urgent issue that has to be tackled.

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[1] Human rights are a "…essentially Western concept –ignoring the very different cultural, economic, and political realities of the other parts of the world…" (Tharoor, 1999: 1) It may be that, "human rights doctrine is now so powerful, but also so unthinkingly imperialist in its claim to universality, that it has exposed itself to serious intellectual attack." (Ignatieff, 2001: 102)

[2] We may discern two sources of the non-western relativism against the claim of universality of human rights. The first one is the Islamic dogma, which is clearly at odds with particular elements of western conception of human rights, namely sexual and religious matters. Certain states of Muslim population, particularly Pakistan, Egypt, and Saudi Arabia, raised objections to provisions of the 1948 Universal Declaration of Human Rights, which were relevant to marriage and family and guaranteed the right to change one's religion (Witte and Green, 2009). The second one may be named as the East Asian objection, where the communitarian values are endorsed against individual freedom. In this context, the community and family are favored over individual rights and the order is favored over democracy and individual liberties (Ignatieff, 2001: 105).

We may formulate the problem as follows: Does a legal norm, claiming to be universal, produce different outputs in different societies?

We answer this question affirmatively and coin the term for this situation "normative distortion" the details of which will be dealt below. We see this, as an actual, important, and urgent matter as regards the human rights for the following reasons: 1) The risk that same rights and freedoms may be interpreted and applied differently in different societies constitutes a serious threat to the universality of human rights. 2) States claiming to abide by the human rights use the weapon of *legal veil*: They incept in their legal system legal rules as exactly worded by the international legal instruments or analogous national provisions of model states. However, they use it in a way diametrically opposed to its aim. What we would like to highlight is not the problem of effectiveness of law in Kelsenian terms. We are not discussing here the gap between "paper" and "reality." 3) The relevant literature reviewed so far, has remained to be inconclusive regarding this problem.

In this context, we will tackle as an example of normative distortion, the prohibition of hate speech as regulated by the article 216 of the New Turkish Penal Code. We will try to demonstrate how this hate speech regulation adopted pursuant to a universal legal standard aimed to protect the rights and freedoms of the disadvantaged and vulnerable groups is distorted by the Turkish judicial system. In this framework, we wish to explain the meaning of hate speech in international human rights law, in light of legal instruments and case law of the European Court of Human Rights. Then we will go on to explore how the article 216 is understood and applied.

At this point, we should underline that the problem of normative distortion is not directly linked with the above-mentioned antithetical views of universalism and cultural relativity and criticisms of western-centrism. At best, they may prove secondary insights to the formation of the motives and mindset of the law-interpreting actors in judiciary. Rather, the problem involves: the meaning, interpretation and political-ideological distortion of a norm. We will handle this issue by referring to the concept of "indeterminacy of norm", albeit with a particular approach. In the conventional studies regarding the legal indeterminacy, the emphasis is made on the different interpretation of the same legal rule by different judges in a legal system. This study, however, tackles a process by which a norm of human rights, namely the Article 216 of the Turkish Penal Code, which is created to protect vulnerable and disadvantaged groups in a society, is turned into a weapon to oppress those who should be under protection. Thus, in the following section, the concept of the indeterminacy of norm is examined, and then we will go on to explain the concept of hate speech.

Finally, we will evaluate the status of hate speech in Turkey: the relevant legal provisions and their use in practice.

We may note the following premises that will guide our study.

1. Hate speech norms in international instruments on human rights aim to protect the disadvantaged and vulnerable groups,
2. The universality of human rights calls for the same and standard application of such norms in each state,
3. The Article 216 purportedly aims to prevent the hate speech,
4. The Article 216 is not used to protect the disadvantaged and vulnerable groups but to oppress them at the advantage of prevailing majoritarian views,
5. This situation may not be understood by simply referring to the literature on cultural relativity or indeterminacy of norm. The issue involves a mixture of elements from the problems of cultural relativism and normative indeterminacy,
6. To explain this concept, we suggest the term "normative distortion."

## 2. Norm and Legal or Normative Indeterminacy

Norm, with its technical meaning in law, is defined as a statement of "ought to". Briefly, norm is the technical term used for the mode of expression of the legal rules. In principle since they are both hypothetical premises, natural laws and legal rules are stated within the same logical form of the premise. Yet, the form of natural law may be demonstrated as "If A is, B is" while the form of legal norm is as "If A is, B is ought to be" (For the definition of the norm see Kelsen, 1999: 46).[3]

[3] Kelsen also underlines the difference between the meaning of the norm and its application: "A legal order as a whole and the particular legal norms which form this legal order are to be considered valid only if they are, by and large, obeyed and applied, only if they are effective. But their validity must not be confused with their effectiveness. Effectiveness is merely a condition of, but not identical with, validity. A legal norm may be valid before it becomes effective. When a statue is applied by a court for the first time after its adoption by the legislative organ, hence before the statue could become effective, the court applies a valid law; it can apply the law only if the law is valid…. [j]ust as the act by which the norm is created is not identical with the norm-which is the meaning of this act- the effectiveness of a legal norm is not identical with its validity." (Kelsen, 1960: 272.) As mentioned above, we do not like to use the indeterminacy of the norm in the Kelsenian concept of effectiviness of the norm.

The concept of legal indeterminacy involves two interacting aspects: 1) The indeterminacy of the legal text, i.e. the norm, itself 2) The indeterminacy of the meaning which may appear at some stage in the application of a norm to a concrete case. In the first context, the indeterminacy stems from the intelligibility of the legal text, whereas in the second, the judge finds herself in the face of an incident where she has to determine the meaning of the norm in relation to that case (Özkök, 2002: 1).[4]

Hart notes that the legal texts are flawed with the "open-texture." By "open-texture," Hart means that in some situations, i.e. when a case is not regulated by a norm, the discretion of judges is needed. This is due to the indeterminacy of the application of rules. According to Hart's conception, positive law is made of the "core" and an outer circle of "penumbra". The core of law is, evident and "determinate", whereas "penumbra" is ambiguous or indeterminate. During the interpretation of certain legal provisions the core is self-evident, as applied without any space for moral argument. Alternatively, the penumbra invites ambiguity, in which case, judges have to leave the sphere of law and enter that of morality, where they judge on particular cases, by means of their own subjective values.

> There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out. These cases will each have some features in common with the standard case; they will lack others or be accompanied by features not present in the standard case. Human invention and natural processes continually throw up such variants on the familiar, and if we are to say that these ranges of facts do or do not fall under existing rules, then the

[4] "Legal theorists distinguish among ambiguity, vagueness, and contestability though all three are usually covered by the general term indeterminacy. Ambiguity is language-governed and occurs when a word has more than one meaning, or when the syntactic arrangement of a normative proposition leads to more than one interpretation. Vagueness results when it is not clear if a legal term applies or not to an object or case, thus making it a borderline case, or a "hard" or "penumbral" case, in Hart's terms .... Finally, contestability concerns the disagreements among legal interpreters about the negative legal and social consequences that the application of a legal term or expression may carry" (Villars, 2009:2313; Lawson (1995:414) distinguishes legal 'indeterminacy' from 'uncertainity'. The latter being any sort of factor that could lead to indeterminacy. For him, one needs 'to know how uncertain one must be about an answer before one ought to throw up one's hands and pronounce the question indeterminate.' Perry, (1995:375) notes that; "A legal text can be, in the political community whose text it is, opaque, vague, or ambiguous." See also: Waldron, 1994:512-515).
As will be discussed below, we argue that the article 216 does not have any flaw regarding the intelligibility.

> classifier must make a decision which is not dictated to him, for the facts and phenomena to which we fit our words and apply our rules are as it were dumb…. Fact situations do not await us neatly labeled, creased, and folded, nor is their legal classification written on them to be simply read off by the judge. Instead, in applying legal rules, someone must take the responsibility of deciding that words do or do not cover some case in hand with all the practical consequences involved in this decision.
>
> We may call the problems which arise outside the hard core of standard instances or settled meaning 'problems of the penumbra'; they are always with us whether in relation to such trivial things as the regulation of the use of the public park or in relation to the multidimensional generalities of a constitution. If a penumbra of uncertainty must surround all legal rules, then their application to specific cases in the penumbral area cannot be a matter of logical deduction, and so deductive reasoning, which for generations has been cherished as the very perfection of human reasoning, cannot serve as a model for what judges, or indeed anyone, should do in bringing particular cases under general rules. In this area men cannot live by deduction alone. And it follows that if legal arguments and legal decisions of penumbral questions are to be rational, their rationality must lie in something other than a logical relation to premises (Hart, 1958: 607-608; See also: Dyzenhaus, 1997: 6-7)

Hart assumes that the "penumbra of uncertainty" in a legal norm stems from the ambivalence of the legalese and its state of open-texture. In short, according to him the judges may legitimately create law whenever they are confronted with such areas of penumbra (Hart, 1958: 606-607; see also Kress, 1989: 287). Hart puts three main reasons in order to explain indeterminacy: the indeterminacy of the language, the generality of the standards that are used in the norms, and the indeterminacy of precedent in the common law system.

The claim of indeterminacy of law may be observed as a main subject of the debates in the framework of Critical Legal Studies, a school in legal thought which, among others, assert that, legal materials (such as statutes and case law) do not completely determine the outcome of legal disputes.[5] Legal decisions are a form of political decision. According to Kairys,

> …[L]egal reasoning does not provide concrete, real answers to particular legal or social problems. Legal reasoning is not a method or process that leads reasonable, competent, and fair-minded people to particular results in particular cases….there is nothing within the law that determines which

[5] See generally Tushnet, 1996

> rationalization a judge should choose in particular situations, and this lack of a legally required result is systematically obscured in law classes, legal discourse, and popular conceptions of the law. (Kairys, 1983-1984: 243 and 265)

In fact, one may see the logical link between the concept of legal indeterminacy and the anti-formalist criticism to law. Briefly, "the term formalism is usually taken to describe: belief in the availability of a deductive or quasi-deductive method capable of giving determinate solutions to particular problems of legal choice" (Unger, 1982-1983: 564).

Such a formalist approach may be sensed in Blakcstone's famous account on law: "…judgment or conclusion depends not…on the arbitrary caprice of the judge, but on the settled and invariable principles of justice." For him, the juridical decisions are not the determination or verdict of the judges despite the fact that they say what the meaning of law is. They are the conclusions that logically flow from the premises of law (Quoted in Wilfrid E. Rumble, 1966: 254).

On the other hand, anti-formalist approach rejects the idea that law is an autonomous system of norms, which is free from politics and ideological conflicts. Hutchinson and Monahan clearly underline this point: "Law is simply politics dressed in different garb; it neither operates in a historical vacuum nor does it exist independently of ideological struggles in society. Legal doctrine not only does not, but also cannot, generate determinant results in concrete cases. Legal doctrine can be manipulated to justify an almost infinite spectrum of possible outcomes." (Hutchinson and Monahan, 1984: 206-208).[6] Particularly, Dorf is skeptical about the "unelected judges (who) are the actors charged with specifying the content of legal norms, (and in which case) indeterminacy poses a problem so long as the range of plausible interpretations is not trivially small. (Indeed it is difficult to discern whether) law rather than (judges') own inclinations leads them to adopt one plausible interpretation rather than another." (Dorf, 2003: 883).[7] Thus, especially for the critical thinkers, no objectively correct result exists in law. Choosing between values is inevitable.

As a result, the idea of "legal indeterminacy" challenges the assertion that legal rule is the single determinant in the proceeding of a judgment, same legal

[6] While mentioning to the "choice between the values" we should keep in mind the discussion about the cultural relativism and the choice between "the values of liberty and autonomy" and "values of order" (see Henkin, 1989: 11).

[7] See also: Chiassoni, (2005:269) concluding; "the judicial activity of finding out the normative premise of...decisions cannot be regarded as regulated by a simple interpretive code."

rule may produce same legal outcome in the similar cases. A legal ruling is not a mere product of the value-free application of its content. The mentality structures of the judges, public prosecutors, and law enforcement agents are the chief elements that affect the judicial decision of a given case (Akbaş, 2006: 188).

## 3. From Cultural Relativity and Normative Indeterminacy to Normative Distortion: On the Regulation and Application of the Hate Speech Norms

### 3.1. The Regulation, Meaning, and Application of Hate Speech Norms on International Level

An organ of the Council of Europe, The Committee of Minister's Recommendation on Hate Speech defined the concept of Hate Speech as; "all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism, or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination, and hostility towards minorities, migrants, and people of immigrant origin."[8] Thus the concept of hate speech may involve any sort of speech that is 'designed to promote hatred on the basis of race, religion ethnicity or national origin' (Rosenfeld, 2003: 1523)[9].

We may note the international instruments concerning the hate speech as follows: Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) requires parties to prohibit racial propaganda promoting and inciting racial discrimination and to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred."[10] Likewise, article 20(2) of the International Covenant on Civil

[8] http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec(1997)020&expmem_EN.asp

[9] For similar definitions see Gelber, 2002: 16; Heyman, 2008: 10; Cram, 2006:102. Rosenfeld(2002: 1523) puts the difference between United States (US) and other Western democracies: while in the former 'the hate speech is given wide constitutional protection', in the latter (Canada, Germany and the Unied Kingdom) 'it is largely prohibited and subjected to criminal sanctions'. For an evaluation of the concept in the US context see,Wolfson, 1997: 47-81; Jacobs, 2000: 111-121; in the context of the UK, Canada and Australia see Cram, 2006: 102-123.

[10] *International Convention on the Elimination of All Forms of Racial Discrimination* Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969, in accordance with Article 19. The text of the Convention may be found at: http://www2.ohchr.org/english/law/cerd.htm. Retreived; 21.09.2012.

and Political Rights (ICCPR) requires that "any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence shall be prohibited by law."[11]

The common underpinning of prohibition of hate speech is the protection of vulnerable and disadvantaged groups. Witte and Green commenting on the particular question of hate speech on religious grounds, assert that protection of "religious minorities within a majoritarian religious culture" has been one of the most important issues that the international system of human rights had to address and deal with (Witte and Green, 2009: 594).

There is no established criterion for the identification of the vulnerable and disadvantaged individuals and groups. For the purpose of our study, we may consider these concepts in the light of the following definition:

> Typically, vulnerable and disadvantaged populations (these terms are sometimes used interchangeably) have been victims of violations of civil and political rights and often, even more severely, of economic, social, and cultural rights. Many of these groups experience discrimination, social exclusion, stigmatization, and deprivation of protections and entitlements on an ongoing basis. They may be subject to human rights violations by the state, by others in the society, or from institutions, structural barriers, social dynamics, and economic forces (Chapman and Carbonetti, 2011: 683).

According to the UN Committee on Economic, Social and Cultural Rights (CESCR), there may be twenty groups which may be considered as such: Women, children, the poor, race/minority, indigenous peoples, single parents, unemployed, disabilities, young persons, the elderly, temporary workers, travelling peoples, homeless, foreigners/ immigrants, refugees/ displaced persons, mothers, farmers, prisoners, domestic workers.[12] Thus, we may summarize that disadvantaged groups involve those who do not belong to the dominant socio-economic layer, ethnicity, and religion in a society.

Considering its purported aim to protect the weak, the prohibition of hate speech is deemed as a rightful limitation on the freedom of expression in the international law of human rights. This may be seen in the case law of the

[11] *International Covenant on Civil and Political Rights*. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49. The text of the Covenant may be found at: www2.ohchr.org/english/law/ccpr.htm Retreived; 21.09.2012.

[12] According to the overall findings of Chapman and Carbonetti from an analysis of the Committee's reporting guidelines, general comments, statements, and concluding observations about state parties' performance (Chapman and Carbonetti, 2011: 722-732).

ECtHR. Whenever faced with a speech or discourse with an unequivocally racist or xenophobic content, the Court refuses to bestow the freedom of expression as provided by Article 10. Since its earliest decisions, the Court excluded the clear racist statements and Holocaust denial from the scope of Article 10. The case law is consistent in this respect. The allegations of infringement of freedom of expression involving hate speech continuously result in the "inadmissibility" decisions of the Court (Oetheimer 2009, 429 and 430).[13]

*Jersild v. Denmark* established the basis that the hate speech is not protected, albeit in an indirect manner, since the persons who had made racist and insulting remarks were not parties to the case. The Court said in this case that; "There can be no doubt that (racist and hater) remarks…(are) more than insulting to members of the targeted groups and did not enjoy the protection of Article 10 (of the ECHR)" (Jersild v. Denmark, no. 15890/89 ECtHR, 1994 -A298 Para.35). Since this decision, the ECtHR endorsed this approach in subsequent cases and considered the cases by applying the article 17[14] of the European Convention on Human Rights (ECHR).[15]

To mention one of the several related cases in front of the Court, we may remind Norwood v. United Kingdom, which demonstrates the approach of the ECtHR jurisprudence to hate speech. The case concerned the conviction of the Regional Organiser of the British Nationalist Party(BNP) for displaying in his window, a large poster with a photograph of the September 11th incident underlined by the words "Islam out of Britain- Protect the British People"

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[13] The European Court of Human Rights (ECtHR) affirmed the crucial function of freedom of expression for a democratic society, as well as its role in assuring the autonomy of the individual. In the case of *Handyside v. United Kingdom*, the Court reminded that freedom of expression is "one of the essential foundations" of a democratic society. As regards the protection of individual autonomy, the Court said the freedom of expression "constitutes ... one of the primary conditions of its progress and for the development of every man" Also in this decision, the court coined its famous maxim used as the template for its further analogous decisions: "It afforded the protection to the acts of expression for not only the 'information' or 'ideas' which are favorably received or regarded as inoffensive or as matter of indifference, but also to those that hurt, shock or disturb the State or any sector of the population" (*Handyside v. United Kingdom*, no. 5493/72 ECtHR,1976-A24)

[14] Article 17 of the Convention: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

[15] *Sürek v. Turkey* (No. 1), no. 26682/95, 1999-IV ECtHR.; *Vejdeland and Others v. Sweden*, no.1813/07, 2012, ECtHR; *Leroy c. France* no 36109/03, 2008, ECtHR; *Balsytė-Lideikienė v Lithuania*, no.72596/01, 2008, ECtHR.

and a symbol of a crescent and star in a prohibition sign. In its decision, the Court upheld the domestic punishment of the relevant statement. According to the Court;

> Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination. The applicant's display of the poster in his window constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of (the Article 10) (*Norwood v. United Kingdom*,(dec.) no. 23131/03, 2004-XI, ECtHR ).

The articulation of holocaust denial is another form of speech that the ECtHR does not support in terms of the Article 10 of the Convention. For the Court, "the denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order."

We may largely divide Court's approach to hate speech into two groups: The court uses the articles 10 and 17 jointly and categorically denies affording freedom of speech to holocaust denial and clearly racist remarks. In other cases, three approaches may be discerned from the case law of ECtHR: 1) Hate speech can be justified by reference to the context, 2) hate speech cannot be justified, and 3) total absence of hate speech (Oetheimer, 2009).

Case law of ECtHR on hate speech has developed by a series of cases related to the Kurdish issue in Turkey. The Court clearly discerns statements of condemnation against the state from hate speech and incitement to violence, however resentful these condemnations may be:

> The Court observes in particular that, if certain particularly bitter passages, of the article draw a very negative picture of the State, and thus give the narration a hostile tone, they do not mean to encourage the use of violence, armed resistance or an uprising, and it is not hate speech, which is -in the eyes of the Court- essential to take into account (*Dicle c. Turquie* (No. 2), no. 46733/99, ECtHR, 2006).

Court on the other hand, refused to confer the freedom of expression when the physical integrity of individuals is at stake:

> It must also be observed that the letter entitled "It is our fault" identified persons by name, stirred up hatred for them and exposed them to the possible risk of physical violence (*Surek v. Turkey* (No. 1), no. 26682/95, 1999-IV, ECtHR, Para.62)

As seen from these explanations, the case law of ECtHR offers a sound legal source to determine the unequivocal contours of freedom of expression as regards the hate speech. This also leads us to infer that hate speech norms in international human rights are free of the above-mentioned problem of intelligibility of a norm.

### 3.2. The Regulation, Meaning, and Application of Hate Speech Norms on National Level

For the Turkish legal system, the prohibition of the hate speech may be found in the Article 216 of the New Turkish Penal Code (No. 5237). It states that:

> (1) A person who openly incites groups of the population to breed enmity or hatred towards one another based on social class, race, religion, sect or regional difference in a manner which might constitute a clear and imminent danger to public order shall be sentenced to imprisonment for a term of one to three years.
>
> (2) A person who openly denigrates a part of the population on grounds of social class, race, religion, sect, gender or regional differences shall be sentenced to imprisonment for a term of six months to one year.
>
> (3) A person who openly denigrates the religious values of a part of the population shall be sentenced to imprisonment for a term of six months to one year in case the act is likely to distort public peace.

Turkey claims that the rationale behind this law is to prevent hate speech. In the explanatory memorandum of the above-mentioned article, it is stated that "inciting the population to breed enmity or hatred" as specified in the first paragraph "exists in criminal codes of states governed by the high standards of the rule of law. No state should allow a group of population to shelter hatred and hostility against another, which might lead to violent hatred involving reprisal." The lawmaker further noted, "The ability to express thoughts in a free environment is a sine qua non for a democratic society. The definition of the above-mentioned offence is made in the light of this approach." We may also sense the concern to overcome the ambiguity of the previous version (Art.312) of the definition of the analogous crime. To this end, the act of "incitement" was defined as the acts, which would "lead to development of hostile attitude towards a group of people or reinforcing such attitude in an objective manner…. In order for the act to be of criminal nature, there should be a grave and intense incitement to hatred and enmity."

Thus, it is quite apparent that the aforementioned provision was adopted in order to comply with the hate speech norms in the international law. For this purpose, Convention on the Elimination of All Forms of Racial Discrimination (CEFRD), entered into force in Turkey 16 October 2002.

The report that was submitted to the Committee on the Elimination of the Racial Discrimination, in the context of the (CEFRD), indicates the purported aim of Turkey to comply with the international standards on hate speech. In its report Turkey maintained that it "is fully committed to the fight against racism, and racial discrimination as defined in the Convention….With this understanding, (it) incorporated sound and effective measures into its legislation concerning prohibition of racial discrimination." The article 216 of the Turkish penal code, among others, aimed at fulfilling its obligations under this Convention.[16]

In Turkish practice, the article 216 is used as diametrically contrary to its aim as underpinned by international law. Indeed, this article serves as a veil to generate a false impression that a there is a firm struggle against hate speech. However, the actual state of affairs is quite contrary. The article 216 has turned to be a tool, which is regularly and systematically, used to obstruct the disadvantaged groups from enjoying their rights to articulate dissident views against the dominant-hegemonic portion of the society.

While, it is an established routine to overlook the acts of hate speech against the non-Turkish and non-Muslim minority; anti-majoritarian views are frequently prosecuted and even punished by the courts. According to the reports of Human Rights Foundation of Turkey, (HRFT) a very large part of prosecutions pursuant to article 216 between the years 2005-2009, involved the critical anti-majoritarian statements made by the minority groups. In this context, Kurdish issue and blasphemy against sunni-islam may be noted as the two themes that are observed to bring about lawsuits.[17] In the 2009 report of the (HRFT), twenty such cases are reported. Among these, seven resulted in the conviction of the defendants, six resulted in the acquittal decision, and other seven were still pending. There is one particular point that should be noted here: The lawsuits filed by the public prosecutors do not necessarily have to result in the conviction for us to consider them in connection with our argument. Considering

[16] Written replies by the Government of Turkey to the list of issues to be taken up by the Committee on the Elimination of Racial Discrimination in its consideration of the third periodic report of Turkey (CERD/C/TUR/3) (http://www2.ohchr.org/english/bodies/cerd/docs/AdvanceVersions/WrittenReplieTurkey74.pdf).

[17] http://www.tihv.org.tr/index.php?TArkiye-AEnsan-HaklarAE-Raporu

the lengthy trials in Turkey, a mere prosecution may turn to be a weapon of retribution at the hand of the dominant-hegemonic groups in the society.

To name but a few, one may remind the case of a cartoonist Bahadır Baruter. He was indicted for his caricature published in the weekly "Penguen" humor magazine, which contained the hidden words "There is no Allah, religion is a lie." Istanbul chief public prosecutor's office filed the lawsuit pursuant to the article 216 al. 3 "insulting the religious values adopted by a part of the population."[18] Baruter is not the only publicist prosecuted for legitimate freedom of expression.

The claim that the Article 216, which purportedly aim to protect the minority and dissident groups, is systematically used for oppressing the nonconforming views in the society is resolutely argued by several authors. In this line of thinking, Ataman and Cengiz (2009) claim that, no one has been prosecuted or convicted of racism, or discrimination, or for committing hate crimes pursuant to the article 216. With the exception of rare cases, almost all of those who were brought before the court under this provision, were the nonconformist writers, academics and human rights activists being opposed to the hate crimes themselves. More importantly, the issue is not simply the way in which the laws are applied. It is a matter of a broad social problem. Kaya (2009) claims that racist propaganda targeted at the individuals and groups who do not possess Turkish-Islam identity is common in political life, civil society, and media. However, the so-called article 216 has never been used to punish such statements and to protect the demonized minorities in public sphere.

There are also bitter results of the neglect of the prosecution of xenophobic statements. In the murders of priest Santoro, Hrant Dink, and Malatya massacre where three Protestants were killed, all the perpetrators clearly stated that they had been influenced by the biased broadcasts and publications about the victims. There had been a plethora of biased and provocative newspaper articles and TV broadcasts about the victims and the groups to which the victims had belonged (Göktaş, 2010: 86). None of the statements in these publications and broadcasts had been investigated or prosecuted, leading eventually up to the mentioned murders.

In its 2009 report, the Committee on the Elimination of the Racial Discrimination[19] was "concerned that article 216 of the Penal Code has been

[18] http://www.hurriyetdailynews.com/n.php?n=turkish-cartoonist-to-be-put-on-trial-for-denouncing-god-2011-09-28

[19] The Committee on the Elimination of Racial Discrimination (CERD) is the body of independent experts that monitors implementation of the Convention on the Elimination

applied against persons advocating their rights under the Convention (article 4)". The Committee also call(ed) upon the State party to ensure that article 216 of the Penal Code is interpreted and applied in conformity with the Convention (Committee on the Elimination of Racial Discrimination 2009, para 14).

Same remarks were made in its reports of 1999, 2001, and 2005 of ECRI. The previous version of the article 216, article 312 was said to function as diametrically opposed to its aim, i.e, the protection of the disadvantaged groups (Karan, 2010).

The ECRI reiterated its view decidedly in its most recent report:

> ECRI remains concerned about the application in practice of Article 216 of the Criminal Code (the slightly successor to the former Article 312), has continued to be used to prosecute and convict journalists, writers, publishers, members of human rights NGOs and other personalities advocating rights guaranteed under the International Convention of the Elimination of All Forms of Racial Discrimination or expressing non-violent opinions with respect to issues concerning minority groups, and especially Kurdish issues. Civil society actors stress that Article 216 is rarely, if ever, used to prosecute persons making racists statements against members of minority groups; at present, the prevailing approach in the application of the criminal law appears to target members of minority groups whose expression of their specific identity is perceived as a threat to the unity of the Turkish state, rather than to protect the peaceful expression of all views, including minority views, that do not incite hatred against or denigrate other individuals and groups. Other provisions have also been used to bring similar proceedings (The European Commission Against Racism and Intolerance 2011, para. 25).

The case of Baskın Oran and İbrahim Kaboğlu may be helpful to understand the pattern in which the meaning of article 216 is deflected. These two academics, former human rights advisory board president İbrahim Kaboğlu and sub-commission chairperson Baskın Oran were charged for the passages of their report entitled Minority and Cultural Rights. The lawsuit was filed for "inciting hatred and hostility" for using the term "Türkiyelilik" (to be from Turkey) instead of Turks, and claiming that there were minorities (implying particularly the Kurds), in Turkey other than as specified by the treaty of Lausanne. The 8th Criminal Chamber of the Court of Cassation overturned the acquittal decision, which had been held by the court of first instance. In its decision, the Chamber said:

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of All Forms of Racial Discrimination by its State parties.

> The Nation is one of the elements that constitute the state. The concept of nation here denotes the group of citizens who live in the country. To say that "the word 'nation' results in the rejection of the sub-cultures," creates a threat in terms of public order, public security. In a country like Turkey, which is the home for ethnic and cultural diversity, over-valuing or over-demonstration of one of these diversities at the expense of the others, will destroy the peaceful fundamental values of social cohesion. Making such a distinction of difference constitutes the crime of openly inciting groups of the population to breed enmity or hatred towards one another, which might constitute a clear and imminent danger to public order.

Fortunately, the Assembly of Criminal Chambers overruled this decision. However, there left the question what may induce the judges for such a distorted evaluation. Indeed, being grossly fallacious both in terms of textual and teleological interpretation, this holding of the court demonstrates the hermeneutical fallacy of Turkish judicial actors, which will be dealt in the following section

### 3.3. On the Concept of Normative Distortion

In general terms, the concept of distortion may be defined as; a 'falsified reproduction'(http://www.merriam-webster.com/dictionary/distortion,Retreived: 25.12.2012) or, an 'action of giving a misleading account or impression' (http://oxforddictionaries.com/definition/english/distortion, Retreived:25.12.2012) or, 'changing something from its usual, original, natural or intended meaning' (http://dictionary.cambridge.org/dictionary/british/distort, Retreived:25.12.2012) This implies, in the context of law, a 'distortion of the meaning of a statute', which involves; 'false reading, misapplication, misjudge, mistranslation, twit or misuse' of any legal provision and the norm provided by it. ("William C. Burton, Burton's Legal Thesaurus, 4E. 2007" quoted in: http://legal-dictionary.thefreedictionary.com/distort+the+meaning Retreived:25.12.2012). Thus in this case, the judges may be said to 'distort the law, that is, the plain meaning of the statute'. (Alexander, 1999:383)

Such a distortion is often associated with the concept of judicial activisim, resulting in a court's 'failure to act like a judiciary'. In this case, the judicial actors do not use the 'accepted interpretive methodology', instead, they 'distort the meaning of (legal norms) simply to further judges' personal policy preferences' (Cross & Lindquist, 2007: 1765-1766) In this context as Zeigler (2001:105) argues; 'a (judicial) decision that focuses just on one element without acknowledging the impact other (elements of a legal provision) may distort the meaning of the statute in issue and undermine intent' of the legislator. Seperation of a

legal text from its 'overall structural orientation as a whole', which 'contradicts the original intent behind that legislation'. (Garry, 2009:1746) Indeed, "With only a dictionary and without context, the meaning of words are easily distorted." This implies a 'kind of manipulation' 'where with a little imagination and a dictionary a skillful judge can find an alternative interpretation to almost any statute'. (Alexander, 1999:399)

It should be noted at the outset that probable reasons and a synthetic empirical study of normative distortion is a subject of another study. Yet few points should be underlined to explain the concept.

Firstly, in order to explain the current problem under study, we disagree with the traditional legal-formalism, which implies that legal norms automatically apply and the judges are no more than automatic devices who merely verbalize the legal provisions. On the contrary, we believe that the arguments of legal indeterminacy had better explain the case of distortion of the hate speech legal provision in Turkey. On the other hand, we slightly differ from the conventional conception of legal indeterminacy, which sees the conflict of actual practice and legal norms as a problem of normative "ambiguity" or "vagueness" of legal provisions.[20] Rather, we consider the actual problem in Turkey, as a well-calculated distortion and deflection of a legal provision, notwithstanding its clear, unambiguous, and un-vague content. Such a legal and normative distortion of the article 216 leads up to a state practice where it is used as diametrically opposed to its aim.

Secondly, our study induces us to reflect on the conventional positivist wisdom that justice may be achieved solely by the "conscientious application" of positive law (Kelsen, 1999: 14). In fact, one may legitimately argue article 216 is not conscientiously applied by the Turkish judicial actors (public prosecutors and judges) in line with the international standards on hate speech.

Thus, one may refer to the role and mind-set of the judicial actors in the process of legal reasoning. It may be that, judges and prosecutors biased by dominant political cultural values in the society, consciously deflect the meaning of the article 216. In this context, Sancar and Atılgan coin the term "judicial etatism", a mind-set prevalent among the judges and prosecutors aimed at protecting the "interests of the state", whenever they were in conflict with individual interests (Sancar and Atılgan, 2009: 3).[21] One of the judges interviewed by

[20] For the concepts of "ambiguity" and "vagueness" see Demir, 2007: 41-46.

[21] The authors argue that judges and prosecutors suffered from an "allergy of the West" accompanied by an "an isolationist nationalist mindset." Induced with a "nationalist reflex", these judicial actors have also displayed strong prejudices against the European

the authors put it bluntly: "Whenever the interests of the state are at stake the Justice is somewhat ignored" (Sancar and Atılgan, 2009: 137).

On the other hand, the current use of the Article 216 may not be explained with a sole reference to the concept of "judicial etatism". The law-interpreting actors not only act to protect the interest of the state but also political, cultural, and religious values of the majority of the Turkish society. While interpreting the article 216, the judicial actors include their own subjective values in the process and re-produce the legal provision itself. This leads us to claim that no legal provision-notwithstanding its plain wording- is self-evident. The law interpreting and applying agent has a fixed expectation of meaning, which may not be changed by the text, however obvious it may be. Thus, the judges and prosecutors as the readers of a legal provision do nothing but paraphrase their "pre-understanding", as had already been fixed long before reading the text (Sancar and Atılgan, 2009: 24).

The operation of fallaciously adjusting the written text to one's pre-understandings and expectation of meaning is made through the labyrinth of hermeneutics. Umberto Eco defines this situation as "over interpretation" where the reader exceeds the rational limits of plausible interpretation (Eco, 2008). Richard Rorty sees the hermeneutics as a tool for adjusting the text to fit one's own aim (Rorty, 2008). In a similar train of thought, Paul Ricoeur pictures a reader who claims to "grasp a deep semantic of the text (even deeper than as provided by the author) and makes it his "own" (Ricoeur, 1971: 561) The account of these authors may provide useful insights on the nature of the relationship between the text, its reader and its interpretation.

To conclude, the misuse of the article 216 by the Turkish judicial actors demonstrates a significant example of adjusting a legal text to a pre-determined mindset, regardless of its verbal content, thereby resulting in the normative distortion of this legal provision. This normative distortion occurs at two stages: At the first stage, this legal provision is trimmed of its genuine normative content because of the inertia to investigate, prosecute, and convict the hate speech incidents. At the second, judicial actors, make the legal provision of their "own" and use it to limit the freedom of expression in line with their own subjective values.

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Court of Human Rights(ECtHR): "It is clear that this constitut(ed) a serious impediment to ECtHR decisions having impact on the national legislation and transforming the national system." (Sancar and Atılgan, 2009: 4).

## 4. In Lieu of Conclusion

As a brief synthesis of what has been said so far, the normative distortion of the article 216 of the Turkish penal code displays elements from the problems of normative indeterminacy and universality and cultural relativism conflict. Yet, none of them alone is sufficient to explain the issue under study.

When we consider this situation in terms of normative indeterminacy; firstly, in terms of the semantics of the text and problem of textual interpretation, it is crystal clear from the text itself, explanatory memorandum, and report of Turkey to CERD that; this provision is designed to prohibit hate speech, and nothing else. Any judge may resort to these mentioned legal sources to clarify what it means to "openly incit(ing) groups of the population to breed enmity or hatred", or "openly denigrating a part of the population". Besides, the problem is not the standard application of a norm to concrete cases. One norm may produce different outcomes depending on the cultural and political context in which the decision is taken. However, our problem is not the question of a limits or actual use of a right in practice, which may depend on the society and culture.

In addition, the problem is related to cultural relativism only partially. On the one hand, it has nothing to do with this. Because the Turkish lawmaker had not put any reservation as to its content and meaning in terms of the hate speech, by claiming some cultural and historical particularities of Turkey. On the contrary, it asserted that the said article existed in the laws of diverse states having a high quality of rule of law and that law was adopted to attain that quality. On the other hand, the problem of cultural relativism occurs during the process of judicial interpretation. The spectra of "judicial etatism" over the judges and prosecutors, prejudices, biased reasoning, and fallacies in the process of judicial interpretation may be considered as the main problems in this context.

As a result, it should be stressed that the Article 216 is diametrically opposed to its legal rationale: Instead of protecting the vulnerable and disadvantaged groups and human right activists, it is used to oppress them. The judges and prosecutors biased with dominant political, cultural, and religious values, consciously ignore the clear meaning of this legal provision. With a sleight of a hand, it is shrewdly reversed to produce a counter effect without necessarily making a rational linkage, in the indictment reports or judgments, between the supposed act of crime and the article.

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PEER REVIEWED ARTICLE

# A Short Political History of the Legal Profession in Turkey

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ABSTRACT

This paper aims to offer a brief historical account of legislative and professional developments concerning the Turkish legal profession within the larger socio-political against a backdrop of political struggles. The original ideological alliance between the profession and the Republic has been a key determinant of the profession's positions with respect to social and political issues, especially in the early decades of the new state. The relationship, however, has always been influenced by the changing national and international political context. Whereas the profession seemed content to subordinate itself to the executive until the 1950s, the transition to a multi-party system intensified political polarisation, generating controversies about the profession's relationship with the State. In the following decades, the global leftward movement encouraged many lawyers to actively challenge illegalities. The increasing authoritarianism and widening social and political cleavages of 1980s and 1990s, by contrast, led to a resurgence of the Kemalist constituency within professional associations. In recent years, efforts by the Government to assert absolute control over the state apparatus have provoked the profession to assume even more visibility as a political actor.

**Key words:** Legal profession, law and modernization, law and politics, legal reform, Turkey

**Early Republican and single party period**

The project of modernisation in Turkey, which took off with the establishment of the Republic in 1923, considered educational reform the primary axis of social change through which a new generation could be shaped (Erozan 2005 : 64; Söğütlü 2004 : 122). Law was the second axis. After the founding of the Republic, driven by the modernisation aspirations and reformist ideals of the new regime, the entire legal apparatus was restructured. This judicial reform also required a new staff of legal professionals who would not only interpret and apply this new legal corpus but guide the thought and behaviour of the people according to Republican principles.[1] Hence, training new legal cadres was an extension of the regime's aspiration to create its own national intellectuals, who would be mobilised as agents of this modernisation process (Erozan 2005 : 67; Özman 2000). Modern legal education, therefore, emerged as a politically oriented training with a strongly Kemalist orientation. Istanbul University Law Faculty had been established in the late nineteenth-century but was renamed and redesigned in 1933 to conform to the Republic's ideological aspirations. The new faculty created in Ankara in 1925, however, was charged with producing 'well educated legal professionals who will protect, teach and improve the law of the Republic' (Ankara Üniversitesi Hukuk Fakültesi). The emergence of this new profession was also consolidated through legislation and professional associations. The 1924 *Muhamat Kanunu* (Legal Professional Code No 460) was the first law institutionalising the profession by regulating entry (including a mandatory internship) and professional competence and establishing bar associations. It limited the profession to Turkish citizens, effecting a 'nationalisation of bar associations' reflecting the new State's aspiration to create a political community freed from all non-national elements (Özman 1995 : 103). Making 'betrayal of the nation' a ground for disqualification exposed lawyers to discipline on arbitrary and highly ideological criteria (Karabulut 2013 : 89; Özkent 1940 : 114). Even stronger measures were authorised by the 1938 *Avukatlık Kanunu* (Legal Professional Code No 3499), which defined the profession as an independent practice with a 'public service quality', subordinating it to the executive in order to guard the 'public interest'. Paradoxically, lawyers were the principal supporters of state supervision of the profession, arguing this would allow monitoring of a profession that had been 'set loose' (Toprak 2014 : 185).

[1] The term 'legal professional', which is primarily associated with practising lawyers in Anglo-Saxon countries, has a much wider ambit in Turkey, where it includes judges, prosecutors, practising lawyers and notaries. It is in this sense closer to concept of *jurist* employed by some scholars. In this short text, however, I follow the Anglo-Saxon usage.

**Multi-party period and military interventions (1946-1980)**

Until 1950s, the legal profession, considering itself the guardian of the Kemalist regime, seems to have kept a rather stable alliance with the State. The transition to a multi-party system in 1946, however, not only terminated the privilege of Atatürk's party, the Cumhuriyet Halk Partisi (Republican People's Party – CHP) in state administration, but also introduced an ideological conflict between the profession and the new ruling party under Adnan Menderes, the Demokrat Parti (Democrat Party – DP). When many judges were forced to retire in 1957 and replaced by the DP's political appointees, legal professionals declared their solidarity with the judiciary. Hence, in the face of the government's repressive measures and promotion of political Islam as an anti-communist strategy, legal professionals maintained their ideological position as protectors of the regime. This was manifested again in the profession's support for the 1960 coup, which the legal community played a major role in legitimating, not only by remaining silent in the face of trials and executions but also by prohibiting lawyers from defending members of the ruling party.

In the 1960s and 1970s, however, paralleling the global ideological shift to the left, the legal profession started to move from its role as guardian of the Kemalist regime to a more diverse political engagement. One indicator of such polarisation within the Istanbul Bar Association was the emergence of Çağdaş Avukatlar Grubu (the Modern Lawyers Group – ÇAG), a 'loose politically oriented platform' with a leftist constitution, and Meslek Birlik Grubu (the Professional Unity Group), a right-wing group (Öngün & Hassan 2013 : 143). Although the latter won the 1974 Bar elections, ÇAG defeated it two years later, retaining power until now with brief interruptions and despite internal divisions. Particularly in the first couple of presidential terms, the ÇAG-led Istanbul Bar was actively involved in everyday politics through a series of protests against unconstitutional, extrajudicial and illegal practices by the State and the military. Professional developments during this period also reflected these shifting alliances and political complexities. The most significant was the 1969 *Avukatlık Kanunu* (Legal Profession Code No 1136), which remains the principal legislation regulating the profession despite many changes. Against a backdrop of increasing demands for freedom worldwide and enactment of the 1961 Constitution, the 1969 Code was drafted in response to the legal profession's quest for greater autonomy from the executive. One of its primary achievements was establishing the Türkiye Barolar Birliği (Union of Turkish Bar Associations – TBB) as the umbrella professional organisation located in Ankara and transferring responsibility to it (from the Ministry of Justice) for supervising and monitoring individual bar associations. This had significant

implications for the relationship between the State and the profession as the TBB resisted the repressive policies of an executive confronting an increasingly violent socio-political environment.

**1980s-1990s**

The malicious military coup on 12 September 1980 in the face of increasing political instability and violence shaped the succeeding decades. During the junta period, all political parties were banned, Parliament was dissolved, and the 1961 Constitution was replaced by the highly authoritarian and repressive 1982 Constitution. By 1988, reflecting the authoritarian character of the junta, the 1969 Legal Profession Code was already amended seven times to include ever more repressive provisions. Amendments included greater executive supervision over the profession through limitations to activities of bar associations, mainly in the form of prohibiting political engagement of any kind, or empowering organs of the executive to dismiss elected bar administrators in urgent cases threating the 'existence, independence and integrity of the State and nation'. This increasing authoritarianism was accompanied with a burnout among lawyers concerning reactionary politics. In the 1983 Istanbul Bar elections, the association's political involvement caused ÇAG to lose the presidency after three terms, replaced by Birleşmiş Avukatlar Grubu (United Lawyers Group), representing the more conservative wing, whose campaign discourse focused on 'saving the Bar' from political struggles by shifting attention to purely professional matters (İnanıcı 2008 : 177). This transfer of power from ÇAG was interpreted as indicating lawyers' desire for 'peace and stability' and a return to a narrower political involvement limited to 'preserving the State and its Kemalist values' (Silverman 2017). When ÇAG regained power toward the end of the 1980s, however, the Bar again assumed an active role in politics.

The 1990s saw further divisions among coalitions within the Istanbul Bar Association, especially the rise of a Kemalist group among ÇAG lawyers. The founding of Önce İlke- Çağdaş Avukatlar Grubu (Principles First-Modern Lawyers Group – Öİ-ÇAG) was the first official split within ÇAG and an expression of its egalitarian approach to Islamic revivalism. Starting in the early 2000s, Öİ-ÇAG gained power by mobilising older lawyers, thereby managing to shape the politics of the Istanbul Bar Association in the following two decades (Öngün & Hassan 2013 : 150). Political sectarianism was not limited to the Istanbul Bar. The Izmir Bar Association, infamous for its unanimous commitment to a secular Kemalist leftism, has never had a right-wing president. However, its unity was shattered in 2002 when Izmir ÇAG also split into two groups over

the 1997 postmodern coup[2] and the headscarf debate it sparked. The new fraction, called Cumhuriyetçi Avukatlar (Republican Lawyers), focused on the primacy of a Kemalist secularism with respect to the political visibility of Islam. ÇAG, by contrast, was increasingly identified as pro-Kurdish and accused of being a PKK supporter.

**AKP Period (2002-2017)**

The early-twenty-first century was marked by political pressures for democratisation and a wave of legal changes constituting the most comprehensive reform after the early Republican period. In the 2002 elections, only the CHP and the newly established pro-Islamist Adalet ve Kalkınma Partisi (Justice and Development Party – AKP).

led by Recep Tayyip Erdoğan managed to get Parliamentary seats. With 34 per cent of the votes, AKP initiated a period of single-party rule after a decade of coalitions characterised by economic fluctuations and political uncertainties. In its first term, AKP was an ardent supporter of harmonisation that also had a direct consequence for the regulation of the legal profession. The 2001 amendments to the 1969 Code, in particular, introduced revolutionary changes such as the recognition of the profession as a tier of the judiciary, thereby increasing lawyers' public and professional credibility and identifying advocacy as a prestigious profession deserving protection by the State, not monitoring. This change was also meaningful in the context of provisions replacing the Ministry of Justice with the TBB as final authority on professional issues, like registering lawyers in or removing them from the Bar, prohibiting them from working, or disciplining them. Increasing the quality of legal services was another concern addressed by provisions regarding entry, professional boundaries and rules of conduct such as the introduction of the compulsory Bar exam for harmonising the differences in legal education stemming from rapid increase in the number of law faculties.[3]

[2] Known as the 28 February post-modern coup when the military issued an ultimatum to the Government in the name of the Republic and 'democratic values'.

[3] In 2006, the provision was annulled by Parliament just before the first exam was to occur. In 2009, however, the Constitutional Court overturned that action, declaring that the public demanded qualified lawyers. The Court reasoned that minimal legal training was insufficient to practise law and professional competence could be achieved only through special training and selective entry. Nevertheless, by 2017 the examination still had not been administered.

Nevertheless, the Government's Islamist pedigree continued to raise serious anxieties among Kemalist segments of the population, including the legal profession. In 2007, controversies around the upcoming presidential election, triggered by the possibility of Erdoğan winning, was followed by mass demonstrations called 'republican meetings'. These protests mainly organised by Kemalist civil society mobilised thousands of people concerned about the visibility of the Islamist lifestyle in public life and especially about the nomination of a pro-Islamist politician as the President. Following a period of constitutional battles over presidential elections, in the evening of 27 April, the military intervened again, publishing an e-memorandum on its official web site declaring its determination to guard the foundational principles of the Republic, pre-eminently secularism. In 2008, however, the constitutional crisis was further intensified by a so-called judicial coup in the form of a closure case against AKP for becoming 'the focus of anti-secular activities'.[4] Meanwhile, the AKP's 2010 constitutional amendments, framed as a means of 'getting rid of the legacy of 1980 coup', were approved by 58 per cent of the electorate. The constitutional package was promoted as an opportunity to liquidate the 'authoritarian, statist, and tutelary features of the 1982 Constitution', thereby garnering support from the intelligentsia and further enhancing the legitimacy of AKP's populist programme (Özbudun 2012).

In summer 2013, amid social and political tensions provoked by controversies around the role of the headscarf in public life, allegations of illegal wiretapping of the judiciary, intensifying police violence, devastating earthquakes, and violations of rights and freedoms, Turkey witnessed a nationwide uprising commonly referred to as the 'Gezi events', in which thousands demonstrated against the repressive policies. In June 2015 elections, when the Halkların Demokratik Partisi (Peoples' Democratic Party – HDP), which championed Kurdish rights, entered the Parliament, passing the 10 per cent parliamentary threshold, AKP lost its majority for the first time, only to regain its ruling position in November 2015 early elections with a promise of stability in the face of increasing violence. However, 2016 ended up being one of the most violent years in Turkish history, with numerous suicide bombings, a constant increase in attacks on women and children, greater use of force by the police, and arrests of journalists, academics, politicians and civilians on terror charges. *A Petition of Academics for Peace Initiative* signed by 2,000 scholars further

[4] The case was overruled by a close vote, and AKP was merely deprived of state funding. In December 2009, however, the Court affirmed the closure of the Demokratik Toplum Partisi (Democratic Society Party – DTP), representing Kurdish voters, because of its alleged activities 'against unity of the State with its nation'.

intensified the tension between the Government and opposition leading to numerous arrests and indictments. The situation became even more critical when the 15 July 2016 failed coup attempt shattered the already unstable political and social environment, leading to a long-lasting state of emergency. The constitutional referendum of April 2017 proposing to expand presidential powers was held in this tense atmosphere, with yes votes barely exceeding the opposition (51 per cent).

After AKP's first term, bar associations and the TBB adopted a critical attitude toward the government. In December 2007, a rally for an independent judiciary was organised by TBB and joined by representatives of civil society organisations and bar associations, as well as members of the judiciary, academia, and military. After 2009, the legal profession reacted even more frequently and forcibly to the increasing politicisation of legal issues and threats against judicial independence. Politically motivated actions by the Ministry of Justice, such as requesting the dismissal of judges based on unconstitutionally gathered information, were particularly troubling. The Istanbul Bar Association condemned these developments as clear evidence of the Government's determination to control the judiciary and replace existing judges with its own loyalists. Professional organisations also criticised the 2010 constitutional package, warning that the proposed changes would violate separation of powers and benefit the executive. TBB was also concerned about the arrest of judicial staff, high ranking military officers, and lawyers in the *Ergenekon, Balyoz*[5], and *KCK*[6] cases and rising police violence against journalists and lawyers.

Until 2013, however, TBB maintained a serious, professional and legalistic tone in its public statements, even prompting CHP to criticise the TBB President for being too reticent in addressing the emerging legal and political crises. With the election of Metin Feyzioğlu as TBB Chair, however, its administration assumed a much more defiant stance, with a very explicit Kemalist and Republican outlook. This administration often has admonished the government, with Feyzioğlu making more frequent, confrontational public appearances. On 10 May 2014, during his speech at the 146th anniversary of the Council of State, Prime Minister Erdoğan stalked out of the auditorium, accusing Feyzioğlu of 'being shameless' in commenting on political matters about which he knew nothing. The September 2014 Judicial Year Opening Ceremony was boycotted

[5] A series of high-profile trials of politicians, bureaucrats, academics and journalists, high-ranking military officers, including the former Chief of Staff, accused of being members of an organised criminal conspiracy against the democratically elected government.

[6] Trials of Kurdish politicians and rights activists for being members of Kurdish Communities Union (KCK), the alleged urban wing of PKK.

by many cabinet members, including then President Erdoğan, who were protesting the inclusion of Feyzioğlu in the programme.[7] In November 2014, the Government annulled the legislative basis of this ceremony, accusing it of becoming a political occasion to attack the Prime Minister (Hürriyet 2014). In 2015, the ceremony was split in two, one organised by the Court of Appeals and attended by the President and another 'alternative opening' organised by TBB with the participation of bar associations and CHP Chair.[8] In 2016, when the Judicial Year Opening Ceremony was held at the presidential complex with a talk by the President for the first time, TBB refused to participate.

Meanwhile, Erdoğan and the AKP Government continued accusing TBB, and especially Feyzioğlu, of improper involvement in political issues, asking him to 'take off his robe and do politics'. His engagement with politics was most vividly epitomised by his participation in the campaign on the April 2017 referendum. Travelling around the country and abroad, Feyzioğlu claimed that he had 'hit the road' to let people know that the proposed amendments would expand the President's power, propelling Turkey towards a more authoritarian system. TBB was 'enlightening everyone on a vital issue that was above politics', a responsibility vested in it by the 1969 Code. Although these meetings were entitled 'we are discussing the Constitution', they were more about why people should say no to proposed amendments than how they could make an informed choice. Feyzioğlu was usually accompanied by several influential figures from the Kemalist establishment during these gatherings, which were organised by popular Kemalist civil society organisations and supported by local bar associations. Consequently, when Feyzioğlu was invited to the 2017 Judicial Year Opening ceremony as a guest, not as a speaker, TBB announced it would not attend 'just to applaud', escalating tensions between the executive and the profession.

[7] Each year the anniversaries of high courts like the Council of State and Court of Appeals are celebrated with ceremonies including members of the judiciary and high state and government officials. The Judicial Year Opening Ceremony, held at the Court of Appeals in early September, is another symbolically significant gathering for the judiciary. Traditionally, the TBB Chair is expected to deliver a speech at all these gatherings as a sign of the indispensability of defence for the judiciary. These speeches are usually full of references to major contemporary political and social issues (Elveriş 2014).

[8] This cooperation between TBB and CHP has also been criticised by lawyers (Elveriş 2014 : 91 – 92).

**To Be Continued…**

This summary is intended to be an introduction to a more comprehensive work on the origins and developments of the Turkish legal profession. For the moment, it is possible to state that these struggles are in fact meaningful in a socio-political context where TBB has never functioned as a true corporatist structure cooperating with the government to pursue its own economic and professional interests (Elveriş 2014). Turkish lawyers have always been advocates of political and ideological values and principles (Kalem 2010; Özman 1995). Its historical ideological alliance with the Republic determined the profession's positions with respect to social and political issues, especially in the early decades of the new state. Despite increasing political polarization among lawyers especially after 1980s with the emergence of different groups in bar associations, in the last two decades, and particularly during AKP rule, there seems to be a strong resurgence of the Kemalist constituency within the professional associations.

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# State of Emergency, State of Emergency Decree-Laws and the Legal Situation

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## 1. Legal regime of SOE and SOE Decree-Laws in general

Immediately after the coup attempt of 15 July, a state of emergency was declared throughout the country for a period of ninety days from 21 July 2016 by the Council of Ministers decision dated 20 July 2016 and numbered 2016/9064 under article 120 of the Constitution on grounds of "*widespread acts of violence and a serious deterioration of public order*". This Council of Ministers decision was published in the Official Gazette and submitted to the Parliament for approval in accordance with article 121/1 of the Constitution and was approved by the decision of the Parliament dated 21.7.2016 and numbered 1116; later, it has been extended for three months each time.

State of emergency (SOE) is one of the extraordinary methods of administration provided in the Constitution and leads to an enlargement of the ordinary law enforcement powers used to protect and ensure public order. According to article 15/1 of the Constitution, in cases of emergency, the exercise of fundamental rights and freedoms may be suspended in part or in whole or measures may be taken contrary to the safeguards provided

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for them in the Constitution, **to the extent required by the situation**, on condition that obligations arising from international law are not violated. At the same time, according to paragraph 2 of the same article, the individual's right to life and the integrity of his material and spiritual existence shall be inviolable; no one may be compelled to reveal his religion, conscience, thought or opinion, nor be accused on account of them; offences and penalties may not be made retroactive; and no one may be held guilty until so proven by a court judgement. Article 121/2 of the Constitution provides that how fundamental rights and freedoms will be restricted or suspended in line with the principles of Article 15, by what means the measures required by the situation will be taken, what sort of powers will be conferred on public servants, what sort of changes will be made in the status of officials, shall be regulated by the Law on State of Emergency. The Law on State of Emergency mentioned in article 121/2 of the Constitution is the Law on State of Emergency dated 25.10.1983 and numbered 2935 (the Law on SOE). Article 11 of the said Law specifies in detail the measures to be taken in a state of emergency declared on grounds of "*widespread acts of violence and a serious deterioration of public order*".

In addition, according to article 121/3 of the Constitution, the power of the Executive to make decree-laws in SOE is extended and facilitated. **During the state of emergency**, the Council of Ministers, meeting under the chairmanship of the President of the Republic, may issue decree-laws on **matters necessitated by the state of emergency**, and additional measures may be introduced by these decree-laws where the measures provided in the Law on State of Emergency numbered 2935 prove insufficient. These Council of Ministers decisions, referred to as state of emergency decree-laws (SOE decree-laws), are subject to a very different legal regime than ordinary decree-laws, which are issued under article 91 of the Constitution. To start with, unlike ordinary decree-laws, it is not required that the Parliament should adopt a special law to empower SOE decree-laws to be issued, and it will be possible with such decree-laws to restrict the fundamental rights, personal rights and duties, and political rights and duties included in Part Two, Chapters One and Two of the Constitution, and to make arrangements which are contrary to the safeguards provided in the Constitution for fundamental rights and freedoms. In addition, the procedures and rules concerning the approval of these decree-laws by the Parliament are also different and, while it is provided that ordinary decree-laws must be submitted to the Parliament for approval on the day of their publication in the Official Gazette and must be discussed in the committees and in the Plenary Assembly of the Parliament with priority and urgency, the procedures and rules concerning the approval of SOE decree-laws by the Parliament are shown in

the Rules of Procedure of the Parliament, article 136 of which states that SOE decree-laws must be discussed and decided within thirty days. Finally, while ordinary decree-laws are subject to review by the Constitutional Court, it is not possible to allege the unconstitutionality of SOE decree-laws (article 48/1 of the Constitution).

It is true that the power of the Executive to make arrangements having force of law is very considerably extended and facilitated with SOE decree-laws. However, both article 15 and the final paragraph of article 121 of the Constitution impose certain limits on this power, as explained below.

- The power of the Executive to issue SOE decree-laws is limited first of all *in terms of location*. It will be possible to make arrangements through SOE decree-laws to be applicable only in the region/regions where SOE is declared.
- This power of the Executive is also limited *in terms of subject-matter*. SOE decree-laws may only be issued on matters necessitated by the state of emergency, and while providing for such matters, the fundamental rights and freedoms and the safeguards listed in article 15/2 of the Constitution may not be violated and the provisions made must be "*to the extent required by the situation*". In other words, if public order disturbed as a result of widespread acts of violence can be restored through ordinary law enforcement measures or the measures provided in the Law numbered 2935, it will not be permissible to introduce new and heavier measures through SOE decree-laws.
- Finally, the power of the Executive to issue SOE decree-laws is limited *in terms of time*. Just as the Law on SOE may be applied only during the state of emergency, SOE decree-laws may also be applied only during such period and will cease to apply after the SOE is lifted. In other words, SOE decree-laws may not include provisions that may also be applied after the state of emergency. In this context, it should be noted that it is also impossible to change or repeal current laws through SOE decree-laws. For, otherwise, the rules introduced by SOE decree-laws would continue to be in force after the state of emergency terminates.

## 2. Examination of the SOE decree-laws issued after 20 July 2016

Considering the above-mentioned constitutional limits on SOE decree-laws, it is found that the decree-laws issued after 20 July 2016 transgress those limits, as explained below.

- First, some of these decree-laws provide for matters which have nothing to do with matters necessitated by the state of emergency. For example, the Decree-Law numbered 674 which came into effect following its publication in the Official Gazette on 01.09.2016 provided for the transfer of Research Assistants covered by the Programme for Training of Members of Teaching Staff and employed under article 33 of the Law on Higher Education numbered 2577 to the position of Research Assistant specified in article 50/d of the same Law. The Decree-Law numbered 676 which came into effect following its publication in the Official Gazette on 29 October 2016 amended article 13 of the Law numbered 2547 concerning the election of university rectors and abolished their election by members of teaching staff in universities, giving the power to elect rectors to the Higher Education Council and the President of the Republic. The Decree-Law numbered 687 which came into effect following its publication in the Official Gazette on 09 February 2017 added article 65/A to the Law on Road Traffic numbered 2918, introducing the requirement of winter tyres for vehicles used in passenger and cargo transport. Many other examples can be given.
- In addition, these decree-laws have introduced additional provisions to a large number of current laws and amended certain provisions of law. Apart from what is mentioned above; for example, Decree-Law 680, published in the Official Gazette on 06 January 2017, amended Law 357 on Military Judges, Law 2797 on the Supreme Appeal Court, Law 2802 on Judges and Public Prosecutors, and Law 7271 on Criminal Trial Procedure, and changes were made by Decree-Law 682, published in the Official Gazette on 23 January 2017, to Law 6741 Concerning the Foundation of the Turkish Asset Fund Management and Joint-Stock Company and the Amendment of Certain Laws. More examples can also be given here.
- Finally, rules to be applied also after the end of the state of emergency have been introduced through many of these decree-laws, for example by closing hundreds of private health institutions and organizations, private education institutions and organizations, private student hostels and boarding houses, foundations and associations together with their economic operations, foundation-owned higher education institutions, trade unions, federations and confederations, private radio and television organizations, newspapers, magazines, publishing houses, and distribution channels, by expelling students from education institutions, or by dismissing tens of thousands of public servants from the public service, never to be employed again in the public service, on grounds that they

were found out "*to have been members or associates of or related to or connected with terrorist organizations or those entities, formations or groups which are determined by the National Security Council to be engaged in activities against the national security of the State*", without there being any court decision or even any investigation and prosecution concerning the accusations directed at them.

### 3. Judicial review of SOE decree-laws

According to article 148/1 of the Constitution, it is not permissible to allege the unconstitutionality of SOE decree-laws. Leaving aside the fact that this rule of the Constitution is not compatible with the principle of the supremacy of law, there is no doubt that it is applicable for SOE decree-laws issued within the limits of the Constitution. In other words, it should first be determined by the Constitutional Court whether a decree brought before the constitutional judiciary is an SOE decree-law issued within the limits of the Constitution or a decree that, although named an SOE decree-law, has been issued clearly in breach of the rules of authorization in terms of subject-matter and time. Once the Supreme Court has determined that the decree brought before it is an SOE decree-law, it will no longer be possible to review that decree with regard to constitutionality; otherwise, even if it is named an SOE decree-law, it will be necessary to review it as an ordinary decree-law and to cancel it because it lacks an enabling law. In fact, the Constitutional Court held that certain provisions of the decree-laws issued under the name of SOE decree-laws during the state of emergency applied in Southeast Anatolia in the 1990s were contrary to the principles and rules laid down in the Constitution for SOE decree-laws, and, calling those decree-laws ordinary decree-laws, decided to cancel them on grounds that they were not based on an enabling law as required in article 91 of the Constitution and were therefore contrary to the said article. Examples are given below:

The Constitutional Court in its decision of 10.01.1991 with the case number 1990/25 and the decision number 1991/1 cancelled articles 1,2 and 3 of the "*Decree-Law for Amendments to Law 2935 on State of Emergency and to Decree-Law 285*" numbered 425, amending certain provisions of Law 2935, on grounds that "*it is not permissible to amend laws through such decree-laws*".[1] In its decision of 03.07.1991 with the case number 1991/6 and the decision number 1991/20, the Constitutional Court cancelled the provisions of articles 1, 5 and 6 of "*Decree-Law 430 on the State of Emergency Regional Governorate*

[1] The Official Gazette, 05.03.1992-21162

*and on Additional Measures to be Taken during the State of Emergency*" which conferred on the state of emergency governor powers that he could exercise also in regions outside the regions where state of emergency had been declared.[2] Finally, in its decision of 22.05.2003 with the case number 2003/28 and the decision number 2002/42, the Supreme Court cancelled article 7 of "Decree-Law 285 on the Establishment of the State of Emergency Regional Governorate," which was rearranged by Decree-Law 425 and which provided that "*no annulment action may be brought against administrative acts involving the exercise of the powers conferred on the State of Emergency Regional Governor*", on grounds that article 125 of the Constitution permits the issuing of stay orders to be restricted in cases of state of emergency but that it is not permissible to prevent, even by law, the remedy of starting an annulment action.[3]

However, in an action brought for the annulment of the provisions of the "*Decree-Law on Certain Measures to be Taken in the Scope of State of Emergency, on the Establishment of a National Defence University, and on Amendments to Certain Laws*" dated 25.07.2016 and numbered 669, the Supreme Court completely abandoned the approach in its former case-law, stating that it had previously made an examination in terms of location, time, and subject-matter to determine whether a state of emergency decree-law was indeed a decree-law of the type specified in article 121 of the Constitution but that such an examination would be contrary to article 148 of the Constitution. According to the Supreme Court:

> "*An examination made by the Constitutional Court based on the criteria of location, time, and subject-matter, to determine whether arrangements in the form of a state of emergency decree-law actually represent a state of emergency decree-law makes it necessary to evaluate the substance of the provisions contained in the decree-law… This approach renders completely meaningless and unfunctional the ban in article 148 of the Constitution on review with regard to form and substance….*" [4]

Given this new approach of the Constitutional Court, there is not any possibility left for the constitutional review of the SOE decree-laws issued after 20 July 2016 and continuing to be issued, which clearly transgress the limits imposed by the Constitution.

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[2] The Official Gazette, 08.03.1992-21165

[3] The Official Gazette, 16.03.2004-25404

[4] See the CC decision dated 12.10.2016 with the case number 2016/167 and the decision number 2016/160, The Official Gazette 04.11.2016-29878

**4. Judicial review of the acts directly established by the SOE decree-laws issued after 20 July 2016**

The private health institutions and organizations, private education institutions and organizations, private student hostels and boarding houses, foundations and associations together with their economic operations, foundation-owned higher education institutions, trade unions, federations, and confederations, that were reportedly found out to be controlled by or related to or connected with the Fettullahist Terror Organization (FETO/PDY), and that were listed in Annexes I-II, III, IV and V thereto, were directly closed by article 2/1 of the "*Decree-Law on Measures Taken in the Scope of State of Emergency*" numbered 667 which was published in the Official Gazette on 23 July 2016 in its copy 29779.

In article 2/3 of the same Decree-Law, it is provided that private student hostels and boarding houses, foundations, associations, foundation-owned higher education institutions, trade unions, federations, and confederations, which are found out to be members of or related to or connected with terrorist organizations or those entities, formations or groups determined to present a threat to national security, and which are not listed in the Annexes thereto, shall be closed by minister's approval upon a proposal by the commission to be created by the minister at the relevant ministry, that is, they shall be closed by an administrative decision.

Finally, articles 3 and 4 of Decree-Law 667 provide that members of the judiciary and those who are deemed to be of this profession, and public servants, who are considered "*to be members of or related to or connected with terrorist organizations or those entities, formations or groups determined by the National Security Council to be engaged in activities against the national security of the State*", shall be dismissed from the profession/the public service again by an administrative decision.[5] To put it briefly, it is provided that members of the judiciary shall be dismissed by decision of the Supreme Council of Judges and Public Prosecutors (SCJPP), and other public servants by an administrative act to be established on the basis of evaluations to be made by a commission to be created at the administrations and institutions where they are employed.

In article 10 of Decree-Law 667, it is stated that legal actions may be brought against decisions made and acts carried out under this Decree-Law but that no stay of execution may be ordered during the course of such actions. The Council of State, the highest administrative court, has ruled that the decisions

[5] "*Decree-Law on Measures Taken in the Scope of State of Emergency*". Although this Decree-Law was adopted with changes by Law 6749 of 18.06.2016, no substantial change was made to its provisions concerning dismissals.

of the SCJPP concerning the dismissal of members of the judiciary from the profession may not be subject to review at the administrative judiciary,[6] but it has been possible to bring legal actions at the administrative judiciary against other acts and decisions.

After Decree-Law 667, a different method has been followed to dismiss public servants who are stated "*to be members of or associated with or related to or connected with terrorist organizations or those entities, formations or groups which are determined by the National Security Council to be engaged in activities against the national security of the State*". Through the Decree-Laws issued after Decree-Law 667, tens of thousands of public servants have been dismissed from the public service, never to be employed again, by including their names in the lists attached to those Decree-Laws, without the need for any other procedure. In other words, the dismissal of these public servants has been carried out directly through a regulatory executive act having force of law. However, the Council of State and, in line with its approach, the administrative courts have refused to review those dismissals on grounds that they were carried out through decree-laws having force of law issued on the basis of the power granted by article 121 of the Constitution.[7] As a result, there is no effective domestic legal remedy left against the acts established directly through decree-laws, including the acts of dismissal concerning tens of thousands of public servants. Although it might be thought that because there is no effective domestic legal remedy left, individual applications may be filed with the Constitutional Court against the acts of dismissal in question, the approach of the Supreme Court has been that SOE decree-laws may not be reviewed in any manner, as explained above.

### 5. Commission for the Examination of State of Emergency Acts

Probably with the aim of avoiding the tens of thousands of applications that would be filed with the European Court of Human Rights as a result of the lack of any domestic legal remedy against the acts of dismissal carried out directly through SOE decree-laws, the "*Decree-Law Concerning the Creation of the Commission for the Examination of State of Emergency Acts*" numbered 685 was issued and came into effect following its publication in the Official Gazette dated 23.01.2017 and numbered 29957.

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[6] See the Council of State Fifth Department's decision of 04.10.2016 with the case number 2016/196 and the decision number 2016/4066

[7] See the Council of State Fifth Department's decision of 04.10.2016 with the case number 2016/8136 and the decision number 2016/4076

Decree-Law 685 created the "*Commission for the Examination of State of Emergency Acts to evaluate applications concerning acts established directly through decree-law provisions, without further administrative acts, due to membership of or association, relationship or connection with terrorist organizations or those entities, formations or groups which are determined by the National Security Council to be engaged in activities against the national security of the State, in the scope of the state of emergency declared under article 120 of the Constitution and approved by the Turkish Grand National Assembly through its decision 1116*".

**a. Composition, term, and working procedures and principles of the Commission**

The Commission for the Examination of SOE Acts will be composed of seven members, three of whom will be appointed by the Prime Minister from among public servants, one member by the Minister of Justice from among the judges and public prosecutors working in the central organization and affiliated or related bodies of the Ministry of Justice, one member by the Minister of Interior from among personnel in the class of territorial administration heads, and one member each by the SCJPP from among the examining judges employed at the Supreme Appeal Court and the Council of State, respectively, and the Commission will elect a president and a deputy president from among its members.[8]

The term of the Commission will be two years and may be extended by decision of the Council of Ministers for periods of one year each. The initial members of the Commission will serve for two years. Should it be decided to extend the term, new members will be appointed through the same procedure. The secretarial services of the Commission will be provided by the Prime Ministry, and a sufficient number of personnel for these services will be allocated to the Commission.

It is stated that the working procedures and principles of the Commission will be determined by the Prime Ministry upon a proposal by the Commission, and these procedures and principles were announced by publication in the Official Gazette on 12.07.2017 in its copy 30122 (repeated).

[8] The members of the Commission were determined on 2 May 2017.

**b. Area of duty**

The Commission will evaluate and decide applications to be made concerning acts established directly through SOE decree-laws without the need for any other procedure. In this context, the Commission will examine and decide applications made concerning the acts of:

- Dismissal or expulsion from the public service, the profession or the organization where one is employed,
- Expulsion from schools or universities,
- Closing of associations, foundations, trade unions, federations and confederations of trade unions, private health organizations, private education institutions, foundation-owned higher education institutions, private radio and television organizations, newspapers, magazines, news agencies, publishing houses, and distribution channels, and
- Depriving retired personnel of their ranks,

And other acts in relation to the legal status of natural persons and legal entities, established directly through SOE decree-laws. However, it will not be possible to make applications concerning those acts for which legal remedies are open, for example the administrative acts and decisions under Decree-Law 667 as we have noted above (Decree-Law 685, art. 2/3). In addition, since judges and public prosecutors whose continued presence in the profession is found inappropriate by decision of the SCJPP and who are decided to be dismissed from the profession under article 3 of Decree-Law 667 are granted the possibility to bring a legal action before the Council of State as the court of the first instance (Decree-Law 685, art. 11/1), it will not be possible to file an application with the Commission against those decisions, either.

The Commission has the power to request all information and documents concerning its area of duty from those concerned. Public institutions and organizations must promptly send the Commission all information and documents which the Commission needs in the scope of its duty or allow the examination of the same on location, subject to legal provisions regarding the confidentiality of the investigation and State secrets (art. 5).

**c. Period and procedure for applications**

The period for applications to the Commission has been determined as sixty days. It is provided that this period will start to run, in the case of applications concerning those decrees which were put into force before the date on which

the Commission starts to receive applications, as from such date and, in the case of decree-laws to be put into effect afterwards, as from the date of publication in the Official Gazette. It was stated that the date on which the Commission would start to receive applications would be announced by the Prime Ministry, and this date was determined and announced as 17.07.2017.

Applications will be made through governorates. Individuals who have been dismissed from the public service may also apply to the institution where they were last employed. Governorates and institutions concerned will promptly forward applications received by them to the Commission (art. 7).

**d. Initial examination, examination, and decision**

It should first be noted that there is no certain period specified for the Commission to examine and decide applications. In any event, considering that the number of applications to the Commission will exceed tens of thousands, it is impossible to stipulate any such period. For this reason, it is stated in article 7/2 that applications to be made under this Decree-Law will not be subject to article 10/2 of the Law on Administrative Trial Procedure, thereby excluding the possibility that an implicit decision to reject may come into being as a result of failure to resolve an application within sixty days and that the applicant may bring a legal action at the administrative judiciary for the annulment of such implicit act.

Applications made to the Commission will be subjected to an initial examination in respect of conformity to the required conditions. If it is found at the end of the initial examination that the application has not been made within the relevant period, that the applicant has no legal interest concerning the matter, or that an application has been made regarding acts not covered by Decree-Law 685, it will be decided to refuse the application without being examined (art. 8).

Applications that have passed the initial examination will be taken into examination, and this examination will be made on documents. As a result, the applicant does not have the possibility to make oral explanations before the Commission.

Following the examination, the Commission will decide to refuse or grant the application.

It will be possible to bring annulment actions against the decisions of the Commission to refuse applications before the administrative courts of Ankara to be determined by the SCJPP. It should be noted that the contested act in

such a legal action will be not the act established directly through the Decree-Law but the act of the Commission involving the refusal of the application. Therefore, for example, when the contested act is annulled by the court at the end of a legal action brought following the refusal of an application concerning dismissal from the public service, the applicant will –at best– be able to obtain his rights for the period after the date on which his application was refused by the Commission but he will be deprived of his rights for the quite long period elapsing from the date of his dismissal to the date on which his application was refused by the Commission.

Article 10 of Decree-Law 685 specifies how to implement the decision of the Commission to grant an application when that is the case.

According to article 10/1, in the event of granting applications by those who were dismissed or expelled from the public service, the profession or the organization where one was employed, the decision will be notified to the State Personnel Department, and proposals for the appointment of the notified personnel will be made within fifteen days by the said Department to cadres and positions conformable to their former status and titles at public institutions and organizations other than those where they were previously employed (excluding those who cannot be assigned to other institutions in terms of their status, titles, and duties). As will be noted, the applicant will not be reinstated in his job but will be appointed from outside and, as a result, the act previously established by decree-law in relation to such an applicant will not be withdrawn. Therefore, such an applicant will be able to obtain only those rights which accrue after the act of appointment is established.

On the other hand, according to article 10/2, in the event of granting applications concerning closed institutions and organizations, the provisions of the relevant decree-law will be deemed to have been removed with respect to those institutions and organizations from the date of publication, and the relevant acts will be carried out by the Ministry of Interior, the Ministry of Finance, the Ministry of Health or the Directorate-General of Foundations, as applicable. In the event of granting an application concerning closed institutions and organizations, it may be said that the decision to grant will be in the nature of an act of withdrawal and that the act established by decree-law with respect to those institutions and organizations will be removed from the beginning together with all its effects and consequences.

**e. Is the application that will be made to the Commission an effective remedy?**

The right to an effective remedy, one of the ways to use the freedom to seek rights, is secured both in the European Convention on Human Rights (ECHR) and in the Constitution. According to article 13 of the ECHR, "*…everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity*". Article 40/1 of the Constitution provides that "*everyone whose constitutional rights and freedoms are violated has the right to request prompt access to the competent authorities*". Looking at the acts established directly through SOE decree-laws, it is clear that they violate the freedom of association, the right to education, the right to union membership, freedom of the press, and the right to work, which are guaranteed both in the ECHR and in the Constitution, and that they are therefore in the scope of the right to an effective remedy.

The most important condition required for an application to be considered an effective remedy is that in the event of determining a violation, the application should have the effect of preventing the violation or removing its consequences. In addition, the nature of the authority to examine the application and the method by which the application is examined are also among the conditions for being able to speak of an effective remedy.[9]

First of all, it would be impossible to say that the decision to be given following the application made to the Commission will prevent the violation caused by dismissals in particular or fully remove the consequences of the violation. When the Commission decides to grant the application, this will lead to the establishment of an act of "*appointment from outside*" and the applicant will be able to obtain his rights only after this act of appointment is established. In the event that the Commission refuses the application, although the possibility will be opened for application to the administrative judiciary, the act to be contested in such application will be not the act of dismissal but the act of refusal by the Commission, and therefore only the latter (that is, the decision of the Commission) will be annulled by an eventual court decision and the applicant will be able to obtain his rights for the period after the date on which his application was refused but he will be deprived of his rights for a very long period elapsing from the date of dismissal to the date on which his application was refused by the Commission.

[9] For detailed information about the conditions of an effective remedy, see TANRIKULU, SEZGİN: The European Convention on Human Rights (in Turkish), Ankara 2012, p. 139 et seq.

Furthermore, the method for the appointment of the members of the Commission casts a shadow on the independence of the Commission. Just as it is problematic that the term of office of the members should be two years and that in the event of extending the term of the Commission, new members should be appointed by the same method, it is also problematic that the Commission should not have a secretariat of its own and that its secretarial services should be provided by the Prime Ministry. In addition, although it is a safeguard that the members of the Commission may not be removed from office during their term of office, the fact that one of the reasons for removing a member from office is stated as "*an administrative investigation started or permission given for investigation by the Prime Ministry on grounds of alleged membership of or association, relationship or connection with terrorist organizations or those entities, formations or groups which are determined by the National Security Council to be engaged in activities against the security of the State*" could prevent the Commission from operating independently of all influence.

Finally, the Commission, whose working procedures and principles have been determined by the Prime Ministry, will examine applications on the basis of documents. There will be no question of the applicant being heard by the Commission. Moreover, it is doubtful that the tens of thousands of applications to be made can be examined properly, and it is impossible for the examination to be completed within a reasonable period.

In brief, it is clear that an application to the Commission cannot be an effective remedy and that the grievance of those who have been dismissed cannot be fully redressed by a judiciary annulment order or an act of appointment from outside following the decision to be made by the Commission upon such an application.