

Lawyers on the Barricades: The Politics of Exceptional Law in Turkey, 1930-1980

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Abstract

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Why would a country's top law professors support a military coup d'état and political show trials? Conversely, how could lawyers succeed in bringing military trials of civilians to a halt, rendering them all but useless as political tools? This dissertation addresses how Turkish lawyers engaged with exceptional law from the early 1930s until 1980, when the Army repeatedly took the reins of government and sought to reshape the political landscape through military trials. Most scholars have seen such trials as political instruments of the Army. I demonstrate that they depended to a great extent on the cooperation of lawyers, and were therefore far less pliable political tools than many have assumed. While the 1960 military coup and the ensuing show trial of the deposed government enjoyed wide support among lawyers, the military trials of the 1970s met with massive resistance from many of the same lawyers, who often subverted the Army's intentions to the extent that the trials ended in acquittal.

I argue that Turkish lawyers were able to obstruct the trials of the 1970s because the state ideal that the Army claimed to be defending was one where lawyers' share in public authority was equal to that of the Army itself. I conceptualize this authority as a

form of professional “jurisdiction” over the right to define the boundaries and forms of legal procedure. Paradoxically, the jurisdiction that enabled lawyers to resist legal authoritarianism in the 1970s had been shaped during the 1930s by jurists whose primary goal was not to limit it, but to ensure that they would have a place in its exercise.

Although by the 1970s many jurists sharply disagreed with the Army over the ideological direction the country should be taking, the Army had to engage with jurists on their own terms in order to plausibly maintain that it was defending the state against political subversion. Only by gradually undermining the autonomy and symbolic authority of non-state lawyers was the Army able to use military courts as a brutal, if awkward and blunt, tool for political purposes after the 1980 coup d'état.

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Prologue

A few days before I defended this dissertation in December 2014, the US Senate Select Committee on Intelligence released the redacted executive summary of its much-anticipated report on the CIA's conduct during the "War on Terror."¹ Compounding the shocking revelations of the CIA's torture of detainees was the knowledge that it had been continuously authorized by lawyers in the Department of Justice, Department of Defense, and other government agencies, a form of legal vetting that Jack Goldsmith described in his 2012 book *Power and Constraint*.² Against accusations that the expansion of executive power after 9/11 has undermined the rule of law, Goldsmith contends that an increase in informal legal controls on American intelligence and security activities since the 1970s has significantly constrained the executive branch. Though different from traditional judicial review, Goldsmith argues, this oversight has created a form of accountability reassuring enough that President Obama, despite his critique of the Bush administration's legal "black holes," felt justified in continuing and expanding most of his predecessor's counterterrorism policies.

After reading the "torture report," few would agree that this accountability—from

1 Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program. Findings and Conclusions. Executive Summary* (US Senate, 2014).

2 Jack Goldsmith, *Power and Constraint: The Accountable Presidency after 9/11* (New York: W. W. Norton & Company, 2012).

congressional intelligence committees and legal counsels to the hundreds of paralegals that can be involved in vetting a single covert action by the CIA—has made the government’s actions appropriate. The engagement with lawyers that Goldsmith identified may have shaped how the US conducted its activities, but it is difficult to argue that it made those activities adhere to any substantive conception of the rule of law, or indeed of morality. Then what did it do?

This dissertation is an effort to understand the role lawyers play in enabling, framing, representing, and resisting authoritarian legality. I look outside of the consolidated democracies of the West, where the rule of law is widely considered to be the norm and torture, arbitrary detention, and military tribunals of civilians are seen as exceptions, and turn to Turkey, where such “exceptional” law has been so constant that it has, at times, threatened to become normal. I focus in particular on the Cold War, the same period when many of the legal oversight mechanisms Goldsmith discusses first appeared in the US. They appeared in part because the Cold War eroded the distinction between “wartime” and “peacetime” all over the world,³ allowing emergency measures traditionally reserved for clearly delimited situations to seep into the framework of day-to-day governance, a development that required mechanisms of accountability more responsive to political signals and changing circumstances.

Turkey entered the postwar era by adopting electoral democracy and taking up NATO membership, only to find itself torn by the same political polarization that

³ Mary Dudziak, *War Time: An Idea, Its History, Its Consequences* (Oxford University Press, USA, 2012), 68.

occurred throughout the West. By the time domestic unrest set in, however, Turkey already had a history of legalistic state repression going back at least to the early 1930s. As a result, I argue, lawyers became so involved in the three military coups d'état that took place from 1960 to 1980 that the Army at times appeared as the less powerful part.

The role Turkish lawyers played during these military interventions ranged from facilitation to sabotage. A seemingly unanimous community of law professors, judges, and bar associations endorsed the 1960 coup and provided expert advice and public support for the show trial of the deposed government. By the time the Communist-weary Army forced out another elected government in 1971 in order to impose its own standards of justice, many of the same lawyers had drifted toward the left, and used their formal and informal authority to resist and sabotage the military trials of leftists that followed. This dissertation thus examines how Turkish lawyers have been able to both support and subvert authoritarian legality, acting sometimes as extensions of prerogative power, other times as its stubborn limit.

The broader lesson I draw from Turkey is similar in certain respects to the lessons Goldsmith draws from the US. Goldsmith argues that the same fabric of accountability that constrained the Bush administration's practices later enabled the Obama administration to adopt them as its own. I similarly find that Turkish state leaders' exercise of prerogative has been deeply shaped by their engagement with lawyers. Indeed, Turkish Army leaders have at times felt so constrained by legal scrutiny that they have been unable to take action without first consulting with lawyers, even during periods

when ordinary constitutional protections were suspended. As a result, I argue, the military coups in 1971 and 1980 were not so much assertions of sovereignty as desperate attempts at undercutting lawyers' indelible authority over the uses of legal procedure for purposes of political repression. Like American lawyers, therefore, Turkish lawyers on both sides of the state-society divide have done more than simply rubberstamp state power. They have at times resisted authoritarianism, but they have just as often embraced and extended it even further than civilian and military state leaders would have liked.

But my argument differs from Goldsmith in one crucial respect. Goldsmith sees the continuity from the Bush administration to the Obama administration as evidence that the legal oversight he describes is effective, that it truly does constitute a form of accountability akin to judicial review but better suited to a world where unpredictable, transnational, asymmetric war has become a permanent fact of life. For many critics, there is something uncanny about such legal discourse, something both reassuringly and suspiciously authoritative. Although many of these government lawyers sit at the apex of their profession, their discourse seems to lack a crucial quality that would convince us that torture, for example, is acceptable. Indeed, some critics have described the expert memos of US government lawyers as "pseudo-jurisprudence,"⁴ more akin to an "enabling legal environment"⁵ than an "ecology of transparency,"⁶ and have concluded that at least

4 Stephen Sedley, "Terrorism and Security: Back to the Future?," in *Secrecy, National Security and the Vindication of Constitutional Law* (Cheltenham: Edward Elgar Publishing, 2013), 13.

5 Darius Rejali's term for the common acceptance of coerced confessions in Japan's legal system in the 1970s and 1980s, in *Torture and Democracy* (Princeton and Oxford: Princeton University Press, 2007), 54.

6 Goldsmith, *Power and Constraint*, 118.

some of the highest-ranking lawyers of the government are guilty of professional misconduct.⁷

My conclusion is even more pessimistic. I agree with Goldsmith that lawyers exert real power, but unlike Goldsmith I do not see their influence as an unequivocal force for good. If anything, post-Cold War developments both in Turkey and the US demonstrate that more law does not necessarily result in more transparency or better protection of civil and human rights. Much as the permeation of the US executive branch by lawyers has failed to curb violations during the “War on Terror,” so the normalization of authoritarian legality in Turkey after the 1980 coup has made the judiciary into an independent bastion of paternalism that, while not beholden to any particular political group, has repeatedly shown itself willing to undertake political witch hunts and facilitate human rights violations.

But I also disagree with those who would brush off such jurisprudence by labeling it “legal pretzel logic.”⁸ Goldsmith is right when he attributes the errors of the legal memos that authorized indefinite detention and torture to the reality-bending powers of political context.⁹ Much as the creeping authoritarianism of the Turkish government in the late 1950s made an almost unanimous legal profession embrace the 1960 coup, so the widespread sense of danger after 9/11 led US government lawyers to exploit legal

7 United States Department of Justice, *Office of Professional Responsibility Report*, July 29, 2009, 11.

8 “Prosecute Torturers and their Bosses,” *The New York Times*, December 21, 2014.

9 Jack Goldsmith, “The Third Annual Solf-Warren Lecture in International and Operational Law: Reflections on Government Lawyering,” *Military Law Review* 205 (2010): 192–203.

ambiguities and loopholes and to stretch the meaning of constitutional provisions in ways that facilitated abuses. In both cases, professional lawyers found the authority to facilitate oppression in law itself.

Separating such jurisprudence from law proper lets us off too easily. The errors of US government lawyers and pro-military Turkish lawyers were not legal or logical, but ethical and political. If there is a moral to this dissertation, therefore, it is that law has no liberal entelechy, no core of human decency that would enable us to unequivocally separate “real” jurisprudence from mere sophistry. Law can be liberal or authoritarian, emancipatory or oppressive. Although this ambivalence does not excuse the actions of lawyers who facilitate torture and other abuses, I do not believe we will prevent future rights violations by placing them in a conceptual quarantine, cordoning off their reasoning as exceptional aberrations from an unadulterated realm of pure legality. On the contrary, doing so might facilitate future abuses by maintaining the illusion that law is a metaphysical source of ethical guidance that, if consulted correctly, can determine when constitutional protections must be set aside for the greater good. Instead, I suggest, we should seek ways to connect legal interpretation with its political, moral and human context. My dissertation does not show how that can be done, but it does hopefully contribute to questioning some of the assumptions that keep us from trying.

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Introduction

In March 1983, less than three years into the military administration that was established after the Turkish Army conducted its third coup d'état in September 1980, the International Committee of Jurists (ICJ) published a survey of legal states of emergency around the world.¹ The report found that martial law practices tended to go beyond existing legal provisions and almost always had a corrosive impact on basic human rights. Indeed, some of the report's contributors remained anonymous for fear of retribution in their home countries. Those who did not request anonymity, among them lecturer of constitutional law Bülent Tanör from Turkey, participated at considerable personal risk.

Tanör was no stranger to judicial repression. After Turkey's second military coup in March 1971, he and around 200 other academics had been arrested, fired, tried in military courts, and in many cases tortured in military prisons along with around 5,000 other suspected leftists.² The following years Tanör and many other law professors and attorneys mobilized to prevent the Army from permanently militarizing the criminal

1 ICJ, *States of Emergency: Their Impact on Human Rights* (Geneva: International Committee of Jurists, 1983). The report was meant to complement the UN Commission on Human Rights report by special rapporteur Nicole Questiaux, *Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency* (United Nations, 1982).

2 Bülent Tanör, "Turkish Universities Fall Silent," *Index on Censorship* 3, no. 2 (1974): 49; Erich Jan Zürcher, *Turkey: A Modern History* (London: I.B. Tauris, 1998), 259.

justice system. It thus came as no surprise that Tanör was again fired in a wider purge of academics, teachers, students and public servants the same year the ICJ report appeared.³

Nevertheless, Tanör’s historical-legal analysis did not uniformly condemn Turkey’s many military “states of exception.” In his eyes, the legitimacy of an emergency regime depended on two principal factors: the extent to which it had “democratic” goals and the extent to which it remained within the legally defined limits of states of emergency. Strictly speaking, none of Turkey’s three military coups fulfilled the second criterion, but the first coup, in 1960, “was clearly marked by a democratic tendency.” Moreover, the junta of 1960 had rapidly legalized its suspension of the constitutional order with massive support of the country’s top legal scholars. Those legal scholars had then produced the 1961 Constitution, which guaranteed civil rights and autonomy for universities, the press, and labor unions, and established the new Constitutional Court to oversee the pact. The 1971 and 1980 interventions, in contrast, installed regimes of exception whose suspension of the constitutional order was exacerbated by their “authoritarian goals,”⁴ as evidenced in their assault on the 1961 Constitution and jailing of hundreds of intellectuals.

Murat Belge—a lecturer of literature who had also fallen victim to the Army’s justice after 1971, and did so again in 1983, despite writing under a *nom de guerre*—was

3 Between February 1983 and January 1984, around 500 academics lost their jobs. Mete Tunçay, “YÖK,” in *Cumhuriyet Dönemi Türkiye Ansiklopedisi*, vol. 3 (Istanbul: İleri Yayinlari, 1984), 686.

4 Bülent Tanör, “States of Exception in Turkey 1960-1980,” in *States of Exception: Their Impact on Human Rights* (Geneva: International Commission of Jurists, 1983), 309–36.

more critical of the legacy of the 1960 coup. Although he agreed that the 1961 Constitution introduced a progressive regime based on the rule of law, the military coup itself was a “blatantly undemocratic” transition followed by “an absurd and disgraceful trial” of the leaders of the ousted Democrat Party. The fact that it nevertheless “produced a liberal reform of Turkish government” with the help of legal experts, some of whom later became mainstays of the Workers’ Party of Turkey (WPT), had given leftist intellectuals the false hope that they could affect social change through legal means.⁵ For Belge, the WPT’s “legalism” ultimately led to its downfall as younger leftists lost faith in parliamentary politics and legal activism in favor of building ties to the Army, which instead of listening simply tortured and tried them in military courts.⁶

Tanör and Belge thus agreed that the 1961 Constitution outlined a liberal *Rechtsstaat*, but they disagreed on the political consequences of the fact that it had come into being through a partnership of a military junta and legal professionals. For Tanör, the 1960 junta’s engagement with law professors and other intellectuals demonstrated the Second Republic’s democratic character; for Belge, on the other hand, the Turkish intelligentsia’s cooperation with the Army was a *trahison des clercs*, an abrogation of legal, democratic and scholarly principles that in turn “threatened to annul [the Constitution’s] effective application.”⁷ The legalistic genesis that in Tanör’s eyes made the 1961 Constitution a bulwark against the right-wing politicians, generals and

5 Ahmet Samim [Murat Belge], “The Tragedy of the Turkish Left,” *New Left Review*, I, no. 126 (April 1981): 66.

6 Ibid., 71.

7 Ibid., 66.

prosecutors who tried to marginalize the left through political trials during the 1960s and 1970s made it dangerous in the eyes of Belge, who thought that leftist lawyers fought an ultimately hopeless battle against the militarization of justice.

The opposite lessons that Tanör and Belge drew from the history of Turkish lawyers' engagement with military regimes illustrates a fundamental paradox in the relationship between law and state power from the founding of the Republic by Mustafa Kemal in 1923 until the end of the Cold War. Although Turkish lawyers had in common a legal education rooted in French and German doctrinal traditions that emphasized political disinterestedness and technical expertise, lawyers had a long history of engaging in politics. Their engagement straddled the state-society divide and functioned at times to contain state power, other times to extend it far beyond its constitutional limits. During the aggressively Westernizing Kemalist single-party regime (1923-1945), law professors and judges functioned as extensions of state power, even when it, as Belge put it, "had blown with the Nazi wind" in the late 1930s and early 1940s.⁸ After the war and the first democratic elections in 1950, many of the same jurists became staunch defenders of judicial independence and academic autonomy. When the Army took power in 1960, however, they rallied around the junta in resurrecting what some have called a "neo-Kemalist" state centered on the bureaucracy, courts, and universities.⁹ As political polarization swept Turkish cities from the mid-1960s onward, this alliance of lawyers and officers fell apart, as conservative jurists supported a wave of political repression through

⁸ Ibid., 65.

⁹ Jacob M. Landau, *Radical Politics in Turkey* (Leiden: E. J. Brill, 1974), 14.

both ordinary criminal courts and military courts, while their colleagues on the left, many of whom had also taken part in creating the 1961 Constitution, resisted and often managed to sabotage even military trials.

The wildly inconsistent behavior of Turkey's legal establishment left intellectuals such as Tanör and Belge wondering whether there was anything in the Kemalist *Rechtsstaat* that could be salvaged to create a truly liberal and progressive regime built on the rule of law. Ultimately, their answers depended on how they conceived of the law and the legal professionals tasked with interpreting and applying it. Tanör, a lawyer, found hope in the normative power of legal principles even as he was writing from European exile after years of judicial persecution. Belge, a scholar of literature, abandoned what he saw as the twin evils of state-centered legalism and militant vanguardism, and began searching for a third way.

In this dissertation I address how such differences in the conception and practice of law made the Turkish legal profession both amenable and resistant to authoritarianism. I take a step back from the disagreement between Tanör and Belge, who were writing in the midst of a struggle, in order to understand how their viewpoints illustrate this wider paradox in Turkish lawyers' relation to state power. I ask: Why would lawyers, members of a profession whose *raison d'être* is to maintain a functional legal system, use their authority and expertise to support the military overthrow of an elected government and a constitution? Conversely, how could lawyers succeed in bringing military trials of civilian activists to a halt, rendering them all but useless as political tools?

I address the first issue by way of the second. The question of why Turkish lawyers have so often gone out of their way to assist state leaders in using law for purposes of political repression, I suggest, is best understood as part of the more difficult question of *how* they acquired the share in public authority that allowed them to perform that service. Answering that question, in turn, requires taking their legal discourse seriously as an expression and exercise of the law, even when it is used in support of what we see as “exceptional” or “political” law such as military trials of civilians.

Lawyers are different from non-lawyers mainly by virtue of their professional identity. That identity encompasses practical and substantive knowledge of the law and its governing principles as well as rules of conduct and some sense of collective identification with other legal professionals, all of which are acquired through legal education and practice. Beyond professional identity they have different political and private opinions, world views, aspirations, and flaws much like anyone else. In Germany, Hans Litten and Roland Freisler were educated within the same legal tradition, but one became a heroically principled anti-Nazi attorney and the other a mouthpiece of the most fanatically arbitrary strand of Nazi justice. If, in seeking to understand their behavior, we limit our inquiry to their personal views and inclinations, the answer would be relatively simple. Our understanding of law and justice would be absolved from guilt; instead, we could simply blame the individual lawyers for their moral defects or praise them for their conscientiousness.

But the moral sense that compels us to ask *why* a judge like Roland Freisler or a

law professor like Carl Schmitt would throw their intellectual weight behind state atrocities also implies an affronted *how*—how can the custodians of the rules, principles, and values that are meant to preserve the peace and protect the person violate the trust we place in them? Does authoritarianism have a judicial methodology, and if so, does it simply bend with the will of the rulers or does it also set limits to what they can do with the law? Are authoritarian jurists simply “atrocious judges,”¹⁰ lawyers willing to set their legal ethos aside for the sake of political ideology or careerism, or is there also something in that ethos, in the combination of knowledge and conduct that constitutes the law, that makes the path from upright scholar to tyrant or sycophant less dramatic than we like to imagine?

The importance of these questions has been evident since the interwar years, when liberal constitutionalism came under attack from within the same countries that had produced and—in theory, if not in practice—exported it around the world.¹¹ After the war, legal and political thinkers sought to develop the foundations for a legality that would avoid the excesses of Fascism without falling prey to the spinelessness it had exposed in German, French and Italian liberal jurisprudence. While the Universal Declaration of

10 Richard Hildreth, *Atrocious Judges: Lives of Judges Infamous as Tools of Tyrants and Instruments of Oppression* (New York, 1856).

11 On European powers’ export of abusive martial law practices alongside their more acknowledged dissemination of continental and common-law traditions to their colonies, see Nathan J. Brown, “Law and Imperialism: Egypt in Comparative Perspective,” *Law and Society Review* 29, no. 1 (1995): 103–26; Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: The University of Michigan Press, 2003); Olivier Le Cour Grandmaison, “The Exception and the Rule: On French Colonial Law,” *Diogenes* 53, no. 4 (2006): 34–53..

Human Rights gave cause for optimism, many of the countries on the forefront of the human rights movement displayed embarrassing continuities between pre- and post-war legal practices. Instead of emerging from the extremes of the “watershed”¹² war years with an unequivocal commitment to liberal constitutionalism, postwar democracies were torn between, on the one hand, the impossibility of finding legal professionals untainted by Fascism, and on the other, the need to maintain a front against Communism. In France, Italy, Germany and many other war-worn countries, lawyers with less public profiles than Joseph Barthélemy, Alfredo Rocco, and Carl Schmitt continued administering the state as if almost nothing had happened.¹³ Meanwhile Germany attempted to protect its fragile equilibrium by invoking Karl Loewenstein’s “militant democracy”¹⁴ to charge anti-militarists in the 1950s and leftists in the 1970s, while France conducted political trials at home¹⁵ and allowed former Fascist officials to use extrajudicial violence against Algerians overseas¹⁶ and eventually even in the heart of

12 Edward Peters, *Torture* (Philadelphia, PA: University of Pennsylvania Press, 1996), 105.

13 Claudio Pavone, “La continuità dello Stato. Istituzioni e uomini,” in *Italia 1945-48. Le origini della Repubblica*, ed. Claudio Pavone (Turin: Einaudi, 1974), 137–289; Michael Stolleis, “Reluctance to Glimpse in the Mirror: The Changing Face of German Jurisprudence After 1933 and Post-1945,” in *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions*, ed. Christian Joerges and Navraj Singh Ghaleigh (Oxford and Portland, OR: Hart Publishing, 2003), 1–18.

14 Karrin Hanshew, *Terror and Democracy in West Germany* (Cambridge: Cambridge University Press, 2012); Alan Rosenfeld, “Militant Democracy: The Legacy of West Germany’s War on Terror in the 1970s,” *The European Legacy: Toward New Paradigms* 19, no. 5 (2014): 568–89.

15 Yves-Frédéric Jaffré, *Les Tribunaux d’exception, 1940-1962* (Paris: Nouvelles éditions latines (Rennes, Impr. réunies), 1963).

16 R. Maran, *Torture: The Role of Ideology in the French Algerian War* (New York: Praeger, 1989); Sylvie Thénault, *Une drôle de justice - Les magistrats dans la guerre d’Algérie* (Paris: La Découverte, 2001); Olivier Le Cour Grandmaison, *De l’indigénat. Anatomie d’un «monstre» juridique: le droit colonial en Algérie et dans l’empire français* (Paris, Zones/La

Paris.¹⁷ In Europe as in the USA, activists protesting their own countries' violence in former colonies were tried and frequently jailed. As Robert Cover argued at the height of the Tet Offensive, widespread draft evasion left many American judges with the choice of either affirming their humanity or acting like the "atrocious judges" of the past.¹⁸

In Turkey, the first confrontation between authoritarian legality and the liberal democracy of the 1950s came in the form of the show trial of the several hundred members of the deposed Democrat Party after the 1960 coup, a process Walter Weiker called "one of the most thorny" issues of the interim regime. The trial involved "a host of legal complications," from retroactively amending the Penal Code to establishing an *ad hoc* tribunal with tailored procedures and hand-picked judges and prosecutors.¹⁹ Turkey's most respected law professors, the highest-ranking of whom had acquired their fame during the 1930s and 1940s, were more than willing to help, and pro-coup media made celebrities out of figures such as Salim Başol, the chief judge of the show trial. In return, law professors were awarded with the opportunity to design a new constitution that secured their place in the new Republic.

When Turkish society became polarized in the 1960s, however, the alliance of jurists and Army officers began falling apart as a series of politically charged trials of leftist writers, translators and publishers forced them to take sides. By 1970, jurists who

Découverte, 2010).

17 Jean-Luc Einaudi, *La Bataille de Paris, 17 Octobre 1961* (Paris: Seuil, 1991).

18 Robert M. Cover, "Book Review: Atrocious Judges: Lives of Judges Infamous as Tools of Tyrants and Instruments of Oppression," *Columbia Law Review* 68 (1968): 1005.

19 Walter F. Weiker, *The Turkish Revolution 1960-61: Aspects of Military Politics* (Washington, DC: The Brookings Institution, 1963), 25.

had sat side by side in rubberstamping the 1960 military coup were accusing each other of undermining the rule of law, while generals, terrified of Communist subversion in their own ranks, sought and eventually succeeded in using their own courts to try leftist civilians. From June 1970 through the Army's takeover in March 1971, military tribunals tried several hundred suspected leftists under the cover of martial law. They were supported by conservative jurists, while law professors and attorneys on the left fought what they saw as "exceptional" uses of legal procedure and symbols for purposes of political repression.

To understand how Turkish lawyers were able to both support and restrain the state's use of "exceptional" legal powers I return to the formative period of the Turkish Republic's doctrine of state powers. Instead of seeing authoritarian legality as a choice between normative principles or political instrumentality, I will argue that the theory and practice of legal "states of exception" are shaped through the same process in which the identity of states and their constituent professions are shaped. Far from being simply imposed on the legal system from the outside by authoritarian rulers, "exceptional" law has been intrinsic to the complex of institutions, preferences, behavioral norms and discourses that constitute the Turkish state. This dissertation is therefore an attempt, as Austin Sarat puts it, to place "responses to emergency in historical and institutional context, to remind ourselves of continuities and discontinuities in the ways emergencies are framed and understood at different times and in different institutions."²⁰

²⁰ Austin Sarat, "Introduction: Towards New Conceptions of the Relationship of Law and Sovereignty under Conditions of Emergency," in *Sovereignty, Emergency, Legality*, ed. Austin

Attention to theoretical and pragmatic continuities in the legal discourse of state powers from the interwar period to the end of the Cold War, I suggest, explains why Turkish lawyers have been able to both support and subvert state power, even when it appeared in the guise of military force. The symbolic and practical authority that allowed jurists to sabotage military trials in the 1970s was the same authority that enabled them to support the authoritarian single-party state of the 1930s. Turkish lawyers, law professors and judges on the left could obstruct the trials of the 1970s because the state ideal that the Army claimed to be defending was one where lawyers' share in public authority was equal to that of the Army itself. Law professors had taken an active part in shaping that state ideal during the 1930s, in the process making themselves and their colleagues in the courts into indispensable extensions of state authority. They had re-affirmed this ideal in the 1960 coup, when they stepped out of their ivory towers and, assisted by pro-coup media, shaped the interim regime's public face as one of apolitical expertise and legal scholarship.

Of course, real jurists were anything but apolitical. Although by 1970 many jurists sharply disagreed with the Army brass over the ideological direction the country should be taking, the Army had to continue engaging with jurists on their own ostensibly apolitical terms in order to plausibly maintain that it was defending the state against politicization. Only by gradually undermining the autonomy and symbolic authority of leftist lawyers such as Bülent Tanör was the Army able to use military courts as a brutal,

Sarat (Cambridge and New York: Cambridge University Press, 2010), 6.

if awkward and blunt, tool for political purposes after the 1980 coup d'état.

“Realism” and the primacy of politics

There is considerable resistance to the idea of taking legal normativity in authoritarian contexts seriously. Scholarship on judicial independence and empowerment often assumes that it is either possible under only democratic conditions²¹ or, that when it does occur in authoritarian contexts, it is circumscribed and contingent on rulers' willingness to cede power within certain bounded issue areas in order to maintain the regime's internal cohesion²² or to obtain external benefits such as foreign investments.²³ Such approaches adhere to what Ran Hirschl²⁴ calls a “realist” framework in that they explain the empowerment of courts and legal professionals as a result of rulers' strategic and self-interested delegation of power. Thus some scholars argue that rulers encourage independent administrative courts in the hopes that they will provide channels of information into the bureaucracy, thereby preventing the emergence of competing power

21 C. Neal Tate, “Why the Expansion of Judicial Power?,” in *The Global Expansion of Judicial Power*, ed. Torbjorn Vallinder and C. Neal Tate (New York and London: New York University Press, 1995), 29.

22 Robert Barros, *Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution* (Cambridge: Cambridge University Press, 2002); Robert Barros, “Courts out of Context: Authoritarian Sources of Judicial Failure in Chile (1973-1990) and Argentine 1976-1983),” in *Rule by Law: The Politics of Courts in Authoritarian Regimes*, ed. Tamir Moustafa and Tom Ginsburg (Cambridge: Cambridge University Press, 2008), 156–79.

23 Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (Cambridge: Cambridge University Press, 2007).

24 Ran Hirschl, “The Realist Turn in Comparative Constitutional Politics,” *Political Research Quarterly* 62, no. 4 (2009): 825–33.

centers within the state.²⁵ Others argue that constitutional courts should be seen as independent control mechanisms set in place by outgoing regimes afraid of losing future elections.²⁶ Similarly, Hirschl argues that although judges may uphold constitutional rights, they thereby also preserve the political hegemony of the incumbents who shaped the constitution against the oncoming tide of reforms based on political worldviews that clash with their own.²⁷ Finally, a “rule of law” literature points to the role of credible constitutional guarantees in maintaining a hospitable environment for economic development.²⁸

Though there is significant variation among these approaches, they all fall in line with a wider trend within political science to understand the rule of law not as “a nirvana-like ultimate ideational harmony,”²⁹ but as “a product of concrete choices, interests, or strategic considerations by self-interested political stakeholders.”³⁰ Courts, in this view, are overseers of pacts between powerful political, economic, and military groups in

25 James H. Rosberg, “Roads to the Rule of Law: The Emergence of an Independent Judiciary in Contemporary Egypt” (Ph.D. Dissertation, MIT, Political Science, 1995); Tom Ginsburg, “Administrative Law and the Judicial Control of Agents in Authoritarian Regimes,” in *Rule by Law: The Politics of Courts in Authoritarian Regimes*, ed. Tamir Moustafa and Tom Ginsburg (Cambridge: Cambridge University Press, 2008), 58–75.

26 Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003).

27 Ran Hirschl, *Towards Juristocracy: The Origins of Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004).

28 Douglass North and Barry R. Weingast, “Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England,” *The Journal of Economic History* 49, no. 4 (1989): 803–32; Douglass North, *Institutions, Institutional Change, and Economic Performance* (Cambridge: Cambridge University Press, 1990); Moustafa, *The Struggle for Constitutional Power*.

29 Hirschl, “The Realist Turn in Comparative Constitutional Politics,” 829.

30 Ran Hirschl, “The Judicialization of Mega-Politics and the Rise of Political Courts,” *Annual Review of Political Science* 11 (2008): 106.

society, and the “rule of law” obtains when, and only as long as, relevant players see it in their interest to comply with the rules given the continued compliance of the other players.³¹ Importantly, “realist” approaches assume that powerful actors’ *behavioral* compliance with rule-of-law principles has nothing to do with the deeper *attitudinal* commitment often associated with the rule of law. Normative legal discourse may serve to legitimize authoritarian regimes but is essentially epiphenomenal and is likely to be set aside as soon as exogenous factors alter the actors’ interest perceptions. Realist approaches thus highlight the role of power and violence in maintaining what we call “the rule of law.” As opposed to legal argumentation, which tends to submerge its own “foundational acts”³² under the surface of normative discourse, these approaches consider legal discourse to be the mere behavioral expression of a power balance maintained through the constant threat of violence. In Maravall and Przeworski’s words, therefore, “[t]he normative conception of the rule of law is a figment of the imagination of jurists. It is implausible as a description.”³³

If one is to take the role of law in authoritarian contexts seriously, attention to the

31 Rebecca Bill Chavez, *The Rule of Law in Nascent Democracies: Judicial Politics in Argentina* (Stanford, CA: Stanford University Press, 2004); Barros, *Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution*; Jose Maria Maravall and Adam Przeworski, *Democracy and the Rule of Law* (Cambridge: Cambridge University Press, 2003); Barry R. Weingast, “The Political Foundations of Democracy and the Rule of Law,” *American Political Science Review* 91, no. 2 (1997): 245–63.

32 Robert M. Cover, “The Supreme Court 1982 Term. Foreword: Nomos and Narrative,” *Harvard Law Review* 97, no. 4 (1983): 4–68.

33 Jose Maria Maravall and Adam Przeworski, “Introduction,” in *Democracy and the Rule of Law*, ed. Jose Maria Maravall and Adam Przeworski (Cambridge: Cambridge University Press, 2003), 1.

goals and conflicts of organized political forces is obviously necessary. But completely rejecting the independence of legal norms and argumentation precludes any attempt to take seriously the qualities that make “rule by law” an attractive option for authoritarian rulers, who, as Juan Linz points out, usually “make a considerable effort to operate within a legalistic framework.”³⁴ Even rule *by* law depends on upholding at least a credible semblance of adhering to the rule *of* law.³⁵ For Bülent Tanör, Murat Belge and other leftists victimized by the Turkish Army’s brand of justice after 1971 and 1980, the difference between this semblance and the alternative was the difference between legal persecution and death. Thus even the ICJ’s pessimistic report concluded that “recourse to a state of emergency corresponds to a certain respect for legalism, or at least the desire to demonstrate such respect.”³⁶

Furthermore, although “realist” scholarship argues that authoritarian regimes only adhere to legal frameworks as long as they remain useful for them, in practice the point at which rule-governed behavior ends and normative commitment begins is difficult to determine in any empirically satisfactory way. First, proving that legal procedure and discourse is driven by self-interest requires an explanatory strategy that downplays legal outcomes that do not favor the rulers as exceptional concessions in the interest of maintaining the rule-of-law illusion. Second, even if one is able to convincingly

34 Juan J. Linz, “Totalitarian and Authoritarian Regimes,” in *Handbook of Political Science, Vol. 3: Macropolitical Theory*, ed. F.I. Greestain and N.W. Polsby (Cambridge, MA: Addison-Wesley, 1975), 287.

35 E.P. Thompson, “The Rule of Law,” in *Whigs and Hunters: The Origin of the Black Act*, 1st American Edition (New York: Pantheon Books, 1975), 258–69.

36 ICJ, *States of Emergency*, 413.

demonstrate that adherence to constitutional limitations is a matter of self-interest, the indeterminate meaning of the constitutional texts that would serve as a yardstick for such adherence makes it all but impossible to determine whether or not an emergency regime is in fact complying with the law. One does not have to believe that all law is fundamentally indeterminate to concede that real-life emergency regimes tend to blend the legal with the semi-legal and improvised even as they claim to be adhering to existing emergency provisions, thereby throwing into question the determinacy of those provisions.³⁷ Moreover, textual indeterminacy is often exacerbated by the accumulation of parallel jurisdictions and vague and contradictory statutes that characterize what Questiaux called “complex” emergency regimes such as Turkey.³⁸ When even professional military judges are not sure what the legal basis of their jurisdiction is, researchers cannot hope to determine whether or not those judges are keeping within the limits of law.

As H.L.A. Hart argued, however, the “open texture” of legal language does not in fact prevent jurists from interpreting and applying it. Setting aside the question of whether or not their interpretations are correct, jurists do in fact interpret the law, and they do so by recourse to the contextual “penumbra” of jurisprudence and explicit and

37 Oren Gross, “What ‘Emergency’ Regime?,” *Constellations* 13, no. 1 (2006): 74–88; Kim Lane Scheppele, “Legal and Extralegal Emergencies,” in *The Oxford Handbook of Law and Politics*, ed. Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira (Oxford and New York: Oxford University Press, 2008), 165–84.

38 Questiaux, *Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency*, 29.

implicit norms of their profession.³⁹ For the purposes of historical research on real-life authoritarian emergency regimes, therefore, the sharp distinction between normative and instrumental orientations may be inconsequential. Law only legitimates a regime as long as the executive and the judiciary behave “as if” they are adhering to law; and as Lisa Wedeen has argued, behaving “as if” one is adhering to a norm also *constitutes* normative behavior.⁴⁰ Thus the crucial question for understanding how exceptional law can be considered both a legitimate part of legal practice (as Turkish law professors considered the 1960 coup to be) and an illegitimate power grab (as many of the same professors believed the 1971 coup was) is what doctrinal, discursive, and institutional characteristics make it possible for legal professionals to make the extralegal appear as “as if” it were legal. Answering this question, I suggest, requires addressing exceptional law in light of the evolving body of rulings, judicial opinions, and surrounding legal discourse that takes part in framing and presenting it for professional and lay audiences. Much as court rulings and academic jurisprudence interact to incorporate inconsistent or innovative rulings into accepted doctrine,⁴¹ so the “penumbra” of legal discourse, including newspaper articles and editorials, professional publications, courtroom performances, press conferences and street protests, all take part in determining how controversial uses

39 H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 124–154.

40 Lisa Wedeen, *Ambiguities of Domination. Politics, Rhetoric, and Symbols in Contemporary Syria* (Chicago and London: The University of Chicago Press, 1999).

41 Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 149; Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (Cambridge and New York: Cambridge University Press, 2000), 214–44.

of legal procedure are perceived by legal professionals as well as by a wider public.

Antony Pereira, in his study of the “political (in)justice” of Latin American military regimes, has demonstrated that this wider sphere of legal discourse can have large consequences. He shows that the degree of extrajudicial violence committed by Brazilian, Chilean and Argentinian security forces depended on the extent to which judicial and military elites shared a professional ethos and interpretive worldview prior to the onset of military repression.⁴² In Brazil, where military and civilian judicial personnel had a cross-organizational understanding of how national security laws were to be applied, most persecution took place within the judiciary and was relatively lenient, while in Argentina, where there was little consensus between military and legal practitioners, the resulting “institutional vacuum” was filled by extrajudicial violence. From a liberal-constitutional point of view both countries would be classified as authoritarian emergency regimes, but the doctrinal, discursive and normative context within which Brazilian rulers ruled, Pereira argues, made their legal authoritarianism far less violent than its Argentinian counterpart.

Unfortunately, attention to such political-legal discourse has been hampered by a second consequence of realist assumptions. Even scholarship that places greater emphasis on the normative aspects of judicial empowerment tends to focus exclusively on “high-profile” issues of public policy. In practice, this leads to an overwhelming focus on the role of courts charged with determining the constitutionality of legislation—typically,

⁴² Anthony W. Pereira, *Political (In)justice: Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina* (Pittsburgh: University of Pittsburgh Press, 2005), 10–11.

constitutional courts or supreme courts—in altering state policy. Research has shown that the presence of courts willing to act independently of executive or legislative powers can have a significant impact on the formation of policy.⁴³ Even after policy formulation, such courts can provide individuals and organized civil society with opportunities for altering the way legislation is interpreted and implemented by courts and by a wider public.⁴⁴

Applied to authoritarian states, this approach has demonstrated that judicial empowerment can occur in the most unlikely places. Tamir Moustafa, for example, shows that although the Egyptian regime’s reasoning for empowering the Supreme Constitutional Court (SSC) may have been a matter of self-interest, it also provided activists with an avenue for challenging state domination through litigation, and this litigation, in turn, enabled the SCC to widen the avenue for litigant participation. According to Moustafa, therefore, even “staged deference to liberal legality”⁴⁵ may lead regimes to behaviorally adhere to the rule of law.

Understood as the power to restrain state rulers, however, judicial empowerment

43 Karen Orren, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (Cambridge: Cambridge University Press, 1991); Mark Graber, “The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary,” *Studies in American Political Development* 7 (1993): 35–73; George I. Lovell, *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy* (Cambridge and New York: Cambridge University Press, 2003).

44 Martin Shapiro, *Courts. A Comparative and Political Analysis* (Chicago: Chicago University Press, 1981); Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: Chicago University Press, 1994); Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*; Rachel A. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge and New York: Cambridge University Press, 2007).

45 Moustafa, *The Struggle for Constitutional Power*, 38.

in authoritarian contexts has a limit, which Moustafa locates in the SCC's deference to the government whenever the jurisdiction of State Security Courts has been questioned. Because challenging the jurisdiction of these political courts would result in a "futile confrontation with the regime," he argues, the SCC exercises self-restraint, resulting in "bounded activism" within a "fundamentally illiberal system."⁴⁶ For Moustafa, then, the place where the "ordinary" judiciary ends and the "parallel" security courts begin marks the outer limits of true judicial empowerment, and thus also where law ceases to be a behavioral constraint on the executive and becomes, instead, epiphenomenal.

In conceptualizing the Egyptian State Security Courts as the absence of judicial empowerment rather than as a legal phenomena in their own right, Moustafa falls in line with the majority of legal, historical, and political-science discussions of exceptional law. Commonly used terms such as "political justice," "show trials," and "quasi-jurisprudence"⁴⁷ enable scholars to avoid the uncomfortable ambiguity of authoritarian legality by placing it outside the scope of "real" law and thus maintain the idea that the legal profession as such is fundamentally invested in the liberal rule of law. Focusing exclusively on constitutional courts serves a similar function: In contrast to the criminal judiciary, where rulings are numerous, decentralized and often involve drawn-out and messy negotiations that make it difficult to clearly define whether a court is operating as

⁴⁶ Ibid., 8, 52; for a similar argument with respect to Spain, see Jose Toharia, "Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain," *Law and Society Review* 9 (1975): 475–96.

⁴⁷ Peters, *Torture*, 114.

an “ordinary” court or an “exceptional” tribunal, courts that deal with “mega-politics”⁴⁸ provide relatively clear, accessible and quantifiable rulings that facilitate the conceptual sorting of what belongs “inside” and “outside” of the rule of law. A half-military state security court can thus be cordoned off as a manifestation of prerogative power, allowing the “rule of law” to continue functioning untainted by politics in the higher realms of constitutional law.

In this dissertation, in contrast, I focus in particular on courts that operate in the grey zones of legality, and show how these courts as well as wider sphere of legal discourse within which they are either legitimated or criticized is as much a part of law as the more unambiguous sphere of constitutional rulings. I thus side with recent scholarship that has questioned the assumption that judicial empowerment necessarily leads to more restraints on state leaders.⁴⁹ In this approach, the “penumbra” of jurisprudence and norms has no built-in liberal teleology, nor do the legal professions that are tasked with interpreting, practicing, applying and representing it. Jurisprudence can be authoritarian or anti-authoritarian, pro-state or anti-state, revolutionary or conservative, regardless of

48 Hirschl, “The Judicialization of Mega-Politics and the Rise of Political Courts.”

49 Martin Shapiro, “Judicial Review in Developed Democracies,” in *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies*, ed. Siri Gloppen, Roberto Gargarella, and Elin Skaar (London: Frank Cass, 2004), 5–18; Gad Barzilai, “The Ambivalent Language of Lawyers in Israel: Liberal Politics, Economic Liberalism, Silence and Dissent,” in *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Liberalism*, ed. T.C. Halliday, L. Karpik, and Malcolm M. Feeley (Oxford and Portland: Hart Publishing, 2007); Zühtü Arslan, “Reluctantly Sailing Towards Political Liberalism: The Political Role of the Judiciary in Turkey,” in *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Liberalism*, ed. Terence C. Halliday, Lucien Karpik, and Malcolm M. Feeley (Oxford and Portland: Hart Publishing, 2007), 219–45.

where it takes place. Constitutional courts can give in to authoritarian demands, but judges working within the shadier parts of the criminal judiciary can also resist the use of legal procedures for purposes of political repression.⁵⁰ I attempt to show how the simultaneously independent and flexible quality of a certain strand of the Turkish doctrine of state powers during the formative period of the Republican legal profession made jurists indispensable to the exercise of state power and enabled postwar jurists to act both as its extension and its outer limit.

Expertise and jurisdictional struggles in the field of the state

Throughout this dissertation I use the term “lawyers” and “jurists” interchangeably to refer to what Turks call *hukukçu*: a person who has a law degree and works with the law in some capacity. When referring to more specific positions, I refer to the “law professors” (*profesör, doçent*) or “teaching assistants” (*asistan*) of the law faculties, or “attorneys” (*muhami, avukat*), “judges” (*hakim, yargıç*) or “prosecutors” (*savcı*).

The terms “lawyer” and “jurist” thus have much wider connotations than the professional occupations that lawyers may have. I use the terms to capture two important aspects of Turkish lawyers’ self-understanding. First, Turkish legal professionals across both the state-society and practitioner-theorist divides have typically used the term *hukukçu* to describe themselves precisely when their authority as a corporate professional

50 Güneş Murat Tezcür, “Judicial Activism in Perilous Times: The Turkish Case,” *Law & Society Review* 43, no. 2 (2009): 305–36.

group of legal experts has been threatened or come under attack by political or military rulers. Second, they have used the term because it carries connotations of a theoretically grounded, and therefore more legitimate authority than “law” or “statutes,” both of which can be used as English translations of the Turkish *kanun*.⁵¹ The jurisprudential tradition within which laws are interpreted are referred to in Turkish not as *kanun*, but as *hukuk*. Thus when one studies or teaches law at the university, one studies *hukuk* and becomes a *hukukçu*, a lawyer or jurist, and may then go on to specialize as an attorney, judge, or prosecutor. Alternately, one may, as many graduates of Turkish law faculties have, work in unrelated fields such as journalism or politics, without thereby losing the implied right to refer to oneself as a *hukukçu*.

It is no coincidence that the Turkish translation of *Recht* in *Rechtsstaat* is *hukuk*. As opposed to *kanun*, which simply refers to the written law of the state, *hukuk* has connotations of expertise, scholarship and learned interpretation, maintained in a tradition that is concentrated in the law faculties, but not limited to them. Thus a “state of law” (*hukuk devleti*) is a state whose power is not only dependent on and limited by laws (*kanunlar*), but also by the wider community of jurists qualified to interpret them. Without this limit, Turkish lawyers often point out, the state would merely be a “state of statutes” (*kanun devleti*), a strictly positivist authority with no grounding in morals,

51 *Kanun* has etymological roots in the greek κανών, the root of “canon” in modern English. In Islamic empires such as the Ottoman, *kānūn* came to denote statutes or edicts of the state in matters of administrative and penal law, as opposed to the *sharī‘ah* and the *fiqh*, which was the domain of scholars of the Islamic legal tradition, and which early on became limited in practice to matters of private and family law. Halil İnalcık, “Kānūn,” in *Encyclopaedia of Islam*, ed. P. Bearman et al., 2nd ed. (Brill Online, 2009).

tradition, scholarship or human decency. As the president of the Turkish Law Association (*Türk Hukuk Kurumu*) Muammer Aksoy wrote in 1975, examples of such “states of statutes” include Fascist Italy and Nazi Germany, states which had set centuries-long traditions of humanist legal interpretation aside and committed atrocities that were nevertheless perfectly in keeping with “laws.”⁵²

Aksoy’s claim that the Nazi regime relied on the formalism of German jurisprudence to implement its policies through the judiciary has a long history in postwar thought, and has also recently been applied, with modifications, to cases such as Pinochet’s Chile.⁵³ In such authoritarian situations, it is argued, state leaders were able to subdue and instrumentalize legal institutions because the legal professionals who staffed them shared an apolitical and positivist understanding of the law and of their own role in applying it. They therefore lacked recourse to interpretive standards outside of statutory law that would have enabled them to curb the excesses of authoritarian policies.

More recent scholarship has questioned the historical validity of these claims and has argued that the German justice system was nazified not because its practitioners were committed to the ideal of passive statutory application but because they were not formalist enough and were therefore susceptible to ideological bias.⁵⁴ Some have even

52 Muammer Aksoy, *Devrimci Öğretmenin Kıyımı ve Mücadelesi*, vol. 1 (Ankara: Sevinç Matbaası, 1975), 20–3.

53 The debate on positivism among judges in Nazi Germany began with Gustav Radbruch’s famous argument in “Gesetzliches Unrecht Und Übergesetzliches Recht,” *Süddeutsche Juristenzeitung*, 1946, 105–8. For Pinochet’s Chile, see Lisa Hilbink, *Judges beyond Politics in Democracy and Dictatorship: Lessons from Chile* (Cambridge: Cambridge University Press, 2007).

54 Matthias Mahlmann, “Judicial Methodology and Fascist and Nazi Law,” in *Darker Legacies*

claimed that the German courts' nazification would not have been possible if judges had been strict positivists and have therefore argued, in part based on the thought of Otto Kirchheimer and Franz Neumann, that a degree of formalism is necessary to maintain the rule of law.⁵⁵

Nevertheless, Aksoy's argument that legal practice must be grounded in a scholarly tradition of doctrinal interpretation if it is to act as a safeguard against authoritarianism expresses a crucial aspect of Turkish jurists' self-conception. As I show in Chapter 1, the self-understanding of Turkish law professors between 1930 and 1980 was similar to that of the French tradition on which the Turkish reformers of the late-nineteenth and early-twentieth centuries drew. As in France, Turkish legal scholars are considered the ultimate authorities in the articulation of the legal contours of the state. Firstly, law professors are responsible for educating future generations of lawyers, judges, prosecutors, and many categories of public servants. They are therefore the most important figures in shaping the particular *sens d'état* of their country. Secondly, as opposed to the common-law tradition, where it is expected that judges engage in a personal, creative form of legal writing, courts in the French tradition tend toward an anonymous, objective style of discourse, while it has been up to legal scholars to exercise

of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions, ed. Christian Joerges and Navraj Singh Ghaleigh (Oxford and Portland, OR: Hart Publishing, 2003), 233.

55 William E. Scheuerman, *Between the Norm and the Exception* (Cambridge, MA: MIT Press, 1997); Vivivan Grosswald Curran, "Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law," *Cornell International Law Journal* 35 (2001): 101–86.

creative freedom and interpretive authority in developing the doctrine on which judges rely.⁵⁶ Thus the doctrinal writings and public statements of Turkish law professors carry a symbolic authority with which even high-ranking judges sometimes have difficulties competing.

However inaccurate or naïve Aksoy's belief in his own profession's role in curbing authoritarianism was, therefore, it does indicate the importance of taking the legal discourse of lawyers seriously as a factor in struggles over the boundaries of state legality. My study of Turkish jurists' role in both enabling and limiting authoritarian law during the 1950-1980 period therefore begins with an examination of the Turkish doctrine of state powers in the 1930s, the formative period of the Republic's legal professions.

Before explaining what my approach to interpreting the discourse of Turkish legal scholars is, however, it is important to understand what it is not. The only study I am aware of that addresses the discourse of Turkish law professors in the context of the single-party state is a PhD dissertation by Boğaç Erozan entitled "Producing Obedience: Law Professors and the Turkish State." Erozan's concern is to show that although Turkish law professors were forced to work on behalf of an authoritarian state, their thinking was not structurally determined. On the contrary, they displayed initiative and creativity in their thinking. Far from inhibiting their "missionary" role, however, their agency supported the overall goal of instilling loyalty to the state among future public officials,

⁵⁶ Kenneth H. F. Dyson, *The State Tradition in Western Europe: A Study of an Idea and Institution* (Oxford: Martin Robertson, 1980), 110–1; Philippe Jestaz and Christophe Jamin, "The Entity of French Doctrine: Some Thoughts on the Community of French Legal Writers," *Legal Studies* 18, no. 4 (1998): 415–37.

lawyers, and a more general middle-class audience. Thus some professors identified, for example, with Maurice Hauriou's idealist theory of institutions while others drew more on the realist theory of Hauriou's rival Léon Duguit. Ultimately, however, "as long as the regime was justified it would not matter whether a professor did it by following Duguit or another by Hauriou."⁵⁷ For Erozan, then, all of the intellectual roads of Turkish state thinking led to the same destination: an authoritarian one-party state.

So far I agree with Erozan. Many of the law professors hired after the university purge in 1933 were both independent-minded and well-versed in contemporary European debates on the state, and their eclecticism, enabled by a selective reading of authorities such as Hauriou and Duguit, allowed them to couch their theoretical divergences in a way that served to support the same goal of legitimizing the authoritarian Turkish regime. This explains the fact that the rivalry between law professors such as Ali Fuad Başgil and Sıddık Sami Onar was so amicable that it hardly qualified as a "debate." Despite identifying loosely with Duguit and Hauriou, respectively, both professors served to disseminate the acceptance of expansive state powers; allegiance to one or the other theoretician made little difference with respect to their loyalty to the authoritarian one-party state.

My divergence from Erozan's argument concerns an issue that stands at an oblique angle to such philosophical debates; it is frequently contested in terms of doctrinal differences such as that between Hauriou and Duguit, but it does not depend on

⁵⁷ Hüseyin Boğaç Erozan, "Producing Obedience: Law Professors and the Turkish State" (Ph.D. Dissertation, University of Minnesota, 2005), 147.

them and in certain respects cuts across them. The philosophical debates of Turkish legal scholars did not establish ideational structures which determined how judges, public officials and military officers were to act during the following decades. Legal theories alone simply lack that kind of power. They may provide justifications for different political projects, but they do not on their own determine political allegiance. Thus in France the theory of Duguit, though left-leaning and syndicalist in his hands, was later used to support a wide range of political projects, from Socialism to Monarchism and Fascism,⁵⁸ while Hauriou's theory was later seized upon by Rudolf Smend and Carl Schmitt, both "arch-apologists for what came to be National Socialism."⁵⁹ Even for individual theorists, philosophical arguments that once served a particular political stance could later be used for a completely different one. Thus Henry Berthélemy and Joseph Barthélemy, both liberal in the 1920s, switched tracks to create "appropriate authoritarian theories of the state" in the late 1930s without thereby discarding their entire theoretical apparatus.⁶⁰

Although it may not have been completely clear to them within the ideologically fluid context of the one-party state, thinkers such as Başgil and Onar had real disagreements. But the crucial difference was not whether their main source of inspiration was Hauriou or Duguit, nor was it whether they supported or opposed a powerful state.

The most important distinction was whether they described the state's power in terms of

58 Dyson, *The State Tradition in Western Europe*, 148.

59 Christopher B. Gray, *The Methodology of Maurice Hauriou: Legal, Sociological, Philosophical* (Amsterdam and New York: Rodopi, 2010), 34.

60 Dyson, *The State Tradition in Western Europe*, 92.

prerogative or procedure, as unfettered decision or rule-bound adjudication. This difference is worth dwelling on because it touches on one of the primary issues in contemporary debates on state legality, spurred in particular by the recent surge in interest in Carl Schmitt's defense of the Nazi state. As Richard Wolin argues, Schmitt's famous pronouncement that "Hegel died" with Hitler's accession was not a jab at the German tradition of *étatisme* per se, but at its bureaucratic, procedural character.⁶¹ According to Schmitt, Hitler was sovereign not because he had overcome the state, but because he had deposed the "politically instinctless civil bureaucracy,"⁶² what Hegel called the "universal" class,⁶³ and had thus come to embody the state's sovereignty in his own person. Schmitt's decisionism was an attempt at grounding legitimacy in a principle explicitly opposed to procedure and norms. His infamous description of the Night of Long Knives as the "highest form of administrative justice" was, not a defense of administrative jurisprudence and the authority of legal professionals, but a claim that the Führer was "himself the highest form of justice."⁶⁴

In the end, of course, the leader principle did not survive the death of the leader himself. To counter-paraphrase Maravall and Przeworski, Schmitt's decisionism was not only normatively dangerous; it was empirically implausible as a description of

61 Richard Wolin, "Carl Schmitt: The Conservative Revolutionary Habitus and the Aesthetics of Horror," *Political Theory* 20, no. 3 (1992): 424–47.

62 Carl Schmitt, "Der Führer Schützt Das Recht," *Deutsche Juristen-Zeitung* 39 (August 1, 1934).

63 Georg Friedrich Wilhelm Hegel, *Philosophie Des Rechts* (Frankfurt Am Main: Suhrkampff Verlag, 1983), 166.

64 Schmitt, "Der Führer Schützt Das Recht."

authoritarian legality. Even during the height of the Nazi state, spaces existed for the negotiation of authority between the political and judicial dimensions of what Ernst Fraenkl called the “dual state,” one “prerogative” and the other “normative.”⁶⁵ Some of these spaces were informal, others were formal mechanisms for jurisdictional negotiation dating back to the Prussian era, mechanisms that Schmitt himself had recommended in order to “to preserve the courts from the dangers of the political sphere, in the interest of their independence.”⁶⁶ Crucially, these spaces tended to straddle the divide between theory and practice in that they were created and modified through administrative practices, not through heroic political “leadership,” but through jurisdictional procedure and theoretically informed action at the margins of public attention. It was these mechanisms and their surrounding “penumbra” of jurisprudence and professional norms that survived the war.

So also for Turkey. Although certain of the Turkish one-party state’s leaders actively emulated Mussolini, Turkey never become a fully developed Fascist state. Some Turkish jurists did stray dangerously close to charismatic decisionism, but as I argue in Chapter 1, these were the jurists whose interwar thinking did not survive Turkey’s transition to democracy. They may have adapted to the new era of liberalism and democracy and thus continued their careers as respected scholars and public intellectuals, but from the vantage point of the state’s self-proclaimed guardians in the army,

⁶⁵ Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (New York: Octagon Books, 1941).

⁶⁶ Carl Schmitt, *State, Movement, People: The Triadic Structure of the Political Unity*, ed. and trans. Simona Draghici (Corvallis, OR: Plutarch Press, 2001), 22–3.

bureaucracy, judiciary and universities, they were no longer relevant. When push came to shove—as it did on the night of May 27, 1960—they were left out in the cold, while their opponents, foremost among them Sıddık Sami Onar, rose to the apex of the state.

The jurists who did have a long-term effect on the relationship between law and state power were those who had couched the single-party state's authority not in terms of emotional bonds to the Leader, but in terms of scholarship, norms, and procedure. Sıddık Sami Onar was no Carl Schmitt, and Salim Başol no Roland Freisler.⁶⁷ On the contrary, Onar and Başol represented, embodied and defended the “universal class” of state servants. Onar certainly legitimized an authoritarian regime and its right to “decide on the exception,” but he did so by entangling even the “exception” in a game of legal moves and jurisdictional technicalities. The legitimacy he constructed was scholarly and procedural; it depended, not on who was in charge and what decisions they made, but on whether or not the decision had been made in accordance with criteria that the jurists themselves had created.

The polite debates between the Turkish jurists of the 1930s were therefore more than a matter of picking which French theorists they would use to defend authority of the state; it concerned the future of their own profession and its relation to political power. The crucial difference between them was not which theorist they preferred to cite; it was

⁶⁷ On the relationship between Carl Schmitt and Roland Freisler, the head of the Nazi *Volksgerichtshof* until his death in 1945, see Robert D. Rachlin, “Roland Freisler and the Volksgerichtshof: The Court as an Instrument of Terror,” in *The Law in Nazi Germany: Ideology and Opportunism, and the Perversion of Justice*, ed. Alan E. Steinweis and Robert D. Rachlin (New York: Berghahn Books, 2013), 71.

how they used their citations to connect theoretical issues to the services they were to perform as the “scientific” articulators, critics and apologists of state authority. The consequences of this difference only became obvious when jurists were forced to adapt their thinking to a new political atmosphere once more—this time, not from the halls of the Sorbonne to an authoritarian single-party state, but from the latter to a tentatively liberal democracy.

A more satisfactory approach to the foundational legal scholarship of 1930s Turkey, then, would see its explicit theoretical claims as subordinate to the practical claims it made by way of theory. These claims, I contend, were addressed to other legal scholars, to future state servants, and to society as a whole in order to consolidate what Andrew Abbott calls professional “jurisdiction” for themselves and for the lawyers and civil servants they educated.⁶⁸ In this perspective, the theoretical knowledge of law professors cannot be seen independently of the practical jurisdiction they established for themselves and for the future judges and prosecutors they produced. As with many professions, the practical prestige of the latter was in large part created and continued to depend on the theoretical prestige of the former.

I use Abbott’s notion of professional “jurisdiction” throughout this dissertation as a heuristic device to understand how Turkish lawyers have used legal discourse to lay claim to public authority. Abbott argues that expert professions construct and defend their areas of expertise against other professions by making claims to jurisdiction addressed to

⁶⁸ Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (Chicago: University of Chicago Press, 1993).

different parts of society. He distinguishes between three arenas for such jurisdictional claims: The workplace, the public arena, and the legal arena. Whereas the workplace is the arena that allows for the most flexible and ambiguous jurisdictional division of tasks, the public and legal arenas are where professions acquire the cultural perception and state-approved qualifications they need in order to monopolize a set of tasks, and are therefore more formal and more difficult to change.

Abbott conceives of jurisdictional “turf wars” as occurring mainly between expert professions such as medical doctors and nurses or attorneys and notary publics, whose duties potentially overlap, and who therefore have reason to compete over a finite field of tasks. I apply it here instead in order to understand the relationship between lawyers (*hukukçular*) and the political and military leaders of the state. As I have shown above, this relationship is usually considered a problem not of professional competition but of fundamental political struggles with little room for nuance. Abbott’s framework is useful in part because it captures variations in levels of formality and political contentiousness between these various arenas for jurisdictional claims and thus provides a finer-grained approach to struggles over the boundaries of authoritarian legality.

Abbott’s attention to the fluid and multidimensional jurisdictional struggles of professions thus allows me to go beyond commonplace perceptions of the Turkish state, which has traditionally been described in “Bonapartist”⁶⁹ terms as a unitary and all-powerful set of institutions. Karen Barkey, Michael Meeker, Ariel Salzman, Reşat

⁶⁹ Ahmet Samim [Murat Belge], “The Tragedy of the Turkish Left,” 64.

Kasaba and others have demonstrated that the Ottoman state, which was traditionally described as a unitary and insulated institution peopled by a social class of “military” (*asker*) administrators separate from the rest of Ottoman society, was in fact deeply embedded in, and dependent on the active participation of, different social groups with whom it continually negotiated over public authority.⁷⁰ Similarly, scholars have argued that the Turkish Republic relies on the willingness of citizens to take part in continually performing and narrating the state’s monopoly on public authority, even when they are opposed to its policies.⁷¹ As Timothy Mitchell argues, therefore, “Political subjects and their modes of resistance are formed as much within the organizational terrain we call the state, rather than in some wholly exterior space.”⁷² Using Abbott’s framework allows me to situate the symbolic and practical authority of Turkish lawyers in relation to the Turkish state, and thus see how their claims to public authority—even when they are opposed to state leaders—are a product of their profession’s co-emergence with the state.

Applied to the lawyer-state relationship, this approach focuses our attention on how different arenas enable and require lawyers to shape their jurisdictional claims in

70 Karen Barkey, *Bandits and Bureaucrats. The Ottoman Route to State Centralization* (Ithaca and London: Cornell University Press, 1994); Karen Barkey, *Empire of Difference* (Cambridge: Cambridge University Press, 2008); Michael Meeker, *Nation of Empire* (Berkeley: University of California Press, 2002); Ariel Salzman, *Tocqueville in the Ottoman Empire. Rival Paths to the Modern State* (Leiden: E. J. Brill, 2004); Reşat Kasaba, *A Moveable Empire: Ottoman Nomads, Migrants, and Refugees* (Seattle and London: University of Washington Press, 2009).

71 Catherine Alexander, *Personal States. Making Connections Between People and Bureaucracy in Turkey* (Oxford: Oxford University Press, 2002); Yael Navaro-Yashin, *Faces of the State: Secularism and Public Life in Turkey* (Princeton, NJ: Princeton University Press, 2002).

72 Timothy Mitchell, “The Limits of the State: Beyond Statist Approaches and Their Critics,” *The American Political Science Review* 85, no. 1 (1991): 93.

different ways at different times. During the single-party regime of the 1930s, for example, Turkish judges and attorneys had few opportunities to directly affect the constitutionally and organizationally defined division of powers between the executive, legislature, and judiciary through the legal arena. Their access to the public arena was also limited by censorship and an atmosphere of political repression. In making jurisdictional claims the legal professions were therefore confined to their “workplace.” The most important of these workplaces was the universities, where lawyers had the opportunity to shape the authoritative “knowledge” of the various legal professions. As Abbott argues, a profession’s theoretical knowledge is rarely an accurate description of what the profession actually does, but its emphasis on “rationality, logic and science” gives it high symbolic value as a representation of the profession’s authority.⁷³

With the transition to multiparty democracy in 1950, lawyers’ access to the “legal” arena was briefly opened but then closed as the Democrat Party, which held power throughout the decade, became increasingly hostile to the universities and its law professors. Turkish lawyers therefore turned to the “public” arena and couched the jurisdictional claims they had made through academic doctrine in the 1930s and 1940 in a media narrative where lawyers were presented as the heroic trustees of rationality and logic. Only with the 1960 coup did they gain full access to the legal arena. They used the opportunity to dramatically reconstruct the state, creating a constitution that provided guaranteed autonomy for the universities, judiciary, media, and bar associations, and

⁷³ Abbott, *The System of Professions*, 54.

established a Constitutional Court to oversee the constitutionality of legislation.

By the time political polarization set in during the mid- to late-1960s, therefore, the claim to professional jurisdiction that Turkish lawyers had first articulated through doctrinal writings and lectures in the 1930s had acquired a strong basis in all three “arenas,” limited only by its implicit reliance on continued cooperation with the Army, which had also acquired strong autonomy with the 1960 coup. When conflict broke out over the use of civilian and military courts to charge leftist intellectuals, therefore, it took place in all three arenas at once. Leftist lawyers, some of whom had held academic positions since the 1940s, resisted the militarization of the justice system by writing doctrinal publications for their peers and newspaper op-eds for a general audience, participating in trials as defense attorneys or external “experts,” giving press conferences and building alliances across occupational boundaries to even include labor unions.

Finally, Abbott’s framework is useful because it captures the distinction between professional jurisdiction and jurisdiction in the formal legal sense. The former refers to a profession’s claims to competence vis-à-vis other, competing professions. Formal jurisdiction, on the other hand, belongs to the highly technical-procedural field in which the precise power of a court or other legal venue is defined vis-à-vis other courts. In struggles over authoritarian legality, professional and formal jurisdiction are often connected, though not as directly as one might imagine. A military judge’s claim to professional jurisdiction does not necessarily translate into a claim to wider military court jurisdiction vis-à-vis civilian courts. On the contrary, if the military judge knows that his

tenure on the court is at the mercy of military commanders, claiming formal jurisdiction for himself and his court could be tantamount to ceding professional jurisdiction to the Army. During the military trials of leftists the 1970s, in particular, several military judges and prosecutors were sympathetic to leftist defense attorneys and law professors and therefore recused themselves in the hopes that the ordinary judiciary would accept the cases. Thus claims to professional jurisdiction sometimes manifests as a rejection of formal jurisdiction, while claims to formal jurisdiction, conversely, sometimes imply deference to the professional jurisdiction of military and state leaders.

The Chapters and their Sources

The chapters of this dissertation follow a chronological order, starting from the purge of Istanbul University in 1933 and ending with the immediate aftermath of the 1980 military coup. My narrative is the story of how a handful of academic jurists' writings on state authority assured them a role in the articulation of public power; how this role, in turn, was translated via a military coup and a new constitution into an ambiguous jurisdictional power-sharing arrangement between lawyers and the Army; and finally, how contestation within the space opened up by this ambiguity enabled right-wing lawyers and army officers to use the justice system for political repression while also allowing leftist lawyers to resist the onslaught of militarized justice. Because the locus of these jurisdictional struggles moved over time, the chapters differ not just in terms of

periodization but also in terms of the material they deal with.

Chapter 1 is a close reading of certain Turkish law professors' work on the state's relation to law and the juristic profession. My focus in this chapter is on the jurists of the single-party period (1923-1950), an era that coincided with the tumultuous years between the two world wars in Europe. Turkey only participated in the first of those wars, which from the vantage point of the European powers were relatively discrete periods of warfare. For the Turks, however, the Great War was a continuation of the devastating Balkan Wars, and led straight into the War of Independence. Only with the nationalist forces' victory in 1922 and the Lausanne Treaty in 1923 could Turkish state leaders begin the task of building a new state on what was left of the Ottoman Empire's core territories.

Turkish jurists of the single-party period were thus working under a very particular set of circumstances. Mustafa Kemal (later given the surname Atatürk) and his closest associates wished to consolidate a nation-state that would be as independent, rational, and lawful as the most advanced states of Western Civilization. They reserved for themselves the right to step outside the bounds of legality and to curb intellectual independence if any of their servants challenged their particularly urban, secular and bourgeois version of these ideals. To make matters worse, the meaning of all of these ideals was undergoing deep revisions in precisely those countries that had served as inspiration for Kemal's dreams of Westernization. The story of how Turkish law professors negotiated these dilemmas after the purge of the universities in 1933 is the topic of Chapter 1. This chapter builds mainly on the Ottoman and Turkish books and

legal journal articles I collected during five months of research at the National Library (*Milli Kütüphane*) in Ankara, and was mostly written at the Bibliotheque nationale de France in Paris, where I enjoyed access to the French doctrinal writings with which Turkish law professors engaged.

While Chapter 1 treats the intellectual history of Turkish legal authoritarianism, **Chapter 2** explains how a particular strand of it enabled its adherents to become central figures in re-calibrating the relationship between the prerogative power of the Army and the normative power of the legal profession during the military coup on May 27, 1960. Chapter 2 is partly a study of *why* this “critical juncture” in Turkey’s history became dominated by legal professionals, and partly a study of *how* its main actors were presented in the Turkish media during the juncture. The two dimensions, I argue, are mutually dependent: On the night of the coup, army officers called on Sıddık Sami Onar and his closest colleagues for advice because opposition media prior to the coup had portrayed them as the originators and carriers of the sacrosanct Kemalist legal order through the era of single-party authoritarianism and into the era of democracy. In a narrative that began to appear in the opposition media at least two years before the coup and intensified after it, the Democrat Party government was in the process of undermining this order. In its descent into corruption, the Democrat Party had even begun dragging with it the legal complex, thereby creating “sellout” (*satılmış*) lawyers where there had previously been guardians of the public interest.⁷⁴ The goal of the coup, in the

⁷⁴ *Kim*, October 10, 1960.

words of Onar, was therefore not to establish a new political system or implement socialist or liberalist preferences; it was “only to re-establish a broken legal order.”⁷⁵ In addition to memoirs and documentary histories of the 1960 coup, this chapter mainly builds on newspapers and actuality magazines that I collected during several months of research at the Atatürk Library (*Atatürk Kitaplığı*) in Istanbul.

With the transition from the First to the Second Republic, the jurisdictional claims of Sıddık Sami Onar’s doctrine were translated into the 1961 Constitution, which placed jurists at the center of state authority while also leaving space for negotiation with the Army. **Chapter 3** examines how that legacy both enabled and set limits to its own subversion during the 1960-1970 period, when right-wing prosecutors and judges, helped by conservative members of the legal and other branches of academia, attempted to prevent the spread of Socialist and Communist sympathy by putting leftist writers, translators, poets, and publishers on trial under the Turkish Penal Code’s articles 141 and 142. While the trials certainly made it difficult for leftists to circulate their writings freely, the professional jurisdiction of leftist lawyers enabled them to exercise their authority within the political trials, in particular by submitting “expert reports” (*bilirkişi raporları*) fevaluating the legality of the publications.

To reconstruct these convoluted trials I draw on several sources. Newspapers allow me to trace the trials’ basic trajectories but frequently ignore or only obliquely mention the expert reports that determined their outcomes. In order to piece together

⁷⁵ Sıddık Sami Onar, “Benim Anayasalarım [1971],” *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası* 69, no. 1–2 (2011): 14–15.

these reports I consulted published compendiums of rulings by the Court of Cassation (*Yargıtay*) and, where they exist, collections of case files published by defendants or their friends. These reports demonstrate, first, that while the law professors who had cooperated in legitimizing the 1960 coup disagreed on the boundaries of free speech, their common interest in maintaining the professional jurisdiction of legal scholars over issues of public policy led the struggle over Socialism to take the shape of a competition over the right to occupy the position of scholarly objectivity and authority. Second, they show that the indelible authority of law professors over the uses of legal procedure made it difficult for right-wing prosecutors to use courts as tools for political repression. It was because of this authority, I argue, that the General Staff began expanding the jurisdiction of military courts in the months leading up to the declaration of a State of Siege in June 1970.

As I argue in Chapters 1 and 2, the longevity of Onar's legacy lay in its particularly flexible notion of state legality. With the 1961 Constitution this flexibility was engraved in an institutional blueprint that gave both the lawyers and the Armed Forces a crucial degree of autonomy. In particular, the Constitution failed to clearly delimit the jurisdiction of military courts. In **Chapter 4** I show how, after the Army had watched with horror as leftist intellectuals and trade union organizers were let off by civilian criminal courts during the 1960s, the General Staff began using military courts to try civilian leftists from the summer of 1970 onward.

Military trials of civilians are often considered to lie outside of the scope of

meaningful socio-legal scholarship. Above I have criticized one of the assumptions that lead to this impression: that authoritarian jurisprudence is less “legal” than other forms of law and therefore lacks the institutional continuity and normative integrity that would make it a suitable research object. A second, more practical obstacle is the impression that military trials, because they often deal with sensitive matters of national security, leave few traces that are readily available for researchers. There is some truth to this, but I have found that it is greatly exaggerated. First, the Turkish military trials of the 1970s were thoroughly covered in media on both sides of the political spectrum, allowing me to reconstruct the timeline and key events of the trials with reasonable accuracy. In addition to these media reports, I consulted two archives with significant materials concerning Turkish military trials of civilians. The International Institute of Social History (ISSG) in Amsterdam provided me with case files and voluminous indictments, many of which are difficult to find in Turkey but have been transported to Europe over the years by leftists escaping persecution.⁷⁶ Second, the ISSG’s sister archive in Istanbul, the Turkish Social History Foundation (TÜSTAV), holds a valuable collection of case files and legal memos donated by attorneys that were involved in the trials.

Combined, these primary and secondary materials allow me to argue that even military regimes provide avenues for resistance and contestation when they rely on legal

⁷⁶ For a history of the ISSG’s Turkish materials, see Erik Jan Zürcher, “A Miracle in Amsterdam? The Turkish Collection of the International Institute of Social History,” in *Penser, agir et vivre dans l’Empire ottoman et en Turquie: études réunies pour François Geogon*, ed. Nathalie Clayer and Erdal Kaynar (Paris, Louvain and Walpole, MA: Peeters, 2013), 525–42.

professionals to carry out their repression. Much like in the civilian political trials of the 1960s, the military trials in the 1970s enabled leftist lawyers inside and outside of the courtrooms to draw on their legal, public, and practical authority to challenge what they argued was a subversion of legal procedures for illegitimate political ends. And like the civilian trials, these struggles largely took the shape of contestation over the meaning of legal authority and its relation to state power.

For the Army, therefore, the military trials of the 1970-1974 period were only partially successful. By 1974, when the newly elected center-left government passed a political amnesty, leftist lawyers had not only managed to stall numerous trials and free many leftist intellectuals, they had also turned the courtrooms into public spectacles that reasserted the professional jurisdiction of jurists over the law of the Army. In response, the Army and the politicians on the right sought to normalize the ambiguity of military court jurisdiction by establishing a permanent, peacetime category of half-military "State Security Courts." Drawing on media accounts and case files, **Chapter 5** shows how attorneys on the left mobilized their authority in the public sphere to prevent conservatives from presenting these courts as a technically specialized part of the ordinary judiciary and eventually succeeded in removing them altogether.

But Chapter 5 also shows how the unorthodox strategies of these attorneys created rifts within the bar associations over how far the professional jurisdiction of attorneys should reach. Thus when leftist lawyers took to the streets to protest the militarization of criminal justice, the head of the Ankara Bar Association attempted to debar them because

they had violated what he saw as the limits of legitimate lawyering. Turkish attorneys' campaign against the normalization of military justice thus demonstrates that, as Andrew Abbott argues, the substantial content of jurisdictional arrangements is not pre-given, but is defined relationally through continuous turf battles with other professions. Building on debates that unfolded in the newspapers, the published minutes of the assemblies and board elections of the Istanbul and Ankara bar associations and the Union of Turkish Bar Associations, brochures and publications by leftist attorneys, and archival documents from TÜSTAV concerning disciplinary actions taken against leftist attorneys, I show how the conflict over the boundary separating legal professionalism from political activism eventually led to the creation of a nation-wide association of leftist lawyers that continues to act as a pressure group today.

I **conclude** with some observations on the status of lawyers' professional jurisdiction after the 1980 coup, which is often described as a watershed in Turkish history. The 1980 coup came after a decade of jurisdictional struggles over exceptional law and two years of dramatically increasing street violence which even the declaration of a State of Siege in 1978 could not prevent. Tired of paralyzed politicians and obstinate lawyers, the Army stepped in on September 12, 1980 and began a period of repression far more brutal and far less willing to engage with lawyers than either the 1960 or the 1971 coups.

My rather narrow account of the coup supports the view that 1980 spelled the end of the kind of ideological mobilization that had characterized Turkish political life since

1923, but it differs from such accounts in viewing this development not as a turning point caused by the military coup, but as the final realization of a jurisdictional ethos whose seeds were planted several decades before in the doctrinal writings of Turkish law professors such as Sıddık Sami Onar. I thus show how, just months before the coup, the National Assembly passed a law that established the Court of Jurisdictional Conflict (*Uyuşmazlık Mahkemesi*) to determine the jurisdiction of military courts on a case-by-case basis. In so doing, the Assembly was finally realizing one of the promises of the 1961 Constitution, which Onar had taken part in writing. I analyze several verdicts by the Court of Jurisdictional Conflicts to show how it functions as a venue for negotiating between the “inside” and “outside” of law, thereby preventing the discretion of Army commanders from losing its connection to the authority of jurisprudence. Crucially, it accomplishes this negotiation in a jurisprudential discourse at once highly technical and situational, enabling the Turkish judiciary to maintain its conceptual integrity even during periods of emergency such as the military coup on September 12, 1980, when the court continued to its work uninterrupted. Precisely because it ordinarily operates on the margins of public attention, therefore, the Court of Jurisdictional Conflict provides an intriguing illustration of law’s fundamentally ambiguous relation to prerogative power.

Chapter 1

The Ambiguous State of Jurisprudence: Jurists and the Authoritarian Legality of Turkey's Single-Party Period (1923-1946)

Why would a country's most respected law professors throw their intellectual weight behind the military overthrow of a democratically elected government? Turkish scholars have long debated the paradoxical role of the committee of law professors who undertook the important tasks of explaining the necessity of the 1960 military coup, steering the post-coup transition and creating the legal foundation for the new regime. For over a year this committee spoke on behalf of the junta, produced expert apologies for the trial of the deposed government, piloted the country through the transition and produced a draft for a new constitution.

At the head of the committee, and thus at the forefront of stone-throwing students, armed officers and gavel-wielding judges, stood the unassuming figure of Siddik Sami Onar, the rector of Istanbul University and a cerebral academic theorist of administrative law. To say that Onar was a rector and law professor, however, does not really explain why he came to occupy the position as the legal mouthpiece of the revolution. This "teacher of teachers" (*hocaların hocası*), as he was called, was too engaged in the practical details of public administration to be confined to theory, yet he was too

committed to academia to be called a manager. He was “an erudite scholar in the best of the late Ottoman tradition”¹ whose wide learning and high public profile went far beyond the technicalities of administrative law, yet he wrote barely a word that would have made sense to anyone but administrative jurists. And lastly, he was too independent both as a scholar and as a champion of academic freedom to be reduced to an instrument of the military junta; yet he has widely come to be seen as a moral failure, the leader of a group of “so-called scholars”² and “organic intellectuals of the militarist regime,”³ because of his willingness to disregard basic legal and scholarly principles in defense of the junta.

More importantly, such descriptions fail to explain why the junta immediately contacted Onar upon taking power, and why Onar, in turn, embraced his role with such enthusiasm that he and his fellow law professors soon came to dominate the transition process. It appears less puzzling if we assume that the intent of the junta from the very beginning was to restore the rule of law, making the 1960 revolution a “democratic coup”⁴ or a “régime of exception with democratic goals.”⁵ But such assumptions only transfer the problem from the realm of transitional strategies to the realm of jurisprudence and professional identities. Again we must ask: *How* was it possible for Onar to defend

1 Dankwart A. Rustow, “Connections,” in *Paths to the Middle East: Ten Scholars Look Back*, ed. Thomas Naff (Albany NY: State University of New York Press, 1993), 267.

2 Engin Yıldırım, “İktidar, Üniversite ve Aydınlar,” *Bilgi* 2, no. 1 (2000): 4.

3 Nimet Baş, “Hurdles before Independence, Impartiality of Military Judiciary,” in *Today’s Zaman*, January 13, 2013.

4 Ozan O. Varol, “The Democratic Coup d’État,” *Harvard International Law Journal* 53, no. 2 (2012): 292–356.

5 Bülent Tanör, “States of Exception in Turkey 1960-1980,” in *States of Exception: Their Impact on Human Rights* (Geneva: International Commission of Jurists, 1983), 315.

the overthrow of a democratically elected government as a democratic revolution? *How* could a group of Turkey's top legal experts argue that the retroactive amendments to the penal code that made the trial of the deposed government members possible were defensible?

The explanation I offer in this chapter is that jurists took part in the 1960 coup because it was their job. More specifically, I argue that certain jurists were called upon to help the junta, and embraced that calling, because they adhered to a doctrinal tradition which committed jurists and army officers to *negotiate* the terms of the transition as a matter of professional responsibility toward the state. According to this tradition, law professors were not simply teachers or theoreticians; they were integral to the process through which the legal perimeters of state authority were defined. Importantly, this was a tradition which Onar himself had shaped thirty years earlier, under political conditions which in crucial respects were similar to the situation in which he and his colleagues now found themselves. This chapter is an account of how that doctrine took shape and why it became the preeminent framework for solving potential conflicts of authority between the legal and military branches of the state.

Compared to the attention that scholars have heaped on figures such as Kemal Atatürk⁶ and historians of the single-party period,⁷ very little attention has been paid to

6 E.g., Taha Parla, *Türkiye'de Siyasal Kültürün Resmî Kaynakları* (Istanbul: İletişim Yayınları, 1991); Andrew Davison and Taha Parla, *Corporatist Ideology in Kemalist Turkey. Progress or Order?* (Syracuse, NY: Syracuse University Press, 2004); M. Sükrü Hanioğlu, *Atatürk: An Intellectual Biography* (Princeton, NJ: Princeton University Press, 2011).

7 E.g., Halil Berktaş, *Cumhuriyet İdeolojisi ve Fuat Köprülü* (Istanbul: Kaynak Yayınları, 1983); İsmail Beşikçi, "Türk Tarih Tezi", "Güneş-Dil Teorisi" ve Kürt Sorunu (Ankara: Yurt

law professors. Yet the jurists who entered Turkish academia from 1923 to 1937 played a crucial role in laying the framework within which the Turkish legal complex would operate in the following decades. Like legal scholars elsewhere, Turkish law professors were responsible for educating future generations of attorneys, as well as the civil servants and judicial personnel of the state. In Turkey as in several European countries, the state became increasingly authoritarian and insistent on obedient intellectuals toward the end of the 1930s. Consequently, Turkish jurists had to not only legitimate an often ruthlessly authoritarian regime; they also had to lay the foundations for their own discipline in an atmosphere of censorship and political repression.

The professors of the one-party period were no pawns of the regime. Writing and lecturing may have been their only weapons, but they used them actively and creatively to shape how the Turkish state's authority would be expressed in a legal idiom.⁸ In the process, I contend, they not only legitimated the authoritarianism of the regime in a language of disinterested 'expertise'; they also defined how their own profession was to take part in the articulation of public authority. The early doctrinal work of Turkish jurists can therefore be read as so many attempts at establishing what Andrew Abbott has called "jurisdiction"⁹ on behalf of the legal professions, beginning, of course, with the academic

Kitap Yayın, 1991); Étienne Copeaux, *Espaces et temps de la nation turque. Analyse d'une historiographie nationaliste (1931-1993)* (Paris: CNRS-Éditions, 1997); Büşra Ersanlı, *İktidar ve Tarih: Türkiye'de "Resmi Tarih" Tezinin Oluşumu, 1929-1937* (Istanbul: İletişim, 2003).

8 A point made by Boğaç Erozan in "Producing Obedience: Law Professors and the Turkish State" (Ph.D. Dissertation, University of Minnesota, 2005).

9 Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (Chicago: University of Chicago Press, 1993).

jurists themselves. Their doctrines were not simply theories about the nature of the state; they were also culturally and politically resonant claims about the process through which state authority should be exercised. Turkish jurisprudence of the 1930s was thus both theory of the state and theory of itself; it both constructed a field of legal problems and offered approaches to solving them.

Accomplishing this within the limitations of scholarly legal discourse required translating the politically fraught issue of professional authority into a question of formal legal jurisdiction. Some sub-disciplines of law were better suited to this translation than others, and some jurists better attuned than others to the delicate balancing act required of theorizing that aimed to consolidate its own authority within a repressive state. The discipline that combined sufficient doctrinal prestige with the flexibility needed to accommodate such a state, I suggest, was administrative jurisprudence.

Bruno Latour has noted how, in France, administrative law can place obscure legal matters at the heart of the fundamental political issues that command public interest, how a problem as arcane as the presence of a government minister to break a voting tie on the *Tribunal des Conflits*—a procedural meta-issue *par excellence*—can be “capable of making the whole of France vibrate to questions that in some sense involve the entire history of the law.”¹⁰ Yet administrative law has played a marginal role in social science. Whereas academic jurisprudence has perhaps tended to exaggerate its own normative autonomy, social-scientific studies have tended to reduce the entire tradition to a matter

¹⁰ Bruno Latour, *The Making of Law: An Ethnography of the Conseil d’Etat* (Cambridge: Polity Press, 2010), 34.

of political control over public servants.¹¹ Historical and historical-institutionalist approaches have sought to combine power with normativity, but have often skirted the issue of how jurisprudence can wield political power in the first place. Tamir Moustafa, for example, shows how Anwar al-Sadat’s attempt at rooting out competing power centers in the Egyptian administration by strengthening the administrative courts backfired because it provided opponents with an independent means of keeping the government in check.¹² But the “institutional autonomy” which he argues enabled the administrative courts to play this role remains unexamined. He and many others stop short of explaining how administrative law, whether in the form of court verdicts or scholarly theories, has the power to shape political struggles, all the more so in an atmosphere as authoritarian as existed in Turkey between 1923 and 1945.

Instead of seeing administrative law either as self-contained theory or as a political instrument, I approach it through the lens of professional jurisdiction. From this angle, the legal field is the “site of a competition for monopoly of the right to determine law.”¹³ For jurists entering this competition, law serves as “a body of knowledge, a

11 E.g., Martin Shapiro, *Courts. A Comparative and Political Analysis* (Chicago: Chicago University Press, 1981); Mathew McCubbins, “Administrative Procedures as Instruments of Political Control,” *Journal of Law, Economics, Organization* 3, no. 2 (1987): 243; McNollgast, “The Political Origins of the Administrative Procedure Act,” *Journal of Law, Economics, Organization* 15, no. 1 (1999): 180; Tom Ginsburg and Albert H.Y. Chen, eds., *Administrative Law and Governance in Asia: Comparative Perspectives* (London and New York: Routledge, 2009).

12 Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (Cambridge: Cambridge University Press, 2007), 26–32.

13 Pierre Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field,” *The Hastings Law Journal* 38 (1987 1986): 817.

resource, by which lawyers construct and reproduce their claims to exclusive expertise.”¹⁴

What made the sub-discipline of administrative law a particularly appropriate field for Turkish lawyers seeking to consolidate their share in state authority, I suggest, is its preoccupation with questions of jurisdiction. Sandwiched between state leaders’ suspicions of judicial interference and the judiciary’s suspicions of political power masquerading as law, administrative jurisprudence historically emerged through a scholarly concern with the limits of administrative jurists’ authority vis-à-vis both state power and ordinary law. As a result, administrative law brings together the “political” and the “legal” in a discourse of jurisdiction in which tactical compromises and abstract principles reach negotiated compromises.

Recent scholarship has suggested that the power of jurisdictional discourse lies in a kind of deceptive humility, a “mute anxiety”¹⁵ which allows it to evade the attention of scholars and political leaders alike. According to Dorsett and McVeigh, jurisdiction “encompasses the tasks of the authorisation of law, the production of legal meaning and the marking of what is capable of belonging to law.”¹⁶ However, unlike constitutional law, which is often created through dramatic foundational moments, the discourses and techniques of jurisdiction have tended to emerge gradually and quietly as “an abstraction upward from a sphere of substantive law when the latter confronts, in practice, the

14 Ronen Shamir, *Managing Legal Uncertainty: Elite Lawyers in the New Deal* (Durham: Duke University Press, 1995), 114.

15 Latour, *The Making of Law*, 44.

16 Shannaugh Dorsett and Shaun McVeigh, “Questions of Jurisdiction,” in *Jurisprudence of Jurisdiction*, ed. Shaun McVeigh (London: Cavendish/Routledge, 2007), 5.

question of its competence over a given case.”¹⁷ Jurisdictional discourse is thus generated at the margins of public attention through numerous real-life jurisdictional conflicts. As a result, Mariana Valverde argues, “the sorting and ordering work of jurisdiction is only noticed by ‘technical’ legal experts, not by social and political theorists.”¹⁸ For all its technicalities, however, the legal genre of jurisdiction constitutes a powerful idiom of state authority, all the more so because it is capable of operating at the margins of attention, not just as a subject of political struggles but also as the technology through which political struggles are “transsubstantiated”¹⁹ into law. The juridical power to define whether, for example, the use of military courts to try civilians is either an extra-legal and exceptional use of state power or an ordinary instance of criminal procedure is also the power to shape and modify sovereign state power. Neither pure theory nor pure material practice, therefore, the issue of jurisdiction has a “distributive function that potentially returns the ‘political’ to the administrative reality.”²⁰

Taking the 1960 coup as its starting point, this chapter looks backwards, not forwards. It passes over the proximate causes of the coup, which form part of the subsequent chapter—the Democrat Party’s creeping authoritarianism, the scuffle between police and students in April 1960 that left Onar lightly wounded—and focuses on the

17 Bradin Cormack, *A Power to Do Justice: Jurisdiction, English Literature, and the Rise of the Common Law, 1509–1625* (Chicago: Chicago University Press, 2007), 4.

18 Mariana Valverde, “Jurisdiction and Scale: Legal ‘Technicalities’ as Resources for Social Theory,” *Social & Legal Studies* 18, no. 2 (2009): 145.

19 Mariana Valverde, “The Sociology of Law as a ‘Means Against Struggle Itself,’” *Social & Legal Studies* 15, no. 4 (2006): 591–97.

20 Cormack, *A Power to Do Justice*, 5.

longue durée of army-lawyer relations from the establishment of the Republic in 1923 until the 1950s. I address in particular the interwar writings of Fuad Başgil and Sıddık Sami Onar, both professors and alternating deans at the Istanbul University Law Faculty. As high-profile experts on constitutional and administrative law, respectively, Başgil and Onar were both in a position to shape how future state officials as well as a wider middle-class audience perceived the legal basis of the Turkish one-party state. Although their theoretical frame of reference was largely the same world of French legal theory, however, their approach differed. Başgil's constitutional theory portrayed the state as a moral community bound together by affective loyalty to a paternal Leader. Onar's administrative doctrine, in contrast, grounded state power in adherence to procedural and jurisdictional criteria specified through doctrinal scholarship. Both discourses legitimated the often brutal actions of the single-party regime, but only Onar's negotiational and contextual approach was as viable after the postwar transition to democracy as it had been before.

In 1930s Turkey, then, a particularly flexible legal discipline converged with an unusually sensitive intellect in the form of Sıddık Sami Onar, the founder of Turkish administrative law. In Onar's hands, administrative law became more than an academic pursuit; it became an inseparable part of the language in which the Turkish state expressed itself. If this made Onar's doctrine more theoretically sophisticated than Başgil's ideological rhetoric, it also made it more resilient. By creating a "technical" and "apolitical" framework for solving jurisdictional conflicts, Onar enabled the authoritarian

regime of the 1930s and early 1940s to undertake extensive interventions in Turkish society without giving up its symbolic deference to the rule of law. At the same time, however, he ensured that the most technocratic and statist aspects of the single-party regime's conception of legality would survive among jurists, bureaucrats and intellectuals into the postwar era in the form of a practice of jurisdiction, making the legal complex a deeply ambiguous component of Turkish democracy.

Attention to the Turkish interwar jurisprudence of jurisdiction, then, sheds light on poorly understood continuities between pre- and post-war Turkish legal and political culture. More specifically, it helps explain why it was Onar who became the symbolic leader of the alliance that supported the overthrow of the center-right populist government of the Democrat Party in 1960, while Başgil was arrested on suspicion of subversive activities. The apparent "compulsion of legality"²¹ which led the army junta to engage with jurists was not due to the inherent force of legal arguments; rather, it resulted from a locally and historically situated understanding of what state authority should be and who was competent to define it. The role Turkish jurists played in the 1960 coup depended on how the tradition of legal interpretation they belonged to construed their own role in the articulation of state legality. Accordingly, any exercise of state power in the name of the law required deference to the authority of legal experts—unless, like Başgil, they had renounced that authority through their doctrinal work.

21 David Dyzenhaus, "The Compulsion of Legality," in *Emergencies and the Limits of Legality*, ed. Victor Vridar Ramraj (Cambridge and New York: California University Press, 2008), 33–59.

Seen in these terms it also becomes clearer how a bookish and quiet professor such as Sıddık Sami Onar could play the role of state leader, if only for a short period. Like his conception of legality, Onar's professional identity and ethics were situational. He approached the question of legal limitations on state action through a pragmatic notion of jurisdiction that permitted state leaders to take liberties with law as long as they continued to negotiate their authority with legal professionals such as himself. If this made Onar a morally ambivalent figure, it was precisely because of this ambivalence that he, not the Youth or the Army, was able to ensure the continuity of a legal tradition that stretched from the era of the authoritarian single-party era, through the ten-year experiment with electoral democracy, and into the days of the 1960 "Revolution."

From Sovereignty to Science

By the time Siddik Sami Onar entered the ranks of Turkish legal academia in the late 1920s, successive reformers had gradually replaced the Islamic tradition on which the Ottoman Empire's legal idiom was based with a set of institutions and concepts modeled on those of Western Europe. New legal codes were adapted from German, Swiss, Italian, and French codes; the theories that explained them and the system of courts that applied them were largely French. The latter included, from 1864, a secular system of courts (*Nizamiye*), and from 1868, an Ottoman version of the French *Conseil d'Etat* (*Şura-yı Devlet*), the court of last instance in the hierarchy of administrative courts.

It was no coincidence that Onar's discipline of choice was administrative law. In France, the notion that administrative law constituted an autonomous jurisdiction was largely a product not of legislators or judges but of law professors. Though the administrative courts owed their existence and formal independence to two statutes, one from 1790 and one from 1872, it was law professors who, in the interim, developed a systematic doctrine defining the courts' jurisdiction as a *sui generis* area of law. What began as an ill-defined practice thus developed into an officially recognized jurisdiction and an academic discipline, the former thanks to the latter.

French scholars of administrative law trace the origin of their discipline to the *ancien régime*, when the King kept disputes involving government functionaries outside of the ordinary courts by referring them to the quasi-judicial *Conseil du Roi*, which

otherwise had a primarily advisory role.²² After the Revolution, the landed nobility took refuge in the courts, leading the regime to distrust them as much as the King had. Post-revolutionary governments therefore codified and strengthened the separation between ordinary courts and the ‘retained’ justice (*justice retenue*) of the administration, prohibiting the courts from considering matters within the purview of the public administration and establishing the Conseil d’Etat as a part advisory, part judicial organ.

Over the following century, the French state steadily expanded its involvement in areas such as welfare, infrastructure, public health, and culture, thus widening the scope of potential disputes between public administration and private citizens. At the same time, however, both the religious and Rousseauian doctrines of state sovereignty that had previously justified a separate administrative system of justice were steadily falling out of favor. The law of 1790 which prohibited civilian courts from interfering in public administration was characteristically terse²³ and the Conseil d’Etat’s ability to build its own case law was limited by its dependence on the public administration. Only with a 1872 statute that upgraded the Conseil d’Etat’s independence from *justice retenue* to *justice déléguée* was an institutional space created wherein a community of jurists could gradually articulate a doctrine of administrative law.

Between 1872 and World War I the Conseil d’État gradually asserted its

22 Sylvain Soleil, “La Justice Administrative Avant 1789, Retour Sur Trente Ans de Découvertes,” in *Regards Sur L’histoire de La Justice Administrative*, ed. G. Bigot and M. Bouvet (Paris: Litec, 2006), 3–30.

23 Pascal Binczak, “Un Silence Fondateur. Réflexions Sur La Loi Des 16-24 Août 1790,” in *Regards Sur L’histoire de La Justice Administrative*, ed. G. Bigot and M. Bouvet (Paris: Litec, 2006), 73–102.

jurisdiction over the activities of the public administration.²⁴ This development happened largely thanks to the labors of academic jurists such as Maurice Hauriou and Léon Duguit, who sought a middle ground between liberalist and sovereignist conceptions of state. On the liberal-individualist side stood jurists such as Henry Bethélemy, who believed that the Conseil d'État was no court at all, but simply a part of the administrative hierarchy, and that all state activities except for such core functions as public order and defense should fall under the competence of the ordinary courts. On the other side stood jurists such as Adhémar Esmein, who defended a post-Rousseauian sovereignist conception of the state that gave precedence to the elected legislature.²⁵ For Hauriou and Duguit, liberalist theories were out of touch with the realities of modern public administration, while sovereignist theories were dangerously metaphysical and too close to the *Herrschaft* theories of Germans such as Rudolf von Jhering, which recognized no legal limitations on the state.²⁶

By the turn of the century most of the prominent French jurists agreed with Hauriou and Duguit that “public power” (*puissance public*) must be subordinated to a

24 Jacqueline Lucienne Lafon, “La Judicialisation de La Politique En France,” *International Political Science Review / Revue Internationale de Science Politique* 15, no. 2 (1994): 135–42.

25 Jean Terrier, *Visions of the Social: Society as a Political Project in France, 1750-1950* (Leiden: Brill, 2011), 39–44.

26 For Hauriou’s discussion of Jhering, see Christopher B. Gray, *The Methodology of Maurice Hauriou: Legal, Sociological, Philosophical* (Amsterdam and New York: Rodopi, 2010), 20. For Duguit’s critique of *Herrschaft* theories, see “The Law and the State,” *Harvard Law Review* 31, no. 1 (1917). Duguit’s critique of German state concepts here relies largely on Durkheim’s “*L’Allemagne Au-Dessus de Tout*”: *La Mentalité Allemande et La Guerre* (Paris: Armand Colin, 1915).

more sober conception of “public interest” (*service public*) as the defining criterion of public administration. Hauriou is generally considered the originator of the public interest criterion for the purposes of defining the jurisdiction of the administrative courts, but it was Duguit who made it into the cornerstone of what became known as the *Ecole du service public*.²⁷ Like his colleague Émile Durkheim, Duguit described the state not as a “power” but as the functional outgrowth of the division of labor in modern societies, one in which maintaining social “solidarity” was the responsibility of a specialized occupational group.²⁸ Because the conditions of social solidarity were thought of as objective and external to the state, the “public interest” criterion both furnished the state with its *raison d’être* and delimited its range of legitimate action. For Duguit, this delimitation extended even to such fundamental functions as national security, for the state “cannot be a commanding power . . . in the service of warfare any more than in justice, police or any other [service].”²⁹

By World War I, then, French jurists had managed not only to supplement the 1790 statute with a body of doctrine to which the Conseil d’État could refer in supervising as well as justifying state action, but to do so largely without the help of statutes or constitutional amendments. Instead, as Alec Stone Sweet argues, the legal

27 H. S. Jones, *The French State in Question: Public Law and Political Argument in the Third Republic* (Cambridge and New York: Cambridge University Press, 1993), 85–111.

28 Claude Didry, “De l’État aux groupes professionnels. Les itinéraires croisés de L. Duguit et É. Durkheim au tournant du siècle (1880-1900),” *Genèses* 2, no. 1 (1990): 11–12.

29 Léon Duguit, *Manuel de droit constitutionnel: théorie générale de l’État, le droit et l’État — Les Libertés publiques, l’Organisation politique de la France*, 4th ed. (Paris: E. de Boccard, 1923), 76.

scholar had become the “principal protagonist in the ongoing project to perfect the legal system,”³⁰ and the Conseil d’Etat, whose membership overlapped considerably with the circles of administrative law professors, had assumed its role as the “conscience” of the French state.³¹ In the process, administrative jurists and civil servants had developed a distinctive *sens de l’état*, a self-conception as the standard bearers of the public interest against the fickle will of the legislators and the potential tyranny of governments as well as ordinary judges.³² Law professors represented the highest form of this sensibility, for as Duguit wrote, they are to legal practitioners what biologists are to physicians.³³

It was no wonder, then, that certain Turkish jurists turned to French administrative law in the 1930s. Administrative law offered them a theory of state power that was grounded in the most cutting-edge social science, and its historical development from a pragmatic power-sharing compromise to a self-contained jurisdiction provided them with an aspirational status they had sought since the mid-nineteenth century. French legal theories had been known and discussed in the Ottoman Empire since the large-scale Westernization project known as the *Tanzimat* (ca. 1839-1876), but the continuous unrest and authoritarianism of the years between Abdülhamit II’s ascent to the throne in 1876 and the dissolution of the Empire in 1918 required that jurists either explicitly recognize

30 Alec Stone Sweet, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (New York: Oxford University Press, 1992), 32–33.

31 Kenneth H. F. Dyson, *The State Tradition in Western Europe: A Study of an Idea and Institution* (Oxford: Martin Robertson, 1980), 85.

32 Jones, *The French State in Question*, 49.

33 Cited in Yves Dezalay, “From Mediation to Pure Law: Practice and Scholarly Representation within the Legal Sphere,” *International Journal of the Sociology of Law* 14, no. 2 (1986): 105.

the primacy of political power or exercise caution in expressing contrary views. Abdülhamit not only suspended the 1876 Constitution almost as soon as it was promulgated but also transferred a great deal of authority to the secret police and the Palace bureaucracy (the *Mabeyn*), which was separate from and *de facto* above the ordinary civil administration and judiciary.³⁴ In addition the experimental and fluid way in which institutions such as the Ottoman Conseil d'Etat were organized³⁵ prevented the gradual accumulation of case law that French jurists could draw on in constructing the doctrine of state power.

These limitations did not prevent Ottoman public servants from developing a *sens de l'état* of their own.³⁶ If an independent deontology of public service could not be openly expressed in theory, it could still be cultivated in practice through disciplines such as administrative science (*Usul-ü İdare*), which was taught at the Empire's European-style School of Public Service (*Mülkiye*),³⁷ and through service on the *Nizamiye* Courts, which encouraged uniform proceduralism through an empire-wide court periodical.³⁸ Similar changes in the self-conception of state officials occurred throughout the Ottoman state intelligentsia. The jurist İbrahim Hakkı Paşa, for example, went quite far in

34 Carter Vaughn Findley, *Bureaucratic Reform in the Ottoman Empire: The Sublime Porte, 1789-1922* (Princeton: Princeton University Press, 1980), 175–9, 198–201, 224–50; Ali Akyıldız, *Osmanlı Bürokrasisi ve Modernleşme* (Istanbul: İletişim Yayınları, 2004), 182.

35 Findley, *Bureaucratic Reform in the Ottoman Empire*.

36 Carter Vaughn Findley, *Ottoman Civil Officialdom: A Social History* (Princeton: Princeton University Press, 1989), 9–10.

37 Nuray E. Keskin, “Türkiye’de Kamu Yönetimi Disiplinin ‘Köken’ Sorunu,” *Amme İdaresi Dergisi* 39, no. 2 (2006): 6–7, 12.

38 Avi Rubin, *Ottoman Nizamiye Courts: Law and Modernity* (New York: Palgrave Macmillan, 2011).

challenging Abdülhamit in his 1896 treatise on administrative law,³⁹ discussing both judicial independence and the separation of powers in a way that, had he not been such a highly respected statesman, would perhaps have given him the same fate as Kemalpaşazade Sait Bey, a teacher of constitutional law who was exiled in 1890.

By the turn of the century many Ottoman public servants had replaced their loyalty to the Sultan with a more abstract idea of a “state”⁴⁰ which had to be saved from Abdülhamit’s despotic and impotent attempts at halting the financial and territorial disintegration of the Empire at the hands of the European powers. The political opposition movement that emerged out of this atmosphere came to be known as the Young Turks. In 1908 the Young Turks took power in a military coup carried out by their secretive executive organization, the Committee of Union and Progress (*İttihat ve Terakki Cemiyeti*, CUP) and restored the 1876 Constitution, thus initiating the Second Constitutional Period.

In one sense, then, the 1908 Revolution represented the victory of the reason of state servants over the arbitrariness of the Sultan, introducing what Tarık Zafer Tunaya called the “era of Duguit and Esmein” in Ottoman jurisprudence.⁴¹ At the same time, however, it also introduced a problem with which future jurists of the Turkish state would have to contend: legal authoritarianism. From 1909, when an attempted counter-coup was

39 İbrahim Hakki, *Hukuk-ı İdare*, 2 vols. (Istanbul: Karabet Matbaası, 1896); for a discussion of this work see Findley, *Ottoman Civil Officialdom*, 195–209.

40 Fatma Müge Göçek, *Rise of the Bourgeoisie, Demise of the Empire: Ottoman Westernization and Social Change* (New York: Oxford University Press, 1996), 45.

41 Tarık Zafer Tunaya, *Siyasi Müesseseler ve Anayasa Hukuku*, 2nd ed. (Istanbul: Sulhi Garan Matbaası, 1969), 132.

suppressed by CUP-loyal military units, the CUP became dominated by the Army, whose radicals were influenced more by Prussian militarist conceptions of state power such as Colmar Freiherr von der Goltz's *Nation in Arms*⁴² than by the legally defined state theories of the French. These tendencies were exacerbated during the Balkan Wars (1912-13) and World War I (1914-1918), when martial law was continuously in effect.⁴³ Perhaps as a consequence, jurists of the Second Constitutional Period were more interested in familiarizing their students with French debates than in taking sides. Babanzade Hakki İsmail, for example, cited Duguit's realist approach in defining the state as a "relation between those who govern and those who are governed" but also drew on Esmein's theory in calling it "a political community created by a nation, that is, the nation's legal personification" (*taşahhus-u hukukisidir*).⁴⁴ Unlike army officers, jurists showed little interest in German state theory, but they did tend to portray the state as the more powerful part of the state-society relationship.⁴⁵

Jurists' precarious position continued into the first years of the Turkish Republic. Although the CUP emerged from the continuous warfare of the 1912-1918 period as a dispersed and discredited organization, it nevertheless provided the nationalist resistance movement of Mustafa Kemal, himself an early member of the CUP, with essential

42 Colmar Freiherr von der Goltz, *Millet-i Müselleha: asrımızın usul ve ahval-i askeriyesi* (Istanbul [Kostantiniye]: Matbaa-ı Ebüzziye, 1885).

43 Feroz Ahmad, "War and Society Under the Young Turks, 1908-1918," *Review* 11, no. 2 (1988): 265–86.

44 Babanzade İsmail Hakki, *Hukuk-u Esasiye*, 2nd ed. (Istanbul [Kostantiniye], 1913), 53.

45 Mehmet Ö. Alkan, "Modernization from Empire to Republic and Education in the Process of Nationalism," in *Ottoman Past and Today's Turkey*, ed. Kemal H. Karpat (Leiden: Brill, 2000), 124.

organizational infrastructure during the War of Liberation (1919-1922).⁴⁶ The prominence of CUP members in the movement and the fact that Kemal himself adhered to many of organization's nationalist-authoritarian ideas⁴⁷ encouraged the continuity of a conception of national sovereignty that subordinated all state functions to a single legislative-executive Assembly.⁴⁸ The Assembly even claimed judicial powers that went beyond those of the ordinary courts when it established a number of "Independence Courts" staffed mainly by its own members in September 1920.⁴⁹ The Independence Courts were meant to try army deserters but were soon extended to anyone charged violating the High Treason Law (*Hiyanet-i Vataniye Kanunu*) which had been passed in April 1920, prescribing the death penalty for opposition to the Ankara government.⁵⁰ Some of the Independence Courts were both efficient and ruthless, handing out harsh penalties on offenders and in many cases even their families.⁵¹

The new regime's ambivalent relation to law was codified in the Republic's first peacetime constitution promulgated in October 1924. The Constitution concentrated power in the Grand National Assembly, thus rejecting the principle of the separation of powers. Although articles 8 and 54 described courts as independent from interference

46 Erik Jan Zürcher, *The Unionist Factor: The Rôle of the Committee of Union and Progress in the Turkish National Movement 1905-1926* (Leiden: E. J. Brill, 1984), 91–105.

47 Hanioglu, *Atatürk*, 36–29.

48 Davison and Parla, *Corporatist Ideology in Kemalist Turkey. Progress or Order?*, 50.

49 *İstiklal Mehakimi Kanunu*, Law no. 249, July 31, 1922, in *Kanunlar Dergisi*, vol. 1, pp. 295-296.

50 *Hiyanet-i Vataniye Kanunu*, Law no. 2, in *Ceride-yi Resmiye* no. 1, February 7, 1921.

51 Stanford J. Shaw, *From Empire to Republic. The Turkish War of National Liberation*, vol. 3, Part 1 (Ankara: Türk Tarih Kurumu Basımevi, 2002), 1012.

from the government or legislature, courts had no power to interfere in areas where the latter institutions were competent. This meant that courts could not challenge the constitutionality of laws or the legality of government regulations, both of which were among the powers of the Grand National Assembly (art. 52), which also reserved the right to authorize death penalties (art. 26). As opposed to the 1876 Constitution, the 1924 Constitution lacked a prohibition on establishing extraordinary courts.

The constitutional basis of the legal system was thus as ambiguous in the new Republic as it had been under Abdülhamit's rule: independent on paper but undermined in practice by its inability to oversee legislation or state action and by the government's frequent recourse to emergency powers and parallel courts. Early attempts by the minority Progressive Republican Party (*Terakkiperver Cumhuriyet Fırkası*) at clarifying this ambiguity⁵² only resulted in backlash from Kemal's Republican People's Party (*Cumhuriyet Halk Partisi*, RPP). In February 1925 the RPP seized the opportunity of a rebellion among Kurdish tribes in the Southeast to pass the Law on the Maintenance of Order (*Takrir-i Sükûn Kanunu*), applying martial law to the entire country.⁵³ In addition to activating regional courts-martial with the power to sentence offenders to death, the Independence Courts were once again established. They went far beyond their initial mandate in stifling political opposition to the hardliners within the RPP, arresting a total

52 Erik Jan Zürcher, *Political Opposition in the Early Turkish Republic. The Progressive Republican Party 1924-1925* (Leiden: E. J. Brill, 1991).

53 Mete Tunçay, *Türkiye Cumhuriyeti'nde Tek Parti Yönetiminin Kurulması, 1923-1931* (Ankara: Yurt Yayınları, 1981), 127–175.

of 7446 and having 660 executed before they were dissolved in 1927.⁵⁴ The opposition party was dissolved, strict media censorship introduced, and both rebels and rivals from among Kemal's own former colleagues in the CUP were sidelined or eliminated.⁵⁵

The problem which jurists of the early Turkish Republic were facing was thus in certain respects similar to the problem with which French jurists had grappled since the 1870s: a state that was in need of legal legitimation but whose leaders were reluctant to strengthen the authority of lawyers at the expense of the legislature and government. Added to this dilemma was the fact that in Turkey the latter organs were monopolized entirely by the RPP and its military strongmen. The ambivalent position in which the 1924 Constitution placed the legal complex may have been a side-effect of the war years, but as the 1930s approached these strongmen appeared determined to conserve ambivalence in order to reconcile the state's public image as "modern" and "enlightened" with the authoritarian measures it continued to take against anyone who challenged the regime. For lawyers, therefore, challenging the Party's competence to use legal institutions for political purposes was a dangerous game.

If the public legal arena was closed, however, jurists still had the universities at their disposal. The universities did enjoy a degree of academic independence, but it was an independence that had to be exercised with prudence. In 1925 Justice Minister Mahmut Esat Bozkurt established the Law Faculty as the first department of Ankara

54 Ergün Aybars, *İstiklâl Mahkemeleri: Cilt I-II: 1920-1927*. (Izmir: Dokuz Eylül Üniversitesi Yayınları, 1988).

55 Zürcher, *The Unionist Factor*, 160.

University, thereby creating the institutional facilities to produce ideologically compliant jurists in sufficient numbers to staff the Republic.⁵⁶ The new School of Public Service (*Mülkiye Mektebi*), which replaced the Ottoman *Mekteb-i Mülkiye* in Istanbul, was to do the same for other state personnel. But the new Republic's first higher educational institutions still enjoyed less prestige than the venerable Istanbul House of Liberal Arts (*Darülfünûn-ı Şahane*), the Ottoman Empire's first Western-style university. At the Darülfünûn, most of the faculty were still teaching what they had taught throughout the Second Constitutional Period. Although many of them were privately supporters of the Kemalist regime, in many cases their support was insufficiently obvious to convince the RPP's leaders that they were producing state personnel with the right attitude. Ideological compliance became all the more important as the Depression reached the shores of Turkey, leading the RPP to end the country's "limited state-led entrepreneurial phase"⁵⁷ and turn to protectionism and state-led industrialization. Although "statism" (*devletçilik*) and "revolutionism" (*inkılapçılık*) served mainly as useful umbrella concepts with which to legitimate a wide range of state intervention in the economic and cultural life of the country,⁵⁸ they were important enough as such that they were added to the RPP's list of official principles in 1931 and incorporated into the Constitution in 1937.

56 Hakkı Uyar, "Mahmut Esat Bozkurt," in *Modern Türkiye'de Siyasi Düşünce. Cilt 2: Kemalizm*, ed. Murat Gültekingil and Tanıl Bora, 6th ed. (Istanbul: İletişim Yayınları, 2009), 214–19.

57 Ayşe Trak, "Liberalizm-Devletçilik Tartışması, 1923-1939," in *Cumhuriyet Dönemi Türkiye Ansiklopedisi*, ed. Murat Belge (Istanbul: İletişim, 1986), 1986–7.

58 M. Heper and E.F. Keyman, "Double-Faced State: Political Patronage and the Consolidation of Democracy in Turkey," *Middle Eastern Studies* 34, no. 4 (1998): 260.

The solution to the lack of ideologically committed faculty was suggested by Reşit Galip, a medical doctor who had proven his loyalty to Mustafa Kemal by serving on the notorious Ankara Independence Court between 1923 and 1927, and had been since been appointed Minister of Education. With law 2252 the Darülfünûn was closed in July 1933 and replaced by Istanbul University (*İstanbul Üniversitesi*). In the transition, fifteen of the twenty-six professors of the Darülfünûn's Law Faculty were left without jobs.⁵⁹ Law professors who wanted to secure a foothold within the Republic's legal academe had to enthusiastically reinforce the state's legitimacy. It was not sufficient to remain silent on the regime's policies; jurists were permitted to fill the newly vacant chairs only if they had proven themselves to actively support the Kemalist reforms.⁶⁰ If academic jurists were to gain a share in public authority, then, they would have to do it through their officially sanctioned activities: writing and lecturing on topics that lay comfortably within their areas of expertise.

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In the following sections I outline two general approaches with which Turkish jurists met this challenge. Both were articulated mainly in dialogue with the same French theories, but they differed in their use of these theories. I call the first approach the "political"

⁵⁹ Emre Dölen, *Darülfünun'dan Üniversiteye Geçiş: Tasfiye ve Yeni Kadrolar* (Istanbul: İstanbul Bilgi Üniversitesi Yayınları, 2010), 378–388.

⁶⁰ Mete Tunçay and Özen Haldun, "1933 Darülfünun Tasfiyesinde Atılanlar," *Tarih ve Toplum*, no. 10 (1984): 21–25.

solution because it emphasized ideological principles such as national will and political leadership over legal technicalities and procedure. In so doing, it connected with some of the most radical strands within the RPP. Although the RPP leadership was too concerned with fostering a sense of Turkish exceptionalism to adopt Fascism as an official ideology, certain members of the party's inner circle, notably Recep Peker, openly admired Mussolini's achievements. For several Turkish jurists, the Fascist ideal of a corporate state unified behind a revolutionary leader provided a quasi-juristic language that obscured formal ambiguities in the division of powers. What I call the "political" solution were legal theories which made such ideals into the cornerstone of doctrine.

I call the second solution "procedural" because while it did nothing to repudiate the authoritarianism of the RPP, it located legal authority not in political leaders but in judicially supervised acts of administration. From the viewpoint of the RPP, the authority of law professors may have stretched only to the university courtyards, but in the perception of the law professors who followed this approach their authority extended to the core of the state itself. The French doctrines in which they had been trained told them that in the competition for professional jurisdiction their primary competitor was not other lawyers, but state leaders; the resource they were competing over was public authority. Instead of turning charismatic leadership into a superior jurisdiction in its own right, it insisted that state power was always exercised within a field of law.

As I have argued above, however, explicit challenges to the authority of state leaders would have been politically unacceptable and personally dangerous for jurists of

the single-party period. A legal theory that challenged the preeminence of former military officers such as Mustafa Kemal and İsmet İnönü would have to do so implicitly and equivocally, without exposing the regime's ambivalent relationship to law. Like the political solution, therefore, the procedural solution preserved jurisdictional ambiguity; but unlike the political approach, it did so by making the *practice* of administrative jurisprudence the guarantor of the symbolic integrity of the law. The result was a technical, situational, and pragmatic doctrine less amenable to rousing public addresses than the political approach. But it also made for a stealthily powerful language of power, one that resonated with the self-understanding of jurists, technocrats, and academics as the keepers of the rational and general interests of the nation against fickle political trends.

Establishing jurisdiction 1: The political solution

The “political” solution was by far the most common approach to the problem of how to be a law professor in an authoritarian, revolutionary one-party state. Some jurists, such as Vasfi Raşit Sevig,⁶¹ seized on the principle of “revolutionism” as a kind of *Grundnorm*, thus echoing Mustafa Kemal's own estimation of the RPP's guiding principles.⁶² Sevig

61 Sevig's first name was variously spelled “Raşit” or “Raşid” and his last name, adopted after the Surname Law in 1934, was sometimes spelled Seviğ, other times Sevig. For the sake of consistency I stick to one spelling throughout this dissertation.

62 İsmail Arar, *Atatürk'ün İzmit Basın Toplantısı: 16/17 Ocak 1923* (Istanbul: Burçak Yayınevi, 1969), 56.

had become a respected jurist before the purging of the Istanbul University: The son of a high-ranking Ottoman statesman, he had studied law in Paris with a stipend from the CUP before serving as a reserve officer in the Ottoman Army during World War I. After an internship in interwar Dresden and a stint at the Turkish embassy in Berlin, he returned to Istanbul and, on the request of Mustafa Kemal himself, served as a representative in the Grand National Assembly. He also published an article on the French Conseil d'État,⁶³ two book-length analyses of the new Civil Code⁶⁴ and an exhaustive three-volume exposition of the Law on Civil Procedure.⁶⁵ In his 1934 pamphlet "What the Revolution Taught," however, Sevig threw intellectual self-restraint to the wind and produced a rousing sermon on the necessity of subordinating law to the Revolution.⁶⁶ Comparing the Turkish Independence Courts to the Reign of Terror during the French Revolution, Sevig argued that the *terör* of the Independence Courts was an unfortunate but necessary measure. Because "it is not principles that propel a revolution, but events," Sevig argued, those who insist on the rule of law must be considered reactionaries (*mürteci*) alongside adherents to Islamic *shariah*. The Revolution must be seen as a whole, and "like the sea, it does not accept dirt." Finally, in order to leave no doubt as to his Jacobinesque loyalty to the revolution, he dated the pamphlet "Year 10." The publication worked: In 1936,

63 Vasfi Raşit Sevig, "Fransa'da Şurayı Devlet," *Darülfünun Hukuk Fakültesi Mecmuası* 3, no. 18 (1925).

64 Vasfi Raşit Sevig, *Kanun-u medeni şerhi: Ahkam-ı Umumiye* (Istanbul: Maarif Kütüphanesi, 1926); Vasfi Raşit Sevig, *Tahşiyeli türk kanunu medenisi* (Istanbul (Dersaadet): Maarif Kütüphanesi, 1926).

65 Vasfi Raşit Sevig, *Yeni Hukuk Usûl-i Muhakemeleri Kanunu: tatbikat ve sak* (Istanbul: İstanbul Cumhuriyet Matbaası, 1928).

66 Vasfi Raşit [Sevig], *İnkılapların Öğrettikleri* (Gazetecilik ve Matbaacılık T.A.Ş., 1934).

Sevig was appointed professor of Roman Law at Ankara University, a position he held until his death in 1971.⁶⁷ Sevig's later lectures and writings displayed a wide range of influences, but he is said to have always ended his lectures with the words of Mustafa Kemal Atatürk.⁶⁸

At Ankara University Sevig joined a faculty group that had proven its loyalty to Mustafa Kemal and the RPP's authoritarian-statist program, among them the RPP's strongmen Recep Peker, Raşit Galip, and Mahmut Esat Bozkurt, all of whom taught a new mandatory class on the principles of the Revolution (*inkılap dersleri*).⁶⁹ Mustafa Şeref Özkan, the Ankara Law Faculty's first professor of administrative law, had been an important legal advisor to the CUP during World War I, when he had helped the government shape its nationalist and statist economic policies, and later served as Finance Minister for the RPP.⁷⁰ In his lecture notes on administrative law for first-year students, Özkan argued that among different conceptions of state authority the statist

67 Biographical information on Sevig compiled from Ankara Barosu, *Hizmeti 30 Yılı Aşan Avukatlar Albümü* (Ankara: Ayyıldız Matbaası, 1962); Abdülkadir Altunsoy's biographical footnote to Vasfi Raşit Sevig, "Önsöz," in *Osmanlı Şehülislâmları*, ed. Abdülkadir Altunsoy (Ankara: Ayyıldız Matbaası, 1972), xxxv–xxxvi; K. Öztürk and Fahri Çöker, eds., *Türk Parlamento Tarihi*, vol. TBMM IV. Dönem, 1931–1935, II (Ankara: Türkiye Büyük Millet Meclisi Vakfı, 1996), 535–6.

68 Bilgay Esemeli, "Ord. Prof. Vasfi Raşit Seviğ'in Arkasından." *Barış*, November 29, 1971.

69 A list of the Ankara Law Faculty's first professors is found in *Ankara Hukuk Fakültesi ve Mezunları* (Ankara: Ankara Üniversitesi Hukuk Fakültesi, n.d.), 22.

70 Özcan Sabudak, "Bir Ekonomik Bürokratının Portresi: Mustafa Şeref Özkan" (MA Thesis, Marmara Üniversitesi Sosyal Bilimler Enstitüsü, 2005); Seyfi Yıldırım, "Meşrutiyetten Cumhuriyete Bir Hukukçu ve Siyasetçi: Mustafa Şeref Özkan (1885-1938)," *Modern Türklük Araştırmaları Dergisi* 5, no. 4 (2008): 127–133.

model was superior to the liberal model, which he claimed even Great Britain was abandoning.⁷¹

At Istanbul University the 1933 purge had left professor of Constitutional Law Ahmet Mithat [Metya], whose critique of Fascism⁷² and insistence that the state must be subordinated to law⁷³ must have drawn the ire of Reşit Galip, out in the cold.⁷⁴ Ali Fuad Başgil was appointed in his place. Başgil's thinking during the one-party regime has been taken as the quintessential doctrinal expression of the RPP's most authoritarian approach to corporatism, and ensured that he quickly became "one of the leading party-professors of the day."⁷⁵ Like radical RPP ideologues such as Reşit Galip, Başgil believed that the traditional division between public and private law was out of touch with current realities, in which the "power and extent of the state" had become "almost limitless," rendering private law useless.⁷⁶ There was little room for autonomous syndicates or private initiative in his vision; Başgil's statism called for a society in which the activities and loyalties of citizens were so thoroughly absorbed into the state that it bordered on totalitarianism. Thus he explicitly embraced the credo that Ahmet Mithat had condemned

71 Mustafa Şeref Özkan, *İdare Hukuku Ders Notları* (Ankara: Ankara Üniversitesi Hukuk Fakültesi Talebe Cemiyeti Neşriyatı, 1935), 37.

72 Mithat [Metya], "Faşistlik," *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası* 8, no. 48 (1930): 929–34.

73 Mithat [Metya], "Hukuku Amme Dersleri 2: Devlet Anasının Hukuki Şeraiti," *İstanbul Hukuk Fakültesi Mecmuası* 8, no. 46 (1930): 665–596.

74 For a discussion of some of Ahmet Mithat's writings prior to 1933, see Erozan, "Producing Obedience," 126–130.

75 Taha Parla, *The Social and Political Thought of Ziya Gökalp, 1876-1924* (Leiden: Brill, 1985), 124.

76 Ali Fuad Başgil, "Muasır Devlette Memur Meselesi ve Memurların Mesleki Vazife ve Terbiyesi," *İstanbul Hukuk Fakültesi Mecmuası* 7, no. 4 (1941): 794.

in his article on Fascism, first formulated by the Fascist thinker Alfredo Rocco: “nothing against the state, nothing outside of the state.”⁷⁷

But if there was nothing outside of the state, how could its leaders claim that it was governed by law? Başgil’s answer was that issues such as individual rights and the legality of state action could not be discussed separately from the issues of national unity and, ultimately, survival.⁷⁸ Writing for a francophone readership, Başgil approvingly described the 1924 Constitution as the basis of an “authoritarian democracy” necessitated by the historical and social circumstances of the Kemalist revolution. “Étatisme,” he argued, may have bad connotations in France, but in Turkey it must be seen as a reaction to the ruinous passivity of the Ottoman regime and a natural implication of the deep social changes that the new regime was effectuating. In contrast to his predecessor Ahmet Mithat,⁷⁹ Başgil felt that the state could be trusted to employ “auto-limitation” to keep itself within the principles of public law.⁸⁰

Başgil was not particularly worried about how this self-limitation would be ensured. In an argument reminiscent of the Italian Fascist philosopher Giovanni Gentile,⁸¹ he argued that the only way to ensure the legality of state action was to instill in every

77 Ali Fuad Başgil, “Dördüncü Kurultay Münasebetiyle,” *Aylık Siyasal Bilgiler Mecmuası*, no. 50 (May 1935): 1–5; cited in Parla, *The Social and Political Thought of Ziya Gökalp*, 124.

78 Ali Fuad Başgil, *Klasik Ferdî Hak ve Hürriyetler Nazariyesi ve Muasır Devletçilik Sistemi*, 33 (Ankara: Hukuk İlmini Yayma Kurumu, 1938).

79 [Metya], “Hukuku Amme Dersleri 2: Devlet Anasının Hukuki Şeraiti.”

80 Ali Fuad Başgil, “La Constitution et le Régime politique,” in *La vie juridique des peuples*, vol. 7 (Paris: Librairie Delagrave, 1939), 20, 22–3, 36–8.

81 A. James Gregor, *Mussolini’s Intellectuals: Fascist Social and Political Thought* (Princeton and Oxford: Princeton University Press, 2004), 87.

Turk a commitment to law so genuine that law (*hukuk*), justice (*adalet*) and morality (*ahlak*) became indistinguishable.⁸² Thus the rule of law was not a question of separating powers, but of training and discipline (*terbiye*). Ultimately what was required was not the legal responsibility on which “materialist” jurists insisted, but moral responsibility, a noble feeling (*duygu*) that ensured that each public servant would be loyal to the common good of the nation.⁸³

After accepting the position as dean of the Istanbul Law Faculty and director of the School of Public Service in 1937, Başgil applied the same axiom to his philosophy of education. The foremost function of institutions such as the School of Public Service, he argued, was to develop a national science with which to educate nation-minded public servants who would be loyal to the state and its National Leader (*Milli Şef*).⁸⁴ As World War II began, he enthusiastically embraced what he believed would be a new era of national unity and solidarity (*tesanüt*). It was not tanks and warplanes but “spiritual decrepitness” (*manevî bozgunluk*) and lack of national unity that caused France to fall so easily at the hands of German invaders.⁸⁵ To avoid the same fate and emerge from the war as a stronger nation, Turkey must measure individual rights and freedoms against the yardstick of societal discipline and state security.⁸⁶ In this endeavor, jurists must either

82 Ali Fuad Başgil, “Kanunun hâkimiyeti prensibi,” *İzmir Barosu Dergisi* 2, no. 1–5 (1936): 63–75.

83 Başgil, “Muasır Devlette Memur Meselesi,” 802.

84 Ali Fuad Başgil, *Siyasal Bilgiler Okulunun 86ıncı Yıl Dönümü Münasebetiyle 4/12/1943 Tarihinde Yapılan Merasimde Söylenen Nutuk* (Ankara, 1943).

85 Başgil, “Muasır Devlette Memur Meselesi,” 790.

86 Ali Fuad Başgil, “Vatandaşların Amme Hakları ve Milli Camiannın Emniyet ve Disiplin Meselesi,” *İstanbul Hukuk Fakültesi Mecmuası* 6, no. 2–3 (1940): 289–300.

adapt or risk irrelevancy: “Let the lawyers keep on discussing the limits of state action; in reality these limits have merged with the limits of the nation and encompass all social relations.”⁸⁷

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If Başgil was an apologist for the most radical strands of authoritarian-corporatist thinking within the RPP during the one-party period, he was also among the first to completely revise his worldview after the war. As Turkey joined the United Nations and the RPP renounced its authoritarianism in favor of a policy of careful liberalization and democratization, Başgil formulated the “liberal-conservative” approach for which he is mostly remembered, one which maintained a focus on the “moral” (*ahlakî*) and “spiritual” (*manevî*) basis of politics but veered sharply from his interwar writings in its conception of the state and its relation to law.⁸⁸ Against the “legalist and authoritarian”⁸⁹ ideology of the single-party regime, he now saw the state as a necessary but subordinate component in ensuring social cohesion; the more important factor was the totality of

87 Başgil, “Muasır Devlette Memur Meselesi,” 794.

88 Ali Fuad Başgil, “Hürriyete Dair I,” *Siyasi İlimler Mecmuası*, no. 181 (April 1946): 1–6; Ali Fuad Başgil, “Hürriyete Dair II,” *Siyasi İlimler Mecmuası*, no. 182 (May 1946): 49–52; Ali Fuad Başgil, “Demokrasi ve Hürriyet,” *Siyasi İlimler Mecmuası*, no. 184 (July 1946): 149–52.

moral, spiritual and customary norms embedded in society, only a small subsection of which could be codified and enforced by the state.⁹⁰

Considering Başgil's ability to reverse his views in light of the horrors of World War II and to adapt to Turkey's changing political climate after the RPP had lost its monopoly on state power, one might expect him to have had a significant impact on postwar jurisprudence. Although he continued to publish and teach from his position at Istanbul University until the 1960s, however, Başgil never founded a "school" of legal theory. While his interwar thinking is mostly forgotten, his postwar thinking has had more of an impact outside of academia, where it made him one of the "symbolic names" of Turkish liberal conservatism.⁹¹ This may in part be explained by the political affiliations with which Başgil, only partly through his own actions, became associated during the decade of Democrat Party (DP) rule. In 1947 Başgil co-founded the "Society for Free Thought" (*Hür Fikirler Cemiyeti*) and wrote editorials for the association's Journal of Free Thought (*Hür Fikirler Mecmuası*) and newspapers⁹² alongside his longer theoretical writings for academic journals. Although Başgil claimed never to have had direct dealings with the DP,⁹³ the Association of Free Thought eventually spread to other

89 Ali Fuad Başgil, "Devlet Nizamı ve Hukuk, Hukuk ve Hak ile Kanun Arasındaki Münasebete Dair Bir İzah Denemesi," *İstanbul Hukuk Fakültesi Mecmuası* 19, no. 3–4 (1954): 576–91.

90 Ali Fuad Başgil, "Devlet Nizamı ve Hukuk, Devletle Hukuk Arasındaki Münasebet Üzerine bir İzah Denemesi," *İstanbul Hukuk Fakültesi Mecmuası* 16, no. 1–2 (1950): 27–50.

91 Tuncay Önder, "Ali Fuad Başgil," in *Muhafazakârlık*, ed. Ahmet Çiğdem, vol. 5, Modern Türkiye'de Siyasi Düşünce (Istanbul: İletişim, 2003), 291–301.

92 Especially the daily newspaper *Vatan* from 1948 to 1949 and *Yeni Sabah* in the 1950s.

93 Ali Fuad Başgil, "Nemmamlık, Ahlaklıktır," in *İlmin Işığında Günün Meseleleri*, ed. Ali Hatiboğlu and İsmail Dayı (Istanbul: Yağmur Yayınları, 1960), 194–97.

major cities and became part of the infrastructure on which the DP organized its successful challenge to the RPP in the 1950 elections. His support for a more relaxed Anglo-Saxon secularism against the state-led laïcism of the RPP would have further distanced him from his statist peers.⁹⁴

But Başgil's imputed association with the DP is an insufficient explanation for his fall from grace among Turkish jurists. During the debates on the new University Law in the mid-1940s, both he and Sevig stood up for academic freedom in newspaper editorials. The DP supported the University's struggle for independence from what was then an RPP-dominated state and was consequently quite popular among academics until 1954. Moreover, in the latter half of the 1950s, when the DP government began restricting university autonomy, Başgil distanced himself from its increasing repressiveness and leader worship. Realizing that the DP's authoritarian drift was enabled by the Constitution's lack of checks and balances, he made recommendations for a new constitution that were strikingly similar to those his opponents would make after the 1960 coup, including an assembly with two chambers and a Constitutional Court.⁹⁵

94 Başgil's critique of Turkish laïcism appeared particularly in the journals *İslamin Nuru*, *Sebilürreşad* and *Büyük Doğu*, all of which were associated with conservative-Islamic currents. See Umut Azak, "Secularists as the Saviors of Islam: Rearticulation of Secularism and the Freedom of Conscience in Turkey (1950)," in *Secular State and Religious Society: Two Forces in Play in Turkey*, ed. Berna Turam (New York: Palgrave Macmillan, 2012), 68.

95 His recommendations were presented at a conference in 1956, but only published after the 1960 coup as "Vatandaş Hak ve Hürriyetlerinin Korunma Meselesi ve Anayasamız," in *İlmin Işığında Günün Meseleleri*, ed. Ali Hatiboğlu and İsmail Dayı (Istanbul: Yağmur Yayınları, 1960), 43–85.

A more satisfying explanation, I suggest, lies in the element of continuity between Başgil's interwar authoritarianism and his postwar critique of the hegemony of "expertise" on which the RPP's primary constituency of bureaucrats, military officers, academics, and jurists relied.⁹⁶ Although he never openly cited Fascist legal theorists, the interwar Başgil was similar to thinkers such as Carl Schmitt and Alfredo Rocco in his celebration of the spiritual authority of the National Leader over that of the bureaucratic "universal class." Başgil's interwar and postwar approaches thus had in common that they were grounded not in "materialist" expertise but in the "spirituality" (*maneviyat*) of the people. In Başgil's eyes, rejecting state involvement for the purpose of equality in the economic sphere,⁹⁷ as well as the technocracy that inevitably followed such policies,⁹⁸ was a logical consequence of the greater authority which the common man had acquired with the transition to democracy.

Although many academics and jurists were thankful for the DP's early support for university autonomy and judicial independence, then, Başgil's anti-bureaucratic tenor ultimately made him an unreliable outsider in their quest for an academic theory that would provide them with authority after the war. What they needed was a doctrine that was both sufficiently rooted in the era of Atatürk to support their historical role as the guardians of the Turkish state and sufficiently adaptable to maintain their authority in the

96 Boğaç Erozan also alludes to a "strange continuity between some of [Başgil's] pre- and post-1945 thoughts." Erozan, "Producing Obedience," 171–2.

97 Ali Fuad Başgil, "Demokrasi ve Müsavat Kaideleri," *Siyasi İlimler Mecmuası*, no. 183 (June 1946): 93–97. ; "Demokrasi ve Müsavat," *Yeni İstanbul*, September 10 and 13, 1963.

98 Ali Fuad Başgil, "Demokrasiye Dair," *Siyasi İlimler Mecmuası*, no. 179 (February 1946): 579–85.

new democratic era. The jurist who provided them with such an approach was Sıddık Sami Onar.

Establishing jurisdiction 2: The procedural solution

Sıddık Sami Onar belonged to the first generation of jurists who entered the profession soon after the proclamation of the Republic. Born to an upper-middle-class family in Istanbul, Onar studied law in Paris under the civil law scholar Henri Capitant between 1924 and 1926 before returning to Turkey, where he occupied positions in the judiciary, the universities, and the Istanbul Bar Association.⁹⁹ During the 1920s he wrote mainly on civil law, focusing in particular on the concept of liability, and later international law.¹⁰⁰ In 1926 he began teaching civil law at what the School of Public Service (*Mülkiye Mektebi*), and continued on and off through its re-establishment as the Republic's official pathway to public service directly subordinated to the Interior Ministry.¹⁰¹

Onar soon signaled that his ambitions went beyond the ordinary purview of legal academics. In a period when the RPP was drifting towards a stricter subordination of Turkey's intellectual life to party discipline, I have shown, jurists such as Başgil and

99 "Ord. Prof. Dr. Sıddık Sami Onar'ın Hayat Hikayesi," *İstanbul Hukuk Fakültesi Mecmuası* 39, no. 1–4 (1974): x – xi.

100 For Onar's publications from 1924 onwards until his move to the *Mülkiye Mektebi*, see Ahmet Cihan, "Cumhuriyet Dönemi Türk İdare Hukukçuları," *İdare Hukuku ve İlimleri Dergisi* 13, no. 1 (2000): 110–112.

101 Özer Ozankaya, "Siyasal Bilgiler Fakültesi Tarihinden Bir Belge," *Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi* XLIV, no. 1–2 (1989): 15–16.

Sevig responded by discarding the humanist and individualist principles of their French teachers in favor of a complete embrace of revolutionary statism. Onar's solution was no less effective in defending statism, but in contrast to Bařgil's disdainful rejection of lawyers who "keep on discussing the limits of state action," Onar endeavored to construct a doctrine that would enable him to do precisely that without thereby challenging state leaders' ever-widening powers.

The School of Public Service was an ideal laboratory for such thinking. It provided a milieu that was both intellectually eclectic and closely integrated into state circles, where the ideologues of the RPP were observing the ravages of the Depression and its political fallout in Europe with trepidation. The School's own journal began appearing in 1931 and published essays of Turkish jurists and political scientists alongside translations of the latest texts by thinkers as disparate as Gaston Jéze,¹⁰² Maria Montessori,¹⁰³ Hermann Goering¹⁰⁴ and Benito Mussolini.¹⁰⁵ This diversity must have appeared both promising and frustrating for Onar. In his first articles for the journal Onar lamented the state of Turkish scholarship. His critique was simultaneously an indictment of the preceding five decades of Westernizing reforms and a historical-philosophical argument for the authority which he believed scholarship and science must have in political life. The Tanzimat had failed to salvage the Ottoman state, Onar argued, not

102 Gaston Jéze, "Maaş," *Mülkiye Mektebi Mecmuası*, no. 2 (1931): 35–36.

103 Maria Montessori, "Sulh ve Terbiye," *Mülkiye Mecmuası*, no. 39 (1934): 63–66.

104 Hermann Goering, "Reichstag İhtihabatı ve Fransız-Alman Münasebatı," trans. Halûk Sarım, *Mülkiye Mecmuası*, no. 19–20 (1932): 57–60.

105 Benito Mussolini, "Faşizm," trans. H. Naci, *Mülkiye Mecmuası*, no. 16 (1932): 37–40.

because of the European theories of the reformers, but because they failed to adapt those theories to the lived experience of the Empire's citizens.¹⁰⁶ Conversely, Turkish intellectuals had neglected to connect their thinking to the concrete requirements of state administration. The result was a capricious experimentation with institutional forms and reformist projects with no staying power. Perhaps inspired by Capitulant's hopes for a unity of jurisprudence and legislation in French society, Onar argued that, in the future, "there may not even be a distinction between scholarship and practice."¹⁰⁷

Onar agreed that the danger of reactionary subversion required a state that was strong, expansive and free to respond quickly to threats. What for Sevig and Başgil implied freeing the state from legal limitations, however, entailed the opposite for Onar. For him, the revolution's most noble achievement was that it had replaced the superstition and despotism of the Ottomans with rationality. Previously governing was seen as an issue of cunning and strategy (*zeka ve hud'a*) in a world governed by coincidences and supernatural causes. This left rulers free to pursue their own personal gain, and made it impossible to develop lasting institutions—all of them collapsed "like a house of playing-cards," resulting in, "in the expression of the late Ziya Gökalp, confusion."¹⁰⁸ In contrast, Onar argued, today we know that society is governed by social and economic laws, and that only those leaders who obey the theories and findings of scholars (*âlimler*) succeed.

Thus "the true ruler [*hakikî hâkimi*] of the state is neither emperors, kings, assemblies or

106 Sıddık Sami Onar, "Tetkik Mevzulari," *Mülkiye Mektebi Mecmuası*, no. 2 (May 1931): 1–3.

107 Sıddık Sami Onar, "İlim ve Tatbikat," *Mülkiye Mektebi Mecmuası*, no. 5 (August 1931): 5.

108 Sıddık Sami Onar, "Bizde Cemiyet Fikri ve Hayati Niçin İnkişaf Edemiyor?," *Mülkiye Mecmuası*, no. 22 (1933): 5.

dictators. Above all of these we see the sovereignty of scholarship [*ilmin hakimiyeti*]. Those who deny this invisible ruler [*gayrî mer'î hâkimi*] are soon confronted by reality.”¹⁰⁹

Onar’s portrayal of modern statecraft as intrinsically opposed to arbitrary political leadership may seem dangerously close to identifying the despotism of the Sultans with the authoritarianism of the Kemalist regime. Compared to Başgil, Onar’s insistence that political sovereigns heed the “invisible ruler” of scholarship does indeed resemble a classic defense of the “rule of law.” As I have argued, however, the doctrinal work of jurists such as Onar should not be seen as just theoretical statements, but also as knowledge claims on behalf of the legal profession. Onar’s primary concern was not establishing the “rule of law” but the “rule of lawyers.” He attempted this in his early writings through a skillful elision of concepts that resonated with the ideological imaginary of the Kemalist elite. Thus *ilim* could mean both “science” and “scholarship,” enabling Onar to identify his own academic jurisprudence with the objectivity of statistics and the natural sciences, both of which had long been held in high regard in the Comtean positivism of pre-Kemalist ideologues such as Ziya Gökalp; while *hâkim* could mean either “ruler” or “judge,” allowing the “sovereignty” (*hakimiyet*) of science to merge with the “rule” of law. Similarly, Onar avoided confronting the authoritarianism of the regime by downplaying the violence of the War of Independence and the ensuing Revolution in favor of the timeless and objective principles which he argued that they had vindicated.

109 Onar, “İlim ve Tatbikat,” 5.

Instead of challenging the regime, therefore, Onar celebrated it as the emancipator of “scientific” legal rationality, at the same time freeing legal scholarship from the assumption that it must act as a subordinate servant of the state.

When the RPP dissolved the *Darülfünûn* and established Istanbul University in 1933, Muslihiddin Âdil Taylan was expelled and Onar agreed to be appointed professor of administrative law in his place. Administrative jurisprudence turned out to be far more suited to Onar’s ambitions than civil and international law. It enabled him to channel his efforts away from lawyering and teaching in areas that had little direct bearing on his attempts at establishing professional jurisdiction and to focus on a discipline that would provide him with the conceptual apparatus necessary to specify on what terms, exactly, legal scholarship was to preside over public administration in the new age of enlightened statism. Among his first concerns was to establish a bridge between the narrative he had constructed in the preceding years and the technical terminology of administrative jurisprudence. He did this by defining the “proper goal” which Turkish state servants were free to pursue now that they, according to his historical account of Turkish administrative law, were no longer subject to the whims of despotic rulers. Their proper goal, he argued, was none other than the central concept of the French *Ecole du service public*— “public interest.”¹¹⁰ The public interest, in turn, could be determined through observation and theory development, both of which were the task of jurisprudence.

110 Sıddık Sami Onar, “Türkiye’de İdarenin Kazai Mürakabesi,” *İstanbul Hukuk Fakültesi Mecmuası* 1, no. 1 (1935): 21.

Administrative law was thus a functional imperative of the technical and empirical nature of modern public administration.¹¹¹

Having established the importance of administrative jurisprudence in the organization of state power, Onar turned to the issues that occupied the agenda of the RPP. In 1933, the RPP announced a five-year industrialization plan which, while not as radical as some statist theoreticians would have wanted, still made dramatic inroads into the country's socio-economic structure.¹¹² Onar's understanding of statism was by no means moderate. In his view, modern statism implied that "society comes before the individual; the individual only exists within society. The individual does not have rights, only duties towards society."¹¹³ What for Başgil entailed setting legality aside, however, had the opposite implications for Onar. While the administrative judiciary's operations were previously built on individualist foundations, he argued, they were now built on the basis of Duguit's and Hauriou's notion of "public interest" —certainly a drastically wider notion of public interest than previously recognized, but still one that served as the delimitation criterion for state activity, and thus as the jurisdictional basis of administrative law.¹¹⁴ Given such a wider understanding of public interest, in fact, expansive statism required an equally expansive conception of the jurisdiction of

111 Ibid., 23.

112 Nadir Özbek, "Kemalist Rejim ve Popülizmin Sınırları: Büyük Buhran ve Buğday Alım Politikaları 1932-1937" [The Kemalist Regime and the Limits of Populism: The Great Depression and the Wheat Procurement Policies], *Toplum ve Bilim*, no. 96 (2003): 219–40.

113 Sıddık Sami Onar, *Devletçilik ve İdare Hukuku*, Hukuk İlmini Yayma Kurumu konferanslar serisi 54 (Ankara: Hukuk İlmini Yayma Kurumu, 1937), 8.

114 Ibid., 21.

administrative law.¹¹⁵ The proof, Onar argued, was that even in countries that had in fact rejected the principle of legality, such as of Fascist Italy and National-socialist Germany, the administrative courts continued to operate as an “inseparable element of the system of statism.”¹¹⁶ Therefore, “the transformation of the individual’s natural rights into the concept of social function does not place the state’s activities outside of the scope of legal rules.”¹¹⁷

Onar thus located the conceptual resources for re-affirming the authority of jurisprudence squarely within the received doctrine of French administrative law, without recourse to ideological principles such as leadership and nationalism. It is clear, however, that Onar’s concern for theoretical integrity remained subordinated to his goal of establishing the legal professions’ share in state authority. This becomes increasingly obvious in his writings during the end of the 1930s and the beginning of World War II, when the RPP’s determination to consolidate its hold on the country began blurring the already fragile distinction between ordinary and emergency modes of governance. Onar’s discourse during this period oscillated from sophisticated theorizing to theoretical sophistry—from technical discussion of the doctrinal distinctions and institutional

115 Sıddık Sami Onar, “İdari Kazaya Lüzum Var Mı?,” *İzmir Barosu Dergisi* 3, no. 1–9 (1937): 1–18.

116 Recent scholarship has to some extent corroborated Onar’s assertion that administrative law continued to operate in Nazi Germany. Stolleis, for example, shows that the administrative courts enjoyed a large degree of institutional continuity until the end of the war, in part because they were willing to discard their liberal provenance in order to retain formal jurisdiction. Michael Stolleis, *The Law under the Swastika: Studies on Legal History in Nazi Germany*, trans. Thomas Dunlap (Chicago: University of Chicago Press, 1998), 112–44.

117 Onar, *Devletçilik ve İdare Hukuku*, 22.

mechanisms for solving jurisdictional conflicts between the judicial and executive organs of the state, to purely rhetorical moves meant simply to affirm the authority of “law” where there were in fact no legal limitations on government action. Accomplishing this without giving up a semblance of doctrinal coherence required translating what was essentially a political and professional issue—the issue of power relations among the professions that constituted the state—into a legal idiom. It meant, in other words, converting the problem of professional jurisdiction into a problem of legal jurisdiction.

On the theoretical end of the spectrum, Onar built on the distinction in French administrative doctrine between “acts of administration” and “acts of government.” Although the administration must be granted some discretion (*takdir selahiyeti*) in determining how and when to carry out its duties, it was still subject to the administrative judiciary in all acts and decisions “that do not directly concern sovereignty [*hakimiyet*], but are taken with a view to public service [*amme hizmeti*].”¹¹⁸ These, then, are “acts of administration” (*idarî tasarruflar*). “Acts of government” (*hükümet tasarrufları*), on the other hand, are issues of such sensitivity and exigency that judicial intervention might interfere with the administration’s ability to safeguard the existence of the nation. These are therefore outside of the jurisdiction of both the administrative and ordinary courts, and can not be supervised except through a widely defined form of political accountability (*siyasi mesuliyet*), i.e., parliamentary oversight.¹¹⁹

118 Sıddık Sami Onar, “İdare Hukukunun Tatbik Sahası ve Salahiyet İhtilafları,” *Aylık Siyasal Bilgiler Mecmuası*, no. 46 (1935): 26.

119 Sıddık Sami Onar, “İdarenin Takdir Hakkı,” *Mülkiye İçtimai İlimler Mecmuası*, no. 37 (1934): 36.

Had Onar left his discussion there, he would not only have granted the political leadership wide discretionary powers, but would also have rhetorically excluded himself and his jurist colleagues from the process through which the boundary between legality and sovereignty was determined during the actual exercise of state power. This would certainly have been acceptable from the viewpoint of the RPP and jurists such as Fuad Başgil, whose goal was to legitimate whatever policies the RPP leadership pursued, but it would also have run the risk of making the legal profession's share in public authority marginal and disposable. Yet specifying exactly what circumstances could justify sovereign "acts of government" would have presented its own challenges. On the one hand, as I have argued, explicitly defining the executive's powers ran the risk of falling afoul with RPP leaders such as Recep Peker and İsmet İnönü, both of whom saw the task of leading the Turkish state as analogous to leading an army into war. For them, establishing fixed criteria for identifying an "act of government," however wide, might mean placing unacceptable limits on their power to safeguard the state against foreign aggression and domestic subversion under unforeseen circumstances. In the worst-case scenario, this could lead the RPP to give up its rule-of-law pretensions and sideline the legal profession.

Solving this dilemma required descending from the realm of pure distinctions to the situated and temporary compromises of day-to-day power struggles. Crucially, this had to be accomplished without renouncing the preeminent authority of administrative jurisprudence in setting the perimeters within which such jurisdictional struggles would

take place. Onar conceded Adh mar Esmein’s point that the precise scope of “acts of government” must be left open to changing political circumstances.¹²⁰ Rather than leaving the determination of such acts entirely to chance, however, he recommended that judicial mechanisms be established to determine the distinction between executive discretion and legal limitations using “empirical” (*empirique*) criteria, that is, through “discussion” (*m nakaŒa*) on a case-by-case basis.¹²¹ He therefore suggested establishing a venue such as the French *Tribunal des Conflits*, a court attached to the *Conseil d’Etat* and frequently subject to the doctrinal interpretations of French administrative jurists.¹²² Far from widening the government’s scope of discretion, he argued, such a venue would narrow it by making discretion dependent on a specialized mechanism within the purview of administrative jurisprudence.¹²³

Preparations for a Turkish *Tribunal des Conflits* began during World War II, but was not completed until the end of the war. In the mean time, the Turkish state provided ample “acts of government” to challenge Onar’s pragmatic conception of jurisdiction. The most egregious example occurred not during the war but four years earlier, during an internal conflict in the district of Dersim in Central-Eastern Anatolia. Dersim was one of the last mainly Kurdish areas to be brought under the control of the Republican state. Most of the villages in the district were governed according to customary law and led by tribal chiefs who walked a fine line between accommodating and resisting representatives

120 Ibid., 36–7.

121 Ibid., 36.

122 Ibid.

123 Ibid., 37.

of the central government. On December 25, 1935, the Assembly passed law no. 2884, changing the etymologically Persian name of Dersim to Tunceli and placing it under military administration.¹²⁴ Following a small skirmish in March 1936, the government launched a military campaign to bring the area under central control. Turkish forces bombed the district, shot and hanged the inhabitants of villages that surrendered and in many instances bayoneted and burned women and children alive.¹²⁵ Estimates range between 8.000¹²⁶ to 40.000¹²⁷ civilians killed and another 12.000 forcibly relocated.

The Tunceli law and the intervention it supported were far from constitutional. Existing martial law legislation was at that point grounded in the 1924 Constitution's art. 86, which gave the Grand National Assembly the power to approve or reject a declaration of Martial Law (*idareyi örfiye*) in cases of internal rebellion, and limited its duration to one month at a time, subject to extension by the Assembly. The Tunceli law was no such declaration, but it nevertheless established a semi-permanent military administration in the district and gave the military governor extensive executive and judicial powers over not just Tunceli, but also adjacent districts. Thus the law sidestepped and violated

124 *Tunceli Vilâyetinin İdaresi hakkında kanun*, Law no. 2884, in *Resmi Gazete* no. 3195, January 2, 1936.

125 Martin van Bruinessen, "Genocide in Kurdistan? The Suppression of the Dersim Rebellion in Turkey (1937-38) and the Chemical War against the Iraqi Kurds (1988)," in *Conceptual and Historical Dimensions of Genocide*, ed. George J. Andreopoulos (Philadelphia, PA: University of Pennsylvania Press, 1994), 141–70.

126 *Ibid.*

127 David McDowall, *A Modern History of the Kurds*, 3rd ed. (London: I. B. Tauris, 2004), 209.

constitutional limitations on martial law and allowed the army to usurp judicial authority.¹²⁸

Many law professors went out of their way to praise the resolute way in which state leaders had dealt with the “uprising.” As İsmail Beşikçi argues, the political atmosphere during the years after the military operation was not conducive to moderation; when Atatürk died and İsmet İnönü was appointed “National Leader” in 1938 the tone of public addresses, both political and academic, approximated that of Nazi Germany in its worship of the Leader and the Turkish race.¹²⁹ Thus Cemil Bilsel, the appointed Rector of Istanbul University (1933-1943) and founding professor of the Ankara University Law Faculty, described the events as a victory of the Eternal Leader Mustafa Kemal Atatürk, the National Leader İsmet İnönü, and the military governor of Dersim in replacing “brigandry” (*eşkiyalık*) with safety and infrastructure. Başgil similarly used the opportunity of a public conference in Diyarbakır to praise the “pure-hearted and dutiful” state servants of the Turkish nation.¹³⁰

Onar on the other hand did not shy away from discussing the Dersim operation’s legal aspects. In contrast to the theatrical gestures of professors such as Başgil and Bilsel, Onar’s concern was as always to specify his conception of administrative jurisprudence in such a way that it could absorb the shock of brazen breaches of legality in order to

128 Mehmet Semih Gemalmaz, “Historical Roots of Martial Law Within the Turkish Legal System: Perspectives and Texts,” *Turkish Yearbook of Human Rights* 13 (1991): 102–106.

129 İsmail Beşikçi, *Tunceli Kanunu (1935) ve Dersim Jenosidi* (Istanbul: Belge Yayınları, 1990), 112.

130 *Ibid.*, 107.

produce a doctrinal basis for what we might call a “prosaic politics of emergency.”¹³¹ His contribution to the doctrine of exceptional powers came after the outbreak of World War II, when the government paradoxically turned from the outright violence of the Dersim intervention to coercion of a more economic and quasi-judicial kind. In January 1940, for example, the Grand National Assembly passed the “National Defense Law,” empowering the government to force peasants to work in mines when national security required it.¹³² The Assembly then passed a new Martial Law Act,¹³³ and set the new law in motion by declaring martial law in several districts in November the same year.¹³⁴ Although martial law was justified as a preemptive means of maintaining the rule of law, its usefulness as a means of censoring and court-martialing opponents of the regime led the government to renew it until December 1947, long after the war had ended.¹³⁵ Other instances of wartime intervention included the 1942 “Wealth Tax” which, although presented as a fiscal matter to meet the ballooning costs of maintaining a combat-ready army, was implemented in such a discriminatory way that many members of the non-Muslim bourgeoisie were forced to sell their homes and businesses at very low rates.¹³⁶ As in

131 Leonard C. Feldman, “The Banality of Emergency: On the Time and Space of ‘Political Necessity,’” in *Sovereignty, Emergency, Legality*, ed. Austin Sarat (Cambridge and New York: Cambridge University Press, 2010), 138.

132 *Milli Korunma Kanunu*, Law no. 3780, in *Resmi Gazete* no. 4417, 26 January 1940.

133 *Örfi idare kanunu*, Law no. 3832, in *Resmi Gazete* no. 4518, May 25, 1940, replacing both the 1877 *İdarei Örfiye Kararnamesi* and the 1919 *İdarei Örfiye Kararnamesi*.

134 *Kararname* no. 14705, in *Resmi Gazete* no. 4668, November 23, 1940.

135 Zafer Üskül, *Siyaset ve Asker. Cumhuriyet Döneminde Sıkıyönetim Uygulamaları* (Istanbul: AFA Yayınları, 1989), 111–122.

136 *Varlık Vergisi hakkında kanun*, Law no. 4305, in *Resmi Gazete* no. 5255, November 12, 1942.

France, where according to Giorgio Agamben the “state of exception” that had come into effect with World War I was maintained and extended into the economic realm during the interwar years,¹³⁷ the confluence of domestic and international unrest permitted Turkish leaders to merge military and economic force under a single statist paradigm.

Onar’s take on this transgressive state activity was characteristically phlegmatic. Writing in the *Journal of the Istanbul University Law Faculty*, he admitted that recent state initiatives were stretching the notion of “public interest” to cover circumstances which “older administrative jurisprudence had never imagined.”¹³⁸ Nevertheless, he persisted in his efforts to normalize such actions by rendering them in a technical idiom that made no concessions to less academic audiences. During a public talk in Erzurum in 1940 he reiterated his argument that the boundary between day-to-day acts of administration and sovereign acts of government should neither be left to circumstances nor pre-determined, but should be referred to a specialized court to be determined on a situation-specific basis. He pointed out that such a venue had existed during Ottoman times in the form of the “Council on the Conflict of Venue” (*ihtilaf-ı merci encümeni*), which had however been subject to the same *de facto* limitations as the entire administrative judiciary and had therefore been ineffective.¹³⁹

137 Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago: University of Chicago, 2005), 13.

138 Sıddık Sami Onar, “İdare Hukuku bakımından İktisadi Devlet Teşekkülleri,” *İstanbul Hukuk Fakültesi Mecmuası* 7, no. 4 (1941): 736.

139 Sıddık Sami Onar, “İdari ve Adli Makamlar Arasında Selahiyet İhtilafları,” in *Üniversite Haftası, Erzurum, 13-7-1940 - 19-7-1940* (Istanbul: İstanbul Üniversitesi Yayınları [Ahmed İhsan Matbaası], 1941), 253. I discuss the Turkish Court of Jurisdictional Conflict (*Uyuşmazlık Mahkemesi*) in detail in the Conclusion to this dissertation.

At a public presentation in Elaziğ in September 1942, Onar brought his pragmatic approach to bear on the “very delicate and important” issue of what he called “extraordinary situations” (*fevkalâde haller*).¹⁴⁰ “Extraordinary situation” had played a marginal role in Turkish legal terminology until then. The term was mentioned in passing in the Constitution’s art. 74, which stated that no citizen shall be forced to make any material sacrifice except in extraordinary situations (*fevkalâde ahvalde*), but appeared neither in the Constitution’s art. 86 on martial law nor in the 1940 Martial Law Act.¹⁴¹ Onar’s discussion can therefore be considered a foundational contribution to the Turkish doctrine on exceptional state powers.

After a lengthy preliminary discussion of the legislative, executive, natural, and customary sources of law, Onar pointed out that situations occasionally arise that are so unexpected that no form of normativity can foresee them.¹⁴² Such situations, he argued, require that the government be given wide powers. He nevertheless rejected the notion

140 Sıddık Sami Onar, *Fevkalade Hallerin Hukuki Nizam Üzerindeki Tesirleri* (Istanbul: Kenan Basımevi, 1943), 380.

141 The first law with “extraordinary situation” in its title appears to be the “Law on The Unjustly Expropriated During Extraordinary Situations” (*Fevkalâde Hallerde Haksız Olarak Mal İktisabedenler Hakkında Kanun*, Law no. 4237, in *Resmi Gazete* no. 5122, June 3, 1942). The term does however appear in connection with “situations such as war, coups, and uprisings” as early as the 1930 “Regulation on Municipal Public Officials and their Servants” (*Belediye Memur ve Müstahdemleri Nizamnamesi*, Regulation no. 9948, in *Resmi Gazete* no. 1608, September 29, 1930), and is used intermittently throughout the 1930s in connection with employment conditions in various state agencies. It also gained political currency when it was used several times in a speech by President İsmet İnönü regarding the exceptional measures that were being taken to safeguard the country after the outbreak of war in Europe, including the “National Defense Law” (*Reisicumhur İsmet İnönü’nün T. B. M. Meclisinin altıncı intihap devresinin üçüncü içtima yılını açarken Umumî Heyette irad buyurdukları nutuk*, in *Resmi Gazete* no. 4948, November 3, 1941, 1861-4). It is possible that this speech gave Onar the impetus to discuss the concept.

142 Onar, *Fevkalade Hallerin Hukuki Nizam Üzerindeki Tesirleri*, 378.

that the state could be left to govern itself through “auto-limitation.” Auto-limitation, we have seen, was the remedy which Başgil had suggested in place of judicial oversight of legislation and state action in his 1939 article on the Constitution. Onar, noting that the idea of auto-limitation derived from the German jurist Jhering, argued that this would leave the determination of legality entirely to the “subjective actions” of state administrators, which could have “very dangerous consequences.”¹⁴³ Instead, martial law and similar situations should be seen as a particularly exceptional category of “acts of government” which, like “acts of administration,” were among “the state’s ordinarily available powers.” Although such acts were not subject to judicial oversight, they were entirely legal, and did not imply breaking the principle of legality.¹⁴⁴

Given the wide range of powers which the Government and Assembly had claimed for themselves, it is difficult to interpret Onar’s assertion as anything but a rhetorical move to cover a contradictory state of affairs. On the one hand, Onar insisted that the Turkish state did not supervise itself but had remained bound by law “even in the most dangerous moments of national defense.”¹⁴⁵ If on the other hand it was within the ordinary powers of the Assembly to abrogate any number of constitutional guarantees and rights without judicial supervision, then there were in fact no limitations on what it could do as long as it took the form of “law.” Thus Onar contended that the “National Defense Law” was legal not because it was passed according to Art. 86 of the Constitution but

143 Ibid., 383.

144 Ibid., 381.

145 Ibid., 384.

simply because it was passed by the Assembly. By this standard, even the Dersim intervention was legal. In a flourish of casuistry, Onar argued that the unique and local situation in Tunceli could be considered an extraordinary situation (*fevkalade hal sayılıbilir*) which made it possible for the “legal regime” of such situations to “partially” (*kısmen*) come into effect. This situation could thus be “compared to” the situations which according to art. 86 could justify martial law (*idarei örfiyeyi icap ettiren sebeplere benzetilebilir*), making the Tunceli law “a kind of martial law [*bir nevi örfi idare*] passed by the Grand National Assembly but separate from the Martial Law Act.”¹⁴⁶

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As İsmail Beşikçi argues, Onar and his fellow law professors clearly saw the extrajudicial and savagely violent Dersim operation as “very normal.”¹⁴⁷ But the complacency which in Beşikçi’s eyes makes these Turkish professors the Kemalist equivalent of Nazi intellectuals masks crucial differences in their approach to state violence. Unlike Bilsel and Başgil, Onar consistently strove to incorporate and rationalize the violence of the Turkish state into a legal idiom, using terminology and precedent firmly rooted in French administrative jurisprudence. If this occasionally strained his ability to maintain logical coherence, he met such challenges not with appeals to superior ideological principles but

146 Ibid., 385.

147 Beşikçi, *Tunceli Kanunu (1935) ve Dersim Jenosidi*, 119.

with technical innovation and analysis of the “empirical” conditions with which law had to come to terms.

This was little consolation for the thousands of Kurds killed in Dersim or the Greeks and Armenians whose homes and livelihoods were expropriated under the wartime “Wealth Tax.” But this only underlines my argument that Onar was more concerned with securing the authority of jurisprudence than he was with limiting state action. As such, his doctrine made an important difference to the development of Turkish legal culture after World War II. Like Başgil, Onar placed his expertise in the service of state authority, from state-led industrialization to internal warfare. Unlike Başgil the long-term effect of Onar’s doctrine was to reinforce the authority of jurisprudence as the “invisible ruler” of the state. The result, I contend, was that while Başgil only acquired a following among independent attorneys and liberal-conservative intellectuals after World War II, Onar’s thinking was seized upon as the cornerstone of the self-conception of new generations of jurists and public servants.

Conclusion: Consolidating a legacy

In 1942 Ali Fuad Başgil stepped down as dean of the Istanbul Law Faculty and Sıddık Sami Onar was appointed in his place. As Onar increasingly focused on administrative duties and on writing voluminous textbooks on legal procedure, his doctrinal mantle was assumed by his talented protégé Ragıp Sarıca, who carried on Onar’s investigations into

the issue of “exceptional” state powers. Sarıca, who had spent the first few months of the war in Paris, built his interpretation of the 1940 Martial Law Act mainly on his teacher’s writings, which he elaborated with the help of contemporary French critics of legal limitations on state power, from the ‘Neo-Fascist’¹⁴⁸ Roger Bonnard to the previously liberal Joseph Barthélemy, who became Minister of Justice for the Vichy regime a few months after the German invasion.¹⁴⁹

Like Onar, Sarıca emphasized that martial law is an “act of government,” and therefore “a legal event, a legal situation. That is to say, a situation resulting from a number of statutes which the laws and regulations apply to themselves.”¹⁵⁰ Comparing martial law legislation in France with that of Turkey, Sarıca agreed with Barthélemy that it was preferable to give the government the power to declare martial law without recourse to the legislature, and that the vague and open-ended list of empirical conditions that could justify martial law according to art. 86 of the Constitution was preferable to the specifics listed in the French legislation.¹⁵¹ When it came to the question of judicial oversight, Sarıca’s argumentation took a distinctly Onaresque turn: While he did not

148 Dyson, *The State Tradition in Western Europe*, 148.

149 Barthélemy became Minister of Justice in February 1941. For Barthélemy’s intellectual career, see Frédéric Saulnier, *Joseph-Barthélemy, 1874-1945 : la crise du constitutionnalisme libéral sous la IIIe République* (Paris: LGDJ, 2004). For Bonnard, see Michèle Cointet, “Les juristes sous l’Occupation: la Tentation du Pétainisme et le choix de la Résistance,” in *Les Facs sous Vichy*, ed. André Gueslin (Clermont-Ferrand: PEUMCUBP, 1994), 56–59.

150 Ragıp Sarıca, “Fransa’da ve Türkiye’de Örfi İdare Rejimi,” *İstanbul Barosu Mecmuası* 15, no. 2 (1941): 81.

151 Ragıp Sarıca, “Fransa’da ve Türkiye’de Örfi İdare Rejimi,” *İstanbul Barosu Mecmuası* 15, no. 3 (1941): 132.

believe the declaration of martial law should be subject to judicial oversight, he hastened to add that the very concept of “acts of government” is only meaningful in countries with highly developed administrative judiciaries. In countries with less developed administrative law, he argued, there is no need for such a concept. Since a more developed system of judicial oversight is automatically met by a more developed notion of “acts of government” which fall outside of the scope of judicial oversight, “the result is the same in both cases” (*her iki şıkta netice aynı olacaktır*).¹⁵²

Sarıca’s prodigious output during the following decade continued to bear the imprint of Onar’s concern with maintaining the authority of administrative jurisprudence regardless of political circumstances. For the duration of World War II, Sarıca made doctrinal contributions to issues such as acts of government, war powers and the administration’s financial liability, most often by comparing Turkish legislation to the situation in France and Germany.¹⁵³ After the war, he dropped the issue of extraordinary powers and returned to the finer jurisdictional distinctions which Onar had outlined in the

152 Ibid., 133.

153 Ragıp Sarıca, *Fransada Harp Hukuku*, Hukuk Fakültesi Mecmuasından Ayrı Bası (İstanbul: İstanbul Üniversitesi Hukuk Fakültesi, 1941); Ragıp Sarıca, “Türk Devlet Şurası İçtihatlarına Göre Hükümet Tasarrufları,” *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası* 8, no. 3–4 (1942): 457–72; Ragıp Sarıca, *Türkiyede icra uzvunun tanzim salâhiyeti : Nizamnameler, talimatnameler, türk parasının kıymetini Koruma Kararnameleri, millî korunma kanununa müstenit kararnameler* (İstanbul: Cumhuriyet Matbaası, 1943); Ragıp Sarıca, “Türk Devlet Şurası İçtihatlarına Göre Hükümet Tasarrufları,” *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası* 9, no. 1–3 (1943): 415–31; Ragıp Sarıca, “Almanyada İcra Organının Tanzim Salâhiyeti,” *İstanbul Hukuk Fakültesi Mecmuası* 9, no. 1–2 (1943): 170–248; Ragıp Sarıca, *Almanyada İcra Organının Tanzim Salâhiyeti* (İstanbul: İstanbul Üniversitesi Hukuk Fakültesi, 1944); Ragıp Sarıca, “Teşri Organının Faaliyetinden Dolayı Devletin Mali Mesuliyeti Meselesi,” *İstanbul Hukuk Fakültesi Mecmuası* 10, no. 1–2 (1944): 95–162.

late 1930s, in order to provide the Court of Jurisdictional Conflict (*Uyuşmazlık Mahkemesi*)¹⁵⁴ with doctrinal guidance once it was established in 1945. Thus he devoted two journal articles and one exhaustive 500-page monograph to analyzing the 1873 verdict of the French *Tribunal des Conflits* that had established the jurisdiction of administrative courts in suits for damages against officials,¹⁵⁵ and half of a 900-page volume on the jurisdiction and procedures of administrative courts to comparing the French and Turkish doctrine of jurisdictional conflict, reasoning that the distinction between acts of government and acts of administration must be decided “practically” and “empirically” by legal practitioners and theorists rather than by legislators.¹⁵⁶

If Sarıca’s works displayed an attention to detail that surpassed that of his teacher, it also consolidated Onar’s approach as the bedrock of Turkish administrative law. Law students continued to study Onar’s foundational work through the following decade, and used his massive 1406-page tome on the General Principles of Administrative Law¹⁵⁷—popularly referred to as *gayrimenkûl*, “immovable,”¹⁵⁸—as their guide through the

154 *Uyuşmazlık Mahkemesi Kurulması Hakkında Kanun*, Law no. 4788, in *Resmî Gazete* no. 6057, July 14, 1945.

155 Ragıp Sarıca, “Pelletier İçtihadına Karşı Serdedilen Tenkitlere Cevap,” *İstanbul Hukuk Fakültesi Mecmuası* 13, no. 2 (1947): 474–512; Ragıp Sarıca, “Fransada ajan ve memurlar aleyhinde açılan tazminat davalarında şikayeti mucip fiilin şahsi bir kusur mu yoksa bir hizmet kusuru mu teşkil ettiğini tayin işinin ihtilaf mahkemesine ait bulunduğu hususunda ihtilaf mahkemesinin Pelletier kararındanberi şaşmaz içtihadı ve buna karşı serdedilen bazı tenkitler,” *İstanbul Hukuk Fakültesi Mecmuası* 13, no. 1 (1947): 23–64; Ragıp Sarıca, *Pelletier İçtihadına Karşı Serdedilen Tenkitlere Cevap* (Istanbul: İstanbul Üniversitesi Hukuk Fakültesi, 1947).

156 Ragıp Sarıca, *İdarî Kaza. Cilt 1: İdari Davalar* (Istanbul: Kenan Matbaası, 1949), 21, 444–928.

157 Sıddık Sami Onar, *İdare Hukukunun Umumi Esasları* (Istanbul: Marifet Basımevi, 1952).

158 *Gayrimenkûl* is the older Turkish word for “real estate.” It is borrowed from Arabic *ghayr menqûl* and literally means “immovable,” much like the French “immobiliers” and

complex and often counterintuitive principles of administrative jurisprudence. Perhaps more importantly, even when he later came to disagree with his mentor on political issues, Sarıca took care to acknowledge that his minute investigations of law took place in the margins of a framework constructed by Onar and thus ensured that Onar's more abstract and principled work remained the axiomatic statement on what administrative jurisprudence should be in the Turkish context. From Sarıca onwards, all Turkish administrative jurisprudence was, in a sense, a series of footnotes to Onar.¹⁵⁹

But Onar's doctrine was *gayrimenkül* in more senses than one. Besides the sheer volume of publications which he and his students produced, Onar's jurisprudence contained a seemingly immutable core which the work of jurists such as Sevig and Başıgil lacked. In this chapter I have discussed this core in terms of "jurisdiction." Jurisdiction is an admittedly ambiguous concept. In Andrew Abbott's terms, jurisdiction refers to the exclusive authority which members of a profession attempt to acquire over certain activities. Their endeavor typically takes the form of claims that their profession alone has the expertise needed to identify and solve certain issues, claims which are put forth in the legal, cultural and practical spheres.¹⁶⁰ For Abbott, then, "jurisdiction" encompasses but also goes beyond the confines of law narrowly defined.

"immeuble." Onar's textbook is referred to as *gayrimenkül* by his students in "Üniversite: Sokrat Yaşıyor," *Akis*, April 26, 1958, 12.

159 E.g., İsmet Giritli, "Örfi İdare İlanı Kararı Kazai Mürakabeye Tabii Midir?," *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası*, no. 1-4 (1956): 112-23; İsmet Giritli, *Türkiyede ve yabancı memleketlerde hükümet tasarrufları* (Istanbul: Sulhi Garan matbaası, 1958); Lütfi Duran, "Uyuşmazlık Mahkemesi İçtiharlarına Göre Selbi Vazife İhtilafı," *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası* 16, no. 3-4 (1950): 688-717.

160 Abbott, *The System of Professions*.

The authoritarian context in which Turkish jurists of the 1930s worked foreclosed jurisdictional claims in the legal and cultural spheres. What remained was the quiet and circumscribed space where they had the relative freedom to experiment with theories of state legality as long as they did not question the authority of the RPP's leadership and guiding principles. As I have argued in this chapter, Turkish jurists' approach to this problem spanned from the overtly ideological to the forbiddingly technical, from the political gestures of Başgil to the dry and abstruse discourse of Onar and his followers. The consequences of these differences became apparent soon after the war ended.

Başgil's views on state power and legality underwent a fundamental change after World War II, winning him admirers among intellectuals who were tired of decades of authoritarian statism. If Başgil in 1950 appeared commendably repentant, however, his change of mind was not thanks to the reflexivity of this interwar worldview. Borrowing a distinction from Gilles Deleuze, we might call the interwar Başgil a "representative"¹⁶¹ intellectual in that he was less concerned with reaching a pragmatic accommodation with the RPP leadership than he was with depicting the legal implications of the party's ideology. Consequently, Başgil's theory of state failed to account for himself. In his view, legal authority resided in the hearts and minds of people; the only task left for professors such as himself was to teach new generations of administrators to obey the state. Once Başgil followed the state in officially abandoning authoritarianism, therefore, he also

161 Gilles Deleuze and Michel Foucault, "Intellectuals and Power," in *Language, Counter-Memory, Practice: Selected Essays and Interviews*, ed. D. F. Bouchard (Ithaca: Cornell University Press, 1977), 206.

gave up the privilege that had accompanied membership in the “universal class” of loyal state theorists. It was thus in a sense the simplicity of Başgil’s interwar thinking that forced him to make a clean break with his intellectual past once the horrors of totalitarianism had become clear and to develop what did eventually become a sophisticated liberal-conservative approach.

Onar’s administrative jurisprudence, in contrast, enabled him to moderate his views on authoritarianism without thereby forgoing the jurisdictional claims he had set forth on behalf of academic jurisprudence in the interwar period. The reason, I suggest, was that Onar was less engaged in “representing” the RPP’s ideology than he was in reflexively arbitrating between its internal contradictions. I have argued that he was able to do this largely because his field of choice was administrative law, a discipline self-consciously concerned with issues of jurisdiction. The framework of conceptual distinctions and pragmatic institutional technologies which Onar suggested for dealing with jurisdictional conflicts within the state were also jurisdictional “knowledge claims” on behalf of his profession, claims which construed political conflicts as legal issues and offered legal solutions for solving them. Because this framework presented itself as apolitical, procedural and technical, there was no need to change it once the war ended. The interwar Başgil had vested interests in the substantial political issues of the RPP; the interwar Onar, in contrast, was invested only in the procedures and technologies with which political issues were solved. While Başgil was forced to reinvent his professional

role after the war, therefore, Onar and his intellectual followers entered post-authoritarian Turkey pursuing the same activities as they had before.

There are parallels between Onar's legacy in Turkey and the legacy of authoritarian law in countries that were more directly involved in the totalitarianism of the 1930s and 1940s. In Italy the Fascist philosopher of state Giovanni Gentile was assassinated before the war ended; in Germany Carl Schmitt was shunned by universities until his death. In both Germany and Italy, however, most legal professionals who had been active participants during the authoritarian period continued their careers after the war as if nothing had happened, not just because it would have been impossible to replace them all, but because the conceptual framework of their profession was a "praxis-oriented jurisprudence, embedded within the system of co-ordinates of politics and contemporary values."¹⁶² Their wartime task had not been to depict authoritarianism in the form of coherent legal theory like Gentile and Schmitt, but to perform it through technical procedures, theoretically informed action. Like Onar, their role was not to "represent" but to relay "from one theoretical point to another."¹⁶³

What remained "immovable" in Onar's jurisprudence, then, was an ethically agnostic conception of professional jurisdiction. After the war, jurists such as Onar were

162 Michael Stolleis, "Reluctance to Glance in the Mirror: The Changing Face of German Jurisprudence After 1933 and Post-1945," in *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions*, ed. Christian Joerges and Navraj Singh Ghaleigh (Oxford and Portland, OR: Hart Publishing, 2003), 15. For the legal legacy of Fascism in Italy, see Claudio Pavone, "La continuità dello Stato. Istituzioni e uomini," in *Italia 1945-48. Le origini della Repubblica*, ed. Claudio Pavone (Turin: Einaudi, 1974), 137–289.

163 Deleuze and Foucault, "Intellectuals and Power," 206.

not only practically indispensable because they alone had the legal know-how required to administer a modern state but also politically acceptable because they had always been “apolitical.” Consequently Onar not only founded a school of jurisprudence, he also rose in the ranks of the university. He played an important role in the drafting of the 1946 Universities Law, which gave Turkish universities greater independence from government control. After the law passed, Onar defeated Başgil in Istanbul University’s first elections to the rectorship, receiving 70 of the faculties’ votes against Başgil’s 5, despite the efforts of a small number of members of the Student Association on Başgil’s behalf.¹⁶⁴ Onar remained rector until 1949, when he stepped down in order to establish and serve as the the first director of the Istanbul University Institute for Administrative Law and Sciences.

In the next chapter I examine how Onar’s legacy was translated into political power during the 1960 coup d’état. Onar was elected for a second term as rector in 1959, when the relationship between the Democrat Party government and the universities had deteriorated. By then criticism of the government had grown among academics, army officers, and the members of the RPP to the point where they formed a self-conscious oppositional alliance. As I argue in the following chapter, Onar and his conception of jurisprudence were important components of the public narrative with which this alliance presented itself as the guardian of the “public interest” against the self-serving populism of the Democrat Party from 1958 until the passing of the 1961 Constitution.

¹⁶⁴ Emre Dölen, *Özerk Üniversite Dönemi (1946-1981)* (Istanbul: İstanbul Bilgi Üniversitesi Yayınları, 2010), 71–74.

Chapter 2

A Revolution of Lawyers

“We did the job. What does the law say?”¹

On October 20, 1960, *The New York Times* ran a strange profile. Under the title “Judge for a Regime,” the newspaper devoted two columns to a description of Salim Başol, the fifty-five-year-old president of the First Division of the Court of Cassation in Ankara. Başol had recently agreed to head a special tribunal that was established after the Turkish Armed Forces overthrew the government of the Democrat Party on May 27, 1960, and arrested everyone associated with it. The scope of the tribunal was unprecedented: Turkish courts had tried officials before, but this was the first time an entire elected cabinet and its officials, over five hundred in all, were on trial for political crimes.

In order to house all the suspects the trial was held on Yassıada, an island in the Sea of Marmara reachable by a special ferry that was set up to transport court personnel, attorneys, and the press. The unreliable ferry was a frequent source of complaints from lawyers who failed to make it to court on time, but these complaints were soon overshadowed by larger concerns that the trial itself violated basic legal principles. In

1 General Cemal Gürsel’s words to members of the Ankara Bar Association shortly after the military coup on May 27, 1960, as reported in Yekta Güngör Özden, “27 Mayıs 1960 Devrimi ve Hukuk,” *Ankara Barosu Dergisi*, no. 2 (1960): 20.

addition to the degrading treatment of the main defendants in court, lawyers were given little or no time alone with their clients and were in some cases harassed and even arrested by the martial law authorities.² Crucially, the main charges hinged on retroactive amendments to Penal Code,³ and many argued that the court itself was illegitimate, having been established *ad hoc* after a military coup.

Yet *The New York Times* reporter was not at all interested in the legitimacy of the trial.⁴ He focused instead on Bařol's personal qualities, describing the judge as a devout Muslim who abstained from alcohol and tobacco yet kept his religion to the private sphere. According to his friends he was as a modest, warm, and kind man with a spectator's interest in sports, theater and music. As soon as he entered the courtroom, however, he became a strict and energetic disciplinarian, unwavering in his commitment to justice. He took his professional role so seriously, in fact, that he would even forbid his staff to drink tea and coffee during working hours, "thereby defying a beloved Turkish tradition."⁵

The New York Times was not alone in its fascination with Bařol's personality. Turkish newspapers and weeklies obsessed over him and the other judges and prosecutors of the trial, devoting page after page to describing their professional accomplishments, their family lives and their hobbies. They were equally busy denigrating the fallen regime members and making fun of the pathetic figures they cut during the abusive court

2 E.g., *Milliyet*, December 25, 1960; *Akis*, December 31, 1960, 21-22.

3 Art. 3 of Law no. 15, in *Resmi Gazete* 10548, July 11, 1960, 1687.

4 The article is unsigned, but it was probably either Jay Franklin Walz or Dana Adams Schmidt.

5 "Judge for a regime—Salim Basol," *The New York Times*, October 20, 1960, 12.

proceedings. Meanwhile, well-known jurists spilt gallons of ink in support of the trial as well as for the coup itself. The *Times*' correspondent might be forgiven if his local informant ("one Istanbul lawyer") gave him the impression that the military coup was no coup at all, but a popular revolution on behalf of Turkey's legal establishment to topple a gang of criminals who had sought to destroy the rule of law.

Public representations of the military coup and the ensuing trial changed noticeably once it was over and press censorship was eased.⁶ What seemed like a clear-cut case of justified civil disobedience in the first months after the coup became more fuzzy when the dust had settled and more critical observers were allowed to voice their concerns. By that time, however, heroes such as Başol had returned to, and often been promoted in, the now even more powerful state institutions from which they had been called and where they were impervious to the abuse hurled at them by the anti-coup press.⁷ Concerned with protecting their achievement, the pro-coup segment of Turkish society had constructed both an institutional bulwark and a powerful narrative with which anti-coup forces had to contend.

Scholarship on the coup and its aftermath has often focused on the institutional legacy that was set in place with the 1961 Constitution and how increasing polarization gradually eroded that legacy over the following twenty years.⁸ Many of these studies

6 *The New York Times* also became more critical of the trial once it became clear that four of the defendants would actually be sentenced to death. See e.g., "For Leniency in Turkey," *New York Times*, September 16, 1961, 18.

7 Başol was appointed to the new Constitutional Court in May 1962.

8 Feroz Ahmad, *The Making of Modern Turkey* (London and New York: Routledge, 1993); Erich Jan Zürcher, *Turkey: A Modern History* (London: I.B. Tauris, 1998); Ceren Belge, "Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey," *Law and Society Review* 40, no. 3 (2006): 653–92; Brian Mello,

explicitly or implicitly see the coup as a “critical juncture,” that is, a “period of significant change, which typically occurs in distinct ways in different countries ... and which is hypothesized to produce distinct legacies.”⁹ They thus view the coup as an intervention by officers who, because they acted outside of the chain of command, were relatively unconstrained by the existing legal and institutional framework of decision making. In this approach, the events of May 27th and the following days were characterized by heightened “contingency,”¹⁰ a fluid window of opportunity in which actions were “partly random.”¹¹ This contingency thus created a “substantially heightened probability that agents’ choices [would] affect the outcome of interest”¹² after the coup.

Constitutionally speaking this is true. The 1960 coup d’état constituted a “*de facto* regime of exception”—a regime in which, as opposed to *de jure* regimes of exception, even legal provisions for emergency government are set aside or suspended.¹³ The Army officers who conducted the coup thus appear to have been unimpeded by legal

“Communists and Compromisers: Explaining Divergences within Turkish Labor Activism, 1960-1980,” *European Journal of Turkish Studies*, no. 11 (2010), <http://ejts.revues.org/index4343.html>; Murat Akan, “The Infrastructural Politics of Laiklik in the Writing of the 1961 Turkish Constitution,” *Interventions* 13, no. 2 (2011): 190–211.

- 9 Ruth Berrins Collier and David Collier, *Shaping the Political Arena: Critical Junctures, The Labor Movement, and Regime Dynamics in Latin America* (Princeton: Princeton University Press, 1991), 29.
- 10 James Mahoney, “Path Dependence in Historical Sociology,” *Theory and Society* 29 (2000): 510.
- 11 Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton: Princeton University Press, 2004), 18; Paul Pierson, “Increasing Returns, Path Dependence, and the Study of Politics,” *American Political Science Review* 94, no. 2 (2000): 263.
- 12 Giovanni Capoccia and Daniel R. Kelemen, “The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism” *World Politics*, no. 59 (2007): 348.
- 13 Bülent Tanör, “States of Exception in Turkey 1960-1980,” in *States of Exception: Their Impact on Human Rights* (Geneva: International Commission of Jurists, 1983), 309–36.

considerations and free to wipe the slate clean and shape the Second Republic *de novo*. While the suspension of the constitution did constitute a dramatic break with the existing legal framework, however, it fails to explain why the officers acted as though they *were* constrained by the law, and why, as a result of their actions, much of the responsibility for justifying the coup and shaping the new regime was placed on the shoulders of the law professors they called together as soon as they had taken power. It also fails to explain why, despite the illegality of the coup, Turkish law professors spared no effort to defend it in legal terms. In addition to writing newspaper columns in support of the coup, law professors such as Sıddık Sami Onar, his protégé Ragıp Sarıca, and other high-profile professors of constitutional, penal, and administrative law assisted the military junta in amending the penal code, writing an interim constitution, preparing and supporting the trial of the deposed government, and leading the drafting process of a new Constitution.

Why would leading law professors embrace a military junta that had suspended the Constitution and arrested an elected cabinet and president at gunpoint? Turkish scholars in particular have long debated whether the professors' cooperation with the Army was a shameful abrogation of scholarly principles or a necessary undertaking in a time when democracy and the law itself was under attack by an increasingly despotic government. Supportive accounts have argued that the officers sought the assistance of lawyers because of their "democratic goals"¹⁴ and intention to return power to elected civilians as soon as possible, and that the law professors responded to the call because they shared the officers' ideals. Scholars sympathetic to the coup thus portrayed it as the

14 Ibid., 315.

culmination of a struggle for the rule of law that began in the nineteenth century and ended with the toppling of the corrupt Democrat Party government.¹⁵

While the “critical juncture” approach tends to overstate the contingency of the coup, these normatively driven explanations tend to exaggerate the selfless intentions of the officers and their jurist collaborators. First-hand accounts make it clear that the officers who conducted the coup had few concrete plans for what would come after.¹⁶ Their ideas for the new regime varied from multiparty pluralism to Nasser-style dictatorship. Nor did the law professors who answered the officers’ call for assistance ensure the “victory of modern *Rechtsstaatlichkeit*”¹⁷ without serious qualifications. The

15 Reşat Kaynar, *Türkiyede hukuk devleti kurma yolundaki hareketler* (Istanbul: Tan Matbaası, 1960); Bahri Savcı, “Yeni Bir Anayasa Rejimine Doğru Gelişmeler (I),” *Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi* 16, no. 1 (1961): 62–101; Bahri Savcı, “Yeni Bir Anayasa Rejimine Doğru Gelişmeler (II),” *Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi* 16, no. 4 (1961): 93–145; Hasan Sungur, *Anayasayı İhlal Suçları ve T.C.K. 146ncı Maddesi Hükümleri: Sakıt İktidarın Sorumluluğu* (Istanbul: İstanbul Matbaası, 1961); Mümtaz Soysal, *100 Soruda Anayasanın Anlamı* (Istanbul: Gerçek Yayınevi, 1969); Suna Kili, *Turkish Constitutional Developments and Assembly Debates on the Constitutions of 1924 and 1961* (Istanbul: Robert College Research Center, 1971), 64–149; Ernst E. Hirsch, *Die Verfassung der Türkischen Republik*, *Die Staatsverfassungen der Welt* 7 (Frankfurt am Main and Berlin: Alfred Metzner Verlag, 1966), 31–192.

16 Ali Fuad Başgil, *La Revolution Militaire de 1960 en Turquie (Ses Origines)* (Geneva: Perret-Gentil, 1960); Ali Fuad Başgil, *Ord. Prof. Dr. Ali Fuad Başgil’in Hatıraları* (Istanbul: Boğaziçi Yayınları, 1990); Haydar Vural, *Hürriyet Savaşımız* (Istanbul: Mete Matbaası, 1960); Can Isen, *Geliyorum Diyen İhtilâl : 22 Şubat - 21 Mayıs* (Istanbul: Tan Gazetesi ve Matb., 1964); Dünder Seyhan, *Gölgedeki Adam* (Istanbul: Nurettin Uycan Matbaası, 1966); M. Emin AYTEKİN, *İhtilâl Çıkmazı* (Istanbul: Dünya Matbaası, 1967); Sıtkı Ulay, *27 Mayıs 1960 Harbiye Silah Başına: General Sıtkı Ulay’ın Hatıraları* (Istanbul: Hüsnütabiat Matbaası, 1968); Orhan Erkanlı, *Anılar, Sorunlar, Sorumlular* (Istanbul: Baha Matbaası, 1972); Hadi Hüsmen, *Hatırladıklarım Düşündüklerim* (Istanbul: Baha Matbaası, 1975); Kurtul Altuğ, *27 Mayıs’tan 12 Mart’a* (Istanbul: Yılmaz Yayınları, 1991); Metin Toker, *Demokrasimizin İsmet Paşa Yılları 1944-1973. Yarı Silahlı, Yarı Külahlı Bir Ara Rejim, 1960-1961*, 2nd ed. (Ankara: Bilgi Yayınevi, 1998); Celâl Bayar, *Kayseri Cezaevi Günlüğü* (Istanbul: Yapı Kredi Kültür Sanat Yayıncılık, 1999); Talat Asal, *Güneş Batmadı* (Istanbul: Selis Kitapları, 2003); Nazlı Ilıcak, *27 Mayıs Yargılanıyor* (Istanbul: Merkez Kitaplar, 2007); Talat Aydemir, *Hatiratım* (Istanbul: YKY, 2010).

17 Christian Rumpf, *Das Türkische Verfassungssystem. Einführung Mit Vollständigem*

Constitution did outline what later scholars have called a “liberal”¹⁸ and “pluralist”¹⁹ system of government with greater civil liberties, rights for organized labor, and university autonomy. It also promised independence for the courts and bar associations, and established Turkey’s first Constitutional Court to oversee the pact. However, as Ceren Belge has demonstrated, the post-coup judiciary was more than willing to sacrifice pluralism and civil liberties for the sake of maintaining its own power.²⁰ Moreover, the Constitution was as remarkable for its silences as it was for its contents. Much as Siddik Sami Onar’s interwar doctrinal jurisprudence, the 1961 Constitution described a state in which the division of power between civilian and military leaders was left ambiguous. It gave the Army a say in politics through the National Security Council (NSC), an advisory organ which later expanded its own authority, as well as an “Army Pension Fund” (OYAK) that evolved to become one of the country’s most powerful financial institutions.²¹ It also outlined a military judiciary which, although it was more independent and transparent than ever before, potentially overlapped with civilian criminal courts in peacetime—an issue that became apparent from 1969 onward.

Verfassungstext (Wiesbaden: Harrassowitz, 1996), 68.

18 Zürcher, *Turkey: A Modern History*, 246.

19 Ergun Özbudun, “Constitutional Law,” in *Introduction to Turkish Law*, ed. T. Ansay and D.W. Jr. (London: Kluwer Law International, 2005), 19–46.

20 Belge, “Friends of the Court”; see also Ran Hirschl, “Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales,” *Texas Law Review* 82 (2004): 1819–60; Hootan Shambayati, “The Guardian of the Regime: The Turkish Constitutional Court in Comparative Perspective,” in *Constitutional Politics in the Middle East*, ed. S.A. Arjomand (Onati, Spain: International Institute for the Sociology of Law, 2008); *ibid.*

21 Ahmad, *The Making of Modern Turkey*, 130–131; Taha Parla, “Mercantile Militarism in Turkey 1960-1998,” *New Perspectives on Turkey*, no. 19 (Fall 1998): 29–52; Levent Ünsaldı, “Armée en Turquie: pouvoir militaire, pouvoir civil,” *Défense nationale et sécurité collective*, March 2007, 89–98; Levent Ünsaldı, “La société militaire en Turquie: une collectivité singulière et fermée,” *Défense et Sécurité Internationale*, no. 13 (2006): 40–57.

Scholars opposed to the coup have seized on these ambiguities to argue, first, that the coup was an illegitimate toppling of a democratically elected government, and second, that the “Republican alliance”²² of Army officers, jurists and pro-coup media acted not out of a lofty sense of duty toward the nation but because they realized that their own hegemony in Turkish society was being eroded by the ascendance of the masses through democratic elections.²³ For these critics, the fact that Turkey’s top lawyers and journalists defended the coup indicated not that it was legitimate, but that they were willing to subordinate legal and journalistic principles to the goal of safeguarding the corporate privileges of their own professions.

My aim in this chapter is not to add to the debate on the legal and ethical merits of the coup, a topic on which there already exists a rich and often opinionated literature.²⁴ While I acknowledge the importance of disagreements between pro- and anti-coup scholars, as well as the conflicts that played out during the transition between the law

22 I borrow the term “Republican alliance” from Belge, “Friends of the Court.”

23 Aytekin, *İhtilal Çıkmazı*, 49–53; Kemal Gözler, *Türk Anayasa Hukuku* (Bursa: Ekin Kitabevi, 2000), 77–92; Osman Doğru, *27 Mayıs Rejimi: Bir Darbenin Hukuki Anatomisi* (Ankara: İmge Kitabevi, 1998); Osman Can, *Darbe Yargısının Sonu* (İstanbul: Timaş Yayınları, 2010).

24 Walter F. Weiker, *The Turkish Revolution 1960-61: Aspects of Military Politics* (Washington, DC: The Brookings Institution, 1963); George S. Harris, “The Role of the Military in Turkish Politics - Part II,” *Middle East Journal* 19, no. 2 (1965); İsmet Giritli, *Fifty Years of Turkish Political Development, 1919-1969* (İstanbul: Fakülteler Matbaası, 1969); William Hale, *Turkish Politics and the Military* (London: Routledge, 1994), 88–152; Camilla Dawletschin-Linder, *Diener seines Staates : Celal Bayar (1883-1986) und die Entwicklung der modernen Türkei* (Wiesbaden: Harrassowitz, 2003), 197–263; Ümit Özdağ, *Menderes Döneminde Ordu-Siyaset İlişkileri ve 27 Mayıs İhtilali*, 2nd ed. (İstanbul: Boyut Kitapları, 2004); Can Dündar and Bülent Çaplı, *İsmet Paşa: Her Devir Bir Hayat* (İstanbul: İmge Kitabevi, 2007); Tolga Ersoy and Haydar Çetinbaş, eds., *27 Mayıs: Bir Darbenin Anatomisi* (Ankara: Özgür Üniversite, 2010); Abdi İpekçi and Ömer Sami Coşar, *İhtilalin İcyüzü* (İstanbul: Türkiye İş Bankası Kültür Yayınları, 2010).

professors and the officers and between some of the law professors themselves, my concern here is rather to explain why lawyers held such sway over the transition in the first place, and how their authority enabled them to go far beyond merely shaping the Army's message for public consumption and to become so domineering that some of the officers developed a kind of "justice complex" (*adalet kompleksi*) and were afraid to take any initiative without first consulting with lawyers.²⁵

The officers' invitation to law professors happened as the result of decisions made at particularly fluid moments, but the normative horizon on which those decisions were made had already been established by the work of two professional communities. The first was composed of law professors such as Sıddık Sami Onar, who during the 1930s and 1940s had built a doctrinal tradition in which jurists were the ultimate arbiters of the legality of state action. In the previous chapter I drew on Andrew Abbott's sociology of professions to describe this authority as a form of "jurisdiction," a term which refers to the theoretical, symbolic, legal and practical ways in which members of a profession construct and defend their turf vis-à-vis other professions.²⁶ Abbott's approach is ordinarily applied to situations where the primary jurisdictional challenge comes from similar professions, not from state leaders, but I have argued that it is also useful for understanding how post-1933 law professors consolidated their own authority in the context of a single-party state, ensuring that public power became not a matter of strongmanship or charisma but a technical issue best left to legal experts.

25 Erkanlı, *Anılar, Sorunlar, Sorumlular*, 67.

26 Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (Chicago: University of Chicago Press, 1993).

This emphasis on technicalities was one of the defining characteristics of Onar's jurisprudence. While jurists such as Ali Fuad Başgil located state power in the authority of a fatherly "Leader" (*Şef*), Onar and the jurists who followed in his footsteps construed even extreme abuses of state power as a problem of procedural technicalities that must be solved by lawyers steeped in the jurisdictional discourse of the *Ecole du service public*. The technicism and scientism of Onar's doctrine resonated with the Comtean positivism of the early Kemalist state and its circle of insiders and also made it less threatening to rulers weary of public challenges to their authority. With authoritarian state leaders policing the boundaries both of legislation and public debate, Onar's doctrine secured the authority of legal experts in part because it was difficult to understand for outsiders.²⁷

With the transition to democracy in 1950, the public to which claims to professional authority were addressed suddenly expanded beyond the small circles of urban, educated, middle-class experts and leaders to potentially include all voters. For law professors this transition was both a challenge and an opportunity. It could either prompt fundamental doctrinal change or force them to seek new ways to represent their professional expertise in what Abbott calls the "public arena" of jurisdictional claims.²⁸ While Ali Fuad Başgil tackled the transition by abandoning statist authoritarianism and embracing a conservative liberalism that appealed to the DP, jurists of the Onar school left their doctrine intact and instead translated the jurisdictional claims it made on behalf

27 For a classic discussion of the close relationship between expert knowledge and official secrecy in maintaining the power of state servants, see Max Weber, *Economy and Society*, vol. 1 (Berkeley: University of California Press, 1978), 225.

28 Abbott, *The System of Professions*, 62.

of the legal professions into a discourse that resonated with an expanded, but still largely urban and educated, circle of RPP supporters.

What remains to be explained is *how* jurists of the Onar school translated their authority from a convoluted discourse of jurisdictional technicalities to a public sphere that required more accessible symbols of power without thereby succumbing to populist anti-intellectualism or to the “spiritual” liberalism of thinkers such as Başgil.²⁹ It is here a second group enters the picture: the newspaper and magazine journalists who, like law professors, felt increasingly marginalized by the DP and therefore began a campaign to criticize and smear the government. In this chapter I examine the largely overlooked process through which, in the years leading up to and immediately following the 1960 coup, media such as the weekly journals *Akis* and *Kim*, both of which were close to the RPP, translated the state ideal of Onar’s interwar doctrine into a publicly accessible narrative.³⁰

As Michael Warner argues, the ability to take part in public spheres modeled on European Enlightenment ideals has traditionally required presenting oneself as a “disinterested” interlocutor. In this framework, the private sphere is governed by affective ties and personal interests and pursuits, while the public sphere is predicated on the universal and general principles of science, law, and rational debate. But while this

29 For a discussion of Başgil’s post-war “spiritualism” (*maneviyatçılık*), see Emrullah Kılıç, *Materyalizm Karşısında: Ali Fuad Başgil* (Ankara: Akçağ, 2012).

30 I focus exclusively on newspapers and weekly magazines, although radio also played an important role in constructing the jurists’ public image, in particular during the trial of the deposed government from October 1960 to 1961. Television broadcasting did not begin in Turkey until 1968.

distinction is meant to ensure that anyone can take part in public discourse, in reality it requires a combination both of specific socio-economic and ascriptive properties—typically being a bourgeois male of the majority ethnicity and religion—and specific “rhetorics of disincorporation” by which one can “self-extract” from those properties in order to appear impartial and unbiased.³¹

In Turkey, the elite of the single-party state was acutely conscious of the distance between the public sphere it attempted to cultivate among its core cadres and the heterogeneous social fabric in which the vast majority of its citizens lived. The ideal-typical interlocutor of the Kemalist public sphere was a Turkish-speaking Sunni Muslim who kept religion private and maintained the outward appearance of a European bourgeois, a combination Ernest Gellner referred to as “a seamless web of symbol and sentiment.”³² The society the Kemalists confronted, in contrast, was composed of multiple ethnicities and languages embedded in loyalties that were variously tribal, clientelistic, and publicly religious. While the Kemalist cadres took care to maintain their “monopoly on the universal,”³³ therefore, they also tried to shape citizens through means ranging from education and the dissemination of products of Western culture such as theater, classical music, and opera, to outright coercion designed to enforce European sartorial customs.³⁴

31 Michael Warner, “The Mass Public and the Mass Subject,” in *Habermas and the Public Sphere*, ed. Craig Calhoun (Cambridge, MA: The MIT Press, 1992), 382.

32 Ernst Gellner, *Encounters with Nationalism* (Oxford: Blackwell Publishers, 1994), 89.

33 Pierre Bourdieu, “Rethinking the State: Genesis and Structure of the Bureaucratic Field,” *Sociological Theory* 12, no. 1 (1994): 17.

34 Senem Aslan, *Ethnic Movements and Nation Building in Turkey and Morocco: Dissent and Identity in Kurdish and Berber Communities* (New York, N.Y.: Cambridge University Press, 2014), 72–4.

The 1950 elections gave the masses a voice through the ballot box while also depriving the Kemalist state of its most authoritarian methods of cultural engineering. Nonetheless, the ideal-typical state servant—cultured, rational, devoted to universalism—remained in the consciousness of the Republican alliance as a symbol of state authority. In the years preceding the 1960 coup d'état, oppositional media revived this ideal in order both to deride the DP government and extol the opposition. They accomplished this through narratives in which law professors close to the RPP were the heroically modest trustees of reason, political disinterestedness, and scholarly impartiality, while the DP—a party that was an outgrowth of the RPP, and whose core cadre largely shared the RPP's socio-economic background—revealed itself as a group of fickle, irresponsible and selfish politicians who had failed to master the fine distinction between the private and public spheres.

As I show in this chapter, this narrative intensified once the Army had ousted the DP government. Throughout the transition, pro-coup media presented their allied lawyers as the ideal representatives of Turkey's legal order. Evidence of their qualities was sought in a range of activities, from scholarship to lifestyle and hobbies. According to these accounts, the law professors and judges of the interim regime had the ability to take a genuinely disinterested approach to the specific outcomes of political and legal processes for which they were responsible. Thus professional qualifications, which many DP partisans undeniably had, was not enough; what ultimately determined the quality of jurists was their ability to keep their professional lives separate from the private sphere of

friendship and culture, a distinction, as Warner writes, both of formal definitions and of “kinds of feeling.”³⁵ As the media iconography of jurists such as Salim Başol shows, one’s attitude to tea drinking in the office could take part in this “social production of indifference”³⁶ as much as the technicalities of criminal procedure. In one metaphor, Başol’s workplace vendetta against the “beloved Turkish tradition”³⁷ of tea conjured up the image of the perfect Kemalist jurist, impervious to nepotism, indifferent to party politics, and beholden only to the true and rational interests of the nation.

A brewing storm

There was little during the first two years of the Democrat Party (DP) government to indicate that the decade would end with a military coup supported by the Republican People’s Party (RPP), the universities, and large parts of the media. The DP was an offshoot of the RPP. Although the DP addressed itself more to farmers and landowners than the RPP did, the socio-cultural difference between the parties’ cadres at the national level was mainly one of “ins and outs.”³⁸ This was initially true also of the parties’ ideological orientations, in which the DP was “almost an exact replica” of the RPP.³⁹ Cem

35 Michael Warner, *Publics and Counter-Publics* (New York: Zed Books, 2002), 27.

36 Michael Herzfeld, *The Social Production of Indifference: Exploring the Symbolic Roots of Western Bureaucracy* (Chicago: University of Chicago Press, 1993).

37 *The New York Times*, October 20, 1960.

38 Dankwart A. Rustow, “The Development of Parties in Turkey,” in *Political Parties and Political Development*, ed. J. LaPalombara and M. Weiner (Princeton: Princeton University Press, 1966), 123.

39 Feroz Ahmad, *The Turkish Experiment in Democracy, 1950-1975* (Boulder, Colorado: Westview Press, 1977), 13; see also H. Türsan, *Democratisation in Turkey. The Role of Political Parties* (Brussels: P.I.E.-Peter Lang, 2004), 64; M.P. Angrist, *Party Building in the Middle East* (Seattle: University of Washington Press, 2006), 160.

Eroğul has argued that the RPP's willingness to cede power to the DP despite the latter's more permissive attitude to private initiative was due to the fact that the DP made sure not to challenge the RPP's political taboos on Communism and religion.⁴⁰ In addition, World War II had thoroughly discredited authoritarian étatism and elitist corporatism, both of which the RPP had championed during the 1930s and 1940s. Although the RPP largely abandoned étatism after the war, the DP thus had more credibility because it was an untried party with no record of authoritarianism.

Lawyers constituted the largest category of professionals among the DP's list of candidates for the May 1950 parliamentary elections (88 candidates), followed by administrators and public servants (69), landowners (56), businessmen (55), military officers (23), and academics (19).⁴¹ The DP found support for its emphasis on private enterprise among liberal-conservative jurists such as Ali Fuad Başgil, who nevertheless turned down repeated attempts by Celal Bayar and other party leaders to nominate him, preferring to remain outside of politics.⁴² The party's liberalist approach to law extended also to its views on the relationship between the judiciary and the Army. In September 1950 Minister of Justice Halil İbrahim Özyörük announced that the government was preparing to bring the jurisdiction of the military courts in peacetime under the jurisdiction of the ordinary criminal courts.⁴³ The suggestion caused no particular

40 Cem Eroğul, *Demokrat Parti. Tarihi ve İdeolojisi* (Ankara: İmge Kitabevi, 1990), 87.

41 M. Serhan Yücel, *Demokrat Parti* (Istanbul: Ülke Yayınları, 2001), 78.

42 Başgil wrote in his memoirs that Bayar invited him to become a member of the DP in 1946, before the party had been officially founded. Başgil, *Ord. Prof. Dr. Ali Fuad Başgil'in Hatıraları*, 145; Başgil, *La Revolution Militaire de 1960 en Turquie (Ses Origines)*, 54. He remained on the DP's list of potential parliamentary candidates as late as the 1957 elections. *Milliyet*, September 9, 1957.

43 *Milliyet*, September 20, 1950.

consternation: The unclear competence of the military courts had been under criticism even from the military judiciary's own ranks,⁴⁴ and the DP was not seen as inimical to the Army, having just appointed Fahri Belen, a retired general and high-ranking military judge, to Minister of Public Works.⁴⁵

There was also broad agreement between the RPP, the Army and the DP on the need to fight Communism. During the single-party period the RPP had used the both civilian and military courts as a tool to crack down on Socialist and Communist instigation. The State of Siege had been in effect for over seven months during and after World War II (from November 20, 1940 to December 23, 1947),⁴⁶ enabling the Army to deal with political crimes within its own courts. When the State of Siege was finally lifted in 1947, the civilian criminal judiciary took over the task and pursued it with vigor well into the 1950s. Thus in December 1946, while the State of Siege was in effect, a military court closed the Turkish Socialist Workers and Villagers' Party (*Türkiye Sosyalist Emekçi ve Köylü Partisi*) just six months after it was founded. After the State of Siege was lifted, hearings continued regarding the political activities of the party's individual members until September 1949, when the Istanbul 3. Assize Court released all the defendants. In the 1950s, attempts by leftists such as Hikmet Kıvılcımlı at re-establishing a legal

44 E.g., Yaşar Çıkla, "Kanunsuz Suç ve Ceza Olmaz Presibi Ve As. C. Kanununun 162. Maddesinin Tedkiki," *Askeri Adalet Dergisi*, no. 7 (1950): 14–22.

45 Fahri Belen resigned later that year. After the 1960 coup Belen served as a representative of the junta in the Constitutive Assembly and published a pamphlet where he explained that he left the government in 1950 because it won the election by making promises that it did not intend to keep. Fahri Belen, *Demokrasiden Diktatörlüğe: On Senelik Siyasi Hayatımıza Dair Tenkid ve Tahliller* (Istanbul: İstanbul Matbaası, 1960), 18–19.

46 Zafer Üskül, *Siyaset ve Asker. Cumhuriyet Döneminde Sıkıyönetim Uygulamaları* (Istanbul: AFA Yayınları, 1989).

Communist party with the name The Nation Party (*Vatan Partisi*) continued to meet with repression by the civilian judiciary and ended with the closure of the party in 1957.⁴⁷

Despite the early appearance of consensus between the two major parties, two developments contributed to alienating the DP from the “Republican alliance” of the RPP, civil servants, and universities. One was the economic downturn from the mid-1950s, which eventually forced the government to accept a loan from the IMF in August 1958. By then, however, disagreements over ideology and the freedom of expression had already taken center stage. As the 1954 parliamentary elections approached, university circles began criticizing the DP for what they saw as concessions to religious sentiments, including allowing the call for prayer to be held in Arabic and accepting the support of the Islamic *Nur* movement during the 1954 and 1957 elections.⁴⁸ In reaction to the criticism the government passed a law that restricted the university’s budgetary autonomy, followed by two laws strengthening the government’s power over the appointment of civil servants, among them university professors, who were also prohibited from engaging in politics.⁴⁹ These laws were followed in 1954 by the dismissal of professor of constitutional law Bülent Nuri Esen, a harsh critic of the DP government, and of professor of economy Osman Okyar in 1955. In 1956, Turhan Feyzioğlu, a law professor and dean of the Ankara University Political Science Faculty, criticized the

47 Jacob M. Landau, *Radical Politics in Turkey* (Leiden: E. J. Brill, 1974), 118–119.

48 Zürcher, *Turkey: A Modern History*, 234.

49 *Üniversite Kanununun 46ncı maddesinin (d) fıkrasının değiştirilmesi hakkında kanun*, law no. 6185, in *Resmi Gazete* no. 8469, July 28, 1953; *Türkiye Cumhuriyeti Emekli Sandığı Kanununun Bazı Maddelerinin Değiştirilmesine Dair Kanun*, law no. 6422, in *Resmi Gazete* no. 8738, June 25, 1953; *Bağlı Buldukları Teşkilât Emrine Alınmak Suretiyle Vazifeden Uzaklaştırılacaklar Hakkında Kanun*, law no. 6435, in *Resmi Gazete* no. 8749, July 8, 1954.

government's refusal to appoint lecturer Aydın Yalçın to professor, and was also dismissed.⁵⁰

The tightening of government control over universities was accompanied by more stringent control of the press with the Law on Certain Offenses Committed Through the Press or Radio, which was passed in March 1954. The law provided for sentences from six months to three years for public insults, subject to be increased by up to fifty per cent if the aggrieved was a government official.⁵¹ Prosecutors who supported the DP applied the law with abandon over the following years, in particular from 1958 onward, when the DP's relationship to the opposition had completely deteriorated. On May 7, 1958, Şinasi Nahit Berker, a journalist for *Ulus*, was imprisoned for eight months; the following day *Milliyet* was closed for fifteen days, followed the day after by the temporary closing of *Akis* and *Yeni Gün*. On May 14, Justice Minister Esat Budakoğlu replied to a parliamentary question from the opposition that between March 17, 1954 and May 14, 1958, a total of 1.161 journalists had come under investigation for violating the Press Law, of which 238 had received sentences.⁵²

The tensions between the DP and an increasingly self-conscious alliance of the RPP, the universities, civil servants, and opposition journalists and intellectuals led media outlets close to the RPP to ramp up their campaign against the DP. In addition to the RPP's semi-official newspaper *Ulus* ("Nation"), two weekly actuality magazines played

50 Walter F. Weiker, "Academic Freedom and Problems of Higher Education in Turkey," *Middle East Journal* 16, no. 3 (1962): 282–3.

51 *Neşir Yoluyla veya Radyo ile İşlenecek Bazı Cürümler Hakkında Kanun*, law no. 6334, in *Resmî Gazete* no. 8660, March 17, 1954.

52 "Erişilmez Rekor." *Kim*, December 19, 1958.

particularly important roles in this campaign. *Akis* (“Echo,” or “Reflection”), a magazine designed on the model of American publications such as *Time*, had been in circulation since 1954 under the directorship of Metin Toker, who was the son-in-law of İsmet İnönü, the Chairman of the RPP and former “National Leader” after Mustafa Kemal Atatürk had passed away. *Akis* published rich narratives of current political, legal and academic events, in addition to reviews of edifying culture such as the latest French, Italian or American films, plays, and classical music concerts. Much like the relationship between the RPP and the DP, the weekly was initially sympathetic towards the government, and even ran flattering front-page stories about DP luminaries such as Celal Bayar. As tensions rose between the “Republican alliance” and the DP, however, *Akis* became the primary platform on which the expertise and authority of pro-RPP jurists over the decisions of the government were presented for public consumption.

This presentation happened partly through the jurists’ own statements. For example, when the government declared martial law following the September 5-6 anti-Greek pogrom in Istanbul and instructed the martial law forces to round up over forty “usual suspects” among well-known leftist intellectuals and lawyers, professor of administrative law İsmet Giritli published an analysis of Sıddık Sami Onar’s and Ragıp Sarıca’s doctrine of state powers in *Akis*, arguing that a martial law regime consisted entirely of “acts of administration” and was therefore under the jurisdiction of the administrative courts.⁵³ Such situational analyses appeared more frequently toward the end of the decade, and were often incorporated into the weekly reports of goings-on

53 *Akis*, December 24, 1955, 5.

“behind the scenes” with which *Akis* painted layered portraits of the jurists’ personal and professional lives. A common characteristic of these portraits was their attention to how jurists such as Sıddık Sami Onar, Ragip Sarıca, and Hüseyin Nail Kubalı combined well-rounded and cultured personalities and warm relations to friends, family, and students with an unwavering commitment to the universal, impartial and timeless principles of scholarship (*bilim*) and science (*ilim*), terms which were used more or less interchangeably. In addition to discussing the professors’ informed opinions on current events, therefore, the articles dwelled on their lifestyles, careers, and approach to lecturing, presenting them as calm eyes of wisdom in the center of a brewing storm, simultaneously engaged in current conflicts and aloof from the petty bickering that was driving them.

In February 1957 *Akis* ran an image of professor Ragip Sarıca on the front page of an issue devoted to the crisis that had broken out over the dismissal of Turhan Feyzioğlu the previous Autumn.⁵⁴ In addition to Feyzioğlu himself, *Akis* discussed the important role Onar, Sarıca and Kubalı had played in defending the autonomy of the universities, and praised them for stoically continuing their activities despite the recent unrest. Onar, an “old and short professor with a persuasive voice,” calmly lectured on the limits of legislation, arguing that jurisprudence (*hukuk*) stood above the state and the legislature, which could therefore not pass laws that limited citizens’ freedoms and rights. Kubalı, “another professor with no concern for the unrest,” said in his lectures that the government was going beyond the limits of the law “knowingly or unknowingly.” *Akis*

54 *Akis*, February 9, 1957.

dwelled particularly on Ragıp Sarıca, who in his lectures used current political conflicts as examples of how the doctrinal issue of “acts of administration” could be analyzed to critique the government. An entire article was devoted to Sarıca’s personality, appearance, and reputation among the faculty and students. He had a “wide forehead, sparse brown hair, looks at his students through his thick glasses with a clever squint while interspersing his talk with mature pleasantries and elegant jokes.” His name awakened feelings of respect and affection, not only because of his pleasant demeanor, but also because of his groundbreaking work on “The Organizing Powers of the Executive in Turkey,”⁵⁵ the first monograph on the subject in Turkish administrative jurisprudence, which Sarıca had written by “taking advantage of Sıddık Sami Onar’s earlier publications.”

Jurists remained on the agenda of *Akis* over the following three years. In January 1958 professor of Constitutional Law Hüseyin Nail Kubalı criticized the DP’s draft amendments to the Universities Law that would increase the Minister of Education’s power to punish faculty members over their political statements.⁵⁶ Kubalı, who had served as the dean of the Istanbul Law Faculty from 1948 to 1950,⁵⁷ had at that point

55 Ragıp Sarıca, *Türkiyede icra uzvunun tanzim salâhiyeti : Nizamnameler, talimatnameler, türk parasının kıymetini Koruma Kararnameleri, millî korunma kanununa müstenit kararnameler* (Istanbul: Cumhuriyet Matbaası, 1943).

56 *Akis*, January 18, 1958.

57 Hüseyin Nail Kubalı (1903-1981) was particularly admired because he had worked with Marcel Mauss in editing one of Émile Durkheim’s posthumous publications during his doctoral studies in Paris. For Kubalı’s work on Durkheim, see Ivan Strenski, “Hüseyin Nail Kubalı and Durkheim’s ‘Professional Ethics and Civic Morals,’” in *Exercising Power: The Role of Religions in Concord and Conflict*, ed. Tore Ahlbäck and Björn Dahla (Stockholm: Donner Institute, 2006), 358–72; Suvat Parin, “Durkheim Sosyolojisi’nde Türkiye’den Hukukçu Bir İsim: Hüseyin Nail Kubalı ve Sosyoloji Dersleri,” *Sosyoloji Dergisi*, no. 32 (2010).

already enjoyed coverage in *Akis*. In 1955, for example, the magazine had published a story about Kubalı's role in securing the independence of the judiciary during the transition to democracy in 1949-1950 and about his more recent defense of parliamentary immunity for deputies who had left the DP but retained their seats in the National Assembly.⁵⁸ After Kubalı publicly criticized the proposed amendments to the Universities Law in 1958, Minister of Education Celal Yardımcı opened an investigation to determine whether he had violated the same law by engaging in politics.⁵⁹ Kubalı received massive support from the students: When he arrived to give a lecture on January 7, over 2,000 students gave him a seven-minute standing ovation, which Kubalı humbly deflected by saying that "this display of friendliness and enthusiasm demonstrates your respect for science much more than for me. There is no room for political intrigue under this roof of science."⁶⁰ Kubalı received moral support from RPP parliamentarians while three law professors established a committee to determine whether or not his speech was of a political character.⁶¹ On January 30, the committee unanimously concluded that Kubalı had not overstepped his authority.⁶² Nevertheless, just a few days later the government temporarily removed him from his position.

As with Feyzioğlu before him, Kubalı's dismissal became the occasion for juristic hagiography. Sıddık Sami Onar gave a press conference where he spoke highly of Kubalı's service to the faculty and recalled how he and Sarıca had once stepped in to

58 *Akis*, November 19, 1955.

59 *Milliyet*, January 5, 1958.

60 *Milliyet* and *Ulus*, January 8, 1958.

61 *Ulus*, January 14 and 11, 1958.

62 *Milliyet*, January 31, 1958.

teach administrative law while Onar was ill. He then argued that the government's action was illegal and overstepped its authority to undertake "acts of government" (*hükümet tasarrufları*). Kubalı subsequently filed with the Council of State to have the dismissal annulled, and Onar served as his lawyer until the government voluntarily retracted the decision after three months.⁶³

In the mean time, Sarıca joined in with a long essay that was published as the main front-page story of *Ulus* in which he deferred to Onar on the legal aspects of the issue, preferring instead to discuss the "social and cultural" implications of the conflict. After praising Kubalı for his twenty years of academic service and his "high scholarly values, culturedness, seriousness, honesty, maturity, respect for the dignity of humanity and belief in the law and impartiality," Sarıca argued that the issue must be seen as part of a wider conflict between reactionary forces and the freedom with which Turkish intellectuals inside and outside of the universities were able to perform their enlightenment mission in a civilized society (*medeni cemiyet*). Most important among their duties, he argued, was to serve as the "guide" for improving society, a role Atatürk had acknowledged by stating that "the greatest guide in life is science" (*hayatta en hakiki mürşit ilimdir*). Rather than staying in their ivory towers, therefore, scholars must be just as free to partake in political life as other intellectuals, and indeed as scholars in other Western countries were.⁶⁴

Akis followed up with a profile of Kubalı, paying particular attention to his family

63 *Ulus*, February 4, 1958.

64 *Ulus*, February 6, 1958.

background, education, and love of scholarship, a love so strong that he had preferred his meagre salary as a lecturer to private practice, where he would have earned more. It reproduced a poem Kubalı had written in his youth, when he was “a poet—yes, this was Hüseyin Nail Kubalı’s best side—he was a poet, but a poet with his feet on the ground!” The article went on to describe his fondness for a glass or two of *rakı* and a cigarette in the evening, before delving into his belief in the strict limitations on state powers in Léon Duguit’s theory. It described Kubalı as an “ideal teacher” who strove to impart on his students a love of freedom and sense of duty, as well as a habit of thinking objectively and impartially. The students, in turn, considered him a “gentleman” (*centilmen*) despite his strict grading habits. As a result, Kubalı’s support among students was so strong that many of them had reacted to his dismissal by sending telegrams to Ankara asking that they, too, be dismissed.⁶⁵

In April it became clear that Kubalı would be allowed to return to the university. At the same time, however, the University Senate convened on its own initiative to determine whether Kubalı had damaged the esteem of the university by criticizing the government. After a speedy process the Senate decided to prohibit Kubalı from lecturing for thirty days, a decision that was met with chants of protest from the students when his replacement, Tarık Zafer Tunaya, attempted to lecture on constitutional law. The students and Tunaya instead marched to the offices of the dean of the Law Faculty Hıfzı Timur and of professor of penal law Sulhi Dönmezer, both members of the University Senate, and demanded that they resign. Sıddık Sami Onar and Ragıp Sarıca, on the other hand,

65 *Akis*, February 8, 1958.

received applause. After the protests the university's governing board, with Dönmezer and four other professors, investigated the student unrest but failed to identify a leader.⁶⁶

The following week *Akis* devoted a detailed article to Sıddık Sami Onar, who it described as the “teacher of teachers” (*hocaların hocası*). In an article titled “The University: Socrates Lives,” *Akis* explained Onar’s popularity among students as a result of his learning as well as his character, which it portrayed by way of a narrative *curriculum vitae* culminating with his ascent to the position of director of the Institute of Administrative Law and the Administrative Sciences at Istanbul University. “As we have seen,” the article went on, “he has not worked within just one branch of the law. To call him a ‘Emperor of the Law’ [*Hukuk İmparatoru*] would be correct. Yet what has lifted Prof. Onar to the apex of scholarship is his indisputable specialization and authority.” *Akis* went on to discuss Onar’s indefatigable struggle for scholarly autonomy, a struggle he had waged even under the “human-dissolving” (*insan eriten*) single-party state, during which he had refused to bow his head, earning him the title “father of autonomy” (*muhtariyetin babası*). During a conference in 1947 Onar had said that “politics remains and should remain under the influence of scholarship. Scholarship aims at an absolute truth [*mutlak bir hakikate*], and cannot come under the influence of politics.” Maintaining this distinction, *Akis* continued, was not an easy task. Onar remained on cordial terms with state leaders but took such care to keep a distance from politics that he had once preferred to stand at the very edge of a group photo with professors and government ministers. Similarly, he never expressed a preference for particular politicians because he

⁶⁶ *Akis*, April 19, 1958.

believed that the university should act as a “referee” (*hakem*) in political conflicts.

Lest readers should think Onar’s aloofness indicated a superiority complex, *Akis* related his habit of lighting his assistants’ cigarettes and helping them off with their overcoats, and described the childless professor’s relationship to his students as that of a father to his children. However, his warmth did not translate into indulgence—Onar’s expectations of his students were so high that graduates of his administrative law classes joked that they would be exempt from questioning in the beyond! He treated his teaching assistants and lecturers with equal respect, whether they were his “first” and “second” sons like Kubalı and Sarıca or among the younger assistants such as İsmet Giritli and Lütfi Duran. The article went on to discuss his love of nature, of classical music, theatre, and the fine arts, and his personal involvement in having trees and flowers planted in the courtyard of Istanbul University during his tenure as rector.⁶⁷

Akis continued to cover goings-on in university circles as their relationship to the DP government deteriorated, and was joined by the magazine *Kim* (“Who”) from May 1958, when the DP had won its third elections with a narrower majority than previously, reviving hopes that the opposition parties might one day return to power. *Kim* was led by Orhan Birgit, a graduate of the Istanbul Law Faculty who had worked on the Istanbul desk of the RPP paper *Ulus* in addition to serving as an independent attorney. The magazine joined the rising chorus of criticism against the government from the very beginning, while the government stepped up its efforts to prohibit critical news by banning reporting on particularly damning speeches and protests from the opposition, and

⁶⁷ *Akis*, April 26, 1958.

and even forcing *Kim* to suspend publication from December 1959 to January 1960, during which it continued under the name *Mim*.

The two magazines persisted in covering the many ongoing trials of opposition journalists,⁶⁸ as well as the drawn-out, secretive and by all accounts disorganized court-martial of nine army officers charged with conspiring to overthrow the government from mid-1958 until the end of 1959. The court proceedings adhered to norms that even by the standards of the day appeared bizarre. Foreign and Turkish journalists were only able to cover the trial proceedings intermittently and with great difficulties.⁶⁹ Women were not permitted to attend the hearings, only men of legal age; moreover, military personnel were only allowed in the courtroom if they were of an equal or higher rank to the highest-ranking member of the defendants.⁷⁰ The trial itself was riddled with irregularities and back room deals.⁷¹ The result, as became clear after the 1960 coup, was a trial that fell short in terms not only of legal standards but also efficiency. In the end the eight officers who had in fact been plotting a coup were set free after six months of mistreatment⁷² while the ninth officer, who had turned them in, was given a two-year prison sentence for “encouraging rebellion” (*işyana teşvik*).⁷³ The trials did, however, serve to increase the

68 See especially *Kim*, June 6, 1959.

69 Selahattin Hakkı Esatoğlu, “Açık Yargılama Hakkı,” *Ulus*, January 28, 1958; “Adalet - Sanık Subaylar,” *Akis*, May 31, 1958. Because of the unpredictable censorship practices, Turkish readers and even journalists relied to some extent on reports published in the foreign press. See e.g., “9 Officers Arrested as Turkish Plotters,” *The New York Times*, January 17, 1958; “9 Turkish Aides Go on Trial,” *The New York Times*, May 27, 1958; “Turk Gets 2 Years in Plot,” *The New York Times*, November 26, 1959.

70 “Hak Yerini Bulur,” *Akis*, July 5, 1958.

71 “İddianame Rekoru,” *Kim*, October 24, 1958; “Sönen Balon,” *Kim*, December 5, 1958.

72 “9 Subaydan Biri,” *Kim*, June 7, 1960.

73 İpekçi and Coşar, *İhtilalin İçyüzü*, 60–75.

DP's fear of a coup as well as sharpen the opposition's criticism of its inept exploitation of the legal system.

In April and May 1959, when the government had tried to prevent İsmet İnönü of the RPP from touring the Aegean region, *Kim* argued that Turkey was on its way to becoming a "martial law regime" and quoted professor of administrative law Bülent Nuri Esen's estimation of the government as a "kakocracy." The magazine also reported on a lecture in administrative law given by Ragıp Sarıca, where he reminded students that according to art. 34 of the Constitution state administrators were responsible for any harm caused by their unlawful actions, even if those actions were prescribed by an executive order. The anonymous author of the article wondered what the administrators and police officers who years earlier sat in the same chairs and listened to the same lectures by the Law Faculty's "dangerous professors" would think of this, and explained what Sarıca's words really meant: "We were only following orders" is not an excuse.⁷⁴ When another "dangerous professor," Hüseyin Nail Kubalı, was denied a passport to take part in an international law conference in Warsaw in September 1958, *Kim* ridiculed the government's pretext that it feared for Kubalı's safety, and asked why football players and wrestlers had previously been allowed to travel.⁷⁵

The portrayal of anti-DP jurists as beacons of justice was accompanied by critical portrayals of academics close to the government. The DP's relationship to Ekrem Şeref Egeli, Kazım İsmail Gürkan, and a number of other professors was discussed in an article

⁷⁴ *Kim*, May 15, 1959, 16, 19.

⁷⁵ *Kim*, September 19, 1958.

in *Akis* in April 1958, while the Kubalı affair was ongoing.⁷⁶ In August 1958, *Kim* wrote of a conflict that had broken out between Sulhi Dönmezer, the professor of criminal law who had taken part in investigating the student protests at Istanbul University in April 1957, and his mentor Tahir Taner when the latter discovered that Dönmezer's latest book contained unacknowledged citations from Taner's own writings.⁷⁷ Dönmezer was somewhat vindicated a few months later when he and his co-author Sahir Erman printed a 180-page bibliography to accompany the book, but questions remained as to why they had not included the references in the book itself.⁷⁸ Meanwhile in September 1958, Hicabi Dinç, a public prosecutor known since the 1940s for his enthusiastic pursuit of violators of the press law, received a stinging exposé in an article that described him as a careerist who had become one of Turkey's highest paid officials. Despite his low grades in law school, his industriousness had made him a favorite of Cemil Bilsel, who had given him an administrative position at his rector's office of the University of Ankara and thus launched his career in public service. Unlike oppositional jurists, *Akis* wrote, Dinç was not particularly fond of entertainment, and preferred to spend long hours at his office, the location of which was a closely guarded secret. From there he sent out "official denials" (*resmî tezkip*) to newspapers and magazines concerning government-related news. The article also noted that Dinç was married to Ümit, the daughter of Muslihiddin Âdil, the professor of administrative law who had been ousted and replaced by Sıddık

76 *Akis*, February 22, 1958.

77 *Kim*, August 15, 1958.

78 *Kim*, February 27 and March 13, 1959.

Sami Onar in 1933.⁷⁹ Prosecutor Rahmi Ergil similarly received a sarcastic portrayal when he was transferred from his position as public prosecutor responsible for the press law in Ankara to the head of the General Directorate of Prisons.⁸⁰

During the preparations for elections to the rectorship of Istanbul University in June 1959, *Akis*, whose front page featured a portrait of Sıddık Sami Onar with the subtitle “The University Awakens,” reported that the top candidates, Onar and Ekrem Şerif Egeli, were clearly associated with the RPP and the DP, respectively.⁸¹ Onar won the election and once more affirmed both his own position as the highest-ranking professor of the most prestigious university in Turkey and, by extension, the RPP’s image as the academic community’s preferred political partner. When students later protested the government crackdown on university autonomy and were beaten by police, Onar expressed his sympathy and advised them to pursue their case through legal channels;⁸² similarly, when secularist students were denied permission to protest the arrival in Istanbul of the Islamic theologian Bediüzzaman Said Nursi, Onar assured the students that he would not prevent them from staging a silent rally in the university courtyard, and personally intervened along with Turhan Feyzioğlu when they were arrested.⁸³ *Akis* wrote that during Onar’s opening speech of the 1959-1960 academic year, in which he underlined the importance of university autonomy and scientific impartiality, students

79 *Akis*, September 27, 1958. See Chapter 1 for a discussion of the purge of Istanbul University in 1933.

80 *Akis*, March 3, 1959.

81 *Akis*, June 30, 1959.

82 *Akis*, July 28, 1959.

83 *Kim*, January 13 and 19, 1960.

crowded around him and yelled slogans of support while his rival Egeli sat silently in the back of the auditorium.⁸⁴

As the government sensed that dissatisfaction was taking a turn for the worse, it began taking unprecedented steps to crack down on opposition. On April 17, 1960, a group of retired generals met with İsmet İnönü in his house in Izmir. Although İnönü's exact words to the generals are unknown,⁸⁵ the government saw the meeting as sufficiently threatening that the National Assembly immediately passed a law establishing an "Investigative Commission" (*Tahkikat Komisyonu*)⁸⁶ with a wide mandate to examine "the opposition, which has attempted to establish armed political groups ... in cooperation with a part of the press."⁸⁷ The law also prohibited reporting on the commission's activities in the newspapers. Law professors mobilized again to condemn the government. Kubalı and Tunaya spoke to *Ulus* about the unconstitutionality of the commission,⁸⁸ and two days later professor İlhan Arsel at Ankara University announced that he could no longer give lectures on constitutional law when the government was violating the constitution.⁸⁹

April 27 was the last time *Kim* and *Akis* were published before the coup d'état one

84 *Akis*, September 11, 1959.

85 Metin Heper argues that İnönü was aware of the coup plans but took care not to say anything that would reveal his knowledge or encourage the generals to carry it out. William Hale, on the other hand, writes that İnönü told the generals that "it was up to them to protect the ideals of Turkish progress." Metin Heper, *İsmet İnönü: The Making of a Turkish Statesman* (Leiden: Brill, 1998), 212; Hale, *Turkish Politics and the Military*, 105–6.

86 *Türkiye Büyük Millet Meclisi Tahkikat Encümenlerinin vazife ve selahiyetleri hakkında kanun*, Law no. 7468, in *Resmi Gazete* no. 10491, April 28, 1960.

87 İpekçi and Coşar, *İhtilalin İçyüzü*, 105.

88 *Ulus*, April 27, 1960.

89 *Ulus*, April 29, 1960.

month later. On April 28, students rioted in the streets of Istanbul and Ankara and were attacked by police. The government declared martial law on April 29, handed law enforcement over to the Army, imposed a ban on reporting on the violence, and closed the universities in Ankara and Istanbul, but protests continued every night until May 25, when the Investigative Commission declared that it had completed its work and was ready to announce its results. Rather than wait for the denunciations to begin, a group of mid-level Army officers stepped in to depose the government.

Although the DP managed to silence the most trenchant of its critics in the media, their critique over the preceding five years had the cumulative effect of shaping the terms on which the widening gap between the DP and its detractors were perceived by a wider public: as a conflict between an alliance of principled and learned statesmen in the universities and the RPP and an unreliable and self-interested gang of sycophants and autocrats in government. As I show in the following section, this narrative did not only spur the Army into action, but also determined the shape of its intervention.

The Coup: Officers and Lawyers

In the early hours of May 27, 1960, Army officers took control of the main garrisons in Ankara and Istanbul and ordered the arrest of all the leaders of the DP. Once the junta was in control, Colonel Alparslan Türkeş appeared on the radio at 5.15 AM declaring that “due to recent unfortunate events that have pushed our democracy into crisis, the Turkish

Armed Forces have taken control of the country in order to prevent a fratricidal struggle.” He went on to assure the listeners that the intervention did not target any particular person or group; on the contrary, the Army was completely impartial and intended to hand power back to a freely elected government as soon as possible.⁹⁰

Despite Törkeş’s assurances that everything was under control, the course of events on the night of the coup was surrounded by significant contingency. This contingency was an important reason why the junta immediately engaged with legal professionals. Being composed mainly of mid-level officers, the junta had recognized that it had a leadership problem already during the preparatory stages. The conspirators had reached out to sympathetic generals several times, but had failed to secure guarantees of help until after taking power on the morning of May 27, when they called on General Cemal Gürsel, who had formally resigned from the Army weeks before.⁹¹ Another source of confusion was the lack of detailed planning for the aftermath of the coup. The trial of the “Nine Officers” in 1958-1959 had demonstrated that planning a military coup was risky. Against this risk, the officers had avoided writing anything down, and were therefore not only poorly coordinated but had also failed to agree on procedures for the post-coup transition.⁹²

Even as the coup was being announced over the radio, therefore, officers were making an unsuccessful attempt to contact judges from the Court of Cassation, the

90 Reproduced in *Resmi Gazete* no. 10539, June 30, 1960, 1632. A translation can be found in Hale, *Turkish Politics and the Military*, 119–120.

91 İpekçi and Coşar, *İhtilalin İçyüzü*, 115–123.

92 Erkanlı, *Anılar, Sorunlar, Sorumlular*, 16; İpekçi and Coşar, *İhtilalin İçyüzü*, 23.

Council of State and the Military Court of Cassation.⁹³ Failing this, Major-General Cemal Madanoğlu called on a group of law professors from Istanbul, who were taken to Ankara in a military airplane. The list of professors had been prepared only minutes before by a professor named Nedim Güven, whom Cemal Madanoğlu had met by chance two weeks prior to the coup. On the morning of the coup, Madanoğlu asked Ergüven to write down the names of “a few professors” (*birkaç profesör*). Ergüven wrote down the names of Sıddık Sami Onar, Naci Şensoy, Hüseyin Nail Kubalı, Hıfzı Veldet Velidedeoğlu, Ragıp Sarıca, Tarık Zafer Tunaya, İsmet Giritli and Muammer Raşit Sevig.⁹⁴

Although the fluidity of the coup thus contributed to the junta’s engagement with lawyers, it is unlikely that either Madanoğlu’s decision to contact “a few professors” or Ergüven’s choice of professors was arbitrary. As Nicolas Camelio argues, despite the unprecedented situation, the officers’ invitation to law professors had the appearance of a “routine procedure.”⁹⁵ By engaging with Onar and his colleagues, the officers confirmed what everybody already knew: That law professors were supposed to be the impartial referees of politics, and that those professors who had proven themselves willing to embrace that role could be trusted to pilot the country through the transition. Thanks to RPP-affiliated media such as *Akis*, *Kim*, and *Ulus*, most of the professors, including Onar, Sarıca and Kubalı, were widely known to have been at the forefront of the opposition to

93 İpekçi and Coşar, *İhtilalin İçyüzü*, 181.

94 *Ibid.*, 195–6.

95 Nicolas Camelio, “‘Le droit saisi par les militaires’: la rédaction de la Constitution de 1961,” in *L’art de l’État en Turquie: arrangements de l’action publique de la fin de l’Empire ottoman à nos jours*, ed. Marc Aymes, Benjamin Gourisse, and Élise Massicard (Paris: Karthala, 2013), 133.

the DP in the years and months leading up to May 1960. In the eyes of the officers, therefore, differences in disciplinary expertise among the professors was of secondary importance. Only two of the eight professors they called upon were experts in constitutional law; the rest were experts in penal, civil or administrative law. What was important was that they were all held in high regard among their peers and within wider circles of the anti-DP intelligentsia.

The decision to hand responsibility for the transition to law professors had consequences both for the distribution of power among the Turkish state's constituent professions and for its public face. Once newspapers resumed publishing on May 28, they first sang the praises of the Army officers, who now called themselves the "National Unity Committee," not least because all ongoing trials of members of the press were immediately cancelled and imprisoned journalists released.⁹⁶ The very next day, however, the spotlight had turned to the law professors, who had formed a "Constitutional Commission" (*Anayasa Komisyonu*) and produced a report explaining the necessity of the coup. The report made it clear from the first paragraph that the professors intended to approach their task not as revolutionary ideologues but as scholars of the French *Ecole du service public*. It thus stated that the "the situation in which we find ourselves today cannot be considered an ordinary political coup d'état. Political power, which should represent the idea of the state, law, justice, morality, the *public interest* and *public service*, and which should protect the rights of the public, has for months and even years unfortunately ceased to do so, and has instead become a material force representing

⁹⁶ Front pages of *Ulus*, *Cumhuriyet*, *Milliyet*, May 28, 1960.

personal power, ambitions, and class interests.”⁹⁷

Before I return to the finer points of how this legal ethos was shaped for public consumption, it is important to note that pro-coup lawyers also ensured that their own professional “jurisdiction” was strengthened at every stage of the transition. By the time the Commission produced its report, professor of international law Muammer Raşit Sevig, who was on Ergüven’s list of professors, and his brother Vasfi Raşit Sevig, who was not on the list but had turned up along with his brother, had been politely turned down on the request of Kubalı, who suspected that the Sevigs were not sufficiently opposed to the DP.⁹⁸ The Commission was then expanded to include professors İlhan Arsel, Bahri Savcı, and Muammer Aksoy from Ankara University, and began its work on shaping a new constitution, which Onar optimistically believed would take a month to complete.⁹⁹ Instead, work dragged on under the aegis of the National Unity Committee until October 1960, by which time it had become clear that the drafting process would have to include larger circles of society due to serious disagreements over the shape the constitution should take. In particular, Tunaya and Giritli were opposed to the strong checks on elected officials envisioned by Onar, Sarıca, Kubalı, Velidedeoğlu and Şensoy, who wanted a bicameral legislature with a corporatist second chamber, and who therefore

97 *Ulus*, May 29, 1960. My emphasis. The report was later declared part of the “Principles Determined by the Commission for Preparing the Preliminary Constitutional Draft” and published in *Resmi Gazete* nos. 10540 and 10541, July 1 and 2, 1960. Partial translations can be found in Metin Heper, *The State Tradition in Turkey* (Walkington, England: Eothen, 1985), 85–6; Camelio, “Le droit saisi par les militaires,” 137.

98 İpekçi and Coşar, *İhtilalin İçyüzü*, 197. See Chapter 1 for a discussion of Vasfi Raşit Sevig’s doctrinal work in the 1930s, which I argue was an example of the “political” approach to state power to which Sıddık Sami Onar was opposed because it did not make jurists an indispensable part of the state’s authority.

99 *Hürriyet*, May 31, 1960.

eventually ousted the two younger professors.¹⁰⁰

Faced with protests from lawyers who wanted a more democratic drafting process, the officers agreed to let a planning committee be established in order to design procedures for establishing a Constituent Assembly. The planning committee was led by professor Turhan Feyzioğlu, the dean of the School of Political Sciences in Ankara and member of the RPP after he was fired by the DP government in 1957, and included four other law professors. The planning committee settled on corporatist rules that largely excluded elected politicians in favor of representatives of the major state institutions. About 222 of the Constituent Assembly's 275 members were affiliated with the RPP, among them all of the planning committee's own members.¹⁰¹ Once assembled in January 1961, the Constituent Assembly selected twenty representatives from among its own members to serve on a new Constitutional Committee that continued the drafting work. The new Constitutional Committee's members were selected from the Court of Cassation, the Council of State, Ankara University, and the RPP. After its draft was presented in March, the Constituent Assembly began voting on its different articles and completed the process on May 27, 1961, exactly a year after the coup. The draft was then ratified in a referendum on July 9, 1961, receiving a lukewarm 61.7% of the national vote despite the ban on propaganda directed against the coup.

The mass trial of the several hundred associates of the deposed government from

¹⁰⁰ Onar and Tunaya both shared their views in interviews in *Ulus*, September 4, 1960.

¹⁰¹ Belge, "Friends of the Court," 661; citing Ömer Faruk Gençkaya, "Türk Siyasi Sisteminde Kurucu Meclis: 1961 ve 1981 Deneyimlerinin Karşılaştırılması," in *27 Mayıs Devrimi, Kurucu Meclis ve 1961 Anayasası*, ed. Suna Kili (Istanbul: İstanbul Boyut Kitapları, 1998), 24.

October 1960 to September 1961 provided pro-coup jurists with another opportunity to position themselves. The court's chairman Salim Başol was suggested to the junta by professor Naci Şensoy of the Onar committee and by Abdullah Pulat Gözübüyük, a judge on the Court of Cassation who had previously interned under Başol.¹⁰² Gözübüyük himself had been called from the Court of Cassation to serve as interim Minister of Justice and had forcibly retired a number of judges known to be close to the DP shortly after the coup, among them İhsan Köknel, the president of the Court of Cassation, who was replaced with Recai Seçkin.¹⁰³ When the time came to nominate members to the Yassıada court, Seçkin had been Gözübüyük's first choice to lead the team, but he excused himself and Başol was selected instead.¹⁰⁴

After the trials were finished, several of the judges and prosecutors from the Yassıada court were elected to serve on the new Constitutional Court, including Salim Başol himself, or else received promotions within the judiciary during the following few years. Chief Prosecutor Altay Egesel was made a member of the Court of Cassation and later rose to become president of the court's First Criminal Division. Necdet Daricioğlu, a military judge who served as assistant prosecutor on the Yassıada court, was made secretary chief prosecutor of the Military Court of Cassation; he was elected member of the Constitutional Court in 1977 and became its president in 1990. İbrahim Hilmi Senil, who had served on the court's High Investigative Board, returned to his job as the President of the Council of State, and was elected to the Constitutional Court on May 27,

102 This according to Başol in an interview in *Milliyet*, June 1, 1986.

103 *Hürriyet*, June 15, 1960.

104 *Kim*, October 4, 1960.

1962, where he became president in 1966.

Maneuvering among pro-coup lawyers was thus consequential both for the shape of the 1961 Constitution and for their own position within its judicial institutions after the transition. The lawyers of the coup d'état created powerful “veto points”¹⁰⁵ such as the new Constitutional Court with which to prevent subsequent governments from dismantling the coup’s legacy, made all the stronger because these veto points were “self-referencing,”¹⁰⁶ supervised by the same people who were protected by them. In Abbott’s terms, the coup thus allowed professors such as Siddik Sami Onar and Ragıp Sarıca to expand the claims to professional jurisdiction they had previously only articulated in their “workplace,” which for them was doctrinal literature and lectures, to the “legal” arena, where claims become formalized in the shape of statutory and constitutional law.¹⁰⁷

However, as I discuss in the first part of this chapter, it is difficult to understand how the Army officers allowed jurists such unfettered access to the legal arena in the first place without examining what Abbott calls the “public” arena where the cultural and popular perception of a profession’s authority takes shape. Moreover, as I demonstrate in the following chapter, the professional jurisdiction that lawyers cemented with the 1960 coup was powerful enough that it remained intact even as some of their most important constitutional protections were removed by the Army after 1971. The rest of this chapter therefore continues to focus on the public arena in order to show how the junta’s

105 Pierson, *Politics in Time: History, Institutions, and Social Analysis*, 144–5.

106 Gary Miller, “Rational Choice and Dysfunctional Institutions,” *Governance* 13, no. 4 (2000): 539.

107 For a discussion of the formality of the “legal arena” of claims to professional jurisdiction, see Abbott, *The System of Professions*, 64.

continued engagement with lawyers was intimately connected to how their authority was shaped for a larger audience.

Perfect servants: The renaissance of Kemalist legality

The coup caused explanation problems for the officers who had carried it out. On June 14, 1960, the National Unity Committee published a temporary constitution known as “Law no. 1,” which had been prepared by some of the law professors.¹⁰⁸ The law declared that the officers, in taking power, had acted pursuant to art. 34 of the Army Internal Service Law, which stipulated that the Army was responsible for protecting “the Turkish Republic, as determined in the Constitution.”¹⁰⁹ The fact that the officers had suspended the Constitution and violated the chain of command rendered this defense somewhat contradictory, but engaging with legal experts allowed the Army to deflect difficult questions regarding the legitimacy of its decisions. On May 31, for example, General Cemal Gürsel gave a press conference in which a journalist asked why hundreds of suspects were being held in detention without a court order. Gürsel answered,

I would ask the following from my journalist friends. We gathered a committee of lawyers and scholars headed by the rector of the University already during the coup. I ask that you carefully read the report which we immediately published

108 *1924 tarih ve 491 sayılı Teşkilatı Esasyiye Kanunu'nun bazı hükümlerinin kaldırılması ve bazı hükümlerinin değiştirilmesi hakkında Geçici Kanun*, Law no. 1, in *Resmi Gazete* no. 10525, June 14, 1960.

109 Hale, *Turkish Politics and the Military*, 80, 123.

after the committee gave it to us, and that you distribute it in your own countries. If you read this report carefully you will understand the purpose of our actions and all your questions will be answered.¹¹⁰

Pro-coup lawyers, in turn, went out of their way to demonstrate their support. If this engagement allowed the junta to shift responsibility for justifying the coup onto the shoulders of lawyers, however, it left lawyers with an analogous dilemma. The 1924 Constitution had been produced under the auspices of Kemal Atatürk himself and remained in force until May 27, 1960. By supporting the coup, lawyers were arguably betraying not just the legal system they were meant to preserve and administer but also its Kemalist spirit. To solve this dilemma some jurists took recourse to concepts similar to the theory of state power which Ali Fuad Başgil had developed in the 1930s. Mustafa Elöve, an attorney and teaching assistant at the Ankara University Law Faculty, argued that the DP's last years in power amounted to a re-emergence of the autocratic Committee of Union and Progress,¹¹¹ and praised "Law no. 1" as an example of "auto-limitation."¹¹² Similarly, Vasfi Raşit Sevig, the law professor who had expressed his Jacobin-like loyalty to the Kemalist regime with the pamphlet *What the Revolution Taught* in 1934, penned a series of editorials in which he described the 1960 coup as an exercise of "the legitimate right to defend oneself against oppression."¹¹³

110 *Ulus*, June 1, 1960.

111 See Chapter 1 for a discussion of the CUP's relation to law.

112 Mustafa E. Elöve, "Anayasa Hareketlerimiz Şeması," *İstanbul Barosu Dergisi* 35, no. 5–6 (1960): 148–88.

113 *Hürriyet*, May 30 and June 3, 10, 14, 16, 19, 24, and 30, 1960.

For adherents to the state ideal of Sıddık Sami Onar, Hüseyin Nail Kubalı and their colleagues, however, such explanations relied too much on extralegal principles to serve as a transitional narrative. Convincing the junta and the rest of Turkish society that jurists were indispensable parts of the new regime required an explanatory framework that placed legal experts at the core of the coup and thus demonstrated in practice what Onar wrote in his updated edition of *The General Principles of Administrative Law* soon after the coup: that it “was correct and beneficial that the National Unity Committee considered the constitutional issue a matter of scholarship [*ilim*] and thus left it to an impartial panel.”¹¹⁴ More important than such doctrinal statements, therefore, were the narratives with which pro-coup media such as *Akis* and *Kim* portrayed Onar and his colleagues as the embodiment of Kemalist legal rationality.

Onar stood out as a natural leader of these jurists. In addition to being the rector of Istanbul University, Onar was held in high esteem among the elite of the RPP, where his expertise in administrative law had made him a symbol of scholarly concern for the public interest. In May 1950, shortly before the first free elections were held, representatives of the RPP had asked Onar to stand for election as President of the Republic, reasoning that he would serve as an “impartial referee” in whatever political conflicts might surface in the event that the RPP lost.¹¹⁵ Onar therefore played a particularly important role in the narratives which newspapers and magazines ran once

114 Sıddık Sami Onar, *İdare Hukukunun Umumi Esasları*, 2nd ed., vol. 1 (Istanbul: İsmail Akgün, 1960), 171.

115 Cihad Baban, “Politika Galerisi,” *Cumhuriyet*, July 12, 1969. The RPP asked Onar and Kubalı to stand for election again in September 1961, but both declined because they wanted to stay out of politics. *Milliyet*, September 8, 1961.

they began publishing again after the coup. Many of these stories initially focused on the unrest that had taken place during the month of martial law preceding the coup. *Kim*, for example, ran a picture of Sıddık Sami Onar with a bandage covering a wound he had suffered to his forehead during scuffles with police in the courtyard to Istanbul University.¹¹⁶ *Akis* similarly recounted the dramatic events that had led up to the coup, dwelling in particular on how both Onar and the officers who carried out the coup had placed themselves on the front lines against the DP's henchmen, and how, during the fighting in the university courtyard, "Turkey's policeman number 1" had attempted to arrest Onar, "Turkey's scholar number 1," a provocation that made the students even more angry and led the police to shoot indiscriminately into the crowd. These events, in turn, had prompted law students in Ankara to take to the streets "as if pushed by an invisible hand" to demand that Menderes step down.¹¹⁷

The media then turned to the transition process. In its second issue after the coup, *Akis* discussed how the "most valuable lawyers" of Istanbul University had convened on May 27 to write a new constitution under the leadership of the "teacher of teachers" and "voice of scholarship" Sıddık Sami Onar. According to *Akis*, "everyone believed in the knowledge, courage and patriotism of the committee's members."¹¹⁸ Most important among the believers was the junta. *Kim* described how General Cemal Gürsel, who had now been appointed President, paid Onar and the other professors of the constitutional committee a visit of respect at Istanbul University. According to *Kim*'s journalist, Gürsel

116 *Kim*, May 30, 1960.

117 *Akis*, May 30, 1960, 14, 18.

118 *Akis*, June 5, 1960.

and Onar were surrounded by enthusiastic students in the courtyard, and upon entering the building, Onar took off guests' overcoats much like he was known to do before the coup.¹¹⁹ *Kim* also reproduced Onar's speech, where he explained that the Constitutional Commission was working to write a constitution better suited to a democratic Turkey than the 1924 Constitution, which was a creation of the exigencies of the revolutionary years and therefore concentrated all power in the Assembly and government.¹²⁰ *Akis* later printed a photo of the stocky and thick-glassed Onar leading the uniformed members of the National Unity Committee into the university courtyard.¹²¹

As the transition progressed, the pro-coup's media ability to portray the professors and officers as the embodiment of above-politics legality became increasingly strained, in part because of the conflicts within the constitutional commission itself, which media had difficulties conveying due to Onar's reticence, and in part because of the junta's purge of 147 university professors and lecturers in October 1960, which exposed a deeper fault line between the junta's radical figures such as Alparslan Türkeş and the voices of moderation among the jurists and officers. The media's attention therefore increasingly turned to the trial of the several hundred individuals connected to the DP that took place on the island Yassıada from early October 1960, when the team of judges and prosecutors from the highest instances of Turkey's criminal, administrative and military judiciaries was announced, until September 1961, when sentences were finalized and carried out.

Akis promised to report on the trial "as if you were there!" and to do so by summarizing

119 *Kim*, July 6, 1960.

120 *Akis*, July 6, 1960, 12.

121 *Akis*, August 17, 1960.

“the long texts” to just a few lines and instead relate the “underlying points.”¹²² It also provided copious action photos both of the “representatives of honesty, attention and patience”¹²³ on the court team and of the pathetic figures of the nervous defendants.

The coverage began with the amendments which Onar’s committee, expanded with professors of penal law Sulhi Dönmezer, Feyyaz Gölcüklü, Nurullah Kunter and Sahir Erman, made to the Turkish Penal Code in order to facilitate the trial.¹²⁴ On July 12, 1960, the committee published a report explaining the necessity of the amendments, in particular the removal of article 56, which permitted defendants over the age of 65 to be pardoned from the death penalty. After underlining the gravity of the crimes of treason the defendants were charged with, the report pointed to the trial of Philippe Pétain after World War II as an example of how such crimes sometimes “render it necessary to depart from certain general principles.”¹²⁵ *The Times* noted that although the amendment did not mention particular members of the fallen regime, Celal Bayar and Refik Koraltan were clearly its target.¹²⁶ In an editorial five days later the newspaper noted that “[a]ll retrospective legislation has an unpleasant taste,” but then went on to say that the “conclusion fortunately does not follow that the trials will be vindictively conducted or that the extreme penalties, if passed, will be carried out.”¹²⁷ The impression that the court was in safe hands persisted even after death sentences had been passed little over a year

122 *Akis*, October 10, 1960, 3.

123 *Kim*, November 14, 1960, 29.

124 *Türk Ceza Kanununun 146ncı Maddesine Fıkra Eklenmesi ve 56ncı Maddesinin Kaldırılması Hakkında Geçici Kanun*, Law no. 15, in *Resmi Gazete* no. 10548, July 11, 1960.

125 *Milliyet* and *Cumhuriyet*, July 12, 1960.

126 *The Times*, July 13, 1960.

127 *The Times*, July 18, 1960.

later. *The Times* called the judgment “one of merciless and unexpected severity” and *The New York Times* called for leniency,¹²⁸ but legal scholars and historians nevertheless continued to describe the trials as “correct”¹²⁹ and “strictly according to Turkish law and in terms of Turkish constitutional and penal law provisions.”¹³⁰

The court had the media’s admiring coverage of jurists to thank for this widespread perception. In the weeks leading up to the trial, pro-coup media closely followed the work of the High Investigative Board (*Yüksek Soruşturma Kurulu*), a committee consisting of law professors, judges and ministers tasked with collecting evidence of the DP’s wrongdoings, reporting in detail on the alleged misdeeds of the DP’s leaders and henchmen. In contrast to these character assassinations, the media painted adoring and curiously detailed portraits of the jurists involved in the investigation and the subsequent trial, from interim Minister of Justice Abdullah Pulat Gözübüyük, who had selected many of the members of the High Investigative Board as well as the court itself, and who according to *Akis* was a modest, hard-working man who drank in moderation and had little interest in nightlife apart from seeing a show with some close friends once in a while,¹³¹ to Cemalettin Kurelman, the Court of Cassation judge whom Gözübüyük had selected to lead the investigations, and who was, again according to *Akis*, “both a good jurist and a mature man” who had never married but led an ordered life and enjoyed the theater and cinema when he had the time.¹³² Much like popular

128 *The Times*, September 16, 1961; *The New York Times*, September 16, 1961.

129 Hirsch, *Die Verfassung der Türkischen Republik*, 39.

130 Weiker, *The Turkish Revolution 1960-61: Aspects of Military Politics*, 25.

131 *Akis*, June 16, 1960, 12.

132 *Akis*, July 6, 1960, 10-16.

representations of movie celebrities, pro-coup media brought together different dimensions of the personalities, careers and social backgrounds of the jurists, presenting them as avatars of the revolution's justice, both extraordinarily successful and principled lawyers and recognizable humans with hobbies, interests, weaknesses and affects.¹³³

From March 16, 1961, *Kim* announced that each coming issue would include a “portrait” (*portre*) article of one of the members of the Yassıada court. It began with Fahreddin Öztürk, an “idealist” and “poet prosecutor” who was serving as assistant to the head prosecutor of the court. After going through Öztürk's family background, which included many high-ranking members of the judiciary, as well as his illustrious career as a judge, legal publicist, and amateur scholar of sufi poetry, the article reproduced a poem he had written for the occasion of the ongoing trials in honor of his superior, Altay Ömer Egesel. The poem cleverly incorporated Egesel's name in the first line: “We flow from the Altai [*Altay*] mountains to the Aegean [*Ege*] like a flood [*sel*]...” and went on to describe the court team as “twelve apostles on the road to democracy.”¹³⁴

The main feature of the issue, of course, was Altay Ömer Egesel himself, the head prosecutor of the court who appeared in his robes in a detailed full-color block print on the front page of the magazine.¹³⁵ *Akis* had at that point already provided its readers with a description of Egesel's character and life story in an article that emphasized his impoverished childhood, from which he had pulled himself up through hard work and

133 For a discussion of how film stars embody the seemingly contradictory qualities of being both “of” and “higher than” ordinary people, see Richard Dyer, *Stars* (London: BFI Publications, 1998), 43.

134 *Kim*, March 16, 1961, 23.

135 *Ibid.* Egesel was also featured on the front page of *Akis*, October 28, 1960.

studies at the Istanbul Law Faculty. After graduating and finishing his internship at the outset of World War II, Egesel had served as a judge for the court that was tasked with applying the wartime National Defense Law (*Milli Korunma Hakimliđi*), where his rigor and ruthlessness soon made him legendary. According to *Akis*, Egesel was so impervious to bribes that some profiteering businessmen called him “the half-shoed judge” (*yarım papuđlu hakim*), while others simply assumed he was “half-witted” (*aklı yarım adam*).¹³⁶ *Kim* similarly dwelled on Egesel’s background, from his illustrious family members and hobbies, personal quirks and habits, to his favorite football team and speech defect. Like his assistant, *Kim* wrote, Egesel was an accomplished amateur poet and also dabbled in painting, though he kept his artwork to himself. He had long aspired to become a member of the Court of Cassation, a dream to which he was so devoted that he, like professor Hüseyin Nail Kubalı, was willing to live on a modest income. Although he was not personally fond of drinking and smoking, he “found no fault” in those who were. Egesel remembered being asked by the elders of his hometown to stand for election for the DP in 1954, but hastened to add that if he had accepted, he would have been among the nineteen members who left the party in 1955 to protest its attack on the press. He did not rule out entering politics later in life, but was for the time being happy pursuing his duty of separating the guilty from the innocent.

The following issue of *Kim* focused on Ferruh Adalı and Abdullah Üner, two of the court’s judges.¹³⁷ Adalı was presented as an immensely well-read lawyer whose

136 *Akis*, October 28, 1960.

137 *Kim*, March 23, 1961, 25.

interests went far beyond law and who, like many other pro-coup jurists, enjoyed writing poetry; unlike Kubalı and Öztürk, however, Adalı had seen some of his poems in print. Although Adalı himself was too modest to brag, his friends insisted that he was a “master” chess player. He stated that he approached the Yassıada trials as a lesson in order, duty and court manners for the millions of listeners as well as for future generations of lawyers. Üner, who was known among trial observers as “little Başol,” was not fond of places of entertainment and alcohol, but he did enjoy playing tennis and was very interested in the fine arts and in his garden, in which he had planted flowers from all over Turkey. Although he was concerned with the country’s economic development, he was not at all attracted to politics.

Following issues continued with the portraits. They included, among others, Faruk Siret Değermen, one of the court’s prosecutors, who according to *Kim* enjoyed nothing more than spending time with friends, smoking, and collecting stamps, but preferred his law books over other kinds of literature; Hasan Gürsel, a military judge known for being so fair during his tenure on a State of Siege military court in April-May 1960 that many of the arrested protesters prayed that they be brought before him;¹³⁸ Rıza Tunç, a former student of Sıddık Sami Onar and military judge with the rank of general who enjoyed practicing martial arts but also liked a glass of *rakı* and a cigarette now and then, and had written poetry as well as a novel; Necdet Darıcioğlu, a young and “smiling prosecutor” (*güleryüzlü savcı*) whose expertise had brought him to the High Investigative

138 *Kim*, March 30, 1961.

Board and then to the Yassıada court, but who also enjoyed playing the mandolin;¹³⁹ Kemal Gökçen, a “blue-eyed, well-coiffed ... handsome, young judge” and former assistant to the head prosecutor of the Military Court of Cassation who smoked a pipe, dressed well, and spoke with a soft voice;¹⁴⁰ Süleyman Taşar, a military prosecutor who had once met Atatürk in person, and who enjoyed the theater, romantic novels and modernist poetry; and Hıfzı Tüz, a member of the Council of State who enjoyed smoking playing *tavla*, reading and tending to his garden, and who, despite not having a law degree, was an exacting member of the court with a long career in the state administration,¹⁴¹ and several others.¹⁴²

The undisputed star among the personnel of the Yassıada court was chief justice Salim Başol, “the sharp-eyed, chiseled and seemingly irritable chairman whose every movement and word during the proceedings will be scrutinized, and who shoulders the heaviest burden.”¹⁴³ During the trial, the media coverage of Başol reached a level of adoration normally reserved for movie stars. Families would gather around the radio every evening to listen to a selection of the day’s proceedings, which would normally begin with Başol’s voice declaring the session to be opened. Başol was according to all reports happily married and was occasionally pictured in the media with his wife and son, who would sometimes follow the court proceedings from the audience;¹⁴⁴ nevertheless,

139 *Kim*, April 12, 1961.

140 *Kim*, April 20, 1961.

141 *Kim*, April 27, 1961.

142 *Kim*, May 11, 18, June 1, 8, 15, 22, July 6, 1961.

143 *Akis*, October 10, 1961, 7.

144 E.g., *Kim*, October 10, 1960, 6.

some of his female admirers were said to draw a spot on their forehead in imitation of his mole.¹⁴⁵ The popular magazine *Hayat* (“Life”) devoted an entire issue to Başol, “the man of the Yassıada Trials about whom everyone is curious.”¹⁴⁶ *Akis* asked, “who is this lawyer who stepped out of the shadows in one single night, what is his personality, his character?”¹⁴⁷

Akis, whose journalist must have had (or perhaps was) the same source with which *The New York Times* spoke, discussed Başol’s strict prohibition on tea and coffee in the office as evidence of his unwavering work ethics¹⁴⁸; similarly, the correspondent for *The Times* noted that Başol was “known for his integrity,” in particular because he had withstood pressure from the DP while serving on the Court of Cassation.¹⁴⁹ His integrity extended also to his interactions with the media: In March, when Başol had been absent from the court while preparing one of the cases, *Kim* attempted to interview him but was turned down because, he said, “judges don’t speak.”¹⁵⁰

However, according to *Akis*, Başol’s true character was very different from his appearance. In an exclusive interview with *Akis*, Başol confided that his favorite things in life were the wonders of nature such as the sunrise and sunset, the rising moon, and long walks in the countryside, and that he loved speaking with children and reading books. He also liked reading *Akis*, in which he always made sure to read the photo captions.¹⁵¹ In an

145 Avni Özgürel, “Yassıada demokrasi müzesi olsun”, *Radikal*, September 17, 2006; Cemal Kalyoncu, “Zalim Başol!”, *Aksiyon*, June 7, 2010.

146 *Hayat Mecmuası*, no. 3, January 12, 1961.

147 *Akis*, October 10, 1960.

148 *Akis*, October 10, 1960.

149 *The Times*, October 19, 1960.

150 *Kim*, March 23, 1961, 23.

151 *Akis*, February 13, 1961, 18-19.

installment of a short-lived column entitled “The Men of the Day Through the Mouths of their Wives” (*Eşlerinin Ağzından Günün Adamları*), *Akis* described Başol through the words of his wife Meliha. According to Meliha Başol, their son Güngör was studying in Istanbul when student protests broke out in May 1960, and had followed the unrest from a balcony; the night after Sıddık Sami Onar had fought with police in the courtyard of the university, “no one had been able to sleep in the Başol residence.”¹⁵² She said that Başol’s reputation as a severe, scowling judge was completely at odds with his behavior at home, where he always joked and laughed. He followed a strict exercise routine, stayed away from alcohol and had recently quit smoking, and never missed a theater or opera production. When Başol was staying at the judges’ residence on Yassıada, Meliha’s only concern was that he get enough rest in between court sessions. When he was able to come home for a few days, he often received guests and even signed autographs for female admirers, but Meliha assured readers that she was not jealous.

For the duration the Yassıada trial, then, the media iconography that had enabled law professors such as Onar, Kubalı and Sarıca to appear as the last bastions of legal rationality in the late 1950s was applied and elaborated to absurd lengths in a series of in-depth portrayals of the judges and prosecutors responsible for judging the fallen regime. Much like the 1950s narratives, these portraits combined detailed attention to the judges’ personal lives, where they were presented as warm and friendly bourgeois citizens, with attention to their ability to abstract themselves from the sphere of leisure, friends, and hobbies as soon as they entered the sphere of professional pursuits.

¹⁵² *Akis*, April 17, 1960, 22-25.

The detailed coverage of the personal lives and characters of Başol and the other judges, prosecutors, and law professors of the transitional regime stood in stark contrast to the stoic integrity with which they were said to tend to their duties, whether it be defending the autonomy of legal scholarship and the rule of law through lectures and writings, separating the guilty from the innocent among the members of the fallen regime, or constructing a constitutional framework that would ensure that the Second Republic would never fall into the hands of selfish politicians. It thus also illustrates a paradox at the heart of the state ideal that jurists and their supportive journalists believed the coup d'état had realized. On the one hand, their “Neo-Kemalist”¹⁵³ state represented Turkish society as a whole because it hovered above its political factions, archaic traditions, beliefs, and clientelistic networks, and constituted and legitimized itself through administrative and judicial procedures, an ideal Metin Heper calls “bureaucratic transcendentalism.”¹⁵⁴ For them, what created the “effect”¹⁵⁵ that the state was separate from the sphere of private interests was its judicial mode of reasoning. On the other hand, the “Republican alliance” was only able to realize this ideal by forcibly removing a government that had not only been freely elected but also counted among its members and supporters many legal and administrative experts, such as Ali Fuad Başgil, whose claim to legal expertise was as plausible as that of the supporters of the coup. For these “outs” the coup was, “in a sense, backward looking, an attempt to recreate an elitist

153 Landau, *Radical Politics in Turkey*, 14.

154 Heper, *The State Tradition in Turkey*, 67–97.

155 Timothy Mitchell, “Society, Economy, and the State Effect,” in *State/Culture: State Formation after the Cultural Turn*, ed. G. Steinmetz (Ithaca: Cornell University Press, 1999), 76–97.

structure on which the Kemalist revolution had been based.”¹⁵⁶ They thus experienced the discourse of the pro-coup alliance as a form of “intellectual despotism”¹⁵⁷ which manifested itself in a condescending, didactic and monologic mode of address.

Conclusion

For outside observers and supporters of the DP, the Republican alliance’s claims that it was acting on behalf of the entire nation appeared as a “collective hypocrisy,”¹⁵⁸ a fantasy in which jurists are completely lacking in political and personal interests even when they clearly acted to bolster their own position vis-à-vis the state. The pro-coup media attempted to dissolve this paradox by representing the transitional regime’s legal celebrities not as adjudicative automatons, but as members of the cultured, urban and educated public sphere who had the ability to rise above the petty interests of the private sphere. Thus Onar, Kubalı, Başol and Egesel were construed as scholars and judges uniquely capable of leaving their family lives, hobbies, habits and cultural interests outside of their sphere of expertise, which thus retained the pristine purity it required in order to truly represent the entire nation. Conversely, these lawyers were also deserving

156 Harris, “The Role of the Military in Turkish Politics - Part II,” 30; cited in Ümit Cizre, “Ideology, Context and Interest: The Turkish Military,” in *The Cambridge History of Turkey, Volume 4: Turkey in the Modern World* (Cambridge and New York: Cambridge University Press, 2008), 309.

157 Michael P. Hyland, “Crisis at the Polls: Turkey’s 1969 Elections,” *Middle East Journal* 24, no. 1 (1970): 3.

158 Pierre Bourdieu, “Les Juristes, Gardien de L’Hypocrisie Collective,” in *Normes Juridiques et Régulation Sociale*, ed. F. Chazel and J. Commaille (Paris: Librairie Générale de Droit et de Jurisprudence, 1991), 95–99.

of admiration as private individuals, because their professional integrity marked them as morally upright members of the Turkish educated class.

The flip side of these narratives were “bad” lawyers, jurists who were said to have fallen prey to the DP and its culture of corruption and selfishness. As early as June 1, 1960, law professor Muammer Aksoy argued that only “sellout” lawyers would disagree in calling the coup a “just revolution” (*adil ihtilal*).¹⁵⁹ As the trial began on Yassıada a few months later, *Kim* ridiculed the excuses of some of the defendants who claimed they “did not know” that the actions of the DP were unconstitutional, pointing out that lawyers were by far the largest professional group among them.¹⁶⁰ Among the attorneys who took on the difficult job of defending the deposed politicians, Burhan Apaydın, Orhan Apaydın, Hüsamettin Cindoruk, and Orhan Ergüder were continually harassed by pro-coup media as well as by security forces. Soon after the trial began, *Akis* argued that the Apaydın brothers must have agreed to the job in pursuit of fame and accused Burhan Apaydın of leaking information about the mental and physical health of Adnan Menderes to newspapers in order to sway public opinion.¹⁶¹ In December 1960, when martial law authorities arrested Apaydın and several other attorneys on charges of distributing a book that presented the Yassıada trials in a “one-sided way” and thereby functioned as propaganda for the fallen regime,¹⁶² *Akis* argued that they had all been “led astray” (*aldatılan*) by the fallen regime’s sympathizers.¹⁶³ Similarly, *Akis* accused law professor

159 Muammer Aksoy, “En büyük Tehlike: Yersiz acıma hissi,” in *Forum*, June 1, 1960.

160 *Kim*, October 10, 1960.

161 *Akis*, October 17, 1960, p. 22.

162 *Milliyet*, December 25, 1960; *Akis*, December 31, 1960, 22.

163 *Akis*, December 31, 1960, p. 21.

Ali Fuad Başgil, the DP's favored professor of constitutional law, of having served as the imam of the Mosque of Paris during his student days, a preposterous claim that was clearly meant to undermine his image as an ideal-typical law professor.¹⁶⁴ *Kim* repeated similar accusations a year later, when Başgil visited Pakistan and proved that he was an "enemy of Atatürk" by wearing a "strange skullcap" (*acayip takke*).¹⁶⁵

As I show in the following chapters, however, while the RPP's insistence on impartial scholarly expertise as the ultimate criterion of public authority may have been out of touch with the sentiments of most of Turkey's voters, it remained the cornerstone of the country's legal culture and a reference point for jurists both of the left and right. This discourse of distinctions was sufficiently hegemonic that even newspapers sympathetic to the DP and its successor, the Justice Party, drew on its principles in order to discredit pro-coup lawyers once they were able to resume publishing from 1962. Right-of-center newspapers such as *Yeni İstanbul* and *Son Havadis* immediately attacked the judicial luminaries of the coup, in particular Salim Başol¹⁶⁶ and Altay Egesel,¹⁶⁷ as well as leading law professors such as Sıddık Sami Onar and Hüseyin Nail Kubalı,¹⁶⁸ for their lack of professional and personal ethics in supporting the junta. When Egesel and Başol stood for election to the Constitutional Court, the two newspapers relished Egesel's defeat and pointed out that Başol was only elected after seven rounds of voting and back

164 *Akis*, July 20, 1960, 9.

165 *Kim*, September 12, 1961.

166 *Yeni İstanbul*, January 23, May 30, September 7, 24, 25, 1962; *Son Havadis*, June 20, 23, 1962; *Düşünen Adam*, February 1, 1962.

167 *Yeni İstanbul*, January 27, 29, 30, 31, February 11, 17, March 31, April 26, 29, May 24, 26, June 9, 19, July 8, 24, 26, August 20, 1962, May 21, July 3, 1963; *Son Havadis*, January 28, May 29, June 19, 20, 1962, May 15, 18, June 4, 1963; *Düşünen Adam*, February 1, 1962.

168 *Yeni İstanbul*, March 2 and 3, July 21, September 28, 1962; *Son Havadis*, January 9, 1965.

room dealings.¹⁶⁹

As Turkey entered the 1960s with a new constitution, therefore, both sides of an increasingly polarized political system maintained a minimum consensus on the status of apolitical expertise as the touchstone of public authority. As the following three chapters demonstrate, the conflicts that broke out between left-wing and right-wing lawyers over the political and cultural orientation of the Second Republic manifested themselves not as political struggles, but as clashing claims to expert knowledge and professional integrity. Even as Sıddık Sami Onar and Salim Başol slipped out of the public spotlight and hovered on the edge of oblivion, their legacy lived on as a pattern of conflict in which even life-and-death struggles were circumscribed by legal procedure.

169 *Yeni İstanbul*, May 3, 4, 25, 1962, *Son Havadis*, May 4, 7 1962.

Chapter 3

Law on the Barricades: Political Trials and Legal Expertise, 1962-1970

“Deniz ended up in court,
If only I had been his lawyer...”¹

On July 20, 1971, in a crowded courtroom in Turkey’s capital city Ankara, a 24-year-old man named Deniz Gezmiş rose to give his testimony. Gezmiş was among the members of the Turkish People’s Liberation Army (*Türk Halkın Kurtuluş Ordusu*, TPLO), an armed leftist group which both Turkish military prosecutors and observers in the United States, always keeping a keen eye on events within their NATO ally, described as “terrorists,” “anarchists,” and “robbers” (*şakiler*) dragging the country into chaos in order to facilitate a Communist coup d’état.² This perception was not entirely unfounded: Gezmiş and his comrades had received guerilla training in Lebanon, and had earlier that year robbed a bank and kidnapped three US soldiers for ransom to purchase weapons. Now they were

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- 1 From the anonymous ballad “Şarkışla,” recorded by Zülfü Livaneli on *Chants Revolutionnaires Turcs*, LP (Brussels: Info-Türk/Coodiff, 1973). The lyrics may have been written by Mevlüde Günbulut, and have been published as such in a longer version in her poetry collection *N’olaydım N’olaydım*, ed. Şükrü Günbulut (Ankara: Ürün Yayınları, 1998).
 - 2 Harold Sieve, “A Good Breeding Ground for Rebels,” *The New York Times*, June 6, 1971. See also the RAND report prepared for the US State Department five years later by Margaret Krahenbuhl, *Political Kidnappings in Turkey, 1971-1972* (Santa Monica, CA: RAND Corporation, 1977).

charged in a military court with “attempting to overthrow the constitutional order,” a crime that carried the death penalty.

Gezmiş, taking the stand, saw the situation differently. He did not deny the facts of the case, including robbery and kidnapping. Yet when it came to the question of “motive” (*kast*) he denied all charges. The TPLO, he argued, was not attempting to overthrow Turkey’s constitutional order. On the contrary, the organization had been formed in order to *defend* the Constitution against the betrayal of the center-right government. In the defendants’ view the military court had it all wrong: It was the conservative government and the Army who were violating the Constitution, first by their US-friendly and anti-worker policies, secondly by trying civilians such as themselves in a military court.³

The TPLO case was only one of the many political trials that began in the early 1960s and continued into the following decades, but the eloquent defiance and tragic end of its main protagonists have endured in Turkey’s collective memory as a symbol of the brutality of the Turkish Armed Forces (TAF) and its courts in dealing with leftists.⁴

3 Gezmiş’s spoken testimony is reproduced in *Cumhuriyet*, July 19 and 20, 1971. His and his comrades’ more detailed written defense is reproduced in *1. THKO Davası (Mahkeme Dosyası)*, vol. 1 (Istanbul: Yöntem Yayınları, 1974), 393–576.

4 Published memoirs, character studies, novels, plays, and political tracts on Deniz Gezmiş, Yusuf Arslan, and Hüseyin İnan are so numerous that I can only mention a handful here: Erdal Öz, *Deniz Gezmiş Anlatıyor* (Istanbul: Cem Yayınevi, 1976); Burhan Dodanlı, *Daracağı: Deniz Gezmiş, Hüseyin İnan, Yusuf Arslan* (Istanbul: Evren Yayınları, 1978); Turhan Feyzioğlu, *Deniz: Bir İsyancının İzleri* (Istanbul: Belge Uluslararası Yayıncılık, 1991); Veli Yılmaz, *Emirle Gelen İdam Kararı* (Istanbul: Akyüz Kitabevi, 1992); Metin Balay, *Deniz diye bir Delikanlı: Belgesel Oyun, 2 Perde, 50 Sahne* (Istanbul: Mitos Boyut, 2004); Özgür Erdem, *Deniz* (Istanbul: İleri Yayınları, 2008); Atilla Keskin, *Herkesin Bir Deniz Gezmiş Öyküsü Vardır: Aykırı Öyküler* (Istanbul: Tekin Yayınevi, 2010); Turgut Türksoy, *Deniz: Güneşin Çocukları* (Istanbul: İmge Kitabevi, 2010); Vehbi Bardakçı, *Ağlasın Gökyüsü: Roman* (Istanbul: Oran Yayıncılık, 2011); Semih Çelenk, *Deniz Bugüne*

Gezmiş was not just another fatality in the pantheon of “Communist martyrology.”⁵

Unlike many victims of Cold War jurisprudence around the world, Gezmiş, a law student at Istanbul university before he decided to devote himself to the cause, was capable of challenging the judges and prosecutors of the Army on their own turf, articulating his defense in the same legal register and with the same professional conviction that they had. More importantly, while the military court remained unimpressed by Gezmiş’s arguments, his performance was persuasive to large parts of the Turkish public in part because he was backed up by the entire left wing of the Turkish legal profession and academe, which had spent the 1960s fighting attempts at turning the criminal judiciary into a tool of political repression.

This chapter examines how, during the decade preceding the TAF’s incursion into law enforcement in 1970, Turkish lawyers developed such radically different views on the meaning of the 1961 Constitution and the social, political, and legal system it meant to create. Why did many of the same lawyers who supported the mass trial of the deposed Democrat Party government after the 1960 coup d’état change tack to protest the political trials of the 1960s and 1970s? More importantly, *how* were so many leftist lawyers capable of resisting these trials, subverting their authority and securing the release of the defendants despite the efforts of increasingly enraged prosecutors? In this chapter I

Bakıyor (Izmir: Etki, 2011); Hüseyin Turhan, *Bir Dava, İki Devrimci: Che Guevara, Deniz Gezmiş* (Istanbul: Güz Yayınları, 2011); Serpil Çelenk Güvenç, *Daracağına Mektuplar: Deniz, Yusuf, Hüseyin: Türkiye ve Dünya Basınında 12 Mart İdamları* (Ankara: İmge Kitabevi, 2012); Doğu Perinçek, *Arkadaşım Deniz Gezmiş* (Istanbul: Kaynak Yayınları, 2012); Esen Rüzgar, *Deniz Olunmalı* (Ankara: Fabulinius, 2012).

5 Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton: Princeton University Press, 1961), viii.

answer the second question by way of the first. Leftist lawyers, law professors and judges were able to obstruct the political trials of the 1960s and 1970s because the state ideal that right-wing prosecutors and politicians claimed to be defending was one where legal experts were an indispensable extension and embodiment of public authority. It was this authority that had made lawyers into symbols of legality during the 1960 coup, but it was the very same authority that, during the following two decades, enabled the leftists among them to place their expertise at the service of intellectuals charged with Communist subversion. Toward the middle of the 1960s, what began as a small number of politically charged trials of leftist intellectuals grew into a judicial witch hunt, as prosecutors accused poets, translators, publishers and journalists—who, like leftists all over Europe, read, wrote, translated and published on a wide range of topics directly or indirectly associated with Socialism, from the writings of Marx and Stalin to Hemingway, and from dry analyses of agricultural economy to the existentialism of Sartre—of spreading Communist propaganda. While some of these intellectuals were jailed, many walked free, largely thanks to leftist law professors' practice of submitting expert witness reports to assist the court in determining whether a given publication constituted illegal Communist propaganda or constitutionally protected scholarship.

By the time the TAF, frustrated at the inability of civilian courts to clamp down on leftist propaganda, began using its own courts to try leftists in June 1970, the many civilian trials of the 1960s had caused the same judges, lawyers and law professors who had worked side by side in support of the 1960 military coup to drift apart. Although

jurists sharply disagreed among each other and with the Army brass over the ideological direction the country should be taking, the TAF was compelled to engage with jurists of all political stripes in order to plausibly maintain that it was defending the state against political subversion. In this respect, the military trials after 1970 were no different from the civilian trials of the 1960s. Only by gradually undermining the autonomy and symbolic authority of lawyers outside of the courts was the TAF able to use military courts as a brutal, if awkward and blunt, tool for political purposes after the 1980 coup d'état.

My argument entails a reconsideration of the relationship between law and authoritarianism. Military courts can still be considered the “neglected stepchild”⁶ of legal and socio-legal scholarship. The aura of secrecy and national security that so often accompanies military coups and the ensuing military trials undoubtedly contributes to dissuading researchers from searching out archives where they exist at all.⁷ More important than research logistics, however, is the assumption that the many normative failings of military courts make them less “law-like” than civilian courts, and therefore less interesting as a legal phenomenon than as symptoms of larger political conflicts. Instead of examining military trials on their own terms, therefore, scholars often assume that military courts are mere window-dressing, at best a public performance meant to intimidate defendants with legal jargon against the menacing backdrop of militarized

6 Anthony W. Pereira and Jorge Zaverucha, “The Neglected Stepchild: Military Justice and Democratic Transition in Chile,” *Social Justice* 32 (2005): 115–31.

7 Robert Barros, “On the Outside Looking In: Secrecy and the Study of Authoritarian Regimes,” unpublished manuscript (Buenos Aires, Universidad de San Andrés, October 2011), <http://www.udes.edu.ar/files/UAHumanidades/EVENTOS/PaperBarros31111.pdf>.

state violence. Thus scholarship on the TAF's clampdown on leftists from 1970 onward has largely seen the March 1971 "coup by memorandum" as a dramatic break with the pluralist and legalist framework of the conflicts of the 1960s, and has approached the subsequent military trials of civilians as an extension of the military's "free hand."⁸

In this and the following chapter I nuance this view by showing how the professional jurisdiction of the Turkish legal community provided leftist law professors, judges, and defense attorneys with the ability to undermine the authority of political trials. Consulting case files, legal briefs, and media accounts, I examine the behavior of the lawyers involved in civilian political trials from the early 1960s until 1970 in order to demonstrate that in terms of lawyers' professional authority over the boundaries of legal procedure, the military trials of the 1970s were a continuation of the civilian political trials of the 1960s. Although military judges were far less independent than civilian judges, they were bound by the same professional ethos that had made Sıddık Sami Onar and other prominent law professors into central figures of the 1960 coup, and which had subsequently determined the pattern of conflicts over the civilian political trials of the 1960s.

As I argue in Chapters 1 and 2, the longevity of Onar's doctrinal legacy lay in his flexible notion of state legality. Onar's approach to administrative law in the 1930s had made lawyers into an indispensable part of the state, but also allowed the TAF to make dramatic incursions into the private, political, and associational life of the country in the 1930s, 1940s, and again in May 1960. By actively colluding in these incursions, law

⁸ Erich Jan Zürcher, *Turkey: A Modern History* (London: I.B. Tauris, 1998), 259.

professors such as Onar and judges such as Salim Başol enabled the TAF to claim that it was acting in the interest of the state as a whole, not as representatives of particular corporate or class interests. The jurisdictional legacy of the authoritarian single-party period was thus an ambiguous power-sharing arrangement in which lawyers supported the authoritarianism of the state in return for what I, following Andrew Abbott, call “professional jurisdiction”⁹—the symbolic and practical recognition that lawyers remained the final authority in the legal articulation of state power.

With the 1961 Constitution Onar’s ambiguous relation to state power was engraved in an institutional blueprint that gave lawyers as well as the TAF a crucial degree of autonomy. Among other things, it established an independent system of military courts, but stopped short of specifying in detail where their jurisdiction ended vis-à-vis the civilian courts. Few leftist jurists considered the potential overlap between the two judiciaries a problem as long as they saw the TAF as fundamentally allied to the legal profession. Only toward the end of the 1960s, when an increasingly anti-Communist Army leadership began pushing for expanded jurisdiction for military courts, did leftist lawyers protest the expansion of military jurisdiction into their own domain. Their protests, as I show in these two chapters, were successful precisely because they resonated with the shared professional ethos of Turkish lawyers, whether they wore attorneys’ robes or military uniforms.

Whereas Chapter 1 deals with the internal logic of this ethos and Chapter 2 with

9 Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (Chicago: University of Chicago Press, 1993).

its public face, this and the following chapter show how the same ethos shaped the conflict that erupted within the legal profession over how the substantive political issues of the 1960s and 1970s should be translated into legal issues. Analyzing the struggles over political trials as clashing conceptualizations of legal knowledge,¹⁰ I show how the issue of censorship took the shape of a conflict over the professional jurisdiction of legal experts vis-à-vis political authority. My argument builds on sociologists such as Pierre Bourdieu, for whom apoliticism and professional disinterestedness in the legal profession is an ideology shared by lawyers who may otherwise occupy opposite sides of a given political issues.¹¹ Thus the conflicts that erupted in the 1960s over the political meaning of the Constitution and the legal boundaries of public debate all took place within a “legal field” which all players agreed must continue to appear apolitical.

It was against the background that I analyze in this chapter that the 1971-1972 trial of Deniz Gezmiş and other members of the TPLO—among the trials I discuss in the following chapter—resonated so strongly. Although few among the center-left RPP supported the TPLO’s militant activities, the trial became a *cause célèbre* of the left and a symbol of its struggle over the right to speak in the name of law and justice. The TPLO trial was a tactical victory for the Army—Deniz Gezmiş and two of his friends, Hüseyin İnan and Yusuf Aslan, were hanged in May 1972—but as an attempt to appropriate legality for the longer-term end of breaking the left’s hold on the judiciary, it was a

10 Mariana Valverde, *Law’s Dream of a Common Knowledge* (Princeton, NJ: Princeton University Press, 2003).

11 Pierre Bourdieu, *Practical Reason: On the Theory of Action* (Stanford, CA: Stanford University Press, 1998), 78.

strategic failure. While the military judges who condemned Gezmiş and his comrades to death are remembered today only for their grim inhumanity, Gezmiş has passed into popular memory, reproduced through novels, plays, and folk songs, as the defendant of a historic trial in which all leftists, in a sense, were his defense lawyers.

The politics of professionalism

Deniz Gezmiş's fame illustrates the fundamental paradox that Turkish lawyers wrestled with during the twenty years of the 1961 Constitution. Like many students, Gezmiş experienced a political awakening while he was studying law at Istanbul University, where he joined the Worker's Party of Turkey in 1966 and founded a student organization named the "Association of Revolutionary Jurists" (*Devrimci Hukukçular Derneği*) in early 1968, the same year that a group of attorneys founded a "Socialist Lawyers' Association" (*Toplumcu Avukatlar Derneği*) to coordinate their defense of leftists. Although, like leftists everywhere, Gezmiş and his fellow radical students and lawyers disagreed on the doctrinal details, they all saw themselves as heirs to a long tradition of Turkish vanguardism, running from the "revolutionary" étatism of the single-party-era universities to the law professors of the 1960 coup d'état. In their eyes, Atatürk's Turkish Revolution was first and foremost a struggle to replace ruthless imperialist capitalism with the rule of law within the framework of a sovereign nation-state. The gains of this revolution had been steadily undermined by compradors, first in the form of Fascist state leaders such as Recep Peker, then by the center-right government of the Democrat Party

(DP), whose corruption revealed its subservience to international capital. The 1960 “Revolution,” in this narrative, was a reaction against such politicians and a return to the ideals of Turkey’s founding moment. Although the 1961 Constitution was an imperfect manifestation of this spirit, it would eventually, if safeguarded by conscientious jurists, serve to rid Turkey’s laws of its oppressive remnants.

The most important of these remnants were found in Turkey’s 1926 Penal Code (TPC), which remained in effect after the 1960 coup and thus carried over to the ostensibly more liberal Second Republic a number of political crimes that had been added to the code in 1936 with the Fascist jurist Alfredo Rocco’s 1930 amendments to the Italian penal code as a model. In particular, the TPC’s articles 141, which prohibited attempts at “establishing domination of a social class over other social classes,” and 142, which prohibited making propaganda for the same purpose, had been used to prosecute leftists throughout the single-party period as well as during the ten years of Democrat Party rule.¹² After 1960, the clash between such political prohibitions and the Constitution, which Socialists saw as their own, was instrumental in shaping the landscape of leftist politics through lawyer-politicians such as Mehmet Ali Aybar (1908-1995). At the outbreak of World War Two, Aybar, then a legal scholar who did not yet identify as a leftist,¹³ spent some time conducting research in Paris with his friend Ragıp

12 Articles 141 and 142 were added to the TPC with Law 3038, *Resmi Gazete* no. 3337, June 23, 1936. For an English translation of these articles, see Tuğrul Ansay, Mustafa T. Yücel, and Michael Friedman, eds., *The Turkish Criminal Code*, trans. Orhan Sepiçi and Mustafa Ovaçık, The American Series of Foreign Penal Codes 9 (South Hackensack, N.J.: Fred B. Rothman & Co., 1965), 58–9.

13 Barış Ünlü, *Bir Siyasal Düşünür Olarak Mehmet Ali Aybar* (Istanbul: İletişim Yayınları, 2002), 41–2.

Sarıca,¹⁴ and began taking Marxism seriously after arguments with expatriate leftists such as Mîna Urgan, a scholar of English literature.¹⁵ When the Germans invaded Paris in June 1940 Aybar returned to Istanbul and continued teaching law until 1946, when the government had his lectureship terminated because of a series of articles in *Vatan* where he argued for democratization and an end to the State of Siege.¹⁶ He spent the 1950s working as an attorney while developing his Socialist convictions, and took part in protests against the DP government in the weeks leading up to the 1960 coup. Like many leftist, therefore, Aybar identified with the 1960 coup and embraced the new Constitution's promise of political liberalization. However, it soon became apparent that liberalization existed more "in word and hearts" than in practice, and that the interim regime preferred leaving arts. 141 and 142 hanging "like a sword of Damocles" above the heads of leftists.¹⁷ During the State of Siege following the coup, Aybar held a press conference and sent a letter¹⁸ to President Cemal Gürsel arguing that there could be no democracy without leftist parties. In response, the Ankara State of Siege Military Court no. 2 charged him with violating arts. 141 and 142, and sentenced him to five years in prison. Çetin Özek, a law faculty assistant, spoke for many jurists when he complained that the ruling showed that articles 141 and 142 did not just prohibit Communist

14 See Chapter 1 for a discussion of Sarıca's research in Paris during the war.

15 Mîna Urgan, *Bir Dinozorun Anıları* (Istanbul: Yapı Kredi Yayınları, 1998), 192.

16 Uğur Mumcu, *Aybar İle söyleşi: Sosyalizm ve Bağımsızlık* (Ankara: Tekin Yayınevi, 1986), 29–31.

17 Mehmet Ali Aybar, *TİP (Türkiye İşçi Partisi) Tarihi*, vol. 1, Bütün Eserleri 2 (BDS Yayınları, 1988), 73, 100.

18 The letter is reproduced in Mehmet Ali Aybar, *Bağımsızlık, Demokrasi, Sosyalizm* (Istanbul, 1968), 179.

propaganda, but also merely discussing the articles themselves.¹⁹

Aybar's verdict was overturned by the Military Court of Appeals, and the civilian criminal court that took over the case after the State of Siege was lifted acquitted him after one session.²⁰ In the mean time, Aybar and several other socialist intellectuals had joined the newly established Workers' Party of Turkey (*Türkiye İşçi Partisi*, WPT), which made Aybar its General Secretary in 1962. Aybar was by no means the only lawyer in the WPT. While labor unionists constituted the largest professional category of the party's roughly 12,500 party members by the late 1960s (32.4% in May 1968), lawyers were disproportionately represented on the administrative board (between 14,3% and 48,1%, 1961-1968) as well as among party's elected MPs (26,6% after the 1965 elections, against only 20% union representatives).²¹ Among them were lawyers such as Niyazi Ağırnaslı, Halit Çelenk, and Muvaffak Şeref, all of whom would later, along with Aybar himself, play important roles as defense attorneys or legal consultants on behalf of arrested leftists. As soon as they had established the party's Central Legal Office (*Merkez Hukuk Bürosu*), they filed a challenge to articles 141-142 with the Constitutional Court (CC).²² In the WPT's view, the articles were a "conservative" (*tutucu*) relic of Turkey's single-party period, whose Fascist origins were contrary to the new Constitution's

19 Çetin Özek, *141 142* (Istanbul: Ararat Yayınevi, 1968), 198–9.

20 On May 10, 1962, Aybar was tried in a lower-level criminal court (*5inci Asliye Ceza Mahkemesi*) and was represented by no less than eight attorneys. The court declared itself without jurisdiction and turned over the case to an Assize Court, which acquitted him. *Milliyet*, May 11 and November 2, 1962; Aybar, *TİP (Türkiye İşçi Partisi) Tarihi*, 1:85.

21 Artun Ünsal, *Umuttan Yalnızlığa: Türkiye İşçi Partisi (1961-1971)* (Istanbul: Tarih Vakfı Yurt Yayınları, 2002), 390, 414, 428.

22 Nihat Sargın, *TİP'li Yıllar, 1961-1971: Anılar-Belgeler*, vol. 1 (Istanbul: Felis Yayınevi, 2001), 135–43.

Atatürkist and revolutionary spirit as well as to specific articles which guaranteed the freedom of expression (art. 20), the right to pursue scholarship (art. 21), and the freedom to form political parties (art. 26).

In filing the challenge, therefore, the lawyers of the WPT demonstrated their conviction that the judiciary would stand up for what they regarded as the only accurate interpretation of the Constitution, and that it would agree with Aybar that the struggle for a Socialist Turkey was ultimately a continuation of Atatürk's independence war, a "second independence struggle."²³ As we will see, this was an overconfident attitude which nevertheless persisted until the 1971 military coup. The overconfidence may in part be explained by the restrictions that the interim regime placed on publicly criticizing the 1960 coup d'état, restrictions which for obvious reasons mostly targeted those who were associated with the center-right market liberalism of the deposed Democrat Party, now organized in the new Justice Party (JP). Thus while Sıddık Sami Onar, Ragıp Sarıca and other high-profile lawyers enjoyed their status as the official jurists of the coup, lawyers and politicians on the right were tried for violating the 1962 "Law regarding certain actions that violate the constitutional order, national security and calm"²⁴—among them Ali Fuad Başgil because of a book he published in Geneva explaining the causes of the coup.²⁵

23 E.g., *Milliyet*, November 11, 1966; Mumcu, *Aybar İle söyleşi*, 41–2.

24 *Anayasa Nizamını, milli güvenlik ve huzuru bozan bazı fiiller hakkındaki Kanun* (Law no. 38, *Resmi Gazete* no. 11053, March 5, 1962). Until it was cancelled in May 1969 against protests from both the RPP and the WPT (Law no. 1182, *Resmi Gazete* May 30, 1969), a total of 610 charges were filed on the basis of this law, but only 23 individuals had been sentenced. For a list of individuals charged and sentences, see Justice Minister Hasan Dinçer's reply to MP Ahmet Dallı in *Millet Meclisi Tutanak Dergisi* April 12, 1968, 740–8.

25 *Son Havadis*, April 1, May 6, 1965. See Chapter 1 for Başgil's pre- and postwar work as

But the impression of a broad consensus among jurists was also perpetuated by an ideology of professional “disinterestedness.”²⁶ This was an ideology which lawyers across the political spectrum shared, and which therefore concealed deeper disagreements regarding the substantive interpretation of the new Constitution that most of them had taken part in drafting. As I have argued earlier,²⁷ the Army officers who carried out the 1960 coup called on law professors such as Sıddık Sami Onar not because of the professors’ opinions on capitalism but because they considered Turkey’s postwar legal academia to be the last bastion of a state tradition that posited apolitical expertise as the source of legitimate public authority. Conversely, although Onar and his academic associates had different views on economic policies, they had in common a concern with maintaining their own professional jurisdiction over the legality of state action. Even at the height of his involvement in the fundamental political issues of the country, therefore, Onar continued to emphasize scientific objectivity as the authority-bestowing ideal of legal scholarship. In his speeches at Istanbul University for the opening of the 1961-1962 and 1962-1963 academic years, Onar warned students to stay away from “extremist” politics, arguing that they while they should be “progressive” (*ilerici*) and even “revolutionary” (*devrimci*), bringing political propaganda into campus was a form of treachery similar to introducing dangerous microbes into the social organism.²⁸ Similarly,

professor of Constitutional Law at Istanbul University. The offending book was *La Revolution Militaire de 1960 en Turquie (Ses Origines)* (Geneva: Perret-Gentil, 1960).

26 Anne Boigeol, “De l’idéologie du désintéressement chez les avocats,” *Sociologie du Travail*, no. 1 (1981): 78–85.

27 See Chapters 1 and 2.

28 Sıddık Sami Onar, *T.C. İstanbul Üniversitesi 1961-1962 Öğretim Yılıını Açılış Nutku* (Istanbul: İstanbul Üniversitesi, 1961); Sıddık Sami Onar, *T.C. İstanbul Üniversitesi 1962-1963 Öğretim Yılı Açılış Nutku* (Istanbul: İstanbul Üniversitesi, 1963), 9–11.

the dean of Ankara University's Law Faculty Hicri Fişek argued in his opening speech in 1961 that lawyers must play an active but impartial role in politics, must be both "brave and cold-blooded."²⁹ University student surveys reflected a similar contradiction: Students had stood at the forefront of the protests against the DP government in 1960, yet when asked about their political preferences, no clear tendencies emerged beyond a general desire to take an active part in society. Thus Gary Field, surveying law students at Ankara University shortly after the 1960 coup, was forced to conclude that "Legal education ... is both a politicizing and a depoliticizing force in society."³⁰

The superficially apolitical identity of the legal academe did not prevent parts of it from taking an active part in the polarization that swept through Turkish society through the 1960s. Indicators of tensions among students appeared as early as January 1963, when left-wing and right-wing factions within the Istanbul University Law Students' Association (*İstanbul Hukuk Fakültesi Talebe Cemiyeti*) came to blows during their annual meeting after right-wing students announced election platforms with names such as "The Free Jurists" (*Hür Hukukçular*), "The Young Jurists" (*Genç Hukukçular*), and "Virtue" (*Fazilet*), all of which were devoted to fighting Communism. The Association elected as its new president a conservative law student named Halil Milli, who promised to fight "anarchists."³¹ Student activists continued to clash over the next few years, raising fears among conservative observers that Communist subversives were being given

29 Hicri Fişek, "Demokratik Bir Cemiyette Hukukçunun Rolü," *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 18, no. 1 (1961).

30 Gary Robert Field, "Political Involvement and Political Orientations of Turkish Law Students" (Ph.D. Dissertation, University of Oregon, 1964), 252.

31 *Cumhuriyet*, January 4, 1963; *Yeni İstanbul*, December 3 and 12, 1963.

a free hand within the faculties.³² However, even towards the mid-1960s, when political student associations had mushroomed, radicalism remained limited to the most active student leaders while a majority pushed for reforms in university administration, financing and curriculum design³³ within a less ideologically articulated framework.³⁴ Even if their political views differed, then, left-wing and right-wing members of the legal academe tended to debate their differences in a shared idiom of impartial concern for the rule-of-law principles of the legal profession.

So also for the lawyers of the WPT. For them, removing the TPC's articles 141 and 142 was not so much a partisan cause as a realization of the spirit of a Constitution that had been demanded by the people, enabled by the Army, and written by the lawyers. As lecturer of Political Science at Ankara University Mümtaz Soysal argued, therefore, the judges of the CC could now be expected to demonstrate their fidelity to the people just as the Army had by deposing the Democrat Party.³⁵

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While Turkey's highest-ranking judges were mulling the WPT's challenge to articles 141 and 142, the struggle between right-wing and left-wing jurists over what, exactly, should be permitted in the name of the rule of law descended from the sphere of lofty

32 "Siyasal Bilgiler Fakültesinde T.İ.P. faaliyet halinde!" *Son Havadis*, March 27, 1965.

33 Hamide Topçuoğlu, *Neleri Öğrenmek İstiyorlar?* (Ankara: Yargıçoğlu Matbaası, 1966), 33.

34 Özer Ozankaya, *Üniversite Öğrencilerinin Siyasal Yönelimleri* (Ankara: Sevinç Matbaası, 1966), 33–39.

35 Mümtaz Soysal, "Yargıçlar ve toplum," *Yön*, September 12, 1962.

constitutional principles to the messy negotiations of criminal law. In January 1963 a public prosecutor opened an investigation into Adnan Benk, a lecturer of French literature who had translated Jean-Paul Sartre's essay "Marxism and Existentialism" into Turkish, and Afşar Timuçin, the editor of the philosophy and literature journal *Ataç* ("Paperclip") in which it was published.³⁶ The prosecutor charged Benk and Timuçin with spreading Communist propaganda, which carried a sentence of up to 7,5 years.³⁷ The prosecutor commissioned expert reports from three professors of criminal law, Sulhi Dönmezer, Naci Şensoy and Nurullah Kunter, all of whom argued that Benk had violated art. 142. The court eventually acquitted the defendants, apparently agreeing with the weekly *Akis* that the expert witnesses could not possibly have discerned Communist content in a journal as philosophically abstruse as *Ataç*. But *Akis*'s warning that the TPC's art. 142 should be made less ambiguous was a premonition of far more serious trials to come.³⁸

Twelve days after Sartre's essay appeared in *Ataç*, the RPP-affiliated newspaper *Cumhuriyet* published the winning entry in its "Liberalism or Socialism?" essay competition, an article by Lütfulla Şadi Alıkılıç entitled "Only Socialism Can Liberate Turkey."³⁹ Alıkılıç was well known among Turkey's leftists, having been among the defendants in a military trial of several War School cadets who had been charged with Communist subversion in 1938. The War School trial was significant in part because

36 "Marksçılık ve Varoluşçuluk," in *Ataç*, December 1, 1962, a translation of Jean-Paul Sartre, "Marxisme et existentialisme," in *Critique de la raison dialectique (précédé de Question de méthode)*, vol. 1, Théorie des ensembles pratiques (Paris: Libraire Gallimard, 1960), 15–32.

37 *Cumhuriyet*, January 5, 1963.

38 *Akis*, January 12, 1963.

39 "Türkiye'nin tek kurtuluş yolu Sosyalizm." *Cumhuriyet*, December 12, 1962.

while Alkılıç went free, his friend and fellow poet Nazım Hikmet had been sentenced to prison—not for committing violence for the Communist cause, as articles 141 and 142 then required, but simply for spreading Communist propaganda. The ensuing controversy had prompted the National Assembly to undertake the first of several amendments of articles 141 and 142, removing the element of violence that had been present even in the Fascist Italian penal code.⁴⁰

Since the War School trial, Alkılıç had worked as a bureaucrat in the Ministry of Health while occasionally publishing his own quatrains in leftists magazines. Following the publication of his article in 1962, the Interior Ministry and the Ministry of Justice ordered an investigation to determine whether Alkılıç and the managing editor of *Cumhuriyet*, Kayhan Sağlamer, had violated arts. 141 and 142. Though the police found no illegal literature in Alkılıç's apartment, an expert witness report commissioned from law professors Sulhi Dönmezer, Naci Şensoy and lecturer Nevzat Gürelli argued that his essay violated art. 142 because it encouraged abolishing private property.⁴¹ The judges, however, proved more resistant to anti-Communist rhetoric. After two assize courts⁴² recused themselves from the case, the Istanbul 3rd Assize Court agreed to take on the case, and commissioned expert witness reports from three other professors: Hüseyin Nail Kubalı, a professor of Constitutional Law at Istanbul University who had been among the

40 Law 3531, in *Resmî Gazete* no. 3961, July 16, 1938.

41 Mahmut Baksı, *Şadi Alkılıç davası* (Istanbul: May Yayınları, 1969), 48–9.

42 There is no commonly accepted English translation of *Ağır Ceza Mahkemesi* (lit. “Heavy Penal Court”). I will refer to them as the Assize Courts, as they are the Turkish equivalent of the French Assize Courts (*Cour d’assises*), higher-level criminal courts which in Turkey have jurisdiction in crimes punishable by 10 or more years of prison as well as several categories of serious offenses.

most influential jurists of Sıddık Sami Onar's Constitutional Commission, Oktay Yenil, a lecturer in economic history, and Hazım Atıf Kuyucak, an economist and in-house lawyer for Mobile Oil.⁴³ Meanwhile, Sađlamers defense attorneys, professor of criminal law Sahir Erman and former minister of justice Sahir Kurutluođlu, had succeed in acquitting Sađlamers after Erman gave a rousing speech on the hardship of journalists and argued that it was the essay competition's jury that should be held responsible.⁴⁴

Kuyucak's report agreed with the previous report by Dönmezer, Şensoy and Gürelli, while Kubalı argued that the essay constituted a scientific analysis of Socialist thought, and therefore enjoyed the protection of the Constitution's art. 21 on the right to pursue scholarship.⁴⁵ Yenil similarly argued that Socialism is an economic doctrine, not a revolutionary action plan, and that because Alkılıç's article contained no reference to revolution or to the dictatorship of the proletariat, it did not violate the law.⁴⁶ Alkılıç remained in jail for another year while the defense team requested and received supporting reports from professors Bahri Savcı and Sadun Aren, as well as letters from international personalities such as Bertrand Russell, Maurice Dobb, and A. J. Ayer, as well as Guiseppe Saragat, the Socialist President of Italy.⁴⁷

43 Hazım Atıf Kuyucak (1897-1970) was an economist, lawyer, and one-time parliamentarian, who served as legal advisor for the Turkish branch of Mobile Oil from 1946 onward. He is listed among the founders of the Turkish branch of Mobile Oil in "Mobil Oil Türk Anonim Şirketi Esas Mukavelenamesi Birinci Kısım," <http://www.mobiloil.com/Turkey-Turkish-LCW/Files/ana-sozlesme-sept.pdf> (accessed April 7, 2014). He also taught economics at Istanbul University from 1948 onward.

44 *Milliyet*, January 30, 1963. Erman later delivered an expert witness report in defense of Ali Fuad Başgil when the latter was tried for his book on the 1960 coup. *Son Havadis*, June 24, 1965.

45 For Kubalı's report from October 1963, see *Yön*, October 16, 1964.

46 Baksı, *Şadi Alkılıç davası*, 50–65.

47 *Ibid.*, 29–33.

On February 29, 1964, the Istanbul 3rd Assize Court acquitted Alkılıç, relying largely on Kubalı and Yenel's reports. The prosecutor appealed the verdict to the First Division of the Court of Cassation, which overturned the acquittal in June 1964, stating with little explanation that Kubalı and Yenel were wrong.⁴⁸ Receiving the case files again, the Istanbul 3rd Assize Court withdrew from the case in protest, asserting that the Court of Cassation's ruling was an attack on the institution of evidence.⁴⁹ The case files were then sent to the Istanbul 5th Assize Court, which also acquitted Alkılıç.⁵⁰ The prosecutor now appealed the acquittal to the General Assembly of the Penal Divisions of the Court of Cassation, which overturned the acquittal once more, arguing that the article could not be classified as scholarship because Alkılıç had never taught at academic institutions and because the newspaper in which it was published had a wide, non-specialized readership. Finally, the Court pointed out that judges were not bound by the conclusions of expert witness reports.⁵¹ The case thus returned to the 5th Assize Court, which was forced to sentence Alkılıç to six years and two months prison.⁵²

Although the General Assembly's verdict would normally be final, Alkılıç's lawyers again appealed the sentence, arguing that the verdict of the First Criminal Division of the Court of Cassation was invalid because a personal argument had broken out between Alkılıç and one of the judges. The case files were thus sent to the Fourth

48 Yargıtay 1. Ceza Kurulu, İlâm 1005/1318. In *Ibid.*, 140–5.

49 İstanbul 3. Ağır Ceza Mahkemesi, 964/183, October 10, 1964. In *Ibid.*, 155–6.

50 İstanbul 5. Ağır Ceza Mahkemesi, E. 1964/260, K. 1965/19, February 15, 1965. In *Ibid.*, 157–163.

51 Yargıtay Ceza Daireler Genel Kurulu E. 1/158, K. 150, in *Ibid.*, 164–70.

52 İstanbul 5. Ağır Ceza Mahkemesi E. 1965/167, K. 1966/107, May 14, 1966. In *Ibid.*, 179–193.

Criminal Division, which took the highly unusual step of overturning the ruling of the General Assembly.⁵³ Receiving the case files once again, however, the General Assembly ruled with 19 votes against 14 to uphold the conviction.⁵⁴ Alkılıç was thus sent to prison, a verdict that brought leftists in London, Munich, Berlin and Bonn into the streets,⁵⁵ while Hüseyin Nail Kubalı unsuccessfully requested personal intervention from the President of the Republic.⁵⁶

The trials of Alkılıç, Benk, and Timuçin had different outcomes, but they had in common that they exposed the extent to which Turkish legal scholars and judges disagreed not just on the constitutional limitations on free speech, but also on what was to count as “scholarship” and professional “expertise” in the legal realm. At the same time, their concern with maintaining the authority of legal professionals over the uses of legal procedures—even as legal professionals disagreed among themselves—provided them with a shared idiom, an argument bounded by an implied consensus that the courts depended on the authority of the wider sphere of legal scholars. Thus their debates did not revolve around whether or not courts should consult with legal experts and other academics, but on what kinds of extralegal knowledge were relevant to determining the legality of publications by authors such as Sartre and Alkılıç and who among the community of experts was qualified to make that determination. In Alkılıç’s case, the leftist experts that were called upon to defend his innocence sought to prove, first, that

53 Yargıtay 4. Ceza Dairesi, E. 967/377, K. 3131, May 25, 1967. In *Ibid.*, 212–17.

54 Sadi Kazancı, *Topluma Karşı İşlenen Suçlar* (Ankara: İlmî ve Kazai İçtihatlar Dergisi, 1971), 106–110.

55 *Milliyet*, January 13 and 14, February 3, March 3, 1969.

56 *Milliyet*, January 23, 1969.

Marxist analysis was constitutionally protected scholarship, and second, that the judges were professionally bound to accept their opinions as qualified legal experts. Their opponents on the right, meanwhile, attempted to prove that any hint of leftism made a publication tantamount to illegal revolt, and that the so-called legal “experts” and other academics of the left were really Communist subversives attempting to incite a pro-Soviet revolution among the youth.

The trials of Alkılıç and Benk also set a pattern for the succession of political trials that circulated through the civilian criminal judiciary until the end of the 1960s. In all of these trials, judges, prosecutors and attorneys on both ends of the political spectrum continued to rely on expert witness reports to make their case that a given publication or statement either did or did not constitute Communist propaganda, and conversely sought to discredit the expertise and impartiality of their opponents’ expert witnesses. In the process, jurists who had worked side by side during the 1960 coup period drifted apart and formed increasingly hard fronts.

The most prominent on the right were Sahir Erman (1918-1996), Turkey’s foremost authority on military penal law and procedure,⁵⁷ Sulhi Dönmezer (1918-2004), who had taught criminal law and press law at Istanbul University since 1942, and Nurullah Kunter (1911-1994), one of the Turkish Republic’s first authorities on penal law and a regular contributor to *Cumhuriyet* through the 1950s. All three had enjoyed strong links to the RPP during the 1940s and 1950s, and had played central roles in the 1960

⁵⁷ Erman’s treatise on military penal law was reissued seven times between 1956 and 1983. Sahir Erman, *Askeri Ceza Hukuku: Umumi kısım ve Usul* (Istanbul: İstanbul Üniversitesi Hukuk Fakültesi, 1956).

coup, most importantly by preparing the July 1960 report in support of the retroactive amendment to the TPC that paved the way for sentencing president Celal Bayar to death.⁵⁸ Their understanding of the 1961 Constitution carried the hallmarks of the doctrine of the 1930s: They interpreted the Constitution’s clauses on the freedom of expression restrictively, but were also, like Sıddık Sami Onar, concerned with protecting the professional jurisdiction of lawyers and the judiciary from the influence of elected officials. As Bülent Tanör argued, the expert reports of Erman, Dönmezer and Kunter thus rested on a notion of “scientific objectivity” that classified anything written in support of broadly defined leftist policies—or indeed anything that had been written or simply translated by someone considered to have “leftist” views—as falling outside of “scholarship” (*ilim*) and “science” (*bilim*) by definition.⁵⁹

On the left, jurists such as Faruk Erem (1913-1998), a professor of penal law and active attorney who became the first president of the Union of Turkish Bar Associations in 1969, İsmet Giritli (1924-2007), professor of administrative and constitutional law, Bahri Savcı (1914-1997), a political scientist with a particular interest in constitutional issues, Tarik Zafer Tunaya (1916-1991), a law professor and prominent political historian, Muammer Aksoy (1917-1990), a professor of law and political science and several times Chairman of the venerable Turkish Law Association (*Türk Hukuk Kurumu*), Mümtaz Soysal (b. 1929), a law school graduate and professor of constitutional law at the Ankara Faculty of Political Science, Bülent Nuri Esen (1911-1975), professor of

58 *Milliyet*, July 12, 1960.

59 Bülent Tanör, *TCK. 142. Madde Düşünce Özgürlüğü ve Uygulama: Anayasa Mahkemesinin Son Kararı Üzerine Kısa bir Not* (Istanbul: Forum Yayınları, 1979), 57–69.

Constitutional Law at Istanbul University, Hıfzı Veldet Velidedeoğlu (1904-1992), a veteran professor of civil law and former dean at the same faculty, and Siddık Sami Onar’s protege in administrative law Ragıp Sarıca (1912-1993), all defended an expansive conception of the civil and expressive rights of the Constitution, and an often equally wide notion of “scholarship” and “expertise.” Their ownership claim to the Constitution was no less legitimate than that of the anti-leftist camp. All were law faculty graduates, all had participated in or supported the coup, and most had also been co-signatories of the report on the retroactive amendments to the TPC and had taken part in drafting the Constitution. Unlike Erman and Dönmezer on the right, however, they saw the 1961 Constitution as the affirmation of a Socialist, progressive, and even “revolutionary” (*devrimci*) spirit which jurists had cultivated and safeguarded since the days of Atatürk. Thus Mümtaz Soysal, who had served as a representative of the RPP on the committee that drafted the Constitution, taught a “dynamic” approach to constitutional interpretation in which the limits of free speech and precise characteristics of the “social” state should be evaluated in terms of Turkey’s future needs rather than in terms of what the Constitution’s drafters had intended.⁶⁰ Building on Soysal’s approach, Muammer Aksoy, also among the drafters of the Constitution, argued that the CC must go beyond a literal approach (*metincilik*) to the meaning of the Constitution, and must strive to interpret it holistically (*tümünden*) in light of the principles of constitutional jurisprudence (*Anayasa Hukuku yönünden*) in order to grasp its “spirit” (*ruhu*), which he,

⁶⁰ Mümtaz Soysal, *Dinamik anayasa anlayışı. Anayasa dialektiği üzerine bir deneme* (Ankara: Sevinç Matbaası, 1969), 67–86; Mümtaz Soysal, *100 Soruda Anayasanın Anlamı* (Istanbul: Gerçek Yayınevi, 1969), 100–1.

like Soysal, believed required adapting to changing social demands (*toplumsal ihtiyaçlar*).⁶¹ For Aksoy, a scholarly informed jurisprudence (*hukuk*) was what distinguished the *Rechtsstaat*, i.e., the “state of law” (*hukuk devleti*), from a mere “state of laws” (*kanun devleti*), the sad history of which included regimes such as Nazi Germany and Fascist Italy, whose atrocities were entirely in keeping with positive law but violated the deepest principles of jurisprudence.⁶² To avoid becoming such a regime, therefore, the judges of the CC must continuously consult with legal professionals and their associations.⁶³

In keeping with the WPT’s “scientific Socialism,” these jurists frequently argued that even publications by Joseph Stalin and Ho Chi Min could be considered scholarly if they aimed at the systematic study of social issues or had been translated into Turkish for purposes such as familiarizing readers with different political systems. Such publications, therefore, were not only protected by the Constitution’s art. 21, but were also consistent with its progressive and social spirit. Although few leftist legal professionals actively supported the kind of militancy that Deniz Gezmiş and the TPLO undertook, they consistently advocated listening to the demands of the youth and argued that militancy would only disappear if the underlying social tensions were dealt with. When students at the Ankara law faculty joined other students in a campus-wide sit-in to demand more say in the university administration, therefore, Bülent Nuri Esen argued that they were simply

61 Muammer Aksoy, *Devrimci Öğretmenin Kıyımı ve Mücadelesi*, vol. 1 (Ankara: Sevinç Matbaası, 1975), 30–62.

62 Ibid., 1:1.

63 See e.g., Aksoy’s argument that serving as “reporter” to the CC (“Anayasa Mahkemesine raportörlük”) was among law professors’ most important tasks. Ibid., 1:17.

“bringing 1960 to its completion.”⁶⁴

Cracks in the edifice: Civilian political trials, 1965-1970

It was clear that the concern with scholarly objectivity among Turkish lawyers concealed substantial disagreement over what, exactly, such objectivity entailed when it came to political activity. Süleyman Demirel received an even clearer indicator of the fault lines four months prior to the 1965 general elections that brought his Justice Party to power, when the CC finally ruled in the challenge that the WPT had brought against articles 141 and 142. In keeping with their conviction that the judiciary was fundamentally on their side,⁶⁵ jurists Muammer Aksoy, Uğur Alacakaptan, and Burhan Apaydın expressed confidence that the articles would be abolished during public discussion sessions which the WPT organized.⁶⁶ To their surprise the CC rejected the challenge with a majority ruling,⁶⁷ despite what Ceren Belge calls “an ideal basis for expansive rulings on civil liberties.”⁶⁸ The way in which the CC’s verdict was made public made it obvious that the ruling was meant as a message to voters as well as to Demirel: Despite art. 152 of the Constitution, which stipulated that CC verdicts must “immediately” be published with their justification in the Official Gazette (*Resmi Gazete*), the verdict was announced in

64 Bülent Nuri Esen, “Güzel Dersler,” *Cumhuriyet*, June 19, 1968.

65 Ünsal, *Umuttan Yalnızlığa*, 296–7.

66 *Milliyet*, December 8, 1964.

67 Anayasa Mahkemesi E. 1963/173, K. 1965/40, June 29, 1965. Published in *Resmi Gazete* no. 12656, July 25, 1967.

68 Ceren Belge, “Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey,” *Law and Society Review* 40, no. 3 (2006): 671.

newspapers and over the radio on June 29, 1965, four months before the general elections but two years before the detailed justification was published in the Official Gazette.⁶⁹ When the CC finally did publish its reasoning, the majority of the judges, among them the iconic judge of the 1960 trials Salim Başol, argued that Communism not only contradicted the “spirit of the National Struggle” but also violated the principles of the *Rechtsstaat* (*hukuk devleti*) itself. With many of the most important jurists of the 1960 coup among the signatories of the ruling, the CC’s verdict thus exposed a fault line that went through the very heart of the legal profession and emboldened the right to intensify its attack on suspected leftists.

A particularly notorious case was that of Ali Faik Cihan, who was charged under the TPC’s art. 141 for publishing a book in 1965 entitled *Socialist Turkey*, a Marxist analysis of Turkey’s economy.⁷⁰ Cihan became a *cause célèbre* because, as a first-instance judge in Trabzon, his trial was seen as a symptom that the unity of the judiciary and the wider legal complex was in the process of unravelling. Not surprisingly, the crisis took the form of a battle over the right to occupy the position of impartial expertise. The Trabzon Assize Court that received the case files immediately requested expert witness reports from several professors. Sahir Erman’s report argued that the book constituted Communist propaganda because it implied that the working class should overthrow the capitalist order by way of illegal means. A separate report by Ragıp Sarıca and Macit Gökberk, a professor of philosophy, argued that there was no Communist ideology

69 E.g., *Milliyet*, June 30, 1964.

70 Ali Faik Cihan, *Sosyalist Türkiye* (Istanbul: Devrimci Yayınlar Kooperatifi, 1965).

present in the book, and that Erman's report contained several inaccuracies and should therefore be rejected outright. A third report by economics professor Ömer Celal Sarç found that parts of the book went "beyond the limits" of Socialism as an economic doctrine and therefore could be considered propaganda.

The Assize Court eventually sentenced Cihan to seven and a half years in prison and five years' supervised exile,⁷¹ prompting condemnation from leftist jurists who saw such rulings as foreshadowing a wider attack on the autonomy of the legal professions.⁷² Less than a year later, however, the First Division of the Court of Cassation overturned Cihan's sentence in a ruling that stirred protest from the opposite side of the political spectrum.⁷³ Judge Abdullah Pulat Gözübüyük, who had served as interim Minister of Justice for the three months following the 1960 coup and headed the committee that investigated the deposed government, now revealed himself to be equally unsympathetic to leftists. In his dissenting opinion, Gözübüyük relied on Ömer Celal Sarç's expert report to argue that Cihan was a revolutionary Communist pretending to be a moderate Socialist. All over the world, he argued, Communists had adopted the tactic of moderation in order to avoid suspicion from public opinion; promoting the distribution of land to landless peasants, as Cihan had done, was just another step in the direction of a full-scale revolution. As Çetin Özek wrote, if this was the case, the Constitution's art. 37, which called for precisely such redistribution, must also be a Communist tactic.⁷⁴

71 E. 1965/95, K. 1966/92, June 3, 1966.

72 "Siyaset Sahasında Oynanan Kumar," *Yargı Dergisi* (July 1, 1965). Jacob M. Landau, *Radical Politics in Turkey* (Leiden: E. J. Brill, 1974), 24.

73 Yargıtay 1. Ceza Dairesi E. 1966/2548, K. 1967/1392, May 30, 1967.

74 Özek, *141 142*, 188–9, 191.

The case files were sent back to the prosecutor, who re-appealed the sentence to the General Assembly of the Court of Cassation. On June 3, 1968, the General Assembly affirmed the acquittal, arguing that Cihan's book did not recognize the superiority of any social class and therefore did not violate art. 142, and more importantly that far from seeking to overthrow the constitutional order, Cihan's book *defended* it.⁷⁵ Tellingly, the dissenting opinions focused not on the book itself but on the status of the expert reports. While Sahir Erman's report was "completely scientific," they argued, neither Ragıp Sarıca nor Macit Gökberk were competent to serve as experts on the issue because one was a professor of administrative law and the other a philosopher. Furthermore, neither of their reports could be considered objective, because instead of delivering their own impartial views on Cihan's book, their real aim was to discredit Erman's report. They went on to argue that the concept of "Social Justice" provided for in the Constitution was limited to ensuring that workers lived in humane conditions. In a report published after the trial, Abdullah Pulat Gözübüyük argued that Erman's and Sarıca's reports left no doubt as to the criminal intent, while Sarıca and Gökberk had no expertise in economic doctrine and therefore had delivered superficial (*sathi*) and historically inaccurate reports.⁷⁶

Similar trials followed one after the other. In a foreshadowing of the sometimes comically indiscriminate way in which police would confiscate literature after the 1971 coup, the "experts" themselves would occasionally reach for the wrong book. In 1968, Cem Eroğlu was charged with translating *The Elementary Principles of Philosophy* by

75 Yargıtay Ceza Genel Kurulu, June 3, 1968, E. 1/39, K. 196, in Kazancı, *Topluma Karşı İşlenen Suçlar*, 82–106.

76 Ibid., 98–105.

the Hungarian-French intellectual Georges Politzer.⁷⁷ An assize court acquitted Erođlu on December 30, 1968 after receiving expert witness reports in his favor from several academics, among them Uđur Alacakaptan and professor of penal law Hakkı Uma.⁷⁸ The prosecutor, who had received reports in favor of sentencing by Sulhi Dönmezer, professor of the philosophy of law Orhan Münir Çađıl, and economics professor Sabahattin Zaimođlu, appealed the verdict, but the First Criminal Division of the Court of Cassation upheld it because the prosecution's witnesses had apparently been evaluating the wrong book.⁷⁹ Even when the experts did read the right book, the scholarly analysis required to determine whether or not a publication was punishable sometimes reached surreal heights. Was the Turkish translation of George Pálóczy-Horváth's book *In Darkest Hungary* a piece of Communist propaganda disguised as a Russophile account of 1,500 years of Hungarian peasant history?⁸⁰ Law professors Sulhi Dönmezer and Recai Galip Okandan questioned the accuracy of Horvath's historiography to prove that it was, but the Court of Cassation questioned the professors' expertise in Hungarian history and overturned the translator's sentence.⁸¹ Was 15-year-old Gürbüz ŐimŐek, who had written

77 Georges Politzer, *Felsefenin Bařlangıç İlkeleri*, trans. Cem Erođlu (Ankara: Sol Yayınları, 1966); translation of *Principes élémentaires de philosophie* (Paris: Editions sociales, 1946).

78 E. 1967/365, K. 1968/382, in *Ibid.*, 56–7. Hakkı Uma (1912-2010) had previously served as judge on a first-instance criminal court and held various positions in the Ministry of Justice.

79 Kazancı, *Topluma Karşı İşlenen Suçlar*, 56–7. The prosecution's expert witnesses had analyzed another book by Politzer called "The Fundamental Principles of Socialist Philosophy," in Turkish: Georges Politzer, *Sosyalist Felsefenin Temel Prenzipleri*, trans. Cem Gün (İstanbul: Sosyal Yayınlar, 1966).

80 George Pálóczy-Horváth, *In Darkest Hungary* (London: V. Gollancz, 1944); published in Turkish as "Yesterday We Were Slaves, Today We are A People": G. Paloczy Horvath, *Dün köleydik bugün halkız: Bir ülkenin 1500 yıllık köylü hareketleri tarih*, trans. Őemsi Belli (Ankara: Bilim ve Sosyalizm Yayınları, 1966).

81 İsmet Bilgin, *Türkiye'de Sağ ve Sol Akımlar ve Tatbikati* (İstanbul: Toker Matbaası, 1969),

a school paper where he compared Atatürk to Lenin,⁸² a dangerous Communist? After Şimşek's attorneys Muammer Aksoy and Niyazi Ağırnaslı pointed out that Atatürk had, in fact, cooperated with Lenin during the Turkish War of Independence, even the prosecutor demanded his release.⁸³ Could an article by the revolutionary-era French journalist Gracchus Babeuf, published by the newspaper editor Atilla Bartınlioğlu in his daily *Gündem*, be considered Communist propaganda?⁸⁴ The prosecution's witness, Bartınlioğlu's old classmate Uğur Alacaktapan, argued that it was,⁸⁵ and the 1st Ankara Assize Court sentenced him to 7,5 years.⁸⁶ When the case was appealed, the First Criminal Division of the Court of Cassation overturned the sentence, arguing that Babeuf could not possibly be Communist because Communism had not yet been invented in his time. As in Ali Faik Cihan's case, judge Abdulla Pulat Gözübüyük dissented, arguing that such historical details were irrelevant as long as Bartınlioğlu had intended to gain sympathy for the Communist cause.⁸⁷

Behind these scholastic disagreements lay a more fundamental conflict over the relationship between political intention and the legal discourse of scholarly objectivity.

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82 Şimşek appeared on the cover of *Akis*, March 19, 1966, which also carried his story.

83 *Milliyet*, October 1, 1966.

84 "Oyalayıcılara karşı," *Gündem*, July 31, 1964. The article was an excerpt from a collection of Babeuf's writings published in Turkey as *Devrim Yazıları*, trans. Sabahattin Eyüboğlu and Vedat Günyol (Istanbul: Çan Yayınları, 1964).

85 *Milliyet* and *Cumhuriyet*, January 16, 1965. This is the only case I have come across where Alacaktapan witnessed against a leftist. He appears to have rethought his position soon after, and began writing reports in defense of leftists. Bartınlioğlu discusses his disappointment after Alacaktapan witnessed against him in Süleyman Coşkun, ed., *Kendi Anlatımlarıyla Duayen Gazeteciler*, vol. 2 (Ankara: İLAUM, 2004), 33.

86 Özek, *141 142*, 187.

87 *Ibid.*, 189.

For the defendants' part, the most important of these debates was whether the translator of a Communist text could be held responsible for the intentions of the original author. For example, on June 16, 1967, Erol Aydınlik, the translator of Henri Lefebvre's book *Le matérialisme dialectique*,⁸⁸ was acquitted by the Istanbul 3rd Assize Court, which accepted his defense attorney's argument that the book was social-scientific and not propaganda.⁸⁹ The First Criminal Division of the Court of Cassation then overturned the acquittal, arguing that although the translator could be considered a scholar, the text was undoubtedly Communist because Lefebvre considered himself a Marxist and his book did not address anti-Marxist arguments.⁹⁰ Similarly, Remzi İnanç, a graduate of the Ankara Law Faculty, member of the WPT, and publisher, was charged because he had published Murat Devrim's translation of a collection of Ho Chi Min's writings on revolution.⁹¹ During pre-trial investigations, the public prosecutor commissioned reports from a professor of penal law and two professors of economy at Istanbul University; meanwhile Uğur Alacakaptan, who had served as expert witness against Atilla Bartınlıglu, changed tacks to serve as İnanç's defense attorney, and commissioned expert reports from Muammer Aksoy and Mümtaz Soysal, both of whom argued that the book was a "classic work" of political analysis which contained no Communist propaganda. On June 3, 1969, the 3rd Ankara Assize Court sentenced İnanç to one year and six month's prison and six

88 Henri Lefebvre, *Sosyalist dünya görüşü: Diyalektik maddecilik*, trans. Erol Aydınlik (Istanbul: Hür Yayınevi, 1965); from Henri Lefebvre, *Le matérialisme dialectique* (Paris: Presses Universitaires de France, 1962).

89 K. 1964/142, June 16, 1967.

90 Yargıtay 1. Ceza Dairesi, E. 1967/2533, K. 1968/178, January 20, 1968, in Özek, *141 142*, 193–7.

91 Ho Şi Minh, *Milli Kurtuluş Savaşımız, 1920-1967*, trans. Murat Devrim (Ankara: Toplum Yayınevi, 1968).

months' supervised exile in Amasya.⁹² Upon appealing the sentence, İnanç's defense team questioned the qualifications of the prosecution's experts and reiterated that the book constituted scientific research and was therefore protected by art. 21 of the Constitution. Nevertheless, the First Criminal Division of the Court of Cassation voted to uphold the sentence, arguing that because the book included speeches, letters, articles and Communist party statements, İnanç's claims to impartial scholarship were suspect.⁹³

In another trial, the translator of an article by Lenin was acquitted by an assize court on the grounds that it focused on historical events specific to Russia between 1902 and 1905, despite the argument by the prosecution's experts that it had been translated with the "practical" purpose of inciting Communism in Turkey. The court did not find the distinction between "theory" and "practice" to be convincing. After the prosecutor appealed with expert reports from Sahir Erman and Sulhi Dönmezer, however, the First Criminal Division of the Court of Cassation overturned the acquittal because the translator lacked higher education and thus could not be considered a "scholar" (*bilim adamı*). A single judge dissented, arguing that translating texts by Communist could not in itself be considered Communist propaganda; thus no one had thought to arrest the Turkish translator of *Mein Kampf* despite the fact that the book clearly constituted illegal propaganda.⁹⁴ The Court of Cassation similarly overturned a lower assize court's acquittal of Muzaffer Kabagıl, the the translator of Joseph Stalin's *Marxism and the National*

92 E. 1968/334, K. 1969/120.

93 Yargıtay 1. Ceza Dairesi E. 1969/3192 K. 1970/2286, Kazancı, *Topluma Karşı İşlenen Suçlar*, 30–7.

94 *Ibid.*, 71–82.

Question,⁹⁵ arguing that the translator's intentions were irrelevant in determining whether or not the publication constituted scholarship as long as the contents were Communist. One of the dissenting judges argued that if anyone could be sentenced, it was Stalin himself, not the translator.⁹⁶

Ultimately, the "logic of association"⁹⁷ by which translators of Socialist literature became guilty of revolutionary provocation inexorably widened the spotlight of right-wing judges and prosecutors to encompass the jurists who delivered reports in the translators' defense. For example, when Hasan Hüseyin Korkmazgil was charged in the 3rd Ankara Assize Court because of his poem *Kızılırmak* ("Red River"), professor of public law at Istanbul University Recai Galip Okandan delivered a report for the prosecution, arguing that the poem violated articles 141 and 142 because it supported the violent overthrow of the social order.⁹⁸ The defense team's experts, law professor Hakkı Uma, professor of literature Kenan Akyüz, and professor of political economy Aziz Köklü, argued that the poem did not constitute Communist propaganda because it did not mention Communism or Socialism.⁹⁹ Since the two expert reports contradicted each other, the prosecutor requested three new expert reports. Uğur Alacakaptan and lawyer and professor of political science Nermin Abadan argued that there was no element of Communist propaganda in the poem. The linguist Hasan Eren, on the other hand, argued

95 Joseph Stalin, *Marksizm ve Milli Mesele*, trans. Muzaffer E. Kabagil (Ankara: Sol Yayınları, 1967); translation of Joseph Stalin, *Marxism and the National Question* (Moscow: Foreign Languages Pub. House, 1947).

96 Kazancı, *Topluma Karşı İşlenen Suçlar*, 65–71.

97 Hans Magnus Enzensberger, "Towards a Theory of Treason," in *Politics and Crime* (New York: Seabury Press, 1974), 6.

98 Halit Çelenk, *141 142 Üzerine* (Ankara: Anka Yayınları, 1976), 415–7.

99 *Ibid.*, 417–20.

that the word “Red” in the poem’s title, as well as the barbed wire on the cover of the book, made it possible to ascertain that it was Communist.¹⁰⁰ In addition, he argued that Korkmazgil had simply added the names of Atatürk and Mevlana¹⁰¹ to the poem to hide the fact that it was based on the thought of Marx, Lenin, Mao and Castro.¹⁰² The court finally sentenced Korkmazgil to three years’ prison and one year of supervised exile in Kayseri.¹⁰³ After defense attorney Halit Çelenk appealed the sentence, however, the Court of Cassation acquitted Korkmazgil, arguing that a poem about hunger, economic underdevelopment and imperialism was not necessarily Communist. In their dissenting opinions, Celal Varol and Abdullah Pulat Gözübüyük argued that the Court of Cassation should have rejected Nermin Abadan and Uğur Alacakaptan as expert witnesses because both had previously gone public about their opposition to articles 141 and 142 and could therefore not be considered impartial.¹⁰⁴

A similar argument came up in the trial of Uğur Kökden and Coşkun Bölükbaşıoğlu, who were charged with spreading Communist propaganda by writing a review of the Turkish translation of Che Guevara’s *Guerilla Diary*. The Ankara 1st Assize

100 Ibid., 420–3. According to *Cumhuriyet* (May 12, 1991, 17), Eren was close to Democrat Party circles in the 1950s and had long been opposed to leftists. He became head of the Turkish Language Association (*Türk Dil Kurumu*) in 1985, and published a terminological dictionary on the 1982 Constitution: Hasan Eren and Hamza Zülfikar, *Anayasa Sözlüğü* (Ankara: Türk Tarih Kurumu, 1985).

101 Mevlana, or Jalāl al-Dīn Muḥammad Rūmī (1207-1273), a Persian mystic and poet generally known in the West as Rumi.

102 Kazancı, *Topluma Karşı İşlenen Suçlar*, 48–50.

103 E. 1967/59, K. 1969/292, November 25, 1968, in Çelenk, *141 142 Üzerine*, 423–31.

104 The prosecutor was probably referring to one of Alacakaptan’s articles in the Ankara University Law Faculty Journal, where he argued that articles 141 and 142 must be changed to distinguish between Communism, which calls for violent revolution, and “democratic Socialism,” which does not. Uğur Alacakaptan, “Demokratik Anayasa ve Ceza Kanunu’nun 141 ve 142’inci Maddeleri,” *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 22, no. 1 (1966).

Court requested an expert witness report from Sahir Erman, who argued that the article was in violation of article 142 of the TPC. The court did not find the report satisfactory and requested a report from Uğur Alacakaptan, law professor Ergun Özbudun and professor of economy Besim Üstünel, who argued that the sole purpose of the article was to acquaint readers with a book that described a justified struggle against imperialist forces not unlike the struggle Atatürk had waged on Turkey's behalf.¹⁰⁵ In November 1969, the court acquitted the defendants on the grounds that while Guevara was undoubtedly a Communist, the translation did not itself constitute propaganda.¹⁰⁶ When the 1st Criminal Division of the Court of Cassation upheld the acquittal,¹⁰⁷ dissenting judges Ömer Könü and Abdullah Pulat Gözübüyük argued that while Erman's report was accurate, Uğur Alacakaptan and Besim Üstünel were well-known critics of the TPC's articles 141 and 142, while Ergun Özbudun, being a law professor, lacked expertise on Communist doctrine.

1968-1970: The military courts expand

The fact that leftist scholars and attorneys often succeeded in convincing judges to acquit the intellectuals who were contributing to the tide of Socialism rattled the generals in the TAF's High Command, who increasingly viewed leftists propaganda as a threat to the Army's cohesion. In February 1968, therefore, the High Military Council discussed the

105 Kazancı, *Topluma Karşı İşlenen Suçlar*, 38–41; Çelenk, *141 142 Üzerine*, 347–8.

106 E. 969/335, K. 269/273, November 11, 1969, in Çelenk, *141 142 Üzerine*, 342.

107 Yargıtay 1. Ceza Dairesi, E. 1969/3829, K. 1419, May 5, 1970.

need for amendments to the laws governing the jurisdiction and composition of military courts. In addition to changing the composition of the Military Court of Cassation to make it more responsive to the needs of the General Staff,¹⁰⁸ the Council wanted to expand the number of crimes listed in the Military Penal Code to include more of the crimes that were also listed in the TPC, thus creating a larger area of overlap where civilians could be tried for military crimes in military courts if the circumstances permitted.¹⁰⁹ Among the actions that would count as military crimes were spreading political propaganda among military personnel, inciting military personnel to refuse orders or to revolt, and insulting the personality of the state and the Army.¹¹⁰

The proposal provoked protests from several high-profile jurists. The 1960 coup had produced the expectation that the relationship between lawyers and the Army would be characterized by mutual respect for the two professions' respective fields of authority. The reception of the new military judiciary, finalized in October 1963,¹¹¹ had reflected this expectation. The military court system was the product of two years of consultation with Turkish and foreign military jurists.¹¹² The result was a system more thoroughly

108 *Cumhuriyet*, February 20, 1968.

109 *Cumhuriyet*, February 16, 1968.

110 *Cumhuriyet*, February 22, 1968. The civilian Court of Cassation had already in February 1962 determined that the sentence for spreading Communist propaganda (TPC art. 42) could be doubled according to art. 148 of the *military* penal code if the crime had taken place within the Army or among Army members. Yargıtay 1. Ceza Dairesi E. 61/2260, K. 290/1962, February 5, 1962, in Hulûsi Özbakan, ed., *Askeri Yargı İle İlgili İçtihatlar* (Ankara: Yılmazoğlu, 1964), 202.

111 *Askeri Mahkemeler Kuruluşu Ve Yargılama Usulü Kanunu*, Law no. 353, in *Resmi Gazete* no. 11541, October 26, 1963.

112 In the summer of 1961 the General Staff even sent a committee of military judges to consult with German and US military judiciaries and inspect their military prisons. See Faruk Aldemir et al., *A.B.D. Askeri Adalet ve Askeri Polis ve İnfaz Müesseseleri Hakkında Türk Askeri Hakimler Heyetinin Raporu (14 Temmuz - 2 Ağustos 1961)* (Ankara: T. C.

discussed, publicly known, and liberal than Turkey had ever seen.¹¹³ Foreign delegates at the conference of International Society for Military Law and the Law of War held in Istanbul in May 1963 had praised the new military court system for maintaining high legal standards.¹¹⁴ Although there were potential areas of overlap between the civilian and military courts,¹¹⁵ jurists apprehensive about potential future conflicts between the two judiciaries would have been reassured by the fact that Art. 142 of the Constitution foresaw that the already existing “Court of Jurisdictional Conflicts” (*Uyuşmazlık Mahkemesi*) was to have its power to resolve issues of jurisdictional conflict between the civilian and administrative courts extended to also cover the military judiciary.¹¹⁶ On the whole, therefore, both civilian and military jurists had expressed support for the military courts.¹¹⁷

The notion that military courts could also be used to try civilian leftists was therefore met with disbelief. Bahri Savcı, who had been a member of Onar’s committee of jurists after the 1960 coup, argued that trying civilians in military courts amounted to a

Genelkurmay Başkanlığı Karargahı Adli Müşavirlik, 1961).

113 For parliamentary debates and preparatory work on the laws pertaining to the military judiciary, see Ahmet Kerse, ed., *1961 Anayasasına Göre Gerekçeli-Notlu Askeri Yargı Mevzuatı*, 2 vols. (Istanbul: T. C. Deniz Basımevi, 1965).

114 Fahri Çoker, “Askeri Mahkemelerin Kuruluş Ve Yargılama Usulünde Yeni Hükümler (i),” *Cumhuriyet*, October 15, 1963.

115 Ragıp Aycan, “Türk Ceza Kanunu İle Askeri Ceza Kanununun Genel Hükümlerinin Mukeysesi Üzerinde Bir İnceleme,” *Adalet Dergisi* 54, no. 9–10 (1963): 954–972; Ragıp Aycan, “T.C.K. Umumi Hükümleri İle Askeri Ceza Kanunu Umumi Hükümlerinin Mukayesesi,” *Askeri Adalet Mecmuası* 8, no. 32 (1964): 1–17; Erdoğan Başekim, “Orduda Bulunan Sivil Personel,” *Askeri Adalet Dergisi* 10, no. 40 (1966): 11–17.

116 Despite the constitutional provision outlining the new responsibilities of the Court of Conflicts, a new law that would regulate its powers was not passed until 1979.

117 Çetin Özek, “Türk Askeri Muhakeme Hukukunda Son Değişimler,” *İstanbul Hukuk Fakültesi Mecmuası* 30, no. 1–2 (1964): 54; Adnan Üze, “Yeni Anayasa Ve Askeri Kaza,” *Askeri Adalet Dergisi* 7, no. 25 (1962): 15–20.

“metamorphosis” of the military judiciary’s purpose and a significant step away from the principles of the 1961 constitution. Çetin Özek, who had praised the new military judiciary only four years earlier,¹¹⁸ argued that the amendments were contrary to the rule-of-law principles it the Army had acted on when it took power in 1960.¹¹⁹ The General Staff’s attempts at shaping the military judiciary into a pliable political tool even met with resistance within its own ranks. Soon after the High Military Council’s meeting it emerged that the General Staff’s suggestions had caused acrimonious debates during the meetings, in particular from military lawyers. Less than a week later, the president of the Military Court of Cassation filed a challenge to parts of the Military Personnel Law in the Constitutional Court, arguing that the law was contrary to the principle of judicial independence.¹²⁰

It was clear, then, that expanding the competence of military courts over civilian activists would require circumspection, and would have to rely as much as possible on grey zones within existing legislation and on the willingness of the Constitutional Court to look the other way on issues that did not directly concern the courts’ own independence. Ironically, when such a grey zone did appear, it was largely due to leftists’ success in building alliances with lower-ranking officers and cadets through publications such as *Ant*, *Yön* and *Devrim*, which regularly addressed their articles to the Army in the hopes of provoking a 1960-style revolution for a more Socialist regime.¹²¹ The increase in

118 Çetin Özek, “Türk Askeri Muhakeme Hukukunda Son Değişimler,” *İstanbul Hukuk Fakültesi Mecmuası* 30, no. 1–2 (1964): 53–70.

119 *Cumhuriyet*, February 24, 1968.

120 *Cumhuriyet*, February 28, 1968.

121 Landau, *Radical Politics in Turkey*, 84–5; Özgür Mutlu Ulus, *The Army and the Radical Left*

Socialist activity among Army officers created an area of potential overlap between the “natural” jurisdiction of the ordinary courts and the “exceptional” jurisdiction of military courts over civilians, an area where Turkish jurists had little precedence or doctrine to rely on. Although jurists such as Sıddık Sami Onar and Ragıp Sarıca had made important contributions to the doctrine regarding states of siege during the single-party period, their work on jurisdictional conflicts between different court systems had been limited to conflicts between the administrative courts and the ordinary courts, an issue over which the Court of Jurisdictional Conflict (CJC) had had jurisdiction since 1945.¹²² The 1961 Constitution foresaw that the CJC would also have competence to determine the jurisdiction of military courts, but a law specifying its new powers had not yet been produced.¹²³ Beyond a general notion that such jurisdictional conflicts must be solved through jurisprudence, therefore, Turkish courts had few practical guidelines with which to determine the boundaries between military and civilian jurisdiction.

In April 1969 Doğan Özgüden, a journalist, newspaper editor, and member of the WTP’s central committee, was charged in a civilian court for “inciting military personnel to violate the law and their oath” because of an article he had published in his weekly actuality magazine *Ant*.¹²⁴ The civilian court recused itself, arguing that inciting military personnel to break the law fell under the Military Penal Code and therefore belonged to

in Turkey: Military Coups, Socialist Revolution and Kemalism (London and New York: I. B. Tauris, 2011), 44.

122 See Chapter 1 and 6.

123 See Chapter 6 for a discussion of the CJC’s jurisprudence on military court jurisdiction once it was re-established in 1979.

124 Doğan Özgüden, “Cinayet yerinde İntihar,” in *Ant*, April 18, 1967. Özgüden was at that point already being tried in the same court for on charges of “insulting the state’s security forces,” for which he eventually received a 1-year prison sentence. *Milliyet*, June 21, 1969.

the military judiciary. The military court that received the case files, however, reasoned that the relevant article of the Press Law overruled the Law on Military Court Procedure, and therefore sent the case files to the CJC to have the issue resolved. Since the CJC did not yet have the power to deal with military courts, it also recused itself and sent the case files to the civilian Court of Cassation. Although the Court of Cassation could also have recused itself,¹²⁵ it chose not to. Instead, it argued that in cases where two laws contradicted each other, the newer law, in this case the Law on Military Court Procedure, should have precedence. It therefore overturned the military court's recusal and sent the files back.¹²⁶

If the Court of Cassation was willing to err on the side of military jurisdiction, other parts of the civilian judiciary were less forgiving. In particular, the Council of State persisted in blocking the Army's attempts at expelling leftists from their own ranks. During the 1950s, suspected members of the marginal and illegal Communist Party of Turkey (*Türkiye Komünist Partisi*) had been expelled from the Army,¹²⁷ but the Council of State occasionally reinstated them.¹²⁸ The Council continued to frustrate the High Command's attempts at preventing leftist activity among its own ranks in the late 1960s.

125 Sahir Erman, *Askerî Ceza Hukuku: Umumi kısım ve usul*, 6th ed. (Istanbul: İstanbul Üniversitesi Hukuk Fakültesi Yayınları, 1974), 383–4.

126 Yargıtay Ceza Genel Kurulu, E. 1971/96, K. 1971/140, April 12, 1971. In Enis Coşkun, *Açıklamalı Askeri Mahkemeler Kuruluşu ve Yargılama Usulü Kanunu* (Istanbul: Ararat Yayınevi, 1972), 41–2.

127 “Gizli Komünist Partisi’ne girmek ve faaliyet göstermek suçundan üsteğmen Ali Hikmet Maltepe’nin ordudan tardı,” October 3, 1959. 30.11.1/275.9.6. BCA; “Gizli Komünist Partisine girmek ve faaliyet göstermek suçundan ceza alan askeri öğretmenin Behçet Pekmertol’un ordudan tardı,” June 12, 1958. 30.11.1/273/35/11. BCA.

128 E.g., letter from the President of the Republic to the General Staff, September 9, 1966: “Gizli Kominist Partisine girmekten Yd. Sb. Hakkı Kaldırılan Ydç Top. Tğm. Ahmet Yılmaz Çolpan’ın Danıştay kararı ile yd. subaylık hakkının iadesi,” 30.11.1/ 322.35.9. BCA.

In December 1969, for example, the military prosecution began investigating sixty-nine Navy officers who had been caught handing out leaflets among their fellow officers in support of workers' rights.¹²⁹ A few weeks later, five of the self-proclaimed "revolutionary officers" were discharged from the Army, but were later reinstated upon filing a suit with the Council of State.

The case eventually prompted the General Staff to propose amending the Military Penal Code to increase punishment for military personnel who took part in political activities.¹³⁰ In the meantime, however, something needed to be done about the civilians who were recruiting Army officers to their cause. The opportunity arose in March 1970, when six students connected to the revolutionary student association Dev-Genç were apprehended for handing out fliers encouraging the Army to revolt. The students were initially detained by a civilian court and released, but were again detained and re-tried by a military court a few days later on the pretext that their actions constituted a military offense under the Military Penal Code.¹³¹ Similarly, in May 1970, a military prosecutor ordered two editors of the journal *Devrim*, Doğan Avcıoğlu and Uluç Gürkan, to appear for questioning regarding writings that encouraged soldiers to refuse orders (*itaatsizliğe teşvik etmek*).¹³² Just a few days later, the same court ordered the gendarme and the riot

129 Among the officers was Sarp Kuray, a former law student and one of the founders of Dev-Genç. *Cumhuriyet*, December 24, 1969, January 16 and 30, 1970.

130 *Cumhuriyet*, May 8, 1970.

131 The students were Çelik Cesuroğlu, Lokman Seçkin, Sabahattin Kurt, Cüneyt Oğuz Tüzüm, Serdar Mün, and Melih Cessam. The previous day, Atilla Sarp, the president of Dev-Genç, had been released by a civilian court, but was promptly afterwards apprehended by the same military court. The students spent 16 days in Mamak military prison before being released. *Milliyet*, March 18, 1970; *Cumhuriyet*, March 29, 1970.

132 *Son Havadis*, May 15, 1970.

police to raid the student dorms at the Faculty of Political Science at Ankara University and detain 86 students on charges of inciting insubordination among Army personnel.¹³³

These jurisdictional transgressions caused anger and confusion among leftist jurists. Lütfi Duran called the arrests a kind of “state of siege without the declaration of a state of siege,”¹³⁴ while Hıfzı Veldet Velidedeoğlu characterized the creeping expansion of military jurisdiction as a “subversion” of existing institutions.¹³⁵ They stopped short of blaming the Army for the transgressions, however. Several jurists, including Uğur Mumcu, clung to the hope that the Army’s incursion into civilian law enforcement was caused by right-wing politicians’ attempts at causing a rift in the coalition between the Army, the people, and the intellectuals.¹³⁶ This attitude extended even to the activists who bore the brunt of the military clampdown. Following an attack on leftist university dorms by armed right-wing “commandos” the same month, Atilla Sarp, the chairman of Dev-Genç, publicly expressed his confidence that the judiciary, “including the military courts,” would uncover the real culprits.¹³⁷

The event that finally allowed the Army to turn the military courts into an instrument of anti-leftist repression was the large-scale rioting of workers in June 1970, which conservative analysts came to view as a “dress rehearsal for a Communist revolution.”¹³⁸ The riots were prompted by the JP’s proposed amendments to the Law on

133 *Cumhuriyet*, May 18, 1970; *Son Havadis*, May 19, 1970.

134 Lütfi Duran, “Milli Güvenlik Kurulu’nun bildirisi,” *Cumhuriyet*, April 8, 1970.

135 Hıfzı Veldet Velidedeoğlu, “Hukuk Saptırmaları Ve Askeri Yargı,” *Cumhuriyet*, May 4, 1970.

136 Uğur Mumcu, “Polis ve Ordu Birliklerinin Kullanılması,” *Cumhuriyet*, June 10, 1970.

137 *Cumhuriyet*, May 19, 1970.

138 Tekin Erer, “Bir ihtilal denemesi...,” *Son Havadis*, June 24, 1970; “Komünist ihtilalin provası yapılıyor,” *Son Havadis*, February 21, 1971; Ülkücü İşçiler Birliği Derneği, *Komünizmin İhtilal Provası (15-16 Haziran)* (Ankara: Ayyıldız Matbaası, 1971).

Syndicates and the Law on Collective Bargaining Agreements, Strikes and Lockout, proposals that were widely perceived as an attempt at shutting down the radical labor syndicate DİSK.¹³⁹ For the workers, the amendments constituted an attack not just on their right to organize, but also on the Constitution itself. Secure in their belief that the 1961 pact would be upheld by the Constitutional Court, the marching workers chanted “Demirel must go! The Army and workers hand in hand!” and “Hand in hand for the Constitution! Whoever doesn’t recognize it is a bastard!”¹⁴⁰ The police were quickly overwhelmed by the riots and called in the Army, which declared a State of Siege that was ratified by the National Assembly soon after. Over the following days, leftist lawyers attempted to have the State of Siege annulled. They first filed a complaint with the Council of State, which recused itself and sent the case files to the Court of Jurisdictional Conflicts.¹⁴¹ The latter court, however, had no jurisdiction over declarations of states of siege and also recused itself. Finally, the WPT filed a challenge to the Constitutional Court, which also recused itself.¹⁴² The scene was thus set for the first post-1960 use of exceptional courts to try civilians for political crimes.

139 Kemal Sülker, *İki Konfederasyon: Türk-İş ve DİSK* (Istanbul: Koza Yayınları, 1976); Brian Mello, “Communists and Compromisers: Explaining Divergences within Turkish Labor Activism, 1960-1980,” *European Journal of Turkish Studies*, no. 11 (2010), <http://ejts.revues.org/index4343.html>.

140 Kemal Sülker, *Türkiye’yi Sarsan İki Uzun Gün* (Istanbul: V Yayınları, 1987), 123.

141 Council of State (*Danıştay*) verdict no. 970/444.

142 Constitutional Court (E. 1970/44, K. 1970/42), November 11, 1970.

Conclusion: A strained legacy

From 1962 to 1970, the fragile consensus that had allowed Sıddık Sami Onar, Ragıp Sarıca, Hüseyin Nail Kubalı and the many other jurists of the pro-coup “Republican alliance” to assert the primacy of law over the military might of the Armed Forces came under increasing pressure. As political polarization swept Turkey’s urban centers, jurists were pulled along, some, like Muammer Aksoy, Mümtaz Soysal and Ragıp Sarıca, drifting toward the left, while more conservative jurists such as Hüseyin Nail Kubalı and Turhan Feyzioğlu increasingly saw Socialism as a threat to the integrity of the Neo-Kemalist state they had helped found in 1960.

Unbeknownst to leftists the Army leadership sided with the conservatives. And as became increasingly clear from 1965 onward, the Constitutional Court was more concerned with protecting its own independence than with upholding the civil rights of Turkish leftists. Nevertheless, the state ideal for which both left-wing and right-wing lawyers and officers claimed to be struggling had in common a grounding in the authority of jurisprudence. Both sides of the political spectrum had a stake in the Constitution, and both sides saw that document as a guarantee that future deployments of state power would happen in consultation with legal experts and through the use of legal procedure. Consequently, the struggles that unfolded during the 1960s over the freedom of expression took the shape not of political contention but of technical debates between legal experts over how constitutional concepts such as “scholarship” and “impartiality” could be applied to evaluate specific publications during criminal trials. The political

trials of the 1960s thus became so entangled in scholarly arguments that the Army all but lost hope in the utility of the civilian criminal courts for stopping the tide of leftist activity, and began searching, instead, for ways to expand the jurisdiction of military courts.

The failure of both the Constitutional Court and the Council of State to halt the State of Siege that was declared in June 1970 provides us with the opportunity to study how leftist lawyers, deprived of the most important veto mechanism they had gained through the 1960 coup, were nevertheless able to exercise their professional jurisdiction in order to define the boundaries of legality in the face of military repression. In the following chapter, I demonstrate how leftists continued to mobilize their expertise through the 1970s to accomplish two strategic goals: first, to persuade, disrupt and stall military trial proceedings until the military courts either recused themselves or were dissolved, and second, to convert the military courts into public spectacles in which they could assert their own authority over the uses of criminal law and, conversely, subvert the legitimacy of the military courts and the State of Siege.

Chapter 4

Exception and Expertise:

Military Trials and Jurisdictional Contestation, 1970-1974

“I received such a letter from a scholar. He said ‘my client is innocent,’ and easily secured an acquittal. There were very few defendants who were not acquitted. How could a suspect be sentenced after such a huge letter with a huge signature on it? He couldn’t. Not until March 12, 1971.”¹

When the Turkish Armed Forces (TAF) forced the center-right government of Süleyman Demirel to dissolve on March 12, 1971, many on the left thought that they were witnessing a repeat of the 1960 coup d’état: a heroic, unauthorized uprising by mid-level officers to sideline the conniving politicians of the right and reaffirm the authority of the intellectuals and lawyers of the left. There was much to support this view. As Chapter 3 shows, leftist lawyers and scholars had enjoyed strong links to parts of the TAF as well as the judiciary throughout the 1960s, and radical leftists had succeeded in bringing many younger military cadets to their side during the last years of the decade. When the TAF High Command began pushing for wider military court jurisdiction to try leftists in 1969, even military jurists had protested.

¹ A. Baki Tuğ, *12 Mart 1971 Türkiye Gerçekleri ve Sosyal Davası* (Bursa: Ak Ofset, 1995), 119.

It soon became clear, however, that the officers behind the March 12 memorandum were not opposed to the Demirel cabinet because it was too right-wing, but because it was not right-wing enough. Over the next two years the Army pressured successive technocratic governments to undertake a series of sweeping reforms. The reforms not only rolled back a number of collective rights and guarantees that had been enshrined in the 1961 constitution—including ending the autonomy of universities, radio and television and limiting the freedom of the press—they also made significant incursions into the legal system. Among other things, they extended the Army’s discretion to use military courts to try civilians during and after a declared State of Siege, and established a Military High Administrative Court (*Askeri Yüksek İdare Mahkemesi*) to deal with personnel issues within the Army, thus circumscribing the power of the civilian Council of State’s (*Danıştay*) over appointments within the military ranks. Lastly, they secured the Army a permanent footing in the criminal judiciary by establishing State Security Courts (SSCs) where military jurists would sit alongside civilian ones.²

If military courts presented leftists with a challenge, however, the jurisdictional ambiguity that allowed the TAF to expand their use also provided lawyers with opportunities for resistance. This chapter continues the previous chapter’s investigation into the perimeters of contestation over the authority of leftist lawyers vis-à-vis political trials. My aim is to show that far from sidelining leftist lawyers, the military trials after the “coup by memorandum” on March 12, 1971 became subject to the same tactics of resistance that characterized the military trials of the summer of 1970 and the same

² I discuss the impact of the SSCs in the following chapter.

claims to expert authority that had enabled lawyers to acquit leftist intellectuals in the many civilian trials throughout the 1960s. Despite the avowed intention of right-wing military prosecutors such as Baki Tuğ to imprison the law professors who had stood in the way of sentencing leftist intellectuals, the military trials of the 1970s became mired in negotiations both over the jurisdiction of the military courts and over the professional jurisdiction of the very same law professors who now found themselves in handcuffs.

As in the civilian trials of the 1960s, the contestation over military trials from June 1970 onward did not remain within the narrowly defined boundaries of procedural technicalities or legal “moves,” though it often happened within or in connection with such limitations. It occurred in multiple sites and through multiple idioms. Universities, bar associations, and a broader public took part in contesting the conceptual boundaries separating legal procedure from politics by claiming authoritative expertise over issues such as the procedures for declaring a State of Siege, the personal and temporal jurisdiction of military courts in peacetime, when and on what topics attorneys can be permitted to make public statements, and who has the authority to evaluate evidence such as audio recordings or political publications. Even within what is ordinarily thought of as legal “moves” such as appealing verdicts to higher-instance courts, jurisdictional claims were made through a barrage of assertions which questioned everything from the constitutionality of the State of Siege and the composition of the court to the political content of scholarly presentations and its relation to the military court’s jurisdiction.

Instead of treating the March 12 coup d’état as a critical juncture in Turkish

lawyer-Army relations, therefore, I argue that it should be seen as both a continuation of, and a reaction to, the civilian political trials of the 1960s. While most scholars have seen military trials of the 1970s as an extension of the TAF's incursion into politics in March 1971, closer attention makes the coup appear more as a desperate attempt to undercut leftist jurists' indelible authority within the legal field. Military trials of civilians began *before* the military coup, not after, and the TAF's intervention in March 1971 was followed by a concerted attempt by military prosecutors to erode the symbolic and practical authority that lawyers exercised over the procedures and public perception of the trials. I begin, therefore, by showing how leftist lawyers mobilized across professions and professional associations to disrupt the military trials during the State of Siege of the summer of 1970, after radical syndicalists had brought Istanbul to a standstill. I then go on to show how the TAF, frustrated with the failure of the trials, conducted the March 12 coup d'état. Finally, I show how the military courts after March 12, 1971, though far more explicitly dismissive of the authority of law professors and defense attorneys than the civilian courts of the 1960s, continued to struggle with recalcitrant lawyers on both sides of the bench.

My analysis demonstrates that even highly restricted situations such as military regimes provide avenues for resistance and contestation when the state that military leaders claim to be defending has historically been defined and in part constituted by a reasonably independent and cooperative legal profession. The division of practical and symbolic power between the legal professions and the armed forces during times of crisis

is not determined through the brute force of the latter alone; it is contingent on their prior history of institutional and ideological convergence or divergence.³ In the 1930s, 1940s, and again in May 1960, Turkish state leaders had asked lawyers to help articulate their power in legal terms; after 1960, many of the same lawyers used the share they had gained in public authority to obstruct state leaders' attempts at curbing their independence. As a result, the Army was never able to use military trials as the instruments of political control they had designed them to be. Instead, they became unpredictable venues, at times towing the Army line, but often thwarting or even reversing efforts to clamp down on leftist activism.

The 1970 Trials

On June 15, 1970—the same day that the leftist professors of constitutional law Bülent Nuri Esen, Bahri Savcı, Muammer Aksoy and Mümtaz Soysal requested a meeting with the President of the Republic to discuss what they described as an ongoing erosion of the legal foundations of the Turkish *Rechtsstaat*⁴—tens of thousands of workers connected to the radical labor union syndicate DİSK took to the streets in Istanbul to protest an amendment to the Law on Syndicates, Collective Agreements, Strikes and Lockouts that would require unions to represent at least one-third of all workers at a workplace, an

3 Anthony W. Pereira, *Political (In)justice: Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina* (Pittsburgh: University of Pittsburgh Press, 2005).

4 *Cumhuriyet*, June 16, 1970.

obvious attempt to make DİSK illegal. As the government declared a State of Siege and military authorities began rounding up suspects, leftist lawyers mobilized. On June 20, the Turkish Law Association (*Türk Hukuk Kurumu*) released a statement arguing, first, that the union law on should not be amended, and second—in an argument taken right out of Onar’s and Sarıca’s writings on state powers from the 1930s and 1940s—that the State of Siege is by definition “internal” to the law (*hukuk içi*), and thus subject to the authority of the judiciary.⁵ Public interventions aimed more directly at the military courts began on June 26, when Faruk Erem, the chairman of the Union of Turkish Bar Associations (*Türkiye Barolar Birliği*, UTBA), and a group of fifty lawyers connected to the Istanbul Bar Association delivered an official memorandum complaining that they had been denied the right to meet with defendants in violation of the Constitution, the Law on the Establishment and Proceedings of the Military Courts, and the Law on the State of Siege.⁶ The following day, four defense lawyers for the DİSK detainees held a meeting at the syndicate’s headquarters and were subsequently arrested by the State of Siege authorities.⁷ The UTBA sent an open letter to the Turkish Law Association that was published in the left-of-center newspapers, pointing out that this was the first time in Turkish history that lawyers had been arrested while preparing the defense on an ongoing trial.⁸ The UTBA later opened an investigation into the unlawful arrests.⁹

As the National Assembly extended the State of Siege until August, two military

5 *Cumhuriyet*, June 21, 1970.

6 *Cumhuriyet*, June 27 and June 29, 1970.

7 *Cumhuriyet* June 28, 1970.

8 *Cumhuriyet*, June 30, 1970.

9 *Cumhuriyet*, July 5, 1970.

courts were established. A total of 69 cases (*dava*) were opened encompassing a total of 260 individuals, most of whom were workers and students. My focus here will be on the trials that received the most attention in national media: The so-called “trial of the 85,” the trial of the Dev-Genç members, and the trial of 25 members of DİSK.

The “Trial of the 85” defendants concerned events that had taken place on the Anatolian side of Istanbul, where a factory had been destroyed and a number of cars had been set on fire.¹⁰ The trial is interesting not just for the lawyers’ tactic of deploying a rapid barrage of well-prepared yet unexpected objections to stall the proceedings, but also for the way in which their efforts to discredit all aspects of the trial—its procedures, composition, and even the State of Siege that had enabled the Army to establish the courts in the first place—were supported by a wider community of academic jurists.

During the first session, the presiding judge began by asking the defendants which syndicate they belonged to. The defense lawyers protested that these questions were in violation of procedure, to which the chief prosecutor replied that it was up to the court to decide. The prosecutor then read the indictment, whereupon one of the defense lawyers objected that the judge had been appointed in an irregular manner. When the prosecutor overruled the objection, another lawyer objected that the prosecutor himself has been irregularly appointed. The prosecutor then decided to postpone the trial until the next day in order to examine the law on this matter.¹¹

10 See the indictment dated 7 July 1970: İddianame, Sayı 1970, Esas no. 1970/4, Karar no. 1970/4, reprinted in Sırrı Öztürk and Turgan Arınır, *İşçi Sınıfı-Sendikalar ve 15/16 Haziran: Olaylar, Nedenleri, Davalar, Belgeler, Anılar, Yorumlar*, 1st ed. (Istanbul: Sorun Yayınları, 1976), 222–229.

11 *Cumhuriyet*, July 28, 1970.

The tactic of objecting to various aspects concerning the composition and procedures of the trial continued the next session, when the lawyers protested the way in which the questioning of the defendants was being entered into the records. Having once again been confronted with an unexpected objection, the court decided to postpone its ruling on the issue until the next session.¹² When the court resumed questioning 46 of the 85 defendants a few days later, the defense lawyers objected that military judge Hakkı Erkan was ineligible to serve as a prosecutor on the court because he was at the same time a judge for the Military Court of Cassation. The judge overruled this objection. The lawyers then objected to the presence of a non-jurist officer on the court, arguing that non-judicial officers should only be present in military trials involving military personnel and that his presence therefore violated several articles of the Constitution.¹³ They further requested that the court file a challenge against the Law on the Establishment of Military Courts (Law no. 353) with the Constitutional Court and that the trial be postponed until the issue was resolved. The court rejected the requests.¹⁴

Having thus brought up the constitutional ramifications for their objections to the military court, the scene was set for the wider community of legal scholars to step in. On August 7, thirty members of the Istanbul Law Faculty delivered a memorandum to the Constitutional Court, the Council of State and the Court of Cassation arguing that the

12 *Cumhuriyet*, July 31, 1970.

13 The constitutional articles in question were articles 2 (describing the Turkish republic as a *Rechtstaat* [*hukuk devleti*]), 7 (on the independence of the judiciary), 8 (on the supremacy of the Constitution), 30 (on the inviolability of the person), 133 (on judges' security of tenure), 134 (on the judicial profession), and 138 (on the military judiciary).

14 *Cumhuriyet*, August 4, 1970.

State of Siege was unconstitutional because the necessary conditions were not in place to make the State of Siege necessary and that it was within the Constitutional Court's jurisdiction to rule on the matter. Comparing the term "uprising" (*ayaklanma*) in art. 124 of the Constitution with the definition of the term *insurrection* in French doctrine, the professors argued that only a protest seeking to overthrow the entire social order would justify the declaration of a state of siege; the defendants, however, were only protesting one particular legal amendment. They further argued that the military courts were in violation of art. 32 of the Constitution, which guaranteed the right to be judged by one's "natural judge."¹⁵ As Pertev Bilgen demonstrates, the reasoning of the report was firmly rooted in the Onar's and Sarıca's critique of Jhering's doctrine of "self-limitation"¹⁶ but also shows where Sarıca and other leftists differed from conservative jurists: While Onar believed that the National Assembly's ratification of a State of Siege placed the decision outside of the judiciary's jurisdiction, Ragıp Sarıca, İsmet Giritli and Lütfi Duran did not; and while the authors of the report considered military courts established after the declaration of the State of Siege to be unconstitutional, right-wing experts on military law such as Sahir Erman did not.¹⁷

15 "Bilimsel Rapor," August 7, 1970. TÜSTAV Dava Dosyaları 115-2. When it was published in *Cumhuriyet* (August 8, 1970), the report was undersigned by professors Galip Okandan, Ragıp Sarıca, Tarık Zafer Tunaya, Lütfi Duran, Edip Çelik, Aytekin Ataay, Ümit Doğanay, Sami Akinci, Yılmaz Altuğ, lecturers Murat Sarıca, Çetin Özek, Server Tanilli, Ergun Özsunay, and assistants Tavuz Alangoya, Hüseyin Hatemi, M. Can Köksal, Ülkü Azrak, Sait Güren, Mustafa Dural, Bülent Tanör, İzzettin Doğan, Esin Örucü, Ersan İlal, Bakır Çağlar, Atina Diyamandis, Hasan F. Ertuğ, Metin Tuluay, İlhan Ulusan, Bülent Sözer, and Ata Sakmar.

16 See Chapter 1 for Onar's critique of the theory of self-limitation.

17 Pertev Bilgen, *1961 Anayasasına Göre Sıkıyönetim* (Istanbul: Sulhi Garan Matbaası, 1976), 5–6, 11–12, 101–4.

When the trial continued on August 10, the defense lawyers referred to the jurists' report and asked for the defendants to be released. The court rejected the petition but again adjourned the trial another week.¹⁸ For each of the subsequent four sessions, the court released a number of defendants after they had been questioned.¹⁹ When the State of Siege was finally lifted, the handful of remaining detainees were transferred to civilian penal courts, which soon after released them.

While the "trial of the 85" was ongoing, a separate drama unfolded in the State of Siege Military Court no. 2, where thirteen of fifty-two student activists connected to Dev-Genç were being tried for organizing the protests.²⁰ The trial is notable for the fact that it revealed the extent to which the National Intelligence Organization (*Milli İstihbarat Teşkilatı*, MİT) had been wiretapping conversations between Dev-Genç activists. More importantly for our purposes, it shows how lawyers were once again able to use what the prosecution saw as its most important weapon as a wedge with which to open the courtroom up to the authority of the wider legal profession.

The prosecutors used telephone recordings during the initial questioning of the suspects in an attempt to establish that they had planned, organized, and participated in the violence. On July 28, for example, the prosecutor questioned Veysi Sarısözen, a student at the Faculty of Literature at Istanbul University. When Sarısözen denied having had any relation to Dev-Genç, the prosecutor read transcripts of a telephone recording in

18 *Cumhuriyet*, August 11, 1970.

19 *Cumhuriyet*, August 18 and 20, September 1 and 8, 1970.

20 *İddianame*. Sayı 1970/113, Esas No. 1970/112, Karar 1970/72, August 18, 1970. TÜSTAV Dava Dosyaları 154-2/1.

which certain names connected to the organization were mentioned. Sarıözen acknowledged knowing some of the names on the recording but denied having planned anything with them.²¹

Defense lawyers initially allowed the questionings to continue, but when the lawyers in the “trial of the 85” began appealing to the authority of the law faculties, the defense team for the Dev-Genç defendants followed suit. On September 7, the lawyers argued that a tape recording that the prosecutor had submitted was ineligible as evidence because it may have been manipulated. They therefore argued that in addition to technical experts, the Istanbul Law Faculty should be consulted to determine whether such tapes could be considered “trustworthy evidence” (*muteber delil*). The prosecutor denied the request on the grounds that “this is not a court that implements the decisions of the Law Faculty.”²² He did, however, adjourn the court for five days so that a number of other non-academic institutions, among them the Turkish Post and Telegraph Directorate (PTT) and the Istanbul Municipal Theater, could analyze the recordings. When the trial resumed the technical experts were either unable or unwilling to ascertain the veracity of the tape recordings. The lawyers repeated their request for external expert opinions, and the court released all the suspects until the following session, which was set for September 18, after the State of Siege was due to end and the court would have to be dissolved.²³ Once the State of Siege was lifted, therefore, the trial files were sent to a civilian criminal

21 “Sorgu Zabıt Varakası,” July 28, 1970. TÜSTAV Dava Dosyaları 154-2/1.

22 Duruşma Tutanağı. İstanbul Sıkıyönetim Komutanlığı 2 Nolu Askeri Mahkemesi, September 7, 1970. TÜSTAV Dava Dosyaları 154-2/1. Also see *Cumhuriyet*, September 8, 1970.

23 “Duruşma Tutanağı.” İstanbul Sıkıyönetim Komutanlığı 2 Nolu Askeri Mahkemesi, September 11, 1970. TÜSTAV Dava Dosyaları 154-2/1.

court, which acquitted the defendants.

Though not largest in terms of the number of defendants, the trial of 25 leading members of DİSK is notable for the rowdiness of the proceedings, and shows how far the attorneys were willing to go in order to stall the trial. The prosecution asked for up to eight years for Kemal Türkler, the chairman of DİSK, and the other union leaders for encouraging rebellion against the government and for violating Law no. 171 on Protests and Public Marches.²⁴ On the first day of the trial, defense attorney Enis Coşkun complained that the courtroom was too small to fit an audience and that it was therefore in violation of the principle of publicness (*aleniyet*). A presiding non-jurist officer then raised his hand and said “be quiet,” while military judge Muzaffer Başkaynak explained that there was no larger room available and asked, “Are we carrying out a trial or a war here?”²⁵ After ordering Coşkun to leave the courtroom for disrespecting the court, Coşkun removed his robe and was followed by all the 22 other defense lawyers.

When the trial proceeded without the lawyers, the court asked Kemal Türkler whether the defendants lacked confidence in the court. Türkler replied that he had confidence in the judges as persons but that he lacked confidence in the court because it had been appointed on orders of the JP government, which was out to destroy DİSK. Another defendant, Şinasi Kaya, similarly reminded the court of a statement made by the

24 İddianame, Sayı 1970/7, Esas no. 1970/107, Karar 1970/67, 18 August 1970, reprinted in Öztürk and Arınır, *İşçi Sınıfı-sindikalar Ve 15 16 Haziran*, 176–206. Among the defendants were Kemal Türkler (DİSK leader), Kemal Okur Sülker (DİSK leader), Sinasi Kaya (DİSK leader), Yaşar Önsen, Cavit Şarman, Rafet Yıldırım, İsmet Demir, Hakkı Öztürk and Hüsni Özdemir (a lawyer). After the trial began, Murathan Bedel and Ahmet Top were added, bringing the number to 27.

25 *Milliyet*, August 22, 1970.

Minister of the Interior to the effect that “the military courts are under our control.”²⁶

On August 22, Kemal Türkler repeated his argument that “a court is founded upon trust”²⁷ and that, because the military court had been appointed by the government, it fused the roles of court and plaintiff.²⁸ “I see the judge and the prosecutor cooperating against us in a coalition here. My enemy is the JP. Since you have been appointed here by the JP, I have reservations about the decisions of the court.” Judge Muzaffer Başkaynak retorted that the court was not acting on behalf of the government but on behalf of the Turkish nation and was only accountable to its own conscience. Exasperated, he added, “For two days now, you and your lawyers have been accusing us, as if you are sitting in the place of judges and we are the suspects. Are you judges, or are we? This is not the courtroom of DİSK. I answer only to my conscience, whether I have been appointed by the government or by İsmet İnönü. A defendant does not accuse me. No one in this country accuses me and my colleagues.”²⁹ Attorney Mehmet Ali Aybar, who had been replaced by Behice Boran as the Chairman of the WPT seven months earlier, requested that the court recuse itself because the Law on the State of Siege was unconstitutional, while other lawyers argued that there should not be officers without legal qualifications on the court.³⁰

Before the next session, the defense team sent a petition to the Istanbul Bar Association requesting that a committee of observers be present and that the association

26 *Cumhuriyet*, August 22, 1970.

27 *Milliyet*, August 23, 1970.

28 *Cumhuriyet*, August 23, 1970.

29 *Milliyet*, August 23, 1970.

30 *Milliyet*, August 23, 1970.

take steps to make sure that the lawyers would be able to meet with the defendants more often. The petition went on to argue that the defendants were being tried in an unconstitutional and illegal court after protesting an unconstitutional law, and that suspects were being beaten in detention. It also pointed to the fact that the court included officers with no legal training. Furthermore, it complained that non-judicial members of the court had been yelling at the lawyers and banging their fists on the table and ordering the lawyers to leave the courtroom without even listening to the judges, while the military judges kept leaving important events out of the official trial transcripts.³¹ The Istanbul Bar Association agreed to form a committee the following week.³²

When the trial resumed on August 24, onlookers were patted down on upon entering the courtroom, and several were turned away because they were not wearing ties. As in the “trial of the 85,” the defense attorneys argued that prosecutor Hakkı Erkan had failed to act neutrally during the questioning and that he should withdraw from the court because he also served on the Military Court of Cassation. Erkan replied, “All these tactics are prolonging the trial. The lawyers are trying to avoid the issue through circumlocutions [*yuvarlak laf*]. If evidence is provided that we are behaving in a biased way, I am prepared to withdraw.” After a lunch break, Erkan replied to the defense lawyers’ objections one by one: “Military courts are independent courts that adjudicate in the name of the honorable Turkish nation. They perform the tasks they are asked to perform according to the law and their own consciences. They have done so throughout

31 *Cumhuriyet*, August 25, 1970.

32 *Cumhuriyet*, August 26, 1970.

history and will continue to do so.”³³

The lawyers’ constant barrage of petitions continued during the following sessions. During the session on September 3, judge Başkaynak received yet another complaint from defense attorney Muzaffer Amaç regarding “the position and behavior of Judge Başkaynak.” According to the outraged journalist from *Son Havadis*, the lawyer stood up and began reading his complaint just as Başkaynak was about to begin his questioning of one of the defendants.³⁴ Başkaynak first tried to ignore the complaint and continued questioning the defendant, but when Amaç continued reading his complaint, Başkaynak became angry and said, “Until today, you have been undertaking a variety of actions during the sessions. I will not act as a judge before suspects and lawyers who do not trust me. Your aim is to insult me ... I am withdrawing from the trial. I am withdrawing from the Army too, I am resigning.”³⁵ Başkaynak then left the courtroom while Amaç was allowed to finish reading his petition.

The dramatic climax made conservative observers aware of the extent to which the authority of the courts was being consciously undermined by the leftist lawyers. The commentator Orhan Seyfi Orhon wrote an editorial in *Son Havadis* arguing that the lawyers were trying to destroy the authority of the Army by bringing up issues irrelevant to the question of the defendants’ guilt, such as whether or not the State of Siege was constitutional. Defending Başkaynak, he described the event as the first time a judge had

33 *Cumhuriyet*, August 25, 1970.

34 *Son Havadis*, September 4, 1970.

35 *Cumhuriyet*, September 4, 1970.

boiled over with a “national rage” (*milli bir feveran*).³⁶ Tekin Erer, a conservative commentator who had himself been tried for violating the censorship law after the 1960 coup,³⁷ argued that military trials should be held behind closed doors in order to deny the defendants the opportunity to put on a show of bravado.³⁸

Despite telling the courtroom that he was leaving the court and the Army, Başkaynak returned to his position for the following sessions. On the last day of the State of Siege, when it was clear that the court would be dissolved, Mehmet Ali Aybar stated that “those who are sitting in the defendants’ seat here because they defended the rights of the working class will have the opportunity to stand before their natural judge starting from tomorrow. Turkey has come to a turning point to today. Workers are waking up, and are demanding their rights.” The lawyers requested that the suspects be released, but the prosecutor denied the request, retorting, “The end of the State of Siege does not remove the guilt of the defendants.” The files for the remaining defendants were therefore transferred to a civilian penal court. Unlike the other trials, the civilian court this time continued the proceedings for several months until a general amnesty in 1974 allowed all the defendants to walk free.

The military trials of the summer of 1970 thus established several of the “repertoires of action”³⁹ that leftist lawyers would follow during the many military trials of the 1970s. These repertoires included, first, establishing connections to leftist legal

36 *Son Havadis*, September 6, 1970.

37 *Son Havadis*, February 26, 27, and May 18, June 19, 1965.

38 Tekin Erer, “Mahkemeler gizli olmalı.” *Son Havadis*, September 25, 1971.

39 Lucien Karpik and Terence C. Halliday, “The Legal Complex,” *Annual Review of Law and Social Science* 7 (2011): 225–6.

scholars, who responded by publicizing legal reports that questioned the legality of the State of Siege. As with the civilian trials of the 1960s, attorneys also exploited ambiguities in the prosecution's evidence to appeal to scholars who were not directly involved in the trials, as well as to the bar associations, who demonstrated their support for the defendants by sending observers to the trials. Second, the lawyers used the courtrooms as venues for *performing* their opposition to the military courts. They thus bombarded the courts with petitions for refusal, a technical procedure that was taken to such an extreme that it would interrupt judges when they were speaking, and used each opportunity to clarify their belief that the military courts had no jurisdiction over civilians.

As a result, the trials were largely a fiasco from the viewpoint of the Army. They did little to stem the tide of labor activism, and even less to prevent the rise of more militant activism among the youth, many of whom were shocked to find that the Army, instead of siding with the youth as it had done in 1960, sided with the Justice Party. As I show in the following section, while the Army reacted to the failure of its military courts by deposing the government in order to impose a state of siege that would be carried out on its own terms, leftist lawyers gradually awoke to the realization that even former colleagues in the legal profession could no longer be trusted.

The March 12 coup

Unlike the 1960 coup d'état, which was carried out by officers acting outside of the chain

of command, the “coup by memorandum” on March 12, 1971 was ordered by the Chief of General Staff.⁴⁰ That most leftists nevertheless interpreted the coup as a repeat of the 1960 “Revolution” has, in most accounts, been explained by divisions among the generals who carried it out, with some pushing for a radical regime change and others seeking a return to the status quo.⁴¹ From the viewpoint of leftist lawyers, however, the ambiguity went deeper still. In April Nihat Erim, a lawyer and member of the Republican People’s Party (RPP) who had also gained the trust of right-of-center politicians as early as 1962,⁴² was appointed Prime Minister to lead an “apolitical” reform cabinet. Erim’s cabinet continued to consult with legal experts on the left about the reforms even after April 27, when renewed violence had prompted the cabinet to declare a State of Siege in eleven major provinces, thus transferring the jurisdiction to end the violence from civilian law enforcement to military authorities. On May 8, Erim and Justice minister İsmail Arar met with a number of leftist professors at Ankara University— Bülent Nuri Esen, Muammer Aksoy, Mümtaz Soysal, Bahri Savcı, Mukbil Özyörük, Ergun Özbudun and Tuncer Karamustafaoğlu—to obtain their opinions on amending the Constitution.⁴³ The conservative daily *Son Havadis* expressed concern that all of the invited professors were known for being “extreme” leftists and lamented that no moderate, objective, and mature professor of constitutional law had emerged since the late Ali Fuad Başgil.⁴⁴ One

40 Doğan Akyaz, *Askeri Müdahalelerin Orduya Etkisi: Hiyerarşi Dışı Örgütlenmeden Emir Komuta Zincirine*, 1st ed. (Istanbul: İletişim Yayınları, 2002).

41 William Hale, *Turkish Politics and the Military* (London: Routledge, 1994), 184–193; Özgür Mutlu Ulus, *The Army and the Radical Left in Turkey: Military Coups, Socialist Revolution and Kemalism* (London and New York: I. B. Tauris, 2011), 62–63.

42 *Yeni İstanbul*, June 3, 1962; *Son Havadis*, June 20, 1962.

43 *Son Havadis* and *Cumhuriyet*, May 9, 1971.

44 *Son Havadis*, May 11, 1971. Başgil had passed away in 1967. See Chapter 1 for a discussion

columnist argued that some of the law professors had associated with militant anarchists such as Deniz Gezmiş, who had been in custody since March 16, and that one professor had told Erim that constitutional amendments could not be made during a State of Siege, an argument she found preposterous.⁴⁵

On May 11, the same day law lecturer Çetin Özek and three other leftist academics were detained in a raid by the Istanbul State of Siege forces,⁴⁶ Erim and Arar again met with well-known professors, this time from Istanbul University. The political and constitutional historian Tarık Zafer Tunaya, among the drafters of the 1961 Constitution, told Erim that far from amending the Constitution, it should be fully implemented.⁴⁷ Tunaya later published a series of articles arguing that the most important innovation of the 1961 Constitution was that it placed the “sovereignty of law” over the “sovereignty of the Assembly” and established the Constitutional Court and the Council of State as the guardians of the rule of law. Instead of blaming the Constitution, he argued, one should blame the political parties, which had now for a second time stepped outside of the limits “outlined by Atatürk,” forcing the Army to “say stop.”⁴⁸ Professor of constitutional law Orhan Aldıkaçtı declined to tell journalists what he had advised Erim and Arar, but his comments at a conference a few weeks later suggest that he supported amending the Constitution, arguing that they were both necessary and in the spirit of the

of his intellectual career.

45 Adviye Fenik, “Sıkıyönetim ve Profesörler,” *Son Havadis*, May 12, 1971.

46 *Son Havadis*, May 13, 1971.

47 *Cumhuriyet*, May 13, 1971.

48 *Cumhuriyet*, June 27, 28, and 29, 1971.

1961 drafters.⁴⁹

The kidnapping of the Israeli ambassador Ephraim Elrom by the leftist militant Mahir Çayan on May 17 intensified the military authorities' campaign against leftist academics, but the cabinet remained deferential to lawyers even after military prosecutors, who were given expanded powers with a new Law on the State of Siege (Law no. 1402) on May 15th,⁵⁰ began rounding them up. On May 20, İsmail Arar held an advisory meeting at the Istanbul Bar Association and announced that he was meeting with Sıddık Sami Onar later that day.⁵¹ When several leftist academics and lawyers, among them Uğur Alacakaptan, Bülent Nuri Esen, Uğur Mumcu, Bahri Savcı, Tarık Zafer Tunaya, Bülent Tanör, Halit Çelenk and Niyazi Ağırnaslı, were detained by the state of siege authorities the following day,⁵² Nihat Erim sent a communiqué to several governors to warn them that too many detentions had been made,⁵³ and many of the lawyers, including Tanör, Alacakaptan, Tunaya and Esen, were released. Several members of the Ankara Political Science Faculty reminded him that some of the detained professors had taken part in writing the 1961 Constitution, and Erim apologized and promised to investigate.⁵⁴ He later responded to criticism from RPP parliamentarians by blaming

49 *Cumhuriyet*, June 29, 1971. Aldıkaçtı was elected Chairman of the Constitutional Committee after the military coup of September 12, 1980, and became dean of the Istanbul University Law Faculty in 1983. He is known as the “architect” of the 1982 Constitution.

50 *Sıkıyönetim Kanunu*, Law no. 1402, in *Resmî Gazete* no. 13837, May 15, 1971.

51 *Cumhuriyet*, May 21, 1971; *Milliyet*, May 22, 1971. Onar's wife had passed away three weeks earlier, and Onar himself was keeping a low profile in İzmit, where Arar travelled for their meeting.

52 *Son Havadis*, May 22, 1971.

53 *Cumhuriyet*, May 23, 1971.

54 *Cumhuriyet*, May 27, 1971. In his memoirs, Erim wrote that he was not informed of the arrests until after the fact, and that he immediately wrote to the State of Siege commanders asking them to bring the professors before a judge without further delay. Nihat Erim, *12*

overzealous state of siege commanders.⁵⁵

For several weeks after the coup, then, it appeared that the interim government adhered to Sıddık Sami Onar's old doctrinal principle that even states of siege, exceptional as they might be, were "internal" to the law and were, like the Constitution itself, subject to the authority of law professors. When Ephraim Elrom was found murdered on May 22, however, the line separating leftist and conservative lawyers became sharper. Military authorities added a third military court and reassigned 72 military judges and prosecutors⁵⁶ and the cabinet established a commission of high-ranking military officers to determine how the Constitution must be amended. Law Professor Hüseyin Nail Kubalı, a member of Onar's Constitutional Commission in 1961, travelled twice to Ankara to present his recommendations that the executive be strengthened and university autonomy curtailed,⁵⁷ while Muammer Aksoy protested that such amendments amounted to an entirely new constitution because they altered its "spirit."⁵⁸ It was becoming increasingly clear, however, that the interim regime was being overtaken by those who saw leftists such as Aksoy as part of the problem, not as competent advisors. On June 5, the Turkish Law Association, which Aksoy headed, was closed indefinitely by the State of Siege authorities.⁵⁹ On June 17, Çetin Özek, who had been under investigation by professors Sulhi Dönmezer, Sıddık Sami Onar and Ergon

Mart Anıları, ed. Raşit Çavaş (Istanbul: YKY, 2007), 223–4.

55 Zafer Üskül, *Siyaset ve Asker. Cumhuriyet Döneminde Sıkıyönetim Uygulamaları* (Istanbul: AFA Yayınları, 1989), 211.

56 *Resmî Gazete* no. 13855, June 4, 1971, p. 3-5.

57 *Ortam* no. 3, June 14, 1971.

58 *Ortam* no. 3, June 14, 1971.

59 *Cumhuriyet*, June 6, 1971.

Çetingil of the Istanbul University disciplinary committee since April that year,⁶⁰ was expelled from the university because he had been involved in “anarchist events” and was damaging the university’s prestige and impartiality. Teaching assistants Bülent Tanör and Yücel Salman were also temporarily expelled.⁶¹

The expulsion of Özek was a premonition of the clampdown on leftist academics that followed. Between June 18 and June 21, over 2,000 leftists were arrested by State of Siege authorities. Muammer Aksoy protested by appealing to the “jurist and intelligent politician” Nihat Erim, quoting Erim’s own words from three years earlier in defense of the university and media autonomy enshrined in the Constitution,⁶² but less than a month later Aksoy himself was brought before a military court and placed in arrest.⁶³ With the professional jurisdiction of leftist legal experts under attack, the scene was set for a more direct confrontation between the power of the Army and the authority of jurists.

Experts or suspects?

With the State of Siege, the professional jurisdiction of leftist lawyers came head to head with the jurisdictional expansion of military courts in a more direct way than it had during the summer of 1970. According to the new Law on the State of Siege the jurisdiction of the “State of Siege Military Courts” (*Sıkıyönetim Askeri Mahkemeleri*, hereafter “military courts”) extended to actions that had occurred prior to the state of

60 *Ortam* no. 1, April 19, 1971.

61 *Son Havadis*, June 18 and 25, 1971.

62 *Cumhuriyet*, July 1, July 2, 1971.

63 *Cumhuriyet*, July 27, 1971.

siege and were identified in the government's state of siege declaration as being among the events that had necessitated the declaration (art. 13), as well as to a number of articles in the TPC insofar as they were committed within a province and during a period in which a state of siege was in effect (art. 15). The military courts thus had retroactive jurisdiction over an open-ended category of crimes to be defined by the state of siege declaration and prospective jurisdiction over a number of more specific crimes listed in the TPC. The cabinet's declaration of April 27 mentioned not only "clear indicators of a violent uprising with ideological aims against the basic organization of the State and the unity of the country" but also "manipulative circles that have been observed in our country for a long time," a veiled reference to leftist intellectuals, lecturers and professors.⁶⁴ What throughout the 1960s had been a question of determining the validity of evidence now became a matter of court jurisdiction: If a statement, publication, or activity that predated the state of siege declaration was deemed to have contributed to the "widespread violence" that had necessitated the state of siege, the military court had jurisdiction; if it did not, the case might go to a civilian court or not go to court at all. And whereas lawyers had been able to use their professional authority to contest and disrupt the June-August 1970 trials, after March 12, jurists who had previously been respected as extensions of state power frequently found themselves in military courts on charges of subversion.

On September 20, thirty-five articles of the Constitution were amended and

⁶⁴ Bakanlar Kurulu karar no. 7/2302, April 26, 1971, in *Resmi Gazete* no. 13820, April 27, 1971.

another nine temporary articles added. In addition to arts. 134 on judges and 138 on the military judiciary, the list of internal conditions that could justify a state of siege in art. 124 was expanded beyond just “insurrection” (*ayaklanma*), the term that had been contested by leftist lawyers during the State of Siege in 1970, to a more vague formulation that targeted “widespread violence seeking to overthrow the liberal democratic regime of the Constitution or destroy basic rights and freedoms.” It also lengthened the validity of an initial state of siege declaration from one to two months, renewable thereafter every two months.⁶⁵ The amendments constituted a significant departure from the liberal pluralism of the 1961 Constitution and were carried out in an irregular manner, but with a military-backed cabinet in power and military prosecutors arresting anyone suspected of being a leftist, lawyers had no way of preventing them.

Using military courts to try leftist intellectuals was not simply a matter of amending a few laws, however. The jurisdictional expansion met with resistance among military jurists, some of whom were personally sympathetic to the leftists. Others found the rapid pace of amendments and the military commanders’ frequent manipulation of the trials to be a threat to their own independence and an insult to their professional ethos. In the trial of the leaders of the Union of Turkish Teachers (TÖS), for example, the State of Siege commanders replaced military judges Doğan Tolon and İsmet Onur before the session in which they had planned to release release Fakir Baykurt, the union’s general

65 Law 1488, in *Resmî Gazete* No. 13964, 22 September 1971. Zafer Üskül points out that the Erim cabinet began preparations for a new Law on the State of Siege on April 22, four days before it declared a state of siege according to the already existing law from 1940. Üskül, *Siyaset ve Asker. Cumhuriyet Döneminde Sıkıyönetim Uygulamaları*, 192.

secretary, and several of his colleagues. The judges who replaced them, in turn, sentenced the defendants with a two-to-one vote, military judge Zeki Eğin voting against but Celal Altın and Celalettin Perek, for.⁶⁶ During a conference on criminal law reform in February 1972 military judge Turgut Akan complained that the State of Siege military courts had started following their own made-up procedures, abusing and subverting the legal rights of the defendants.⁶⁷ Similarly, Rafet Tüzün, the president of the Military Court of Cassation, complained that the legislative process had gone awry, with dictatorial laws increasing punishments with one hand and releasing suspects through amnesties with the other.⁶⁸ As I discuss later, some high-ranking military jurists even came out in support of leftists such as Mümtaz Soysal and Deniz Gezmiş.

The thoughtful approach of many members of the military judiciary contrasted with the brash behavior of the military forces tasked with rounding up suspects and confiscating evidence. In one trial, 28 defendants, all of whom worked for publishing houses or book shops in Istanbul, were arrested because they were in possession of books which the State of Siege commanders believed were prohibited.⁶⁹ Among the confiscated items were not just explicitly Socialist books like *Turkey's System*⁷⁰ by Doğan Avcıoğlu,

66 Uğur Mumcu, *Çağın Suçu* (Ankara: um:ag Vakfı Yayınları, 1997), 43–5; Halit Çelenk, *141 142 Üzerine* (Ankara: Anka Yayınları, 1976), 301.

67 *Ceza Adalet Reformu İlkeleri Sempozyumu (24-26 Şubat 1972): Raporlar—Tartışmalar* (Istanbul: İstanbul Üniversitesi Hukuk Fakültesi, 1972), 162.

68 Ibid., 127.

69 The indictment (İddianame 1972/355-189, December 30, 1972, cited in *Gerekçeli Hüküm*. Kayıt no. 1973/3075, Esas no. 1973/56, Karar no. 1973/80. İstanbul İnci Ordu Komutanlığı 3 Nolu Sıkıyönetim Askeri Mahkemesi, September 11, 1973. TÜSTAV Dava Dosyaları 115-2) charged the defendants with violating art. 16 of law 1402 by distributing publications that had been prohibited by the State of Siege authority's declaration no. 5 on April 28, 1971 ("Bildiri 1971/5," mentioned in *Milliyet* and other newspapers on April 29, 1971).

70 Doğan Avcıoğlu, *Türkiye'nin Düzeni (Dün-Bugün-Yarın)* (Ankara: Bilgi Yayınevi, 1968).

one of the two editors who had been apprehended by a military court one month before the DİSK riots in June 1970, but also 253 copies of Ernest Hemingway's *For Whom the Bell Tolls*⁷¹ and a portrait of Atatürk who, as we have seen, many leftists believed was a precursor to their own revolutionary Socialism. The military judge soon returned several of the books along with the confiscated portrait of Atatürk which, he pointed out, was not prohibited;⁷² the court eventually kept the publications it deemed illegal but released the defendants. Others were not so lucky: On July 29, Zeki Öztürk, the owner of the bookshop "Leader" (*Öncü*), was sentenced by a military court to five months of aggravated prison because "large amounts" of prohibited leftist publications, among them a translation of works by Ho Chi Minh, were found in his possession.⁷³

The precise scope of the danger that had necessitated a state of siege, then, was open to widely varying interpretations. Unfortunately an important source of interpretations was the indictments produced by State of Siege military prosecutors, most of whom had been handpicked because they saw it as their task to land as many leftists as possible in jail.⁷⁴ Their indictments differed from those of previous political trials both in

71 The edition in question was probably the second Turkish translation, first published in 1966 but re-issued in 1970. Ernest Hemingway, *Canlar Kimin İçin Çalıyor*, trans. Nurettin Özyürek, 2nd ed. (Istanbul: Varlık Yayınları, 1970).

72 The other confiscated books were Kemal Tahir's *Devlet Ana* (1967) and *Yorgun Savaşçı* (1965), and 262 issues of the journal *Uyanış* ("Awakening"). "Gerekçeli Hüküm. Kayıt no. 1973/3075, Esas no. 1973/56, Karar no. 1973/80." İstanbul İnci Ordu Komutanlığı 3 Nolu Sıkıyönetim Askeri Mahkemesi, September 11, 1973. TÜSTAV Dava Dosyaları 115-2. The prohibition of *Uyanış* caused additional confusion, as Jean-Paul Sartre's novel *L'âge de raison* had recently been published in Turkish with the same title: *Uyanış*, trans. Necmettin Arıkan and Engin Sunar (Istanbul: Altın Kitaplar, 1971). The day after reviewing the novel, *Milliyet* (May 15, 1971) therefore clarified that it was not among the prohibited works.

73 *Cumhuriyet*, July 30, 1971. As I discuss in Chapter 3, the translator of Ho Chi Minh's book, Murat Devrim, had already been sentenced by a civilian assize court in 1970.

74 The eagerness of these military prosecutors was publicly criticized by giants of the center-

magnitude and substance. Whereas the indictments of June-August 1970 consisted of one to ten typewritten pages, the indictments after March 1971 went into the hundreds. The increased volume, in turn, was related to the contents. As opposed to the concise and dry indictments of leftist intellectuals during the 1960s, the indictments produced after March 12 adhered to what Barbara Falk calls a “prosecutorial metanarrative”⁷⁵ that situated the individual suspect within a wider historical context in which Communists had been attempting to infiltrate Turkey’s public institutions for almost a century. *Son Havadis* approvingly described the indictment of Dev-Genç, which largely narrated the history of Communism in Turkey, as a “masterwork” that should be printed and sold so everyone could read it.⁷⁶ Another right-wing newspaper did in fact print the indictment in full.⁷⁷ Similarly, an indictment of several leftists connected to the Armed Forces, among them İrfan Solmazer, Sarp Kuray and Atilla Sarp, prefaced the analysis of evidence with a dramatic thirty-page discussion of the history of Socialism in Turkey which began: “This trial is a regime struggle [*rejim davasıdır*]. This trial is the Nation’s struggle to live free and remain free, a struggle which has taught humanity, civilization, virtue and superiority to the entire world.” The indictment then went on to analyze the term “revolution” (*devrim*) in order to demonstrate that when Turkish leftists called themselves “revolutionaries” they were not following in Atatürk’s revolutionary footsteps, even if

left such as İsmet İnönü, who argued that they were “going beyond their authority” (*yetkilerini aşıyor*). *Yeni Ortam*, March 2, 1972.

75 Barbara J. Falk, *Making Sense of Political Trials: Causes and Categories*, Munk Centre for International Studies Occasional Paper No. VIII (Toronto: University of Toronto, 2008), 10.

76 *Son Havadis*, March 3, 1972.

77 *Adalet Gazetesi*, several issues, February-April 1972.

they claimed to identify with him.⁷⁸ Thus the scene was set for arguing that when the suspects spoke of Mustafa Kemal during their secret meetings, they were not expressing Atatürkist leanings but were using him as a code word for revolutionary Communism.⁷⁹

In these narratives leftist lawyers and academics were no longer considered a source of expertise to assist in evaluating evidence but part and parcel of the same conspiracy that had produced radical youth organizations such as Dev-Genç, militant leftists such as Mahir Çayan, and dangerous subversives within the Armed Forces such as Sarp Kuray, one of the 69 “revolutionary officers” arrested in December 1969. The indictment of TÖS, for example, described the teachings of Turkish academics as a “game played in the name of science,”⁸⁰ while an indictment of suspected militants in several universities and professional associations described leftist law professors as “professional propagandists” who were using the youth as a tool in their struggle to destroy the state.⁸¹ In the trial of twenty-six leftist connected to the Workers’ Party of Turkey and the Turkish Communist Party, Lütfulla Şadi Alkılıç, the poet who was jailed for violating articles 141 and 142 in 1969, sat on the defendants’ bench alongside Çetin Özek, the lecturer of criminal law “famous for having written expert reports in favor of

78 *İddianame ve Kovuşturmaya Yer Olmadığı Kararı*. Sayı: 971-304. Esas No: 971/158. Karar No: 921/103. İstanbul: T. C. Sıkıyönetim Komutanlığı Askeri Savcılığı, 1971, 16, 31-2. IISG Library.

79 *Ibid.*, 63.

80 Baki Tuğ. *İddianame. TÖS hakkında*. Sayı: 971/32. Esas: 971/133. Karar: 971/106. Ankara: T. C. Sıkıyönetim Komutanlığı Askeri Savcılığı, 1971, 35. IISG Library.

81 *İddianame (F.K.F., Dev-Genç, İzmir Böl. Yurt. Krl., O.D.T.Ü., E.T.Y.Ö. Okulu, Gazi Eğt. Enst., Ziraat Fak., El-Fetih Gr., Yapı-İş Sendikası, İnşaat Müh. Odası ...)*. Evrak no. 1971-405, Esas no. 1971-211, Karar no. 1971-153. Ankara: T. C. Sıkıyönetim Komutanlığı Askeri Savcılığı, 1971, 32. IISG Library.

several people charged with violating articles 141 and 142 of the TPC.”⁸² Whereas Alkılıç was now being tried for continuing his Socialist activities after being released from jail early due to ill health, Özek was charged with providing legal advice to leftists as well as giving lectures about Marxist dialectics at the headquarters of the aforementioned Union of Turkish Teachers.

With the increased pressure on leftist academics came an harder attitude toward attorneys who refused to remain strictly within the bounds of trial procedure. In March 1972, for example, six leftist defense attorneys in the trial of Solmazer, Kuray, Sarp and others were indicted for insulting the court because they attempted to prove that Atatürk was a Socialist by analyzing one of his speeches and protested the behavior of the prosecutor by taking off their robes and leaving the courtroom. One of the attorneys, Orhan Arsal, additionally insulted the prosecutor by stating that “if you were a suspect and I were the prosecutor, I would show you how prosecution is done.”⁸³ The lawyers were tried in a military court and three of them received six-month sentences.⁸⁴ Similarly, in the trial of the comrades of Mahir Çayan, the militant who kidnapped and killed Ephraim Elrom and was then himself killed after escaping prison, Muzaffer Amaç, Nebil Varuy and a number of other defense lawyers were charged by the military prosecution for disrupting the proceedings and leaving the courtroom without permission.⁸⁵ The

82 Nevzat Çizmeci. *İddianame*. Evrak: 971/103-284-436. Esas: 971/261. Karar: 971/185. İstanbul: K.K.K. Askerî Basımevi, 1971, 50. IISG Library.

83 The other attorneys were Demir Özlü, Nebil Varuy, Necdet Sağır and Yalçın Öztürk. (*Son Havadis*, March 30; *Cumhuriyet*, March 30 and June 6, 20, 1972).

84 *Son Havadis*, June 29, 1972. I discuss the conflicts that erupted within the bar associations over the proper way to resist the Army’s incursions into criminal procedure in the following chapter.

85 Faik Muzaffer Amaç was a prominent leftist lawyer. In addition to his clash with military

interim cabinet, working closely with the military administration, amended twenty-three articles of law 535 on military courts in June 1972 in order to curb the ability of defense attorneys to reject members of the court or otherwise disrupt trial proceedings.⁸⁶ Some attorneys, among them Muzaffer Amaç, reacted by withdrawing from ongoing trials, despite the stipulation in art. 37 of the the Law of Lawyering that attorneys were obliged to take on a case if appointed by the bar association upon the request of a suspect.⁸⁷ Amaç later spent several months in prison for disrupting courtroom proceedings.⁸⁸

Despite these attacks on leftist lawyers inside and outside of the courtroom, however, resistance continued much as it had since 1962. In the following section I focus on a small subset of the trials to show how lawyers were able to continue the tactics they had developed over the preceding decade. As before, my aim is not to narrate the individual defendant's experience of being charged for political trials but to show how lawyers were able to contest both the formal and symbolic jurisdiction of the military courts by questioning the competence of their expert witnesses, their technically defined jurisdiction over political crimes, and their legitimacy in the public eye.

judge Muzaffer Başkaynak in the 1970 military trials, he had previously written books in defense of secularism, including *Laiklik İnkılabının XXV. Yıldönümü Hakkında Milletvekillerine Açık Mektup* (Malatya: Gayret Basımevi, 1954); *Layiklik İlkesi Sanık Sandalyesinde* (Istanbul: Barış Yayınevi, 1966). He was also among the “usual suspects” who were arrested when the Democrat Party government tried to blame well-known leftists for the anti-Greek pogrom in Istanbul on September 6-7, 1955, along with Hasan İzzettin Dinamo, Aziz Nesin, Kemal Tahir and approximately 40 others.

86 353 Sayılı Askeri Mahkemeler Kuruluş ve Yargılama Usulü Kanununun bazı maddelerinin değiştirilmesi hakkında Kanun, Law no. 1596, in *Resmî Gazete* no. 14222, June 21, 1972.

87 E.g., Faik Muzaffer Amaç, “Sayın Müvekkilim,” July 24, 1972. TÜSTAV Dava Dosyaları 115-2.

88 See letters between Muzaffer Amaç and his attorney Turgan Arınır, TÜSTAV Dava Dosyaları 115-2.

The March 12 military trials

The case of İlhan Selçuk, a leftist lawyer and columnist for the left-of-center newspaper *Cumhuriyet*, and Oktay Kürtböke, the newspaper's editor, illustrates how the question of political culpability became entangled with the issue of military court jurisdiction from 1971 onward. On April 27, the same day that the Erim cabinet declared a state of siege, Selçuk published a column in *Cumhuriyet* where he criticized the government for inviting the famous political scientist Maurice Duverger to advise on the planned constitutional amendments as a worthless gesture meant to justify a number of repressive measures, including military trials of civilians.⁸⁹ The prosecutor for the Istanbul State of Siege Military Court no. 2, who suspected Selçuk of supporting a network of revolutionaries, used the column as a pretext to arrest him the following day when a similarly critical column of his appeared. Rather than charge Selçuk and Kürtböke with contributing to the “widespread violence” prior to the declaration of a state of siege the prosecutor charged them in accordance with art. 15 of the Law on the State of Siege with violating art. 159 of the TPC, which prohibited insulting the “spiritual personality of the National Assembly or the Government.”⁹⁰

Selçuk and Kürtböke were kept in detention until the first day of the trial on May 18. During the first session the prosecutor presented an expert report from Bülent Davran, a professor of civil law at Istanbul University, which argued that Selçuk's column

89 İlhan Selçuk, “Hoşgeldin, Tanzimat kafası,” *Cumhuriyet*, April 27, 1971.

90 İlhan Selçuk, “İsa, Musa, ve car-curt üstüne,” *Cumhuriyet*, April 28, 1971.

constituted a crime. The defendants rejected the report, arguing that Davran not only lacked expertise in criminal law but also had a poor publication record and had hardly been at the law faculty the last two years.⁹¹ Defense attorney Nihat Türel instead presented the court with a report signed by Faruk Erem, professor of criminal law and president of the Union of Turkish Bar Associations. The military prosecutor Nevzat Çizmeli asked that the report not be included in the file, to no avail.⁹²

On May 25 the defense attorneys again argued that Davran was not qualified and asked that a new report be obtained from an expert in criminal law.⁹³ They also criticized the report from a legal perspective, arguing that the prohibition on defaming the government in art. 159 of the TPC did not concern individual members of the government but the government function in the abstract. In failing to make this distinction, they argued, the “expert acted exactly like a civil law professor.”⁹⁴ The court therefore requested that professors of criminal law Sahir Erman and Sulhi Dönmezer and assistant professor Kayhan İçel form a committee and deliver a report before the following session. The prosecutor grudgingly acquiesced, but added that “the best expert is essentially the court itself” and that if Davran’s report was to be removed from the case files, the defense attorney’s report from Erem should also be removed.

On June 11 the defense attorneys again rejected the new committee of experts composed of Erman, Dönmezer, and İçel, who had submitted a ten-page report which

91 *Cumhuriyet*, May 19, 1971.

92 *Milliyet*, May 19, 1971.

93 *Son Havadis*, May 26, 1971.

94 *Cumhuriyet*, May 26, 1971.

found the defendants guilty based on Selçuk's April 27 column. The attorneys argued that the experts had insufficient experience, and Selçuk noted that he himself had published articles critical of their work as expert witnesses in previous trials of leftists. The prosecutor replied that the professors were recognized experts of criminal law. The defense then submitted examples of articles in which Selçuk had criticized the professors, as well as a list of professors whom they considered qualified to serve as experts. A conservative newspaper noted that all of the suggested experts were leftists.⁹⁵

On June 17, the court asked Selçuk for his response to the ten-page report from Erman, Dönmezer and İçel. Selçuk replied, "I completely reject this report and consider it a product of their own insufficiencies and bad intentions." He went on to argue that the report demonstrated that the experts were not even aware of what the court was asking them and that instead of trying to determine whether Selçuk's intentions were in violation of the state of siege regime by evaluating the columns as a whole, they had taken sentence fragments out of context to make it appear that Selçuk had written things that he never intended to write, such as "we are going to change the constitution," a sentence where Selçuk was actually quoting the government. The attorneys reiterated a request they had made a month earlier to have certain leftist experts called to the courtroom to witness.⁹⁶

On June 28 the defense lawyers pursued a new and more technical line of defense by attacking the temporal and substantial criteria of the court's jurisdiction. Because the

95 *Son Havadis*, June 12 and 18, 1971.

96 *Cumhuriyet*, June 18, 1971.

column which the expert report found to be in violation of the law had been printed before midnight on April 26, they argued, it appeared *before* the declaration of a State of Siege and therefore fell outside of the military court’s jurisdiction to try violations of article 159 of the TPC. Moreover, the fact that the court was established after the column appeared made it an “extraordinary” (*olağanüstü*) and therefore unconstitutional venue.⁹⁷ The court responded a week later that the court did have jurisdiction, firstly because both the old Martial Law Act from 1940 and the new Law on the State of Siege—valid from May 15, after Selçuk was apprehended— placed art. 159 of the TPC within its competence. Because the court had been established on the same day that the column appeared the judges also rejected the argument that the military court was “extraordinary.” They thus sentenced Selçuk and Kurtböke to one year of prison and four months’ supervision in Konya and Tekirdağ respectively.⁹⁸

In a surprising turn that would repeat itself in many other cases, the head prosecutor of the Military Court of Cassation agreed with the defense and asked that the sentence be overturned and that the military court recuse itself.⁹⁹ The judges of the Military Court of Cassation, in turn, overturned the sentence and sent the files back to the military court with instructions that it reconsider whether or not it had jurisdiction.¹⁰⁰ A month later the Istanbul State of Siege Military Court no. 2 recused itself and sent the files to a civilian assize court, where the trial continued.¹⁰¹

97 *Cumhuriyet*, June 29, 1971.

98 *Cumhuriyet*, July 6, 1971.

99 *Milliyet*, August 21, 1971.

100 *Milliyet*, August 22, 1971.

101 *Milliyet*, September 14, 1971.

Meanwhile several other prosecutors, both military and civilian, had opened cases against Selçuk both for various criticisms of the government and for his suspected ties to radical military officers connected to Cemal Madanğolu, one of the leaders of the 1960 coup who was accused of planning another coup before the March 12 intervention. This gave Selçuk's lawyers the opportunity to request that he be released first from the Istanbul State of Siege Military Court no. 3, which refused, and then from the State of Siege Military Court no. 1, which agreed and released him on December 28, after ten months' detention.¹⁰² He was eventually also acquitted by the Istanbul Assize Courts nos. 5, 3, and 1.¹⁰³

A defendant who was less lucky was the *Akşam* journalist and former WPT parliamentarian Çetin Altan, who was arrested along with the newspaper's editor Mehmet İrfan Derman on April 28, the day after Selçuk was arrested, and charged in the State of Siege Military Court no. 2 with insulting the President and the Armed Forces in a number of columns dating from 1966 to 1971.¹⁰⁴ When the trial began on June 7, the defense lawyers requested that the court recuse itself and transfer the case to a civilian court.¹⁰⁵ Three days later the court acquiesced, arguing that neither the temporal nor the substantive criteria of military jurisdiction were fulfilled, first because most of Altan's

102 *Milliyet*, December 29, 1971.

103 *Milliyet*, February 12, July 14, and September 23, 1972. Years later, Selçuk wrote that he had been tortured for an entire month after he was re-arrested by the State of Siege forces in 1972 and kept in detention at the infamous Ziverbey Villa. İlhan Selçuk, *Ziverbey Köşkü* (Istanbul: Çağdaş Yayınları, 1987).

104 Çetin Altan, "Bornova savcısı lütfen dinleyin," *Akşam*, September 28, 1966. Altan had left the parliament after being physically attacked by a large group of representatives of the JP, who accused him of being a Communist.

105 *Son Havadis*, June 8, 1971.

articles had been published long before the State of Siege came into effect and second because they could not be considered among the causes of the widespread violence that had necessitated a State of Siege.¹⁰⁶ As opposed to the İlhan Selçuk trial, the Military Court of Cassation this time determined that the military court did have jurisdiction and sent the case files back. When the State of Siege Military Court no. 2 met again on April 25, 1972, the prosecution submitted a new expert report by Nevzat Gürelli, the lecturer who had authored reports incriminating Şadi Alkılıç ten years earlier.¹⁰⁷ To this report was later added a report by professor of criminal law Sulhi Dönmezer, known for delivering numerous expert reports in favor of sentencing leftist intellectuals in the 1960s, along with lecturer in criminal law Erol Cihan and the nationalist scholar of Turkish language and literature Necmettin Hacıeminoğlu.¹⁰⁸ At the same time another military prosecutor opened a new case against Çetin Altan for a different newspaper article. This case began on June 28,¹⁰⁹ and the court eventually handed down a 1-year sentence which was upheld on appeal.¹¹⁰ Altan began his sentence on July 18, 1972,¹¹¹ and later received an additional sentence of 1,5 years from the civilian judiciary in a separate case.¹¹² Another case was later opened in a military court on the request of the Ministry of Justice, but the military

106 *Son Havadis*, June 11, 1971.

107 *Cumhuriyet*, April 26, 1972.

108 *Milliyet*, July 6, 1972. Just three months earlier, Hacıeminoğlu had published a book where he argued that education must be considered a part of Turkey's national defense, and that schools for minority groups were a form of cultural imperialism and must be removed in order to create a nationalist system of education. Necmettin Hacıeminoğlu, *Milliyetçi eğitim sistemi: "Dokuz Işık" üzerine bir İnceleme* (Istanbul: Töre-Devlet, 1972), 79–98.

109 *Cumhuriyet*, June 9 and 11, 1971.

110 *Son Havadis*, June 25, 1972.

111 *Milliyet*, July 19, 1972.

112 *Milliyet*, December 31, 1972.

court recused itself and the prosecutor of the Istanbul 4th Assize Court that took over the case files requested that he be acquitted. A similar development took place when a State of Siege commander insisted that the prosecutor of the military court where Altan was being tried for yet another newspaper column reverse his decision to drop the case.¹¹³ Instead the court acquitted him on February 12, 1973.¹¹⁴ Nevertheless, Altan remained in prison until he was released under the Amnesty Law in May 1974.¹¹⁵

If the cases of Selçuk and Altan illustrate how even military courts continued to rely on the opinions of law professors to evaluate evidence and thus remained vulnerable to the influence of leftist academics, the case of Mümtaz Soysal demonstrates the rift that was caused within the military judiciary when one of those leftist law professors was himself put on trial. Soysal was among the drafters of the 1961 Constitution, having served as a representative of the RPP on the Constitutional Commission of the Assembly of Representatives (*Temsilciler Meclisi*) for ten months in 1961. However, his “dynamic” approach to constitutional interpretation was not shared by all of his former fellow drafters. After the Erim cabinet was established in April 1971, professor of constitutional law Hüseyin Nail Kubalı expressed his utmost confidence in the proposed amendments of

113 *Milliyet*, February 1, 1972.

114 *Milliyet*, February 13, 1973.

115 The amnesty law (*Cumhuriyetin 50inci yıl nedeniyle bazı suç ve cezaların affi hakkında kanun*, Law no. 1803, May 15, 1974, in *Resmi Gazete* no. 14890, May 18, 1974) was passed by the coalition government of the RPP and the National Salvation Party (*Milli Selamet Partisi*). It did not release prisoners sentenced for articles 141 and 142 of the TPC, but a ruling by the Constitutional Court in July the same year (E. 1974/19, K. 1974/31, July 2, 1974, in *Resmi Gazete* no. 14943, July 12, 1974) struck down the article of the law that excluded articles 141 and 142, thus paving the way for the release of prisoners of conscience such as Çetin Altan and İlhan Selçuk.

the “strong, young, and Atatürkist” government,¹¹⁶ but argued that Mümtaz Soysal’s “dynamic” and “different” interpretation of the Constitution was written with “well-known goals in mind.”¹¹⁷ The impression that Soysal was providing radical leftist with a scientific veneer stemmed in part from his own writings on constitutional interpretation, in part from his insistence that the causes of the student unrest must be sought in the wider political context. He became a lecturer at the Political Science Faculty of Ankara University in 1963, was promoted to professor in 1969, and elected dean in 1971, when student protests reached a peak. When police raided the dorms of the Political Science Faculty on April 17, 1971, Soysal was present to make sure they did not overstep their authority.¹¹⁸ His editorial in the weekly *Ortam* a few days later ridiculed the notion that Turkey’s problems could be solved simply by installing a cabinet of “patriotic, upright, hard-working and knowledgeable” men and argued that the unrest was caused not by radical leftists but by Fascist groups who wanted to bring university life to a standstill in order to justify bringing the police and the Army into campus.¹¹⁹ In an interview on April 26 he echoed İlhan Selçuk in criticizing the cabinet’s plans to invite Maurice Duverger as an advisor and suggested that inviting foreigners was a throwback to the failed reforms of the *Tanzimat* era.¹²⁰ He went on to argue that any amendments that aimed to limit the freedom of expression or the freedom of organization would lead “straight to Fascism.”¹²¹

116 *Cumhuriyet*, May 11, 1971.

117 *Ortam* no. 16, September 13, 1971, 7.

118 *Milliyet*, April 18, 1971.

119 Mümtaz Soysal, “Dürüst, Çalışkan ve Bilgi,” *Ortam*, April 19, 1971.

120 The *Tanzimat* denotes a series of reforms that are considered to have begun in 1839 and ended with Sultan Abdülhamit’s ascension to the throne in 1876.

121 *Cumhuriyet*, April 26, 1971.

His editorial in *Ortam* the same day argued that the cabinet, in its attempts at achieving “calm and reform” (*huzur ve reform*), ignored the social inequalities that had existed for years as well as the beatings and mistreatment of students. He also argued that focusing on “student unrest” was myopic and overlooked the fact that Turkey was colluding with countries that were capable of killing hundreds of thousands with a single bomb. Thus university reforms would not suffice to make the “unrest” (*huzursuzluk*) go away.¹²²

Soysal was among the 116 academics who were detained for questioning by the Ankara State of Siege forces on May 21.¹²³ He was released but again detained and arrested on June 14 along with six other academics.¹²⁴ As happened to many leftist intellectuals after March 12, he was charged in multiple cases and brought before a number of different courts. In Soysal’s case, some of the trials became controversial enough that they had an impact on the case law regarding military court jurisdiction. In one trial, from which the civilian Ankara 7th Court of First Instance (*Asliye Mahkemesi*) had recused itself and sent to the Ankara State of Siege Military Court no. 2, Soysal was charged along with the director of the Turkish Radio and Television Corporation (TRT) Adnan Öztrak and five others with violating arts. 155 (inciting the people to violate the law) and 311 (publicly praising a crime) of the TPC because of statements Soysal had made during a TV show.¹²⁵ Soysal’s defense attorneys requested that the military court recuse itself, and the court agreed, reasoning that the statements in question did not

122 Mümtaz Soysal, “Güzel Huzursuzluk,” *Ortam*, April 26, 1971.

123 *Milliyet*, May 22, 1971. Other important legal academics were Bahri Savcı, Adil Özkol, Mukbil Özyürek, Bulent Nuri Esen, Uğur Alacakaptan, and Cemal Reşit Eyüboğlu.

124 *Milliyet*, June 15, 1971.

125 *Milliyet*, July 1, 1971.

constitute part of the reasons for the declaration of the State of Siege. Since a civilian court had already recused itself, the judge declared a negative conflict of jurisdiction and sent the case to the General Assembly of the Court of Cassation.¹²⁶ September 27, the Court of Cassation ruled that the military court's recusal was invalid because the Law on the State of Siege empowered only the State of Siege commander to refer a case to the civilian judiciary as a discretionary matter.¹²⁷ Thus all cases from which the State of Siege military court no. 2 had recused itself were sent back.¹²⁸ The head prosecutor of the Military Court of Cassation, Admiral Fahri Çoker, who had praised the independence of the new military judiciary when it first established in 1963,¹²⁹ saw the civilian high court's verdict as threatening the principle of legality of state action because it left the issue of military court jurisdiction to the will of a non-judicial officer. He saw no other solution to the problem than immediately passing a new law on the Court of Jurisdictional Conflict, empowering it to solve conflicts of jurisdiction between military and civilian courts in accordance with art. 142 of the Constitution.¹³⁰

The longest and most convoluted of Soysal's trials took place in the Ankara State of Siege Military Court no. 3, where Soysal was charged over a long list of statements and activities in support of Communism. The prosecutor in the trial was Captain Baki

126 *Cumhuriyet*, July 6, 1971.

127 Yargıtay Ceza Genel Kurulu E. 1971/375, K. 1971/292, September 27, 1971. Printed in *Ankara Barosu Dergisi*, no. 2, 1972, 328-9. I discuss this verdict more in detail in the following chapter.

128 "Sıkıyönetim Mahkemeleri Görevsizlik Kararı Vermeyecek." *Milliyet*, October 27, 1971.

129 Fahri Çoker, "Askeri Mahkemelerin Kuruluş ve Yargılama Usulünde Yeni Hükümler," *Cumhuriyet*, October 15 and 16, 1963.

130 Fahri Çoker, "Adli ve Askeri Yargı Yerleri Arasındaki Görev Uyuşmazlıklarının Çözümü," *Askeri Adalet Dergisi* 15, no. 59-60 (1971): 3-6.

Tuğ, who had served on a peacetime military court tasked with investigating political activities within the Ground Forces of the TAF (*Kara Kuvvetleri*) prior to the March 12 coup.¹³¹ Tuğ had long kept an eye on the activities of “expert witnesses” and viewed them as colluding in keeping their more extreme comrades out of jail. On July 6, during a session in the trial of a man charged with distributing illegal Islamist literature, Tuğ responded to the defense’s request for more sympathetic expert witnesses that “we have no confidence in experts who do not even find an element of crime in the Communist Manifesto. The highest expert is the honorable Turkish judge.”¹³² As Soysal himself was one of those experts, having him sentenced became somewhat of a personal quest for Tuğ.¹³³

Tuğ’s indictment¹³⁴ charged Soysal with spreading Communist propaganda under the cover of scholarly analysis and liberal-democratic discourse and listed a number of his articles and activities from 1964 to 1971 in order to demonstrate that he was a Communist. The main piece of evidence was Soysal’s textbook *Introduction to the Constitution*,¹³⁵ which he had submitted as his thesis for promotion to the rank of

131 This according to Tuğ’s own recollections in a interview with İdris Gürsoy, “Devlet ‘çözersem yanlış olur’ derse dolabı kapatır,” in *Aksiyon*, no. 944, January 7, 2013.

132 *Son Havadis*, July 7, 1971. The suspect in that trial was Mustafa Cahit Türkmenoğlu, who had published *Sözler*, a collection of Quranic commentary by the theologian Said Nursi.

133 Tuğ has since stated that Turkey in 1971 was facing the threat of a Communist coup d’état which, if it had succeeded, would have resulted in the death of over 3 million people. Cemal A. Kalyoncu, “9 Mart olsaydı 3 milyon kişi katledildi,” *Aksiyon*, no. 691, March 3, 2008.

134 *Iddianame* 1971/148-116, September 8, 1971, cited with file number and date in *Sanık Mümtaz Soysal’a Ait Gerekçeli Karar*. Evrak No: 1972/160. Esas No: 1972/160. Karar No: 1972/142. Ankara: T. C. Sıkıyönetim Komutanlığı 3 Numaralı Askeri Mahkemesi, 1972 (ISSG Library), and reprinted in full in Tuğ, *12 Mart 1971 Türkiye Gerçekleri ve Soysal Davası*, 18–29.

135 Mümtaz Soysal, *Anayasaya Giriş*, 2nd ed. (Ankara: Sevinç Matbaası, 1969).

professor. The indictment also noted that despite the fact that Remzi İnanç's translation of Ho Chi Minh's essays was prohibited, Soysal had written a letter of support to the translator and stated that he would put the book on his list of "recommended readings" for students. Tuğ also mentioned that Soysal had written an open letter to the WPT after the workers' uprising in June 1970 in which he argued that the declaration of a State of Siege should be under the jurisdiction of the Constitutional Court.

Tuğ interpreted the presence of several of Soysal's leftist colleagues in the courtroom, among them Muammer Aksoy and Uğur Mumcu, as an attempt to put pressure on the court.¹³⁶ During one of the first sessions in which Soysal was allowed to speak he stated that he had been held for five months and that the only reason he had been detained was a textbook that was still being used at the university. He added, "As a member of the teaching faculty, if I were the teacher of the prosecutor who prepared this indictment, I would not give him a good grade. I have to answer to an indictment to which I would give a bad grade." Tuğ replied, "The office of the prosecution does not take orders from anyone. If it did, Professor Soysal would not be the only one sitting in the defendant's seat but also many of the spectators following this session. If the case files had not been properly examined, defense attorney Professor Uğur Alacakaptan as well as Professor Muammer Aksoy, who is sitting among the spectators, would be sitting in the suspect's seat. I have no need to have my indictment graded, because I know that I received a far better grade at the university than the suspect did."¹³⁷ Upon hearing this,

136 Tuğ, *12 Mart 1971 Türkiye Gerçekleri ve Soysal Davası*, 31.

137 *Milliyet*, October 8, 1971.

Aksoy abruptly left the courtroom.¹³⁸

In his statement to the court, Soysal said that he had taken it upon himself to facilitate dialogue between the activist students and the professors during one of Turkey's most critical phases and that the list of "suggested readings" in his textbook was not meant to indoctrinate students but was written in the spirit of scholarly objectivity. He also said that all of the articles cited as evidence were published before the State of Siege came into effect, placing them outside of the court's jurisdiction, and that if his textbook was propaganda it would not have been taught for several years already. Tuğ replied in his updated indictment that Soysal's book clearly criticized Capitalism and praised Communism, and that out of the 352 books that Soysal recommended to his students, only 107 were books on constitutional law, while the remaining 245 were either "of a leftist tendency," or were written or translated by leftists who had since been sentenced.¹³⁹ He added that Soysal would probably have been charged earlier if it had been possible for police to enter university campuses.

On December 3, the military court sentenced Soysal to six years and eight months in prison, arguing that, while Soysal's articles in *Ortam* did not constitute Communist propaganda, his textbook did.¹⁴⁰ The verdict included an exhaustive discussion of the notion of "scholarly objectivity" (*ilmi objektiflik*), citing the constitutional treatises of numerous Turkish legal scholars, including Tarık Zafer Tunaya, Hüseyin Nail Kubalı and

138 Tuğ, *12 Mart 1971 Türkiye Gerçekleri ve Soysal Davası*, 31.

139 Ibid., 71–7.

140 *Gerekçeli Hüküm*. E. 1971/41, K. 1971/38, Ankara, T. C. Sıkıyönetim Komutanlığı 3 Numaralı Askeri Mahkemesi, December 3, 1971, in Ibid., 97–118.

Bülent Nuri Esen, to show that Soysal's book had a political character. The defense team immediately appealed the verdict to the Military Court of Cassation, arguing that it was wrong on both procedural and substantive grounds, procedurally because the military court lacked jurisdiction and substantively because the book did not constitute Communist propaganda.¹⁴¹

At the Military Court of Cassation the case files first went to the chief military prosecutor, Fahri Çoker, the same admiral who had objected to the civilian Court of Cassation's ruling in favor of military commanders' discretionary power over military court jurisdiction. Çoker prepared a communiqué (*tebliğname*) for the court's judges where he argued that Soysal was a respected scholar whose textbook provided a balanced overview of different approaches to constitutional interpretation, and that he should therefore be released.¹⁴² The defense attorneys added to the file several letters which they had solicited in support of Soysal from Turkish professors such as Çetin Özek, İlhan Arsel, Tarık Zafer Tunaya and Hıfzı Velidedeoğlu.¹⁴³ On March 9, 1972, the First Division of the Military Court of Cassation rejected the argument that the military court had no jurisdiction and had been established in violation of the Constitution, but it accepted the substantive argument that Soysal's textbook was insufficient evidence (*delil yetersizliği*) to find him guilty of the intent (*kast*) of spreading Communist propaganda. It

141 *Milliyet*, December 4, 1971.

142 Fahri Çoker, *Tebliğname* 1972/96, February 2, 1972. TÜSTAV Dava dosyaları 115-2. Baki Tuğ reproduces the communiqué in a slightly different version in *12 Mart 1971 Türkiye Gerçekleri ve Soysal Davası*, 182–6.

143 *Ibid.*, 131–162.

therefore overturned the verdict and ordered that Soysal be released.¹⁴⁴

On April 26, the Ankara Military Court no. 3 insisted on its sentence of six years and eight months.¹⁴⁵ In explaining the verdict, Baki Tuğ said that more evidence could have been submitted to the court to prove Soysal's Communist convictions, among other things the expert reports he had written in the course of the political trials of the 1960s. "No matter which Marxist was put on trial before the State of Siege, reports like these immediately came to their rescue. When Ho Chi Minh's *The War of National Independence* was translated to Turkish, the owner of the *Toplum* Publishing House was tried in an assize court. The defense lawyer was Uğur Alacakaptan, and the expert report writers were professors Mümtaz Soysal and Muammer Aksoy, who said that 'the book is a classic; there is no element of crime in it.' Despite these reports, the court sentenced Remzi İnanç to seven and a half years, and the sentence was upheld on appeal."¹⁴⁶ Tuğ also attacked the several expert reports that had been submitted to the Military Court of Cassation, arguing that it was in violation of procedure to add evidence outside of the trial proceedings in the courtroom. Soysal's lawyers then asked that he be released in accordance with the Military Court of Cassation's verdict, but the court rejected the request and replied that the files would this time go to the General Assembly of the Military Court of Cassation, where the judges of the First Division would not be taking

144 Askeri Yargıtay Esas 1972/52 Karar 1972/69, March 9, 1972. In *Ibid.*, 187–193.

145 T. C. Sıkıyönetim Komutanlığı 3 Numaralı Askeri Mahkemesi Evrak no. 1972/93, Esas no. 1972/93, Karar no. 1972/69, April 26, 1972. *Ibid.*, 204–212.

146 Most of this speech is reproduced in *Sanık Mümtaz Soysal'a Ait Gerekeçeli Karar*. Evrak No: 1972/160. Esas No: 1972/160. Karar No: 1972/142, October 24, 1972. IISG Library.

part.¹⁴⁷

Once again, head prosecutor Fahri Çoker delivered an opinion to the General Assembly of the Court of Cassation where he defended the inclusion of expert reports in the appeals process and reiterated that Soysal's book could not be considered propaganda.¹⁴⁸ The General Assembly of the Court of Cassation reached a unanimous verdict of acquittal on July 14, 1972,¹⁴⁹ arguing that the military court had failed to take into account the expert witness reports. Thus the case files were sent back to the Ankara State of Siege Court no. 3 once more. Prosecutor Tuğ this time argued that the Court of Cassation's reasoning went so far in relying on the authority of expert witnesses that it destroyed the independence and authority of the judge. In addition, he argued, "over the last few years the institution of expert witnesses has been abused in our country, and has almost been turned into a machine for rescuing Marxist-Leninists." He further argued that judges should only have to resort to expert witnesses in order to clarify technical issues such as airplane hijacking; on issues of doctrine and legal procedure, there was no need for external expertise.¹⁵⁰

On August 8, 1972, the State of Siege Court took the Court of Cassation's verdict into account and requested an expert report from five professors of its own choosing from Istanbul University: professor of criminal law Ayhan Önder, economics professors Nevzat

147 *Cumhuriyet*, April 27, 1972.

148 Fahri Çoker, "Tebliğname," June 29, 1972. Tuğ does not reproduce Çoker's entire communiqué, but summarizes it and adds that Çoker's nephew, Ahmet Çoker, was among the 69 "revolutionary officers" who were arrested for distributing subversive pamphlets in 1969. Tuğ, *12 Mart 1971 Türkiye Gerçekleri ve Soysal Davası*, 213–15.

149 Askeri Yargıtay Daireler Kurulu Kararı Esas no. 1972/52, Karar no. 1972/60, July 14, 1972. In *Ibid.*, 217–220.

150 *Ibid.*, 222.

Yalçıntaş and Sabahattin Zaim, and professors of constitutional law Selçuk Özçelik and Ziyaettin Fındıkoğlu.¹⁵¹ Their report argued that Soysal’s book “engages entirely with Marxism and consequently is in violation of the principle of objective teaching and with the rules of the university law.”¹⁵² It went on to explain the Marxist worldview in detail and concluded that Soysal depicted the Marxist economic order as an ideal.

When the Ankara State of Siege Court no. 3 met again on October 24, Soysal’s defense attorney Uğur Alacakaptan rejected the report, which he claimed was written by extreme rightwing individuals with no understanding of Soysal’s book. Attorney Ahmet Tahtakılıç argued that the report could not even be considered an “expert report.” Nevertheless, the court once again sentenced Soysal to six years and eight months prison.¹⁵³ Asked for final words, Soysal said that “this trial has become a struggle for university autonomy.”¹⁵⁴ Soysal’s attorneys immediately appealed the verdict to the Military Court of Cassation.¹⁵⁵

The case files’ circuit between the Military Court of Cassation and the Ankara State of Siege Military Court no. 3 repeated itself several more times. In February 1973 another prosecutor of the Military Court of Cassation, Numan Özdalga, joined Fahri Çoker in arguing that Soysal’s book did not constitute Communist propaganda and

151 *Milliyet*, August 9, 1972. Nevzat Yalçıntaş is now considered a member of the nationalist-Islamist movement *Milli Görüş*, and was among the founders of the AK Parti in 2001.

Sabahattin Zaim was a well-known economist under whom Abdullah Gül studied. He was active in various Islamic research groups.

152 Tuğ, *12 Mart 1971 Türkiye Gerçekleri ve Soysal Davası*, 227.

153 *Sanık Mümmaz Soysal’a Ait Gerekeçeli Karar*. Evrak No: 1972/160. Esas No: 1972/160. Karar No: 1972/142. Ankara: T. C. Sıkıyönetim Komutanlığı 3 Numaralı Askeri Mahkemesi, 1972. IISG Library.

154 *Cumhuriyet* and *Son Havadis*, October 25, 1972.

155 *Cumhuriyet*, October 26, 1972.

therefore asked that the sentence be overturned on both procedural and substantive grounds because the “scientific report” did not inspire confidence and “there is no Communist propaganda in the book. This is a scholarly book. It is normal to give examples on every issue in a scholarly book.”¹⁵⁶ A rapporteur (*raportör*) of the court, Turgut Lüleci, delivered an opinion to the same effect. Soysal’s defense attorneys Turhan Güneş, Ahmet Tahtakılıç, Doğan Tanyer and Necdet Özdemir also criticized the report, arguing that it was written with “clear objectives in mind and with the purpose of getting certain people imprisoned,” and that its authors were defending reactionaryism (*irtica*).¹⁵⁷ After two months of deliberation, the court released Soysal, arguing, first, that the conservative scholars’ expert report did not constitute a rejoinder to the Court of Cassation’s previous verdict, and secondly, that the committee’s professors were not sufficiently respected among their peers and were only chosen from among public intellectuals known for writing for right-wing newspapers and magazines.¹⁵⁸

Thus the case files once more went back to the military court, where Tuğ again prepared arguments against the annulment. Against the Military Court of Cassation’s argument that the court’s preferred experts were well-known conservatives who had written political newspaper articles, Tuğ retorted that exactly the same could be said for the leftist experts on whose reports the Court of Cassation had built its first annulment, and requested that the military court again sentence Soysal. The State of Siege Military

156 Özdalga’s report is reproduced in Tuğ, *12 Mart 1971 Türkiye Gerçekleri ve Soysal Davası*, 253–6.

157 *Milliyet*, February 7 and 27, 1973.

158 Tuğ, *12 Mart 1971 Türkiye Gerçekleri ve Soysal Davası*, 257–60.

Court no. 3 duly sentenced Soysal again, arguing that the expert witnesses it had selected were all in possession of the requisite academic credentials and had no criminal record connected to their ideological worldviews.¹⁵⁹

When Soysal's attorneys appealed again, the General Assembly of the Military Court of Cassation once more overturned the sentence with a majority vote.¹⁶⁰ The State of Siege Military Court no. 3 once more insisted on its ruling, and a third chief prosecutor of the Military Court of Cassation, Nahit Saçlıoğlu, argued that the State of Siege Military Court no. 3 had been violating procedure by soliciting reports from experts in economy and sociology and rather than in constitutional law and political science as the Military Court of Cassation had requested in its original annulment. He further argued that Soysal's book was completely objective.¹⁶¹ By the time the Military Court of Cassation received the case files again in July 1974, the Constitutional Court had altered the amnesty law of May 15 to cover the articles of the TPC that Soysal was being charged for violating. The Court of Cassation therefore saw no reason to continue the argument with the State of Siege military court, and dissolved the case.¹⁶²

The Soysal trial became one of the longest and most convoluted of the many military trials of leftists after the 1971 coup in part because Soysal was not just a leftist, but also a well-known law professor, and thus embodied the professional jurisdiction that

159 Ibid., 272–5. In 1979 Necmettin Hacıeminoğlu, the linguist and literary scholar, was in fact sentenced in a State of Siege military court for his ultranationalist views, but this sentence was overturned by the Military Court of Cassation (*Milliyet*, August 2, 1979).

160 The only judge who voted against was Hakki Erkan, who had served in the military trials of June-August 1970.

161 Tuğ, *12 Mart 1971 Türkiye Gerçekleri ve Soysal Davası*, 288–290.

162 Askeri Yargıtay 1. Dairesi Esas 74/486 Esas 74/651, July 14, 1974, in Ibid., 293.

jurists had cemented during the transition to the Second Republic. Baki Tuğ was clearly aware of Soysal's stature and used the trial as a venue to counter the many performances that leftist lawyers had put on with a performance of his own. Just as leftist lawyers had undermined the legitimacy of military courts, so Tuğ attempted to undermine the authority of Soysal and other leftist lawyers. Fortunately for Soysal, he and his leftist colleagues were still recognized as authorities by high-ranking jurists in the military judiciary such as Numan Özdalga, Fahri Çoker and Nahit Saçlıoğlu. Although they did not succeed in freeing him, they did repeatedly affirm his authority as a legal scholar to freely undertake constitutional scholarship, even if that scholarship appeared to support Socialism.

*

The May 15, 1974 amnesty resulted in the release of around 4,000 political prisoners and detainees and cut short several ongoing military trials, some of which had already been in a limbo for almost two years as the Military Court of Cassation stalled, knowing that an amnesty was likely to be declared soon. In the TÖS trial, for example, the Military Court of Cassation had not been able to reach a verdict within the two-month period stipulated by law, provoking protests from the defense attorneys, who complained that some of the defendants had been in detention for thirty-three months. It turned out, however, that the

Military Court of Cassation was simply waiting for an amnesty.¹⁶³

For three defendants the amnesty came too late to save their lives, but their trial became all the more symbolic of the struggle over the purpose of legal procedure under the 1961 Constitution. The trial of Deniz Gezmiş, Yusuf Aslan, Hüseyin İnan, and several other members of the Turkish People's Liberation Army (TPLA) began in the Ankara State of Siege Military Court no. 1 on July 16, 1971 and was concluded on October 9, 1971 with the death penalty for eighteen of the defendants,¹⁶⁴ three of which were upheld and carried out in May 1972. In the process, however, the "prosecutorial metanarrative" of prosecutors Keramettin Çelebi and Baki Tuğ was confronted with a counternarrative which ultimately resonated far beyond the courtroom, not least because the outspoken defendants were backed up by twenty-nine leftist defense attorneys, among them Halit Çelenk, Muvaffak Şeref, and Niyaz Ağırnaslı. Although the defendants' frank confession of the crimes they were charged with prevented the lawyers from appealing to leftist experts outside of the courtroom to evaluate evidence, the courtroom became the scene of a drama of its own, and the battle that began over the death sentence once the trial was concluded became an occasion for law professors, attorneys, and politicians to rehash the events of the last ten years and reconsider their position on the 1961 Constitution and the coup that created it.

The indictment of the TPLA defendants was written in the familiar style of post-

163 *Yeni Ortam*, March 7, 1974.

164 The other defendants were Sevim Onursal, Necmettin Baca, Metin Yıldırım Türk, Ercan Öztürk, Osman Arkış, Yusuf Aslan, Mehmet Nakiboğlu, Recep Sakin, Mustafa Yalçiner, Metin Güngörmüş, Hacı Tonak, Mustafa Çubuk, Mete Ertekin, Semi Orcan Cemal Özdoğan, Mehmet Asal, Kor Koçalak, İrfan Uçar, Atilla Keskin, and Ahmet Erdoğan.

1971 military trials. It placed the TPLA in the context of a series of chaotic uprisings and catastrophic civilizational clashes that went back to the genesis of Judaism, Christianity, and Islam, through the Battle of Manzikert in 1071 and the Siege of Vienna in 1520, and ended with World War II. It argued that the student uprisings in the late 1960s indicated that “egotistical” feelings had come in the way of national feelings and had been exacerbated by “certain people who are considered intellectuals” and who looked down upon those who were unfamiliar with Marx and Lenin. Finally, it narrated the emergence of leftist student organizations and went through a series of protests and violent activities undertaken by Dev-Genç and the TPLA, including bank robberies, kidnapping and holding three Turkish citizens, and kidnapping American soldiers stationed in Turkey.¹⁶⁵

During the first session, judge Ahmet Tetik asked if any of the defendants had any objections to the court. All but three of the defendants said that they had no confidence in the court, and defense lawyer Halit Çelenk made it clear that he had nothing against the individual judges but that he was opposed to the way the court had been established, in particular because judges and prosecutors should not be selected by the government. Judge Ahmet Tetik stated that the court was in conformity with art. 124 of the Constitution. After reading the indictment, the prosecutor asked for the death sentence for twenty-one of the defendants because they had violated art 146 of the TPC by seeking to

165 The indictment and written statements were collected and published by Halit Çelenk in *1. THKO Davası (Mahkeme Dosyası)*, vol. 1 (Istanbul: Yöntem Yayınları, 1974). I here refer to the expanded 2008 edition which includes the minutes of the trial sessions and became available as a PDF in 2013, *1. THKO Davası (68’ler Vakfı Yayınları, 2013)*, 35, 43, 47–61. (<http://www.halitcelenk.org/sites/default/files/kitaplar/Halit%20%C3%87elenk%20-%201.%20THKO%20Davas%C4%B1.pdf>).

overthrow the constitutional order, and fifteen to twenty years for the two remaining defendants.

On July 17 defendant Yusuf Aslan rejected the charges because he had no interest in changing the Constitution; on the contrary, he argued, everything he had done was with the purpose of defending the Constitution, including organizing “respect for the constitution” (*Ayayayasa Saygı*) meetings, which had been attacked by police on orders of the Justice Party government. Deniz Gezmiş began his statement by pointing out that students had been politically active since the time of Sultan Abdülhamit. He admitted having shot at a police station in Kavaklıdere and also to having robbed a bank and kidnapped a policeman, a bureaucrat and an attorney. He said that he took money from the policeman’s pocket, but that he did not take the 10.000 lira he found in the lawyer’s pocket, because “we know well whose money we are going to take.” Gezmiş then explained how he and his friends had kidnapped the American officer James Finley as well as four other Americans, all of whom they decided to let go without killing them. Finally, he denied having ever been part of a “separatist” movement and said that everything he had done was constitutional and that his only goal was the independence of Turkey.

On July 20, the court heard the rest of Gezmiş’s testimony. After a brief exchange of insults between Gezmiş and the prosecutor, defendant Hüseyin İnan said that the Erim

cabinet consisted of many honest, good people, and that his last words were going to be “Long live the 1961 Constitution.”¹⁶⁶ The defendants’ unapologetic acknowledgement of the acts they had committed continued over the following sessions, even as some of them began complaining of torture in detention, allegations to which the court paid no heed.¹⁶⁷ İrfan Uçar, for example, initially refused to give his testimony because he had been tortured for seventy-five days. Judge Ali Elverdi refused to postpone the questioning. Uçar then frankly identified as a Marxist-Leninist but denied that he was attempting to overthrow the Constitution, arguing that he and his friends were in fact defending it, and would continue to defend it. The court then listened to the testimony of the attorney, the bureaucrat and a driver who had been tied up and robbed in defendant Sevim Onursal’s apartment along with the policeman who discovered the incident. Again, the suspects admitted everything. When one of the witnesses had trouble identifying the suspects, Gezmiş helpfully pointed to himself and was rebuked by Elverdi, who said “No pointing, you’re leading the court astray.” On August 12, Gezmiş and his friends announced a three-day hunger strike to protest the ongoing constitutional amendments.¹⁶⁸

On October 9, the court sentenced of the suspects to death.¹⁶⁹ Upon appeal the Military Court of Cassation upheld the death sentence for Gezmiş, İnan and Aslan against the dissenting opinions of Kemal Gökçen and Nahit Saçlıoğlu, the head prosecutor who had objected to the sentencing of Mümtaz Soysal. The sentence was followed by months

166 *Cumhuriyet*, July 21, 1971.

167 *Son Havadis*, August 10, 1971.

168 *Son Havadis*, August 13, 1971.

169 T. C. Ankara Sıkıyönetim Komutanlığı 1. No.lu Askeri Mahkemesi, *Gerekeçeli Hüküm*. Evrak no. 1971/146, Esas no. 1971/13, Karar no. 1971/23, October 9, 1972.

of negotiations between different judicial, legislative, and executive venues. On March 17, 1972, the National Assembly authorized the sentence with Law no. 1576.¹⁷⁰ The RPP then appealed to the Constitutional Court to have the law struck down for breaches of the National Assembly's procedural rules, a move that divided well-known law professors. Tarık Zafer Tunaya recognized the novelty of the situation but argued that because a death penalty is irreversible it should be investigated in every detail. Sıddık Sami Onar declined to comment, while Hüseyin Nail Kubalı, the professor of constitutional law who had helped draft the 1961 Constitution and had then supported the 1971 amendments, supported the sentence, arguing that the Constitutional Court had no power to annul the Assembly's approval of their death sentences,¹⁷¹ a question over which he believed the Constitutional Court itself was split.¹⁷² He further criticized the RPP's deputies, pointing out that they had not been opposed to the death penalties of the DP's Adnan Menderes, Fatin Rüştü Zorlu and Hasan Polatkan in 1961. Bülent Nuri Esen supported the petition to the Constitutional Court, while Uğur Alacakaptan was uncertain.¹⁷³ Several law professors argued that the death penalty should be removed altogether, to which the conservative daily *Son Havadis* replied that several of the same professors had gladly bent the law in order to enable the Yassıada court to sentence Celal Bayar to death in 1961.¹⁷⁴ In the end, the Constitutional Court did quash Law no. 1576 on procedural

170 *Deniz Gezmiş, Yusuf Aslan ve Hüseyin İnan'ın Ölüm Cezalarının Yerine Getirilmesine Dair Kanun*, Law no. 1576, March 17, 1972, in *Resmi Gazete* no. 14139, March 25, 1972.

171 *Son Havadis*, March 19, 1972.

172 *Son Havadis*, March 29, 1972.

173 *Milliyet*, March 18, 1972.

174 *Son Havadis*, March 15, 1972.

grounds,¹⁷⁵ but the National Assembly soon passed a new authorization,¹⁷⁶ and the executions were carried out on May 6, 1972.

The execution of Gezmiş and his comrades became a legendary chapter in the Turkish left's struggle over the law not because leftist lawyers agreed with Gezmiş's militancy but because the trial itself became a matter of prestige. As it progressed, the trial forced many of the most important jurists behind the 1961 Constitution to take sides for or against the power of the military judiciary and the National Assembly to sentence civilians to death. The Constitutional Court's ruling in April 1972 may have salvaged its reputation as an assertive component of the 1961 alliance's institutions after the disappointment of June 1970, but it nevertheless ultimately failed to uphold the lawyers' authority against the National Assembly. With Onar unwilling to take sides until his death in August 1972 and Kubalı, one of Onar's closest colleagues, on the side of the conservatives, the character of leftist lawyers' opposition to military justice gradually shifted from the careful apoliticism of Onar to a more overtly political activism.

Conclusion

When it came to exceptional legality, Turkish right-wing and left-wing jurists had in common an Onaresque ambivalence. They may have disagreed on which situations justified the "exception," but they agreed that it must be negotiated as an issue of technical expertise and of jurisdictional negotiations. During the twelve years from 1962,

¹⁷⁵ Anayasa Mahkemesi Esas no. 1972/13, Karar no. 1972/18, April 6, 1972.

¹⁷⁶ *Deniz Gezmiş, Yusuf Aslan ve Hüseyin İnan'ın Ölüm Cezalarının Yerine Getirilmesine Dair Kanun*, Law no. 1586, April 25, 1972, in *Resmi Gazete* no. 14178, May 5, 1972.

when political trials of leftists first began, and 1974, when the amnesty law released many of the leftists who had been arrested after the March 12 intervention, these negotiations had taken on an increasingly antagonistic tone, culminating in an all-out attack by military prosecutors on leftist academics and by leftist lawyers on the very notion that right-wing lawyers and professors were capable experts.

The 1971 period thus became another step in the widening fissure over the meaning of legality—as a constitutive principle of legal praxis, as an element of Turkey’s national ideology, and as a principle enshrined in the 1961 Constitution. The complicated technical, scholarly, and jurisdictional debates during the trials of intellectuals such as Selçuk, Altan and Soysal and the dramatic narratives and tragic end of the TPLA trial continued to reverberate over the following decade. Nahit Saçlıoğlu, the member of the Military Court of Cassation who dissented in the verdict that upheld the death sentence of Gezmiş, Aslan and İnan, was appointed to the Constitutional Court by President Fahri Korutürk in 1977 and pronounced “Lawyer of the Year” by the Turkish Law Association the same year. As I show in the following chapter, however, attempts by the military-backed cabinets after March 12 to cover up the widespread torture that had taken place and to normalize their hold on criminal procedure convinced many leftists that Saçlıoğlu represented a dying breed of reasonable, military jurists. Consequently Halit Çelenk and his other leftist attorneys increasingly moved their struggle outside of the courtrooms through organizations such as the “Contemporary Jurists’ Association” (*Çağdaş Hukukçular Derneği*). Other leftist lawyers began pursuing alternative avenues, such as

Uğur Mumcu, who left legal academe altogether in 1974 and devoted himself to investigative journalism.

Meanwhile Ali Elverdi, the chief judge in the trial TPLA trial, officially joined the Justice Party in October 1974, stating “I have served my country as a soldier for thirty-two years ... In addition to being a soldier, I have taken on some of the very difficult and critical political duties that have fallen on the Army. Despite this, I see my service as insufficient, and I still do not believe I have repaid my debt to the nation. Because of this, I have decided to enter politics The Justice Party is on the road of democracy and republicanism that Atatürk staked out.”¹⁷⁷ Halit Çelenk reminded readers of *Yeni Ortam* that Elverdi had denied that his military court was politically appointed and argued that Elverdi joining the JP proved once more that he was not politically impartial.¹⁷⁸ After another apologia from Elverdi,¹⁷⁹ the debate continued for a month, drawing in Uğur Mumcu, Faruk Erem, and Selçuk İrdem.¹⁸⁰

Elverdi’s entry on to the political scene and Mumcu’s entry into journalism are indicative of a larger disillusionment with the superficial consensus that had existed until then on the proper method to solve political differences through legal venues. After the March 12 period, few among the left believed that the legacy of the 1960 coup period provided a strong enough basis on which they could solve their differences with their

177 *Zafer*, October 16, 1974.

178 *Yeni Ortam*, October 21, 1974.

179 Ali Elverdi, “Türk Milleti Adına Aldığımız Kararlarda Oyumu, Allah’a Karşı Sorumlu Olduğumu Asla Unutmadan Verdim.” *Orta Doğu*, October 28, 1974.

180 *Orta Doğu*, October 31, 1974; *Yeni Ortam*, November 2, 1974; *Cumhuriyet*, October 17, 1974; *Son Havadis*, November 24, 1974.

conservative colleagues, many of whom had also helped draft the 1961 Constitution. The fate of Nihat Erim, the “apolitical” RPP lawyer who had headed the two interim cabinets between March 1971 and May 1972 that oversaw the jailing of thousands of leftists, is both illustrative of this process and became a historical factor in its own right in the breakdown of the legal complex toward the end of the 1970s. In 1977 Erim, then a member of the Senate, gave a lecture at the “Hearth of Intellectuals” (*Aydınlar Ocağı*), a conservative right-wing association of intellectuals and academics founded in 1970. In his talk Erim went through the amendments that had been made to the Constitution during his time as Prime Minister, arguing that they had all been necessary and did not alter the basic characteristics of the Constitution.¹⁸¹ Furthermore, he cited recent lectures at the Hearth of the Intellectuals by both Prime Minister Süleyman Demirel of the Justice Party and by Alparslan Türkeş, the chairman of the ultranationalist Nationalist Action Party, in support of further amendments to expand the cabinet’s “special powers” for the purpose of state security.

Erim’s drift toward the right was thus as undeniable as his willingness to set legal concerns aside for the sake of fighting an increasingly militant front of leftist organizations. On July 19 July 1980, Erim was gunned down by leftist militants connected to the radical organization Dev-Sol outside of his house in Istanbul, in what has been seen as a decisive step in provoking the military coup of September 12, 1980. As I show in the Conclusion, the coup did not end the jurisdictional battles of the

181 Nihat Erim, “Anayasa ve Devlet Yönetimi,” in *Türkiye’de hukuk çıkmazı*, ed. Yılmaz Altuğ (Istanbul: Aydınlar Ocağı, 1978), 161–89.

previous two decades, but it did put a definite end to the notion that leftist attorneys, law professors, and intellectuals could challenge the Army's idea of legality within the courtroom.

Chapter 5

Against Normalization: Lawyering Ideals and the State Security Courts, 1973-1977

In September 1976, the streets of Turkey's largest cities were filled with unconventional protesters. Starting on September 16, industrial workers in hundreds of factories, oil refineries and workshops across the country went on strike or began work slowdowns. That was not in itself unusual: Turkey had been intermittently shaken by industrial action since the mid-1960s, and had even seen larger protests than the estimated 350,000 workers who took to the streets on September 17. What was unusual, first, was the issue they were protesting: the State Security Courts (*Devlet Güvenlik Mahkemeleri*, SSCs), a category of criminal courts that had already been in operation for three years. Second, in several cities the industrial workers were joined by unfamiliar comrades—lawyers, a group of professionals more accustomed to voicing their opinions in the ordered, technical idiom of courtrooms than with banners and shouting in the streets. Days later, as protests continued, Turkey's largest bar associations coordinated a nation-wide strike of their own by refusing to enter SSCs and marching through the streets.

What had brought these groups together was their shared conviction that the SSCs were threatening to turn Turkey from a pluralist democracy with a fiercely independent complex of legal professionals and institutions into a militarized tutelary democracy. Five

years earlier, in March 1971, the Turkish Armed Forces (TAF) had reacted to rumors of a Communist coup d'état by forcing out an elected government and installing a cabinet of hand-picked technocrats. The cabinet had then declared a State of Siege, which gave the TAF's own military courts the jurisdiction to prosecute anyone suspected of spreading Communist propaganda. Over the following three years, military courts tried thousands of civilian academics, teachers, workers, and lawyers, in addition to more militant activists such as Deniz Gezmiş and his comrades.

As I discuss in the previous chapter, leftist attorneys and law professors attacked and in many cases succeeded in sabotaging these military trials through expert reports regarding evidence, petitions for recusal, public debates and accusations of torture in detention. Realizing that the jurisdiction of military courts over civilians was under attack, therefore, the TAF sought to normalize its incursion into law enforcement by establishing a peacetime category of courts that would be staffed by judges from both the military and civilian judiciaries. For the following four years, leftist lawyers mobilized a broad alliance against the SSCs, establishing links between bar associations, academics, and labor unions against what they described as a "state of siege without a state of siege." Though all but the most conservative lawyers were critical of the SSCs and of the alleged torture, the unorthodox resistance tactics adopted by leftist lawyers were not universally appreciated. During the three years before the final showdown in the Autumn of 1976, leftist attorneys in particular countered the attempt to normalize military jurisdiction over civilians with modes of protest that increasingly departed from their narrowly conceived

responsibilities of handling case files and making legal “moves” within the framework of court procedure. In addition to stalling many ongoing SSC trials through courtroom protests, lawyers wrote op-eds, organized protest marches, and convinced several SSC judges and prosecutors to submit challenges to the Constitutional Court (CC), which eventually struck down the SSCs with a narrow ruling in May 1975. In the process, however, other leading attorneys, less comfortable with the leftists’ expansion beyond courtroom procedure, pushed back by attempting to debar activist lawyers and to prohibit any action not authorized by the bar associations. By the time the conservative government of the Justice Party attempted to pass a new SSC law in 1976, therefore, leftist attorneys had organized their own nationwide platform. With a powerful support network outside of the established bar associations, leftist lawyers succeed in mobilizing workers, opposition politicians, as well as the nation-wide Union of Turkish Bar Associations into taking action.

Scholars have long debated the boundaries of cause lawyering.¹ The debate has largely revolved around the extent to which lawyers are willing and able to violate professional ideals of disinterestedness without losing the support of their peers. As opposed to workers’ movements, which have framed their struggles in explicitly class-based terms, activist lawyers have traditionally been more constrained by a liberal-

1 Terence C. Halliday, *Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment* (Chicago: University of Chicago Press, 1987); Richard L. Abel, “Revisioning Lawyers,” in *Lawyers in Society: An Overview*, ed. Richard L. Abel and Philips S. C. Lewis (Berkeley and Los Angeles: University of California Press, 1995), 1–38; Terence C. Halliday and Lucien Karpik, eds., *Lawyers and the Rise of Western Political Liberalism: Europe and North America from the Eighteenth to Twentieth Centuries* (Oxford: Clarendon Press, 1997).

democratic ethos that posits impartiality as the constitutive deontology of the legal profession, and consequently as a measure of the extent to which they are capable lawyers.² According to Stuart Scheingold and Austin Sarat, professionalism thus conceived has a double-edged quality than can be both constraining and enabling. On the one hand, professionalism can operate as an ideology of top-down social control, preventing lawyers from stepping outside of the narrow confines of procedure and technicalities. At the same time, however, claims to professionalism are always locally grounded, and only take on meaning in reference to concrete relations, histories, institutions, and struggles. Thus lawyers who devote their time to political agendas rely on an idiom of disinterestedness to further their causes, while lawyers who display impartiality by working on behalf of a variety of private clients often draw on cause lawyers' political activism in order to anchor their professional authority to prevailing social and political values.³

Few countries bring the duality of professionalism more clearly into relief than Turkey. As I argue in Chapter 1, Turkish lawyers were central and active participants in the state-building project of the single-party period that followed the Turkish revolution of 1923 and ended with the transition to democracy in 1946-50. Drawing on Andrew Abbott's notion of professional "jurisdiction," I have argued that this process led Turkish

2 Anne Boigeol, "De l'idéologie du désintéressement chez les avocats," *Sociologie du Travail*, no. 1 (1981): 79; Stuart A. Scheingold and Austin Sarat, *Something to Believe in: Politics, Professionalism, and Cause Lawyering* (Stanford, CA: Stanford Law and Politics, 2004), 1–22.

3 Stuart Scheingold and Austin Sarat, "Cause Lawyering and the Reproduction of Professional Authority," in *Cause Lawyering: Political Commitments and Professional Responsibilities*,

lawyers to identify their work with the authority of the state itself.⁴ Thus Turkish lawyers' ideal of disinterestedness and impartiality found its expression in the state ideology of Kemalism, a heterogeneous idiom that equated the statist and authoritarian policies of the early Republican regime with the interests of the *pays legal* of the Turkish nation. In the process, Turkish lawyers developed a self-conception as the indispensable and apolitical experts of the procedures and institutional technologies through which state power was exercised. With the transition to electoral democracy between 1946 and 1950, lawyers who identified with this ethos withdrew to their anti-majoritarian bastions in the judiciary and universities, only to re-emerge as the expert supporters of the military officers who overthrew the elected government of the Democrat Party in 1960.

As Abbott argues, however, the substantial content of professional ideals is neither static nor subjective, but is defined relationally through continuous turf battles with other professions.⁵ Toward the end of the 1960s, as Turkish society became polarized into left-wing and right-wing camps, Turkish lawyers found their "above-politics" self-conception strained. While some jurists clung to a stance of statist impartiality, many drifted toward the left, placing them on a collision course with the TAF leadership, which had become increasingly anxious about Communist subversion in state institutions. In March 1971, therefore, the TAF, frustrated in its attempt at rooting out leftists by way of criminal trials, took control of the process by once again deposing

ed. Stuart A. Scheingold and Austin Sarat (Oxford: Oxford University Press, 1998), 11.

4 Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (Chicago: University of Chicago Press, 1993).

5 Andrew Abbott, "Jurisdictional Conflicts: A New Approach to the Development of the Legal Profession," *American Bar Foundation Research Journal*, 1986, 187–224.

the government and expanding the jurisdiction of its own courts vis-à-vis the civilian judiciary—first as military courts restricted to the duration of the State of Siege, then as half-military “State Security Courts” that were meant to operate alongside the ordinary judiciary in times of peace. By establishing the SSCs, then, the TAF sought to ensure that its political priorities would permanently occupy a space within a field that lawyers saw as their own domain. The SSCs thus challenged not just the political worldview of leftists, but also their professional jurisdiction over the substantive definition of “normal” law and “impartial” professionalism.

By moving seemingly settled lines of professional jurisdiction, the SSCs provoked leftist attorneys into action. Although the range of action available to Turkish defense attorneys was formally delimited in the Law of Trial Procedure to legal moves that would not challenge the jurisdiction of the SSCs, it encompassed, in the subjective evaluation of leftist activist lawyers, a far wider range of responsibilities, including safeguarding their own authority to define the perimeters of legal “normality” and “disinterestedness” on their own terms. Drawing on news accounts, legal memos as well as meeting transcripts and reports from the general assemblies of Turkey’s largest bar associations, this chapter shows how the struggle over the SSCs took the shape of a discursive contestation over the right to occupy the place of expert impartiality in the Turkish legal field. I first show why and how the cabinet that was installed after the military “coup by memorandum” on March 12, 1971 established the SSCs in the midst of a wave of military trials of civilians and widespread reports of torture in detention. I then

discuss how Turkey’s largest bar associations, which had only recently been placed under the umbrella of the nation-wide Union of Turkish Bar Associations, reacted to what many attorneys saw as an unacceptable encroachment upon their professional jurisdiction, and began mobilizing in order to have the SSCs shut down. Focusing on the Ankara Bar Association I show how the mobilization caused conflicts among attorneys, some of whom saw leftists attorneys’ resistance tactics as breaches of professional norms. Although the leftists eventually succeeded in shutting down the SSCs, therefore, the conflict eventually led to the establishment of different political factions within Turkish bar associations, each one defending its vision of true “conventional” lawyering.

Normalizing Military Jurisdiction

Talk of establishing “specialized” courts (*ihhtisas mahkemeleri*) to deal with leftist subversion began soon after conservative newspapers resumed publication after the 1960 coup d’état ⁶ and picked up pace when the center-right government of Süleyman Demirel took power in 1965,⁷ but the constitutional amendments that were necessary to establish such courts were only possibly after TAF had ousted the government on March 12, 1971, declared a State of Siege, and installed a technocratic government to undertake reforms on its behalf. Despite its *de facto* control over political trials during the State of Siege, the TAF had good reasons for establishing a more permanent presence within the judiciary.

6 E.g., Tarık Buğra, “İhtisas mahkemeleri kurulmalıdır!...,” *Yeni İstanbul*, February 6, 1962; Galip Erdem, “Komünizmle mücadele ve İhtisas Mahkemeleri,” *Düşünen Adam*, March 22, 1962.

7 “Siyaset Sahasında Oynanan Kumar,” *Yargı Dergisi* (July 1, 1965).

First, the military courts' jurisdiction over civilian leftists was limited to the duration and the declared target of the State of Siege, which was by definition a temporary and extraordinary situation. Secondly, in part because military trials of civilians were widely perceived as jurisdictional transgressions, they were susceptible to subversion by defense attorneys and sympathetic military judges and prosecutors.⁸ And lastly, while the ambiguous wording of the new Law on the State of Siege⁹ that was passed after the coup provided military commanders with wide powers to transfer suspects to military courts, the same ambiguity enabled military judges, many of whom were opposed to trying civilians in military courts, to recuse themselves.

On one occasion in September 1971 military-friendly jurists on the Court of Cassation (*Yargıtay*) attempted to prevent such recusals by making State of Siege Commanders the sole authority competent to declare a military court to be without jurisdiction. In the trial of Mümtaz Soysal, the dean of the Ankara Faculty of Political Science who had been charged with spreading Communist propaganda under the cover of constitutional scholarship, a “negative” conflict of jurisdiction arose when both a civilian penal court and a State of Siege military court recused themselves from the case. The Court of Cassation then ruled that because the law on the State of Siege authorized the State of Siege commander to identify the reasons why the State of Siege was needed, and since the jurisdiction of State of Siege military courts was tied to those reasons, the courts themselves would no longer have the power to recuse themselves and all recusals to date

⁸ Chapter 4 focuses on the jurisdictional struggles over the military trials of the 1970s.

⁹ Law on the State of Siege (*Sıkıyönetim Kanunu*), Law 1402, in the Official Gazette (*Resmi Gazete*) no. 13837, May 4, 1971.

would be returned to the military courts.¹⁰

In February 1972, however, other parts of the judiciary reasserted the courts' own power to decide on issues of jurisdiction. First, the Military Court of Cassation (*Askeri Yargıtay*) ruled that verdicts of the civilian Court of Cassation were not binding for the military judiciary,¹¹ and furthermore, that the State of Siege Commanders were not competent to expand their own area of jurisdiction.¹² Thus the power to decide whether or not a given case fell under the jurisdiction of State of Siege military courts was transferred back to the military courts themselves. Second, in October 1972, a deeply divided Constitutional Court (CC) struck down several articles of the new Law on the State of Siege after the Turkish Workers' Party submitted a challenge. Among them was the law's art. 23, which had permitted ongoing military trials to continue after the State of Siege was lifted regardless of whether or not the defendant was a member of the military, and art. 15, which had authorized the State of Siege Commander to transfer a suspect to the military court at his discretion. This ruling made the effectiveness of military courts as a tool for rooting out leftists highly uncertain.¹³

10 Yargıtay Ceza Genel Kurulu E. 1971/375, K. 1971/292, September 27, 1971. In *Ankara Barosu Dergisi*, no. 2, 1972, 328-9. Also see "Sıkıyönetim Mahkemeleri Görevsizlik Kararı Vermeyecek." *Milliyet*, October 27, 1971.

11 Askeri Yargıtay 2. Daire E. 1972/44, K. 1972/50, February 10, 1972; Askeri Yargıtay 3. Daire E. 1972/90, K. 1972/92, March 14, 1972. In Sahir Erman, *Askerî Ceza Hukuku: Umumi kısım ve usul*, 6th ed. (Istanbul: İstanbul Üniversitesi Hukuk Fakültesi Yayınları, 1974), 377, 385.

12 Askeri Yargıtay 1. Daire E. 1972/56, K. 1972/55, February 21, 1972. In *Ibid.*, 377.

13 CC verdict E. 1971/31, K. 1972/5, published in *Resmî Gazete* no. 14336, October 14, 1972. The decision was to come into effect on 14 April 1973. Challenges to the same law had been submitted by several civilian penal courts (E. 1972/24 K. 1972/18, E. 1972/33 K. 1972/31, E. 1973/19 K. 1973/15), but the CC only ruled on one. For a translation and criticism of this ruling by a former colleague of Sıddık Sami Onar at the Istanbul University, see Ernst E. Hirsch, *Menschenrechte und Grundfreiheiten im Ausnahmezustand: Eine Fallstudie über die*

If even military courts could not be relied on to stop the rising tide of leftist activity, then, the military would have to ensure that the civilian judiciary became sufficiently responsive to the TAF's political priorities that purely military courts were no longer necessary. A second round of constitutional amendments followed with Law 1699, passed on March 15, 1973.¹⁴ Some of the amendments were stopgap measures, such as temporary art. 21, which allowed ongoing military trials to continue after the State of Siege was lifted despite the CC's annulment of art. 23 of the Law on the State of Siege.¹⁵ This amendment gave military judges a constitutional basis to reject defense lawyers' petitions for recusal.¹⁶ In addition, however, permanent amendments were made, among them additions to art. 136 on the judiciary, which added the State Security Courts (SSCs) to the court system.

The temporariness of art. 21, and the fact that attorneys working in ongoing military trials began petitioning courts to refer it to the CC for annulment,¹⁷ made the permanent SSCs all the more important. Building on the constitutional amendments,

Türkei und die Agitation "strikt unpolitischer" internationaler Organisationen (Berlin: Duncker & Humblot, 1974), 52–146.

14 Law no. 1699, *Resmî Gazete* no. 14482, March 20, 1973.

15 Tanör refers to temporary art. 21 as "a typical example of 'constitutional fraud.'" Bülent Tanör, "States of Exception in Turkey 1960-1980," in *States of Exception: Their Impact on Human Rights* (Geneva: International Commission of Jurists, 1983), 324.

16 E.g., a trial of several leftist university students connected to the youth organization Dev-Genç, where attorney Orhan Apaydın's petition that the military court recuse itself was rejected with reference to temporary art. 21 of the Constitution ("Duruşma Tutanağı," December 28, 1973. TÜSTAV Dava Dosyaları 227-10). Temporary Art. 2 of Law 1728 amending Law 1402 on the State of Siege was based on this constitutional amendment, and permitted only those military courts established in connection with the State of Siege declared in April 1971 to continue to their conclusion even after the State of Siege was lifted.

17 E.g., attorney Muzaffer Amaç's petition to an Ankara military court to refer temporary art. 21 to the CC: "1. Ordu Komutanlığı Nezdinde Kurulan 2 Numaralı Sıkıyönetim Askeri Mahkemesine. Esas 1973/111," November 30, 1973. TÜSTAV Dava Dosyaları 115-2.

therefore, the “above-politics” government prepared Law 1773, which was passed in a heated session of Parliament June 26, 1973 and came into effect on July 11. With law 1773, the SSCs were established and were given jurisdiction over 99 different articles of the Penal Code, the most important of which were articles 141 and 142, which targeted Socialists and Communists, and art. 163, which targeted religious extremism, as well as articles in the Law on Protests Marches, the law on Collective Bargaining Agreements, the Law on Strikes and Lockouts, the Law on Associations, and the Law on Firearms. In addition, a number of crimes mentioned in the Military Penal Code¹⁸ would fall under the SSCs’ jurisdiction if committed by a civilian independently or jointly with a member of the armed forces.

Five SSCs were established, in Istanbul, Ankara, Izmir, Adana and Diyarbakır respectively. Each had two military and three civilian judges, one of whom served as president of the court. Each court had a civilian prosecutor, with assistant prosecutors from both civilian and military judiciaries, the former of which were selected by the High Council of Judges, the latter by the military authorities. Unlike the State of Siege military courts, then, the SSCs brought military jurisdiction into the framework of the civilian judiciary, creating a permanent military presence within the “ordinary” courts. The covering memorandum (*gerekçe*) for Law 1773 thus stated that the SSCs would transfer crimes which for the military courts had been an “exceptional” (*istisnai*) power to their “natural” court.”¹⁹ This intention was affirmed by a legal commentator writing years later,

18 Articles 54, 55, 57/3, 58, 59 and 560 of the Military Penal Code (*Askeri Ceza Kanunu*, Law 1630).

19 “Devlet Güvenlik Mahkemelerin kuruluş ve işleyişi, görev ve yetkileri ve yargılama usulleri

when the SSCs had been re-established on a more secure footing after the 1980 military coup: The SSCs were not meant to be another “extraordinary” venue; on the contrary, they were established so that there would be no need for courts of exception.²⁰

Professional Jurisdiction and the Boundaries of Lawyering

Critics of the SSCs, on the other hand, characterized them as tantamount to a “Stage of Siege without a State of Siege” (*sıkıyönetimsiz sıkıyönetim*).²¹ For many lawyers, this incursion constituted an irreversible loss of jurisdiction—a loss in the technical, legal sense, but also sense of professional jurisdiction, that is, of their authority to determine the validity of legal procedures according to their own criteria. While attorneys’ legally defined role gave them the authority to submit petitions for recusal during trials, however, the extent to which it allowed them to protest the existence of an entire category of courts was unclear.

On the one hand, Turkish attorneys’ collective independence from government interference was given legal guarantees in the 1961 Constitution’s art. 122, which provided professions “with the characteristic of a public institution” (*kamu kurumu niteliğindeki meslek kuruluşları*) the right to autonomously administer their own

hakkında kanun tasarısı ve Anayasa, Milli Savunma ve Adalet komisyonlardan 4’er üye alınmak suretiyle kurulan 114 No. lu Geçici Komisyon raporu (1/831),” *Millet Meclisi Dönem 3, Toplantı 4, May 9, 1973, 6.*

20 O. Kadri Keskin, *Devlet Güvenlik Mahkemelerinin Yapısı, Görevleri ve Yargılama Usulleri* (Ankara: Kazancı Hukuk Yayınları, 1987), 12.

21 DİSK, “İşçi Sınıfına ve Kamuoyuna DİSK’in Uyarısı,” in *Devlet Güvenlik Mahkemeleri*, ed. Mutlu Kurtuluş (İstanbul: Sorun Yayınları, 1976), 157–65.

professional organizations, and in the Law on Lawyering,²² which provided for a nationwide Union of Turkish Bar Associations (*Türkiye Barolar Birliği*, UTBA) with the power to define the professions' own rules of professional conduct. The Law described the UTBA as an independent professional association which would hold general assemblies January every year after the local bar associations had elected their governing boards and delegates.

On the other hand, the Law on Lawyering stopped short of granting the UTBA full autonomy from interference from the Ministry of Justice, and forbade it from undertaking political activities not in keeping with its strictly professional duties, a limitation that ran counter to the traditional self-conception of Turkish legal professionals. As İdil Elveriş argues, the UTBA thus harbored the same contradiction as many other of Turkey's post-1961 neo-corporatist organizations, such as the labor confederation Türk-İş: Although it was meant to provide attorneys with a "conservative" and consensual relationship to state authorities, it undermined this relationship by giving the government the power to intervene in their internal affairs and failed to address lawyers' self-image as an active pressure group in Turkish society.²³ Several lawyers, among them the UTBA's first chairman Faruk Erem, therefore immediately criticized the law for failing to fulfill the Constitution's promises of independence.²⁴

22 Law on Lawyering (*Avukatlık Kanunu*), Law no. 1136, in *Resmî Gazete* no. 13168, April 7, 1969.

23 İdil Elveriş, "Corporatist Structure Without Corporatist Policy: Union of Turkish Bar Associations and State Institutions" (Ph.D. Dissertation, İstanbul Bilgi Üniversitesi, 2012).

24 See e.g., Faruk Erem, "Baroların Özerkliği." *Cumhuriyet*, July 21, 1969, and Ömer Köprülü, "Türkiye Barolar Birliği." *Cumhuriyet*, August 29, 1969.

The first indication of disagreements among attorneys began in the Summer of 1970, when the National Assembly declared a three-month State of Siege in response to large-scale industrial unrest in the Istanbul region. The military trials that followed met with massive resistance from leftist defense attorneys and were largely a failure from the point of view of the conservative government. More importantly, the board elections of the Istanbul Bar Association (IBA) in December 1970 were the most polarized in the association's history, with groups named after the lawyers' political convictions—"the socialists," "the rightists," "the independents"—loudly competing over the right to determine the direction which Turkish lawyering would take. One of the candidates, İskender Enç, circulated a statement arguing that "lawyering should be socialized," because "lawyers do not simply run around chasing personal gain; we see them as a profession in the service of the people." Nevertheless, the sitting president Ferruh Dereli reluctantly stood for re-election, and won a third term with 473 of the 747 votes.²⁵ In comparison the Ankara Bar Association's general assembly was a low-key affair, with the outgoing president simply reminding the new president and administrative board to keep the organization out of politics.²⁶

The UTBA's general assembly in January 1971 included eighty-nine delegates from fifty-six local bar associations, and resulted in a joint statement warning authorities in no uncertain terms that the UTBA was opposed to those who lay the blame on the unrest on the judiciary's independence. During the same general assembly, however, the

25 *Cumhuriyet*, December 17 and 20, 1970; *İstanbul Barosu Dergisi*, vol. 45, March-April 1971.

26 *Ankara Barosu Dergisi*, No. 1, 1971, 146.

UTBA passed an official list of “Professional Rules” (*Meslek Kuralları*), standards to which the organization meant to hold its members.²⁷ The rules obligated attorneys to express themselves in an objective manner, whether writing or speaking, and to avoid actions for the sake of fame (*ün*), including self-promotion by way of attention-grabbing business listings. It prohibited lawyers from taking advantage of their professional titles in “personal disputes” outside of professional duties, and also from abandoning a courtroom during a trial, unless their personal honor or the honor of the entire lawyering profession was being attacked.²⁸

The “Rules of the Profession” were put to their first test just two months later, when the TAF took the reins of government and forced through constitutional amendments and legislation that limited the autonomy of the universities, media, and judiciary. Upon declaring a State of Siege in April 1971, the TAF established military courts in several major cities and cast a wide net among Turkey’s leftists. Many of them were legal scholars and attorneys, whose status as “impartial” legal experts was often blurred when the military authorities targeted them for prosecution. In May, for example, the Ankara State of Siege authorities detained a total of 116 academics and attorneys for questioning, among them the leftist attorney and legal scholar Halit Çelenk,²⁹ and in July Faruk Erem of the UTBA complained that the offices of prominent leftist defense

27 TBB, *Türkiye Barolar Birliği IV. Genel Kurul Tutanağı. 8-9 Ocak 1971, Adana* (Ankara: Mars Matbaası, 1971)

28 The “Professional Rules” came into effect when they were printed in *TBBB* vol. 2 no. 5, 1970, 5-6. An annotated edition was subsequently prepared by Faruk Erem as *Meslek Kuralları (Şerh)*, 2nd printing (Ankara: Türkiye Barolar Birliği, 1973).

29 *Milliyet*, May 22, 1971.

attorneys had been raided by military police on several occasions.³⁰ The incessant protests from the defense attorneys during military trials of leftists also led military prosecutors to press charges against them for failing to stay within the bounds of the Law on Trial Procedure.³¹

Mobilizing the legal complex against the SSCs

Perhaps due to the explicitly extraordinary character of military trials of civilians, bar associations tended to side with their own members when the State of Siege authorities pressured them to discipline leftist attorneys.³² When the TAF established the SSCs in July 1973, however, the latent conflict regarding Turkish lawyers' role in society entered a new phase. From March 1973 to October 1975, when the CC finally struck down the law 1773 establishing the SSCs, lawyers and jurists opposed to the SSCs used a "repertoire of action"³³ that went far beyond the confines of the Law on Trial Procedure. Their expansion beyond courtroom procedure was in part a result of the arguments they were making. Whereas military courts had often been opposed because they were in

30 Faruk Erem, "Avukat Bürolarında Arama," *Cumhuriyet*, July 13, 1971.

31 See e.g., "Savunma Hakkı ve Bir Sorun" and several other documents in TÜSTAV Dava Dosyaları 115-2. Also see *Cumhuriyet*, July 6 and 8, 1971.

32 For example, when a State of Siege Commander filed a complaint with the IBA because attorney Necdet Sağır had abandoned the courtroom to protest the ejection of two of his colleagues during the trial of Mahir Çayan's comrades, the IBA ruled in the attorney's favor and refused to discipline him. "Dosya No. 971/Ş. 224 ve 972/Ş. 9." İstanbul Barosu Yönetim Kurulu, May 17, 1973; and "Dosya No. 971/Ş.220." İstanbul Barosu Yönetim Kurulu, July 5, 1973. TÜSTAV Dava Dosyaları 115-2.

33 Lucien Karpik and Terence C. Halliday, "The Legal Complex," *Annual Review of Law and Social Science* 7 (2011): 225–6.

violation of the letter of the Constitution or of specific statutes, the SSCs were attacked because the constitutional amendments that had produced them were in violation of the more ambiguous “spirit” of the Constitution and principles of jurisprudence (*hukuk*).³⁴ Thus lawyers used their access to left-of-center newspapers to sway public opinion against the courts, both in order to portray the SSCs as illegitimate courts and to convince judges, prosecutors, parliamentary deputies and the president to file challenges against the SSCs in the CC.³⁵ Inside the courtrooms, defense lawyers involved in SSC trials continued a strategy they had successfully used to obstruct the trials of leftists in military courts under martial law: repeatedly and consistently submitting petitions for the courts to recuse themselves and to challenge both law 1699 (adding SSCs to the Constitution) and Law 1773 (establishing the SSCs) in the CC. As constitutional challenges could also be submitted by the President or by at least one sixth the Senate, a wider campaign began to sway public opinion and put pressure on President Fahri Korutürk and on Senate deputies to challenge the SSCs.

Just three days after law 1699 was passed, thirty-three members of the Senate submitted a challenge to the CC, arguing that the constitutional amendments that had added SSCs to the Constitution were themselves unconstitutional because they had not been passed according to the correct procedures and that four articles of the law were

34 See chapter 3 for a discussion of how leftist jurists such as Muammer Aksoy and Mümtaz Soysal distinguished between jurisprudence (*hukuk*) and positive law (*kanunlar*), and argued that the 1961 Constitution must be interpreted in light of the former.

35 Hıfzı Velidedeoğlu, for example, argued that what needed revision was not the Constitution but the law on the SSCs. He was not, however, categorically opposed to SSCs as such. *Cumhuriyet*, October 22, 1972.

substantively in violation of the Constitution because they contradicted the ban on “extraordinary” courts. On 27 May, İskender Özturanlı, the president of the Izmir Bar Association, sent a letter to the President of the Republic Fahri Korutürk asking that he also file a challenge to law 1699. Özturanlı claimed that the entire judiciary, including both the civilian and military courts of cassation as well as almost all of the Turkish bar associations and the UTBA were opposed to the amendments, in particular the establishment of the SSCs.³⁶ In July, the Izmir Bar Association held an extraordinary general assembly where Özturanlı condemned the attack on the *Rechtsstaat* (*Hukuk Devleti*), in particular singling out the SSCs. Echoing arguments that Mümtaz Soysal and Muammer Aksoy had made in the late 1960s, he warned that his bar association should continue to act to protect not just its professional interests (*meslek sorunlarını*) but also as a “pressure group” (*baskı grubu*) to assert what it saw as the “interests of the country” (*ülke hayrına düşüncelerini*).³⁷

The CC did eventually rule on the substance of Law 1669, but only after months of mobilization among Turkish bar associations. On July 30, Faruk Erem, the president of the Union of Turkish Bar Associations (UTBA), followed up Özturanlı’s telegram with a letter where he argued that the SSCs had been hastily put together and that they would inevitably become an arena for politics. The newspaper *Cumhuriyet* reproduced the entire letter along with a report which the UTBA had produced and sent alongside the letter, critiquing law 1773 in detail.³⁸ This emboldened the more explicitly leftist members of

36 *Cumhuriyet*, May 28, 1973.

37 *Cumhuriyet*, July 8, 1973.

38 *Cumhuriyet*, July 31, 1973.

the major bar associations to voice their opposition to the SSCs. Halit Çelenk, a lawyer particularly active as defense during the military trials of leftist, published an in-depth critique of law 1699 over three issues of *Cumhuriyet*, arguing that the amendments had caused the Constitution to contradict itself.³⁹

Over the following months, the anti-SSC campaign succeeded in convincing SSC judges to file several challenges both to law 1699 and to law 1773. Despite the CC's six-month time limit for delivering verdicts, many more months would pass before the CC ruled on the SSC issue, a fact Özturanlı and others publicly lamented.⁴⁰ While the CC dragged its feet, lawyers engaged in ongoing SSC trials began pressuring the courts to both recuse themselves and to file challenges to the CC. The courts often responded to petitions for recusal, and eventually some of them went one step further and filed challenges to law 1773. In September 1973, in the military trial Nahit İmre, a colonel charged with selling military secrets to the Eastern Bloc, the military prosecutor agreed with İmre's defense lawyer that his case could no longer be tried in a military court because the State of Siege had been just been lifted and that transferring the case to an SSC was not an option because the SSCs were unconstitutional.⁴¹ After discussing the issue, however, the military judges decided to transfer the case files to an SSC, where İmre was eventually sentenced to 30 years.⁴² In the meantime, the first SSC trial had

39 Halit Çelenk, "Anayasada Doğan Çelişki." *Cumhuriyet*, September 10, 1973; "Devlet Güvenlik Mahkemeler Yasası (1)." *Cumhuriyet*, November 1, 1973; "Güvenlik Mahkemelerinin Niteliği (2)." *Cumhuriyet*, November 2, 1973.

40 *Cumhuriyet*, June 3, 1974.

41 *Cumhuriyet*, September 15, 1973.

42 The files were sent to the SSC because art. 1 of Law 1773 establishing the SSCs had been annulled by the Constitutional Court in May 1974 (see below). *Cumhuriyet*, February 18, 1975.

begun in Izmir in November 1973 with charges brought against 9 students whose defense attorney was none other than İskender Özturanlı, the president of the Izmir Bar Association. In his first address to the court, Özturanlı argued that the very existence of the court was in violation of the “spirit of the Constitution” and that since a challenge had been submitted to the CC the SSC should suspend its operations until a verdict was forthcoming.⁴³ During the next session a few days later, however, the court rejected the petition and continued the proceedings, despite complaints from some of the suspects that their testimony had been produced during torture.⁴⁴

During the UTBA’s general assembly in January 1974, the UTBA’s president Faruk Erem spoke about the various ways in which the rule of law was being undermined.⁴⁵ In Erem’s view, the torture of defendants in detention, the limitations being placed on defense attorneys, the establishment of the SSCs, and the increasingly widespread use of phone surveillance as evidence in political trials was all part of a wide attack, not just on the Turkish lawyering profession, but on law itself. Necla Fertan, a defense attorney who was involved in several trials of leftists, complained that the UTBA was not doing enough. In reply, Erem claimed that the UTBA was in a life-or-death struggle on behalf of the profession (*var olması ya da olmaması*), a struggle that had to be waged carefully. Thus he said that the UTBA was in fact working to stop torture but was doing so behind closed doors, hidden from public view.⁴⁶ The general assembly’s

43 *Cumhuriyet*, November 13, 1973.

44 *Cumhuriyet*, November 17, 1973.

45 *Cumhuriyet*, January 11, 1974.

46 *Yedi Gün*, January 16, 1974.

final statement was comparatively oblique in its criticism of the SSCs: “We find it unnecessary to introduce institutions that violate the unity of the judiciary.”⁴⁷ Following the general assembly, Uğur Alacakaptan, a law professor who had been imprisoned by a military court after March 12, articulated the leftists’ view: “Some people in society follow this rule: To live happy one must live in secret. This rule does not apply to attorneys. For attorneys do not have the right to live in silence.”⁴⁸

A leading attorney who had no intention of remaining silent was İskender Özturanlı of the Izmir Bar Association. In December 1973 Özturanlı invited Bernard Baudelot, the head of the Paris Bar Association, to visit Izmir and to discuss how the Turkish SSCs compared to the French *Cour de sûreté de l’État*. Baudelot criticized the Turkish SSCs, arguing that they were even worse than the French court (of which there was only one) because the French court was reserved for armed insurrections while the Turkish SSCs were being used to try leftists for purely ideological crimes.⁴⁹ The following month Özturanlı penned an op-ed in which he insisted that Turkish politicians and state leaders must yield to the authority of the bar associations and jurists: “As long as [leaders] do not listen to jurists in issues of justice, jurists cannot be held responsible. In this case, all responsibility falls on the shoulders of this country’s leaders.” Frustrated at the relatively low number of challenges filed to the SSCs in the CC, he concluded by

47 TBB, “Türkiye Barolar Birliği VII. Genel Kurulu’nun Bildirisidir,” *Ankara Barosu Dergisi*, no. 1 (1974): 122.

48 *Yedi Gün*, January 16, 1974.

49 *Cumhuriyet*, December 13, 1973. Note that the French State Security Court was also under attack throughout the 1970s, and was finally removed in 1981 under François Mitterrand, who had singled the court out for criticism in the book with which he launched his political career, *Le Coup d’État Permanent* (Paris: Plon, 1964).

pleading that bar associations also be given the right to file with the CC: “The Turkish lawyer will not remain silent.”⁵⁰ Özturanlı received support from Vedat Karadeli, a board member of the Ankara Bar Association, who argued that bar associations should not shy away from political activism, and that enforcing a separation between lawyering and politics would be artificial in a country where most members of parliament had a legal education.⁵¹

If establishing the SSCs was intended to normalize the presence of military jurists in the criminal justice system, then, it appeared to have the opposite effect on members of the Turkish bar associations. Far from accepting the SSCs as a specialized branch of the ordinary judiciary, leading attorneys such as Çelenk and Özturanlı saw them as a provocation and a sufficiently serious challenge to their professional role that it required engaging in politics, even if this engagement entailed unorthodox activities.

The Özden Affair

If Özturanlı, Alacakaptan, Çelenk and others saw themselves as public actors in the struggle for judicial independence, other leading attorneys saw such dramatic tactics as abandoning courtrooms and publicly criticizing the SSCs and drawing attention to torture allegations as a threat to the corporate cohesion and moral integrity the Turkish legal

50 *Cumhuriyet*, January 12, 1974.

51 Vedat Karadeli, “Barolar ve Siyaset,” *Barış*, February 18, 1974.

profession. An illustration of these clashing conceptions of professional integrity can be found in the conflict that erupted in 1974 between activist lawyers connected to the Ankara Bar Association (ABA) and its president, Yekta Gngr zden.

In February 1974 the daily newspaper *Hrriyet* called for investigations into leftist attorneys' accusations that the defendants in ongoing military and SSC trials were being tortured in detention, and that the courts were accepting testimony produced using torture as evidence. In response to the *Hrriyet* article, seven lawyers from the Istanbul Bar Association (IBA), eight from the Ankara Bar Association (ABA),⁵² and Kemal Bisalman, the owner of the leftist newspaper *Yeni Ortam*, signed a common statement testifying to the use of torture and calling for investigations. They also stated that if anyone could bring documentation on the use of torture to the newspaper, *Yeni Ortam* would arrange to have the victims and those alleged to be responsible for it together in a meeting to come to the bottom of the matter. The statement was printed in *Yeni Ortam* the same day.⁵³ A month later, in mid-March 1974, it emerged that Yekta Gngr zden, the president of the ABA, had set in motion proceedings to debar eight of the association's members on the grounds that they had "disclosed professional secrets" (*meslet srrn ia ettikleri*) by going public about the torture of their clients.⁵⁴ zden gave them seven days to deliver their defense.

Why would the president of a bar association prevent lawyers from using their

52 The eight Ankara lawyers were Halit elenk, Ziya Acar, Nevzat Helvac, Fehmi am Eran ansal, Refik Ergn, etin Gner, and Emin Deęer.

53 *Yeni Ortam*, February 10, 1974.

54 *Yeni Ortam*, March 16, 1974.

expertise and authority to combat violations of the rule of law? A tentative answer can be found in Özden's understanding of the professional ethos of "disinterestedness," an understanding that drew heavily on the ideals which Sıddık Sami Onar had developed in his doctrinal work during Turkey's single-party period and subsequently restated during the 1960 coup. Like Onar, Özden believed that lawyers had a duty to engage in current events, but that all such activity must adhere to the principle of political impartiality and remain within the bounds of institutional regulations. Shortly after the 1960 military coup d'état, Özden, then a 28-year-old attorney, had published a reflection piece in the Ankara Bar Association Journal on the place of law professors in the coup, which he described as "both legitimate and for legitimacy."⁵⁵ The Army junta had, he argued, taken power from a lawless regime and had displayed its respect for law within an hour after taking power by asking law professors for advice. Citizens could now breathe a sigh of relief, safe in the knowledge that "the rights of the general, administrative, and military courts will no longer be in the dark."⁵⁶ In an article for the subsequent issue, Özden turned his attention to the role of attorneys. Noting that several bar associations had warned their members against representing any of the members of the fallen government in the mass trials that followed the coup, Özden argued that no lawyer could legally refuse such an appointment based solely on the subject of the trial. The defendants were therefore free to request lawyers, and lawyers, "as people who have made it their profession to be in the service of

55 Yekta Güngör Özden, "27 Mayıs 1960 Devrimi ve Hukuk," *Ankara Barosu Dergisi*, no. 2 (1960): 19.

56 Ibid.

law, will undoubtedly submit.”⁵⁷

During the following decade, Özden had steadily climbed the ranks of the Ankara Bar Association (ABA) while serving as the personal legal adviser for prominent members of the Republican Peoples’ Party (RPP), among them İsmet İnönü. In December 1972 he was elected president of the ABA. In his acceptance speech, he emphasized that although he intended to uphold the ABA’s tradition of working on behalf of law through conferences, open meetings and the media, “politics will not enter our bar association. All of our colleagues will remain unified within our bar association on topics pertaining to the law, lawyering and related issues regardless of their their political or personal inclinations.” He also underlined that he would strive to hold all the ABA’s members to the standard of the “Professional Rules” that the UTBA had enacted a year earlier.⁵⁸

After the conflict with the leftist attorneys broke out in February 1974, Özden attempted to clarify his position in a series of op-eds in the RPP-friendly newspaper *Barış*. After the Turkish revolution, Özden argued, Atatürk had created the conditions for a dynamic, progressive legal profession by establishing the Ankara Law Faculty in order to combat those reactionaries who sought a return to theocracy by way of law. Much as Onar had written in the early 1930s, Özden wrote that thanks to Atatürk’s law reforms, “today, law is no longer the custodian of the Sultan’s power.”⁵⁹ Özden consistently

57 Yekta Güngör Özden, “Tayın Yoluyla Müdafaa ‘Zorunlu Savunma,’” *Ankara Barosu Dergisi*, no. 3 (1960): 86.

58 “Ankara Barosu Başkanlığı (I),” December 26, 1972, 4.

http://www.inisiyatif.net/avtarih/baro_tarih/Ankara/1972/1972BskYDObildiri.pdf.

59 *Barış*, September 6, 1974.

emphasized values such as scholarship, freedom of speech,⁶⁰ and the difficult working conditions of judges⁶¹ all with reference to Atatürk and to the 1961 Constitution, which he regarded as definite statement on the role of lawyers and law in Turkish society.⁶² His op-ed on May 1, 1974 was devoted to the memory of the staunchly secularist Court of Cassation judge İmran Öktem. Özden's eulogy was a formulaic example of the lawyer hagiography that had dominated the media following the 1960 coup d'état: He described Öktem as a modest, hard-working judge whose rigorous research, apolitical jurisprudence, and encyclopedic knowledge of law was matched by his warmth and love of classical music in the private sphere.⁶³

Because Özden's conception of lawyering fit squarely within the received tradition of Onar's "apolitical" and "scientific" jurisprudence it also carried with it an aversion toward activities that did not sufficiently respect the boundaries separating personal political expression from professional engagement. Against accusations of conservatism, Özden argued that law itself is not conservative; "what makes law closed and frozen are certain lawyers."⁶⁴ Because "the state announces its authority through law," however, legal professionals seeking social change must also work within the framework of the state and its component professions and institutions: "Law transcends and renews itself through legal criticism, academic work, judicial verdicts, and lawyering

60 *Bariş*, September 10, 1974.

61 *Bariş*, September 7 and 8, 1974.

62 *Bariş*, March 10, September 7 and 8, 1974.

63 *Bariş*, May 1, 1974. See Chapter 2 for similar portrayals of law professors and judges close to the RPP.

64 *Bariş*, March 10, 1974.

that maintains social cohesion and adheres to scholarly standards.”⁶⁵ While he supported giving bar associations the right to file challenges with the CC and complete autonomy from government interference,⁶⁶ therefore, he emphasized that individual attorneys must adhere strictly to the written and unwritten codes of conduct of lawyering, in particular the “Laws of the Profession” of the UTBA, for “the rules of the profession are what make the professional into a true member of the profession; the profession makes the professional.”⁶⁷

In response to Özden’s complaint in March 1974, the eight lawyers of the ABA denied that disclosing torture amounted to divulging professional secrets, arguing that they were first and foremost entrusted with serving humanity.⁶⁸ They also protested that Özden was not competent to open an investigation regarding the lawyers. One attorney complained that lawyers had routinely been mistreated when they entered the courtrooms or prisons after March 1971, to the point where they were not able to perform their jobs to satisfaction and that the assertions of torture had been put forward again and again during trials and were to be found in the trial documents, but that Özden had done nothing to stop the abuses apart from a couple articles in the Bar Association Journal.⁶⁹

Later in March 1974, Özden stated in connection with the ongoing debates about the possible amnesty of convicted leftists that an amnesty must come with certain preconditions. Among other things, he was opposed to letting imprisoned lawyers return

65 *Bariş*, March 10, 1974.

66 *Bariş*, September 8, 1974.

67 *Bariş*, May 25, 1974.

68 *Yeni Ortam*, March 16, 1974.

69 *Yeni Ortam*, March 17, 1974.

to their positions, a view in which the president of the IBA, Burhan Güngör, agreed.⁷⁰ Twenty lawyers from the Eskişehir bar association condemned the statement, and some of them wrote a letter to Özden rejecting his accusations that they were getting the bar associations involved in politics. “You are also doing politics. We are not outside of politics. All institutions and humans are involved in politics. To defend and recommend the opposite view is nothing but deception.”⁷¹

Despite the criticism, the ABA’s administrative board ruled with a five-to three ruling to place the eight lawyers before the disciplinary board. The ruling stated that the lawyers’ public announcement was contrary to the rules of the profession, which prohibited lawyers from entering into conflicts outside of the framework of trials, and that it smacked of self-promotion, which was also in violation of the UTBA’s rules. “Lawyers do not enter into polemics; they stay above personal conflicts.”⁷² *Yeni Ortam* followed up with a detailed article about the unrest within the ABA. Soon after, however, a court order forced the newspaper to print a retraction written by Özden. In addition to rejecting the accusations that he had shown no interest in torture accusations, Özden wrote that the eight lawyers were not being disciplined for calling attention to the torture accusations, but for the public way in which they did so. “Lawyering takes place within the trial and on the job [*dava ve iş içinde olur*]. Lawyering is not a show business [*gösteri mesleği*].”⁷³

70 *Yeni Ortam*, March 26, 1974.

71 *Yeni Ortam*, April 9, 1974.

72 *Yeni Ortam*, April 12, 1974.

73 *Yeni Ortam*, April 30, 1974.

In May 1974, eighty-two lawyers signed a letter to Özden condemning his disciplinary action against the eight lawyers as well as the ABA's lack of interest in the many reported cases of torture.⁷⁴ Fifty of the ABA's lawyers signed up to defend the eight lawyers at their disciplinary hearing.⁷⁵ The disciplinary board set the first hearing for July; in the mean time, more accusations of torture surfaced. In June, for example, a number of suspects in the trial of the Turkish Revolutionary Proletarian Villagers' Party (*Türkiye İhtilalcı İşçi Köylü Partisi*) were transferred to the Mamak Military Prison where they were badly beaten. In protest, the detainees began a hunger strike while their lawyers went to the newspapers.⁷⁶ This time Özden did release a statement condemning the torture but only through the ABA's spokespersons and in the name of the "presidency";⁷⁷ Burhan Günör of the IBA followed suit with a telegram to Prime Minister Bülent Ecevit.⁷⁸

In October, the Ankara Bar Association held an extraordinary assembly in order to discuss the Association's new bylaws that had been drafted by Özden. The draft would among other things prohibit lawyers from making public statements in the form of press conferences or publications and would limit their right to launch complaints to "authorized institutions" (*sadece yetkili kurulla şikayette bulunabilecekleri*). Lawyers would only be permitted to sign public statements with the title "lawyer" (*avukat*) if they were limited to "technical" issues; otherwise they would be obligated to use only their

74 *Yeni Ortam* and *Cumhuriyet*, May 8, 1974.

75 *Yeni Ortam*, May 10, 1974.

76 *Yeni Ortam*, June 1-6, 1974.

77 *Yeni Ortam*, June 8, 1974.

78 *Yeni Ortam*, June 9, 1974.

names. After a discussion during which the draft was criticized for being in violation of the Law on Lawyering, the Constitution, as well as of human rights in general, the assembly voted to reject the entire proposal.⁷⁹ Özden wrote an article in the Ankara Bar Association Journal after the extraordinary assembly defending his work and deriding those who found it easy to criticize and complain but did little to further the cause of the ABA. He argued that the draft was not in violation of the Constitution and that, while the draft did preserve the constitutional stipulation that bar associations be independent, he believed independence could not exist without disciplinary actions against lawyers who took part in illegal activities: “The Bar is not a student association.”⁸⁰

The conflict ended with the acquittal of the eight lawyers against whom Özden had sought disciplinary action. The lawyers’ defense team argued, among other things, that lawyers were morally required to take action when they found during the course of their service that torture had taken place. Moreover, against Özden’s accusations of self-promotion, they argued that Özden himself had undertaken political activity as a lawyer, pointing to an article in the conservative daily *Zafer* where he had argued against lifting articles 141 and 142 of the Turkish Penal Code and had been depicted wearing his lawyering robe.⁸¹ A couple days later Özden replied to his critics with an article in *Zafer*, denying that his purpose with opening a case against the lawyers in the disciplinary committee was to disbar them.⁸² In his *Barış* column following the ruling, he attempted to

79 *Yeni Ortam*, October 14, 1974.

80 Özden, Yekta Güngör. “İç Yönetmenlik Üzerine.” *Ankara Barosu Dergisi* 1974, no. 5 (1974): 867-873.

81 *Yeni Ortam*, October 27, 1974.

82 *Zafer*, October 30, 1974. He published a second response in *Yeni Ortam*, December 11,

nuance his views on what role bar associations should play in politics. Although bar associations should work as “pressure groups,” he argued, they should make their opinions known in an “impartial” way. Significantly, being “above politics” did not imply that they could not play a leading role in legal issues. Being an honorable lawyer, Özden argued, was a matter of safeguarding the universality of law as non-political sphere. Thus lawyers should “provide technical and scholarly assistance in realizing the basic principles of the Constitution and of law and of lifting our level of legal development,” a contribution that emphatically did not constitute “political efforts.” “The bar associations are opposed to evil, injustice, conflicts and irregularities, as well as to any movements that contradict Atatürk’s revolution. This is not an indicator of their politics, but of their national consciousness and sacred glory.”⁸³

Two months later, on December 20, 1974, the Ankara Bar Association held its annual board elections. The conflict, it seemed, had left its mark but not enough that the leftists held the day. A group of attorneys participated on an election platform entitled the “Progressive Lawyers’ Group” (*İlerici Avukatlar Grubu*) under the leadership of Halit Çelenk, an outspoken leftist lawyer. Among its members were well-known defense lawyers from ongoing trials of leftist, including Uğur Alacakaptan and Nevzat Helvacı, who had been among the signatories of the public statement regarding torture.⁸⁴ The

1974.

83 *Barış*, October 28, 1974.

84 “Aday Listesi,” n.d., http://www.inisiyatif.net/avtarih/baro_tarih/Ankara/1974/1974IAGliste.pdf. This and the following election documents have been scanned from the personal archive of attorney Erşen Sansal and made available by inisiyatif.net, a website devoted to the history and practice of Turkish lawyering.

group's election statement described the candidates as "lawyers of a country that is underdeveloped for well-known economic, social and political reasons."⁸⁵ It went on to argue that "today's lawyers cannot and should not say, 'our job is lawyering; we follow the trials we have taken upon us, but our job ends there.' That is the individualist and primitive professional conception of the past." Beyond pursuing legal cases, the group argued, Turkish lawyers must take part in realizing the Constitution's promises of a "Social *Rechtstaat*" (*Sosyal Hukuk Devleti*). Although the group considered law a "superstructural institution," it saw concepts such as "right," "justice," and "the rule of law" as useful to the extent that they could bring about changes to the country's socio-economic structure. The statement then listed a number of specific laws that had been introduced after March 1971 which the group would devote itself to combatting, first among them the State Security Courts, which "place state of siege military courts at the same level as ordinary courts." In addition, it pointed to the limitations that had been placed on defense attorneys during trials and to the use of testimony produced under torture, which in some cases defense lawyers themselves had suffered. Despite all this, the statement argued, the Ankara Bar Association's president had failed to protest the State Security Courts and the wider attack on the rule of law, including the amendments that had limited defense attorneys' rights.

In the end, the 467 votes for Halit Çelenk could not compete with the 843 votes in favor of a centrist platform led by Nejat Oğuz,⁸⁶ who had entered the race with a modest

85 "İlerici Avukatlar Grubu Seçim Bildirgesi," n.d., http://www.inisiyatif.net/avtarih/baro_tarih/Ankara/1974/1974IAGbildirge.pdf.

86 "Seçim sonuçları" (handwritten tally of votes), n.d.

and short proclamation that he would work for the Bar Association's independence in keeping with Atatürk's vision.⁸⁷ Meanwhile Özden, who was not given permission by the ABA's administrative board to stand for re-election,⁸⁸ gave a speech in defense of his actions over the past year. He reiterated his stance that "all organizations have duties that are specified in their establishing laws. If every institution tends to its essential duties, and does not interfere in the duties of others or in side issues, problems will be solved faster. We have taken the path of making our viewpoints known without lowering our Bar Association to the street level, without weakening its strength, placing its values in the shadow, and making noise. We have worked as an institution of scholarship and professionalism [*bilim ve meslek kuruluşu*], without making the Bar into a political organ."⁸⁹ Against Çelenk's assertion that law is a "superstructure," Özden emphasized that "Law is not the instrument of a person, class [*zümre*] or current. ... Let's not forget what the late Vasfi Raşit Seviğ said: 'The Bar associations are professional hearths [*ocaklar*] where competing and contradictory ideas can coexist as brothers.'⁹⁰ In his somewhat bitter final "President's Corner" column for the bar association's journal he reiterated that bar associations should be politically neutral but that they should still act as pressure groups. "Everyone's area of initiative, struggle, work and activity is limited to their own structure. In a professional organization one only works on solving issues

http://www.inisiyatif.net/avtarih/baro_tarih/Ankara/1974/1974AnkSonuc.pdf.

87 "Sayın Meslekdaşım," November 25, 1974,

http://www.inisiyatif.net/avtarih/baro_tarih/Ankara/1974/1974NODuyuru.pdf.

88 *Bariş*, December 19, 1974.

89 "Başkan konuşması," December 20, 1974, 5-6.

http://www.inisiyatif.net/avtarih/baro_tarih/Ankara/1974/1974baskankonusmasi.pdf.

90 *Ibid.*, 9. I briefly discuss Seviğ's interwar jurisprudence in Chapter 1.

belonging to that profession. ... Certainly, as Atatürkist, revolutionary [*devrimci*], progressive lawyers and patriotic intellectuals we will fulfill our duties when they relate to our profession, and at the same time we will make our voices be heard as a pressure group but never as a party member, leader of a club, or as someone under the influence of particular political movement. As neutral, thinking lawyers and professionals who know what we want.”⁹¹

Turkish attorneys’ campaign against the SSCs thus exposed a deep fault line in their self-conception. This fault line had been dormant since the 1960 coup, when leading attorneys such as Özden and Erem had appeared unanimous in their support of the transition, the 1961 Constitution, and the role it gave bar associations in the Second Republic. Just as the Constitution left the division of public authority between the Army and the legal professions ambiguous, so the bar associations’ understanding of their range of action was open to interpretation. Some, like Çelenk, believed attorneys should be free to build alliances with labor unions and publicly express their political opinions with the authority of legal experts. Others, like Özden, saw legal expertise as a power that could only be exercised within the bounds of corporate professional organizations established in accordance with the law. The outcome of the conflict within the Ankara Bar Association kept the ambiguity intact, but as I show in the following section, it also affirmed the right of bar associations to act as corporate pressure groups when it came to issues that directly affected attorneys’ ability to do their job.

91 Yekta Güngör Özden, “Yöneticinin Yaşamı,” *Ankara Barosu Dergisi*, no. 6 (1974): 1059.

1974-1976: Recusals and Resistance

Despite his modest election platform, Nejat Oğuz proved far more willing to criticize the SSCs than Özden had, and thus added his voice to the rising tide of activism within Turkey's major bar associations.⁹² During the general assembly of the UTBA in January 1975, several bar representatives affirmed their opposition to the SSCs and complained that the UTBA's annual report took too passive a stance toward them.⁹³ Meanwhile, the responsiveness to lawyers' arguments among SSC judges and prosecutors varied depending on the courts' composition and the cases being brought before them. The Istanbul SSC, for example, appears to have had a particularly narrow view of its own jurisdiction, at least until new appointments were made in July 1975. By October 1974, the court had received at least 114 case files, but had recused itself from at least 86 of them and rejected another 19.⁹⁴

Such recusals eventually made their way to the CC. Despite having been established in August 1973, the Adana SSC's operations only began in February 1974 with charges against two shepherds who had let their sheep graze within a designated military shooting range.⁹⁵ Until then, the court had already recused itself from eight case files.⁹⁶ In April 1974, the Adana SSC finally filed a challenge to parts of art. 9, which

92 See e.g., *Cumhuriyet*, September 11, 1976.

93 E.g., İskender Özturanlı's speech at the UTBA's general assembly, reproduced in *Türkiye Barolar Birliği VIII. Genel Kurul Toplantısı Tutanağı*, 9-11 January 1975, 169.

94 *Yeni Ortam*, October 16, 1974; *Barış*, October 17, 1974.

95 *Cumhuriyet*, February 5, 1974. One of the shepherds claimed that his sheep had entered the shooting range while he had an epileptic fit. Adana Devlet Güvenlik Mahkemesi İddianame E. 1973/5, December 28, 1973.

96 *Cumhuriyet*, February 5, 1974.

listed the various crimes mentioned in the Penal Code that fell under the jurisdiction of the SSCs, as well as art. 10, which served the same purpose for certain crimes in the Military Penal Code. The court argued that while the shepherds charged with entering a military area may have been in violation of the Penal Code, they were not therefore a threat to state security; thus, the articles of Law 1773 that gave the SSC jurisdiction in cases of transgression onto a military area was in violation of the Constitution's art. 136. The CC eventually ruled in unison to uphold the articles challenged by the Adana SSC,⁹⁷ but this was only the first of several challenges that would be filed.

On April 7, 1974, the Military Court of Cassation for the first time agreed to file a challenge to one article in law 1773 on the SSCs. The background was a trial against Mustafa Hüseyin Katip, an officer who had been tried in a military court and sentenced to 12 years and 6 months for alleged military espionage. Katip's lawyer appealed to the Military Court of the General Staff, arguing that temporary article 1 of law 1773, which allowed ongoing military trials to be completed even after the State of Siege had been lifted and SSCs had been established, was unconstitutional and that the case should therefore be transferred to an SSC. The Military Court of the General Staff rejected the appeal, after which the lawyer again appealed, this time to the Military Court of Cassation. The latter upheld the appeal and filed a challenge to art. 1 of law 1773 to the CC.⁹⁸

In May 1974, the CC ruled to strike down the article on procedural grounds but let

97 CC Verdict E. 1974/12, K. 1974/32, July 15, 1974.

98 *Cumhuriyet*, April 8, 1974.

the rest of the law stand.⁹⁹ *Cumhuriyet* argued that with this ruling, all cases concerning violations of state security committed before law 1773 came into effect would fall under the jurisdiction of the SSCs and would have to be transferred from military courts to the closest SSC.¹⁰⁰ The same day as art. 1 of law 1773 was annulled on procedural grounds, the CC ruled on a separate challenge filed by the Izmir SSC.¹⁰¹ During the session on November 24, 1973, the Izmir SSC had found par. C of art. 9 of law 1773 to be in violation of the Constitution because it widened the SSCs' jurisdiction to crimes connected through "a general or collective intention" (*umumi veya müsterek bir gaye*) to the list of crimes in paragraphs A and B. The SSC therefore filed a challenge with the CC and postponed the ongoing trial until a verdict was forthcoming.¹⁰² The CC's verdict came in May 1974, and struck down par. C of article 9 with a 10-to-5 majority vote.¹⁰³ The Izmir SCC continued to chip away at law 1773 in November 1974, when the prosecutor in the trial of a leftist folk singer named Şah Turna filed a challenge to par. B of the same article to the CC.¹⁰⁴

The ruling that finally struck down the entire law 1773 came on May 6, 1975. The case began almost exactly a year earlier, when the Diyarbakır SSC saw two cases: one case against Abdullah Acar, who was accused of spreading Kurdish separatist

99 CC verdict E. 1974/8, K. 1974/19, 21 May 1974.

100 *Cumhuriyet*, 9 June 1974 and 5 August 1974.

101 İzmir Devlet Güvenlik Mahkemesi İddianame E. 1973/5, cited in CC verdict E. 1973/46, K. 1974/21, 21 May 1974.

102 The Izmir SCC appears to have been particularly sympathetic toward many of the leftists who were transferred to it. In April 1974, for example, it acquitted all nine defendants accused of membership in a leftist organization (*Yeni Ortam*, April 7, 1974).

103 CC verdict E. 1973/46, K. 1974/21, 21 May 1974.

104 *Yeni Ortam*, November 29, 1974.

propaganda, and a separate case against fourteen individuals accused of spreading Islamist (*Nurculuk*) propaganda. The SSC recused itself from the trial of Acar,¹⁰⁵ while the prosecutor in the trial of the Islamists decided that art. 1 and 6 of law 1773 were unconstitutional for procedural as well as substantive reasons.¹⁰⁶ Art. 1 was the same article that several other SSCs and military courts had filed challenges to, while art. 6 concerned the procedures for appointing judges and prosecutors to the SSCs. In filing the challenge, the prosecutor displayed his opposition to the very existence of the SSCs by arguing that article 6 constituted the SSCs as an “extraordinary judicial venue” (*“olağanüstü nitelikte bir yargı merciidir”*) which was prohibited by articles 4, 32 and 136 of the Constitution. The SCC judges agreed with the prosecutor and filed a challenge in the CC. When the CC ruled over a year later, it declined to decide on the substantive and much stronger challenge but agreed that, when Parliament had passed law 1773 in June 1973, articles 1 and 6 had not been separately debated as required by the Senate bylaws. It thus struck down the entirety of law 1773.

With law 1773 struck down, the struggle against the SSCs entered its second phase. As one Adana SSC judge pointed out in an op-ed after the first SCC-related CC verdicts, although the suspension of two articles of Law 1773 had thrown the jurisdiction of the SSCs into question, it had not provided a final solution to the problem as long as law 1699 was still in effect and the SSCs had constitutional backing.¹⁰⁷ This problem remained after the entirety of Law 1773 had been struck down. To make matters worse,

105 *Yeni Ortam*, May 5, 1974; *Cumhuriyet*, May 5, 1974.

106 *Yeni Ortam*, August 13, 1974.

107 Şerafettin Canpolat, “G. Mahkemelerinin Geleceği,” *Cumhuriyet*, July 6, 1974.

when the CC eventually did agree to evaluate law 1699 in April 1975, it upheld it;¹⁰⁸ and when the CC's annulment of the entirety of law 1773 was finally published in the Official Gazette on October 11, 1975 (it was delayed due to the unusual number of dissenting opinions), the CC specified that the ruling would only come into effect one year later, i.e., October 11, 1976. The five-month delay in publishing the verdict combined with the final clause created enough ambiguity that lawyers and judges on both side of the issue could argue that the SSCs should either continue or suspend their operations until a new law was passed. Indeed, as political violence and strikes gathered momentum during the spring and summer of 1975, case files continued to pile up in the Istanbul, Ankara, Izmir and Diyarbakır SSCs while defense lawyers continued to challenge the courts' jurisdiction, arguing that they should suspend operations until a new SCC law was passed.¹⁰⁹

While the government coalition struggled to pass a new SSC law, therefore, jurisdictional conflicts in the SSCs continued unabated but on a different argumentative basis. The argument that the SSCs had lost their legal basis and should suspend operations was first formulated by Halit Çelenk, the leftist lawyer who had established the ABA's "Progressive Lawyers' Group" in December 1974. Although the CC had provided a one-year grace period, he argued, the purpose of that period was, not to allow the courts to continue operating as before, but to allow legislators to pass a new law. Since "a law that has been struck down is considered 'non-existent' and invalid according

108 CC Verdict E 1973/19 K. 1975/87, 15 April 1975.

109 See e.g., *Cumhuriyet*, 26 February, 13, 21, and 28 March, 14, 16, 26, and 29 April, 2 and 4 May, 1975.

to law,” then, “the State Security Courts cannot continue operating.”¹¹⁰ This argument found some followers among SSC judges. On October 5, 1975, a few days before the CC’s verdict was published in the official gazette, the Izmir SSC, which had filed a challenge to parts of Law 1773 in November 1974, recused itself from the trial of the folk singer Şah Turna, referring to the same CC verdict.¹¹¹ Soon defense lawyers in ongoing SSC trials adopted the same stance, asking courts to transfer the case files to the nearest civilian court.¹¹²

Important parts of the judiciary disagreed, however. In early January 1976, for example, the Court of Cassation ruled in a trial of Celâl Işık, leftist a village teacher. The trial had been opened in the Adana SSC, which had recused itself from the case on December 9, 1975, referring to the CC’s verdict from May the same year. The Court of Cassation, however, argued that since the CC’s verdict contained a 1-year grace period, law 1773 was still in effect and the SSCs should continue their operations as before.¹¹³ The Ankara SSC appeared willing to continue as before even after the CC verdict had been published, ordering the arrest of thirty-three in connection with political violence in October 1975,¹¹⁴ and later declaring that it would continue operating until October 1976.¹¹⁵

110 Halit Çelenk, “Devlet Güvenlik Mahkemeleri.” *Cumhuriyet*, June 4, 1975.

111 *Yeni Ortam*, November 29, 1974, and *Cumhuriyet*, October 6, 1975.

112 See e.g., the particularly rowdy trial against members of the leftist “Istanbul Higher Educational Culture Association” (*İstanbul Yüksek Öğrenim Kültür Derneği*), where during the session of October 14, 1975, a defense lawyer demanded that the court shut down while 300 onlookers yelled slogans and held posters that said “The Fascist State Security Courts Cannot Judge our People.” *Cumhuriyet*, October 15, 1975.

113 *Milliyet*, January 10, 1976.

114 *Cumhuriyet*, October 14, 1975.

115 *Cumhuriyet*, November 5, 1975.

For anti-SSC activist lawyers, then, the CCs verdict simply signaled the need for a new and broader mobilization phase. In addition to obstructing the SSCs' operations and attempting to roll back the constitutional amendments that had made the SSCs possible, they now had to prevent lawmakers from passing a new SSC law. On October 15, just four days after the publication of the CC verdict, fourteen leftist organizations kicked off the campaign with a joint declaration protesting that the SSC were continuing as if nothing had happened.¹¹⁶ Halit Çelenk launched an attack on both the Ankara SSC and the Court of Cassation, arguing that they were lacking in basic understanding of constitutional law.¹¹⁷ The IBA followed suit with an "open meeting" where prominent lawyers and law professors such as Öztekin Tosun, Faruk Erem and Erdoğan Teziç condemned the SSCs.¹¹⁸ On December 9, the IBA decided to protest the government's "undemocratic" way of governing, as well as the ongoing attacks on leftist students by right-wing "commandos," by boycotting trials for the entire day.

For the more radical lawyers, however, a one-day trial boycott was insufficient. In December 1975, during the General Assembly of the IBA, leftist members organized an election platform under the name "The Contemporary Lawyer's Group" (*Çağdaş Avukatlar Grubu*) to compete with the more moderate "Professional Solidarity" platform that had governed until then and won the election with 450 votes to 150.¹¹⁹ A similar

116 *Cumhuriyet*, October 16, 1975.

117 *Cumhuriyet*, November 12 and 14, 1975.

118 *Cumhuriyet*, November 23, 1975. The same group of jurists elaborated on their anti-SSC positions in a panel organized by *Milliyet* in September 1976, shortly before the government attempted to pass a new SSC law. See *Milliyet*, September 12, 1976, and September 17, 1976.

119 *Cumhuriyet*, December 22, 1975.

break, we have seen, had already occurred between the Ankara Bar Association's president Yekta Güngör Özden and leftist lawyers organized under the banner of the "Progressive Lawyers' Group" (*İlerici Avukatlar Grubu*) a year earlier. As opposed to the Istanbul lawyers, the Ankara leftists boycotted the Ankara Bar's general assembly in 1975 to protest its passivity.

Soon after the bar elections, leftist lawyers from six different bar associations joined forces to establish an organization named "The Contemporary Jurists Association" (*Çağdaş Hukukçular Derneği*, CJA) led by Halit Çelenk.¹²⁰ With stronger representation in the UTBA, the CJA became an important pressure group among Turkish lawyers, organizing discussion meetings and publishing literature concerning the SSCs.¹²¹ During its general assembly in January 1976, the UTBA presented a report condemning the SSCs.¹²² Later during the same meeting it issued an official call for intellectuals and "democratic organizations" to resist what it called a "veiled authoritarian regime."¹²³ It followed this up later that year with an official report arguing, among other things, that the SSCs had lost their legitimacy after the latest CC verdict and must dissolve immediately.¹²⁴

Perhaps more importantly, the CJA abandoned the more moderate lawyers'

120 *Cumhuriyet*, January 1, 1976.

121 Halit Çelenk, *Devlet Güvenlik Mahkemeleri Niçin Kaldırılmalıdır* (Ankara: Çağdaş Hukukçular Derneği, 1976).

122 TBB, *T.B.B. Olağanüstü Genel Kuruluna Devlet Güvenlik Mahkemeleri İle İlgili Olarak Yönetim Kurulunca Sunulan Rapor* (Ankara: Türkiye Barolar Birliği-Nuray Matbaası, 1976).

123 *Cumhuriyet*, January 12, 1976.

124 TBB, *Devlet Güvenlik Mahkemeleri Kanunu ve son tasarılar hakkında TBB. Yönetim Kurulunca hazırlanan ve Cumhurbaşkanlığına, TBMM. Başkanlığına, Anayasa Mahkemesi Başkanlığına, Yüksek Hakimler Kurulu, Yüksek Savcılar Kurulu Başkanlıklarına ve Başbakanlığa sunulan rapor* (Ankara: Türkiye Barolar Birliği, 1976).

insistence on working within the corporatist statutory framework of the bar associations and reached out to a wider array of leftist organizations. In practical terms the UTBA thus moved closer to Halit Çelenk's view¹²⁵ that bar associations and other professional organizations must move beyond the narrow conception of politics defended by the likes of Yekta Güngör Özden, and must seek a more activist role in society. In particular, the CJA's close cooperation with the radical labor union confederation DİSK rattled more moderate adherents of the Republican People's Party (RPP), whose preferred ally among the workers' movement was the state-sponsored labor confederation Türk-İş, in particular when DİSK answered the CJA's call to action by threatening to pull its support from the RPP if the party did not prevent the SSC bill from passing.¹²⁶ The CJA also acted as a support network for leftist lawyers who sought to realize a more explicitly political role of the legal professions. When the Adana Bar Association's board attempted to debar thirty-seven lawyers because of political activities in July 1976, the CJA came to the lawyers' defense.¹²⁷ The Istanbul Bar Association followed up with an official recommendation to its members that they refuse to appear before SSCs,¹²⁸ a practice certain lawyers had already begun on their own initiative.¹²⁹ (This had proven mostly ineffective, as most SSCs simply continued without defense lawyers present.¹³⁰)

Meanwhile, the government prepared to pass a new SSC law. What should have

125 See e.g., Halit Çelenk, "Baskı Grupları ve Politika," *Cumhuriyet*, June 30, 1975.

126 *Cumhuriyet*, July 8, 1976.

127 *Cumhuriyet*, July 2, 1976.

128 *Cumhuriyet*, January 26, 1976.

129 *Cumhuriyet*, January 21, 1976.

130 E.g., *Cumhuriyet*, January 28 and February 13, 1976.

been a fairly simple process of re-enacting the same law with the correct procedures, however, turned into a draw-out process. The first problem occurred when members of the coalition connected to the Islamist National Salvation party, among them Justice Minister İsmail Müftüoğlu, suggested removing the Penal Code's article 163 from the SSCs' jurisdiction. Article 163 prohibited spreading Islamist propaganda, and although the SSCs had been used overwhelmingly to suppress leftists, there had been a few instances where SSC prosecutors had ordered the arrest of Islamists, notably those connected to "religion camps" for youth in the Aegean region in July 1975.¹³¹

Conservative newspapers close to the Islamist movement applauded the suggestion, as removing Islamists from the SSCs' jurisdiction strengthened their argument that the resistance to the courts was a "red" campaign waged by the same people who feared one day being tried in them.¹³² It prompted immediate attacks from the more secularist members of the government coalition, however, first among them law professor Turhan Feyzioğlu, who was joined by some members of Demirel's own party in arguing that the SSC law should be re-enacted exactly as it was. This standoff within the government coalition made it impossible to pass a new law before Parliament went on summer holiday in August 1976.

By the time the government had prepared a new bill and recalled Parliament early on September 14,¹³³ extraparliamentary opposition had passed a crucial threshold. In

131 *Cumhuriyet*, July 10, 1975. The Imam Fethulla Gülen, who now leads his worldwide *Hizmet* movement from his ranch in Pennsylvania, was among those sought by the Izmir SSC.

132 *Bizim Anadolu*, July 15 and 31, August 25, September 3, 1976; *Sabah*, September 7, 1976.

133 The draft is reprinted in Hikmet İnce, *Devlet Güvenlik Mahkemesi'ne Evet!* (Istanbul: Su Yayınları, 1978), 21–47.

addition to all the bar associations, the CJA and the UTBA, five political parties declared their opposition, along with all syndicates attached to DİSK and over thirty independent unions. The participation of sixteen syndicates attached to Türk-İş¹³⁴ had particular significance, and showed the influence that the leftist lawyers had exercised on the broader labor movement's perception of the courts.

On September 16, 1976, DİSK members around the country began a general strike, dubbed a "General Mourning" (*Genel Yas*), to protest the SSC draft. Despite warnings from the Turkish Confederation of Employers' Unions (*Türkiye İşveren Sendikaları Konfederasyon*) and the Government that illegal strikers would be fired and sued for damages,¹³⁵ the CJA estimated that over 350,000 workers participated across the country.¹³⁶ In some cities, like Mersin, workers began a hunger strike, while in others, like Ankara, they marched in the streets alongside lawyers.¹³⁷ For conservatives, the protests conjured up images of the massive workers' protests of the Summer of 1970, which they had called a "dress rehearsal for a revolution." When Prime Minister Demirel threatened to declare martial law and the SSCs began ordering the arrest of DİSK leaders, the major lawyers' organizations announced their own protest march, which took place in Ankara on 28 September.¹³⁸

Meanwhile, despite warnings from the right-wing Confederation of Nationalist Workers' Syndicates that parliamentarians who failed to take part in the voting would be

134 *Cumhuriyet*, September 11, 1976.

135 *Milliyet*, September 20, 1976.

136 "DGM Sorunu Nasıl Gelişti?," in *Çağımızda Hukuk ve Toplum*, no. 1, October 1976, 17.

137 *Cumhuriyet*, September 18, 1976.

138 *Cumhuriyet*, September 29, 1976.

added to its “black list,”¹³⁹ the SSC bill had again been delayed because of filibusters by the RPP. On October 11, 1976, therefore, the SSCs were dissolved. Realizing that no legislation would be passed if the SSC draft was prioritized, the Parliamentary Advisory Committee eventually moved the issue of SSCs to the 35th place on the agenda, where it remained until after the September 1980 military coup d'état.

Conclusion

The longer-term effects of lawyer radicalization is a question that deserves a more in-depth treatment than there is space for here. On the one hand, the CJA's ability to mobilize support among leftist organizations for a wider conception of cause lawyering than that of the statist “disinterestedness” of corporatist lawyers such as Yekta Güngör Özden made it a powerful pressure group, one which continues its activities today. Its resistance to the militarization of the criminal justice system continued after the SSCs were dissolved in 1976. In 1977, for example, lawyers connected to the CJA convinced the UTBA to declare an official “day of condemnation” (*kınama günü*) of the government's attacks on the rule of law, and to follow up the condemnation with a trial boycott.¹⁴⁰ The president of the UTBA, Faruk Erem, later repudiated conservative critics, arguing that the UTBA's duties included a wide range of “political” activities.¹⁴¹

¹³⁹ *Sabah*, September 14, 1976.

¹⁴⁰ After the 1980 coup a number of lawyers were arrested for violating the Law on Lawyering because of their trial boycott in 1977, but were later released. See letter from Faruk Erem of the UTBA to the Istanbul Bar Association, January 29, 1977, as well as other documents in TÜSTAV Dava Dosyaları, 112/5.

¹⁴¹ *Cumhuriyet*, January 12, 1978.

Although, in keeping with Abbott's argument that professional boundaries are fluid and subject to continuous contestation,¹⁴² the struggle between activist and corporatist lawyers continued long after the 1980 coup, establishing the CJA thus created a permanent structure within which the former could organize and thus prevent attempts at silencing their voice in the public sphere.

If these leftist lawyers' foremost aim was to prevent the normalization of military justice, they succeeded in the short term. During the three years they operated the SSCs received some 540 cases, in which about 3,300 people were charged. Defendants included activists from both the left and right of the political spectrum;¹⁴³ however, as even the right-wing union organizer Ömer Faruk Akıncı admitted, the vast majority of them were from the left.¹⁴⁴ By consistently denying the SSCs the ability to operate as ordinary courts, leftist lawyers and law professors succeeded in preventing authorities from portraying the SSCs as a normatively unproblematic, "specialized" branch of the ordinary criminal judiciary to which attorneys must adapt. Eventually, these efforts succeeded also in convincing SSC prosecutors and judges that their professional independence was dependent on shutting down the SSCs. After SSCs filed several challenges to the CC, the CC finally responded by striking them down in a verdict so narrow that it all but absolved the CC justices of all responsibility.

On the other hand, the CJA's voice within the bar associations may have

142 Abbott, *The System of Professions*.

143 William Hale, "Turkish Democracy in Travail: The Case of the State Security Courts," *World Today* 33 (1977): 189.

144 İnce, *Devlet Güvenlik Mahkemesi'ne Evet!*, 7.

contributed to alienating professional organizations that could otherwise have been swayed to join the resistance in order to protect their professional interests. The struggle between leftists and corporatists within the Ankara Bar Association had its parallels in the CJA's cooperation with the radical labor confederation DİSK, which worried the leaders of the more moderate and far larger labor confederation Türk-İş. Thus Halil Tunç, the president of Türk-İş, made a point of expressing his support for the SSCs during a visit to Turkey by Otto Kersten, the president of the International Confederation of Trade Unions, in October 1976.¹⁴⁵ Although Kersten was more cautious of his support of the SSCs, he denounced DİSK for using a radical discourse that even old communist parties had abandoned.¹⁴⁶

Worse yet, while powerful corporate structures such as Türk-İş wavered in their stance on the SSCs, it seems beyond doubt that the radicalization of leftist cause lawyering alienated the TAF and its conservative political supporters from bar associations and legal academics. The CJA's success in shutting down the SSCs re-affirmed activist lawyers' professional jurisdiction over the procedures of criminal law and the boundaries of state legality, but it did little to modify the Army's conception of its own professional duty to maintain domestic order.¹⁴⁷ Thus the failure of the SSCs may have been a contributing cause of the TAF's more violent coup d'état in September 1980,

145 *Minutes of Press Conferance [sic] of Otto Kersten General Secretary of the International Confederation of Free Trade Unions 7 October 1976*, October 7, 1976. Sina Pamukçu Papers 1. IISG.

146 "ICFTU General Secretary Visits Turkey." *Türk-İş News Bulletin* (January 26, 1977).

147 For Andrew Abbott's discussion of professional jurisdiction in a military perspective, see "The Army and the Theory of Professions," in *The Future of the Army Profession*, ed. Lloyd J. Matthews, 1st ed. (Boston: McGraw-Hill, 2002), 523–36.

which happened after the RPP had given up on containing political violence through constitutional means and declared a State of Siege in Turkey's major cities in 1978. It may also have strengthened the conviction of more conservative politicians that Yekta Güngör Özden's views on lawyering were more viable than the activism of the CJA. While a new wave of military trials of civilians was ongoing in 1978, therefore, the Senate appointed Yekta Güngör Özden to the Constitutional Court, where he participated in the Court's dramatic turn against civil rights. Moreover, the Constitution that was passed after the coup re-established the State Security Courts on a more secure footing, where they remained alongside a far more corporatist system of state control over universities and bar associations than the 1961 Constitution had foreseen. Thus the CJA's victory in the battle to define the boundaries of cause lawyering in the 1970s arguably came at the cost of stricter surveillance of the procedures of political trials once the Army stepped in once again. The effects that these changes had on activist lawyers' ability to challenge the jurisdiction of military courts after 1980 is the topic of the Conclusion.

Conclusion: The Work of Procedure

“By passing this proposal in the best multipartisan way, on an issue that is completely technical and beyond any partisan and political debates, our Assembly has performed a great service and duty.”¹

The military coup on September 12, 1980 is often described as a watershed in Turkish history. It was more brutal and left a far greater impact on the legal and political landscape than the coups of 1960 and 1971. Within one year of the coup, over 122.600 individuals were arrested; the total number had risen to more than 650.000 by the time the State of Siege was lifted from all regions in July 1987.² In addition to thousands of known torture cases, several hundred were either reportedly killed while trying to escape, or were said to have died of natural causes or as a result of suicide while in detention.³ The Army dramatically lowered its toleration of activist lawyers by raiding their offices, confiscating their documents and in many cases charging the lawyers themselves, and produced the 1982 Constitution, which re-established the State Security Courts and ended the autonomy of the traditional bastions of the left, the universities, media, and the

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- 1 Murat Kemal Biberöđlü, lawyer and deputy of the Justice Party, speaking during the parliamentary session in which the law on the Court of Jurisdictional Conflict (*Uyuřmazlık Mahkemesi*) was passed. *Millet Meclisi Tutanak Dergisi*, Session 44, February 6, 1979, 35.
 - 2 Martial law was lifted gradually between March 19, 1984 and July 29, 1987. For details see Zafer Üskül, *Siyaset ve Asker. Cumhuriyet Döneminde Sıkıyönetim Uygulamaları* (Istanbul: AFA Yayınları, 1989).
 - 3 “Darbenin Bilançosu.” *Cumhuriyet*, September 12, 2000.

judiciary.

From the vantage point of the left, therefore, the 1980 coup represents Turkey's "end of history"⁴ and the beginning of an era of neoliberalist de-politicization, paving the way for the country's entry into the age of capitalist democracy after the end of the Cold War.⁵ As in several of the world's local theaters of that war—notably in Latin America—Turkey's participation in the "third wave"⁶ of democratization never entirely left behind the violence of the military regime that preceded it. Instead, Turkey became an "ambiguous"⁷ regime where the return to normality was accompanied by authoritarianism in the form of corporatist state institutions in control of universities and the press. And just as the torture of the 1970s and 1980s was always "just beyond view"⁸ as common but invisible knowledge, so the normalization of Turkish politics happened against the menacing backdrop of military abuses in the Southeast and "deep-state" networks hidden just enough from public view that the state's link to the assassinations of figures such as the union leader Kemal Türkler (July 22, 1980), law professor Muammer Aksoy (January 31, 1990), and lawyer-journalist Uğur Mumcu (January 24, 1993) could be denied, but obvious enough that it had a chilling effect on political life. Enabling all of this, scholars

4 Francis Fukuyama, *The End of History and the Last Man* (New York and Toronto: Free Press - MacMillan, 1992).

5 Kemal İnal and Güliz Akkaymak, "Senior Editors' Preface," in *Neoliberal Transformation of Education in Turkey: Political and Ideological Analysis of Educational Reforms in the Age of AKP* (New York N.Y.: Palgrave Macmillan, 2012), ix – xii.

6 Samuel P. Huntington, *The Third Wave: Democratization in the Twentieth Century* (Norman and London: University of Oklahoma Press, 1991).

7 Larry Diamond, "Thinking About Hybrid Regimes," *Journal of Democracy* 13, no. 2 (2002): 31.

8 Paul W. Kahn, *Sacred Violence: Torture, Terror, and Sovereignty* (Ann Arbor, MI: University of Michigan Press, 2008), 3.

have argued, Turkish courts entered a phase of generalized paternalistic authoritarianism while lawyers, previously proud members of a profession in the service of justice, became technical experts pursuing atomized private interests and accommodation with public authorities.⁹

It was against this background that Murat Belge, writing in 1981, diagnosed the “tragedy” of the Turkish left and recommended that leftists search for a solution that avoided both the legalist strategies of the Workers’ Party of Turkey, which had by then been closed down, and the militant strategy of activists such as Mahir Çayan and Deniz Gezmiş.¹⁰ For Belge the militant strategy was doomed to fail in the face of right-wing military leaders, and the legal strategy—though on the surface a more constructive and democratic approach—was too dependent on Turkish lawyers’ history of accommodating and acting within the state structure to serve as a platform for affecting reach change.

My account in this dissertation has not contradicted this view, but has re-examined its relation to the legal field. I have argued that the Turkish legal profession has wielded significant authority over the boundaries of state power, even when the Army was in control of the state apparatus. Lawyers had this authority, I have argued, because they early on defined themselves as an intrinsic and inseparable part of the Turkish state. In particular, Sıddık Sami Onar, the French-educated expert in administrative law, had engaged with the Kemalist state’s predilection for Comtean scientism by describing state

9 Haluk İnanıcı, *21. Yüzyılda Avukatlık ve Baro: Eleştirel Bir Değerlendirme* (Istanbul: Legal Yayıncılık, 2008).

10 Ahmet Samim [Murat Belge], “The Tragedy of the Turkish Left,” *New Left Review*, I, no. 126 (April 1981).

power as the expression of scholarship and technical expertise, thereby also shaping lawyers' own professional jurisdiction over the legal articulation of state power. When conflict broke out over the authority of lawyers during the 1950s, 1960s, and 1970s, the jurisdiction that Onar had secured in the 1930s and 1940s was translated first into a public narrative, then into a Constitution that provided jurists with a stronger hold on the state than they had ever had before. Armed both with an institutional bulwark and a cultural recognition of their professional authority, jurists on the left managed to subvert the many trials of leftist intellectuals in the 1960s and 1970s, whether they took place in civilian or military courts.

If this professional jurisdiction gave lawyers the power to resist the use of legal procedures for purposes of political repression, it also made them complicit in it. The authority that enabled lawyers to subvert military trials in the 1970s was a result of lawyers' willingness to accommodate and practice authoritarian legality in the past, first as extensions and theoreticians of the single-party state, then as representatives and advisers of the 1960-1961 interim regime. Turkish jurists' professional jurisdiction was thus built on a foundation of ambivalence. Leftist lawyers could resist authoritarian legality because they were its heirs; conversely, authoritarian legality was possible because it depended on the voluntary cooperation of lawyers.

As I discuss in the Introduction, this view goes against much of the current literature on authoritarian legality. Political scientists have tended to argue that judicial empowerment in authoritarian contexts is only possible insofar as rulers reap indirect

advantages from it in the form of regime cohesion, monitoring of subordinates, or an attractive investment environment. Once courts either cease to serve these functions or begin to encroach on the regime's core political interests, rulers will withdraw the conditional support that made judicial empowerment possible. These approaches thus build on the assumption that politicized criminal justice is an indicator not of judicial empowerment but of its absence, that the military or half-military penal courts that so often characterize authoritarian regimes lie outside of the scope of true legality and therefore mark its outer limits. Much of the scholarship on Turkey has similarly approached Turkish military regimes as departures from the rule of law and has seen the ensuing military trials as the subordination of legal procedures to the Army's political interests.

This dissertation has challenged this view. Scholars are wise to emphasize the limitations of judicial empowerment in authoritarian contexts. By framing authoritarian legality as a matter of strategy, however, they stop short of confronting the deeper issue of how it is articulated within the legal sphere of meaning. Stripped of normativity, the claiming and disavowal of jurisdiction becomes reduced to the mere fact of asserting or yielding to force. Meanwhile, little attention is paid to issues that appear absolutely crucial to the practitioners themselves. I have argued that during formative periods of Turkish history, leading Turkish lawyers considered what many scholars see as symptoms of judicial incapacity—the doctrinal accommodation of authoritarian state policies, the technical advice and public support of show trials—as the very hallmark of the rule of

law. From 1930 to the early 1960s, law professors such as Sıddık Sami Onar, Ragıp Sarıca, Muammer Aksoy, and Hüseyin Nail Kubalı would have found the idea that accommodating authoritarian legality was a symptom of weak legal institutions to be preposterous. If some of them, such as Sarıca and Aksoy, later protested political trials of leftists, they did so not because they changed their mind but because those trials were targeting their own authority over the boundary separating legitimate from illegitimate uses of the law. That boundary may have been fundamentally ambiguous, but it was this ambiguity that ensured that Turkish lawyers, as a profession, could maintain a continuous identity and a shifting but unbroken link to state power regardless of the political color of the state's leaders or the formal characteristics of the regime. Drawing on Andrew Abbott's understanding of professional jurisdiction, I have demonstrated that changing political circumstances led Turkish lawyers to assert this authority in different ways depending on which arenas they had access to. However, whether they couched their claims in complicated doctrinal writings, sensationalist popular narratives, courtroom procedure, or street protests, their discourse rested on the same fundamental assumption: that state authority is only legitimate as long as it is authorized by lawyers.

A common argument of the chapters has therefore been that the episodes that in political, constitutional, and human terms have appeared as dramatic breaks with normality have in fact been tempered by a doctrinal, symbolic and pragmatic continuity in Turkish lawyers' interaction with state power. What have been described as "junctures" have been significantly shaped by the way in which lawyers had previously defined the

state and their own relation to it. A concluding observation on the 1980 military coup must therefore address how even this watershed carried with it crucial elements of the jurisdictional arrangement from the 1930s, allowing the ambivalent ethos of Onar's doctrine to survive the clampdown on activist lawyers and subsist in an obscure but crucial part of the Turkish legal system until today.

Seen as a struggle over professional jurisdiction—over the boundaries separating the discretionary power of military leaders from the authority of legal professionals—the pivotal moment in Turkey's domestic theater of the Cold War happened, not with the military intervention on September 12, 1980, but several months earlier, when the National Assembly passed a law establishing anew the Court of Jurisdictional Conflict (*Uyuşmazlık Mahkemesi*, CJC) according to Art. 142 of the 1961 Constitution, which stipulated that the court would have competence to determine the correct venue in cases of jurisdictional conflict between military and civilian penal courts. The law came after more than a year of escalating political violence. In 1978 there had been massacres of civilians and assassinations of lawyers, judges and prosecutors; by 1979, militants had begun assassinating journalists, state leaders and politicians such as Nihat Erim. After a particularly brutal massacre in the town of Kahramanmaraş in December 1978, the left-of-center government of Bülent Ecevit declared a State of Siege again, but violence continued unabated. In April 1980, the Interior Ministry reported that more than 3,000 acts of violence had taken place since the beginning of that year, resulting in 206 deaths and almost 2000 arrests by the military prosecution.¹¹

¹¹ *Milliyet*, April 19, 1980.

With the increase in arrests by State of Siege authorities, the problem of military court jurisdiction that had plagued military commanders during the State of Siege following the coup on March 12, 1971, resurfaced. As I discuss in Chapter 4, throughout the State of Siege leftist attorneys took advantage of ambiguities in military courts' formally defined jurisdiction over civilians to pressure judges into recusing themselves. This strategy resulted in numerous stalled trials. In July 1973, the President of the CJC publicly complained that more than 600 cases were in jurisdictional limbo and that his court could not resolve most of them because it still lacked the statutory basis to deal with military courts it had been promised in the 1961 Constitution.¹² In the event, those military trials that did not reach a verdict during the State of Siege were cut short by the 1974 amnesty.

Thus the battle over military jurisdiction temporarily shifted to the State Security Courts, while the problem of the CJC's lack of jurisdiction over military courts was put on the back burner until the State of Siege that was declared in December 1978 again placed it on the agenda.¹³ In February 1979, the National Assembly finally ratified a new law on the CJC. Little public attention was paid to the law, one newspaper noting only that it was among a number of laws that were passed during a marathon session which lasted into the early morning of the next day.¹⁴ According to the new law, which went into force in June 1979, the CJC would be competent to determine the correct venue in cases

12 See Ahmet H. Boyacıoğlu, "Uyuşmazlık Mahkemesi," in *Cumhuriyet*, July 11, 1973.

13 In February 1979, for example, an Istanbul military court recused itself from a high-profile trial of 30 members of the press despite the objections of the State of Siege commanders. *Cumhuriyet*, February 7, 1979.

14 *Milliyet*, February 7, 1979

where military judges either recused themselves from a trial or claimed jurisdiction over a case that was also being tried in a civilian court.¹⁵

Although the new CJC ostensibly fulfilled one of the stipulations of the 1961 Constitution, its history went much further back. In Chapter 1, I discuss how Siddık Sami Onar, writing under an increasingly authoritarian single-party regime in the 1930s, undertook the task of shaping the administrative jurisprudence of the Turkish Republic in such a way that the professional jurisdiction of jurists would be secured without thereby threatening the prerogative power of state leaders. Among the institutional mechanisms he recommended for dealing with transgressive “acts of government” was a tribunal that would enable jurists to “empirically” determine the limits of government authority on a case-by-case basis.

Onar’s suggestion had precedents both in French and Turkish history. In a formal perspective, the Turkish judiciary’s separation of criminal, administrative and military courts is simply a variation on the institutional division between affairs involving state personnel and ordinary civil and criminal affairs found in many judicial systems derived from the Napoleonic court system. As is common in such systems, the jurisdiction of Turkish courts is defined in constitutional, substantive and procedural laws which allocate cases depending on the subject matter, locality, or the status of the persons involved. In practice, however, legal categories that appear straightforward on paper are frequently confused when confronted with the messiness of real-life situations.

15 *Uyuşmazlık Mahkemesinin Kuruluş ve İşleyişi Hakkında Kanun*, Law no. 2247, in *Resmi Gazete* no. 16674, June 12, 1979.

Some countries seek to avoid the resulting jurisdictional disputes by leaving the issue to a sovereign ruler. This has been the case in Egypt, where it is up to the President of the Republic to transfer detainees to the military judiciary.¹⁶ Another solution is to create mechanisms within the judiciary itself for solving jurisdictional disputes as they arise. Thus in Italy and Belgium, the ordinary courts of last instance have the power to determine the venue in cases of conflict between administrative and ordinary courts; while other countries allocate jurisdictional disputes to a specialized court that deals exclusively with such issues. This is the solution found in the Portuguese *Tribunal de Conflitos*, the Algerian *Maḥkamat Tanāzu'* and the Turkish *Uyuşmazlık Mahkemesi*, all of which are modeled on the French *Tribunal des Conflits*.

When Onar suggested that the ten-year old Republic of Turkey establish its own Court of Jurisdictional Conflict he used the term “Council on the Conflict of Venue” (*ihtilaf-ı merci encümeni*), the name of a tribunal that had been established in 1883 as part of the French-inspired administrative reforms of Abülhamit II and had continued to regulate jurisdictional conflicts between the ordinary and administrative courts until the Second Constitutional Period (1908-1918), when Abdülhamit was ousted by the Committee of Union and Progress.¹⁷ It is unclear what happened to the Tribunal in the chaotic last years of the Empire and the ensuing War of Independence, but it appears to

16 Art. 6 of the 1966 Law on the Military Judiciary, as affirmed by the Supreme Constitutional Court in Verdict 1/15, January 30, 1993. For details see Nathalie Bernard-Maugiron, *Le politique à l'épreuve du judiciaire: la justice constitutionnelle en Egypte* (Brussels: Bruylant and CEDEJ, 2003), 561–63.

17 Carter Vaughn Findley, *Bureaucratic Reform in the Ottoman Empire: The Sublime Porte, 1789-1922* (Princeton: Princeton University Press, 1980), 249; E. Özücu, “Conseil d'Etat: The French Layer of Turkish Administrative Law,” *The International and Comparative Law Quarterly* 49, no. 3 (2000): 680.

have subsisted at least as potential solution. For example, a hand-written decree from the war years suggests that jurisdictional disputes between the civilian courts and courts-martial (*divan-ı harpler*) should be solved by a special tribunal within the Council of State.¹⁸ After the Republic was established in 1923, however, no such tribunal existed until Onar suggested re-establishing it in 1934. The delay in creating the court appears to have frustrated members of the administrative judiciary. In 1936, for instance, the president of the Council of State Reşat Mimaroglu wrote an enraged letter to Prime Minister İsmet İnönü complaining that the civilian courts had begun encroaching (*tecavüz*) on the jurisdiction of the administrative judiciary to the extent that the administration was being paralyzed. Attached to the letter was Mimaroglu's draft law on what he called the "Council of Jurisdictional Disputes" (*Merci İhtilaflı Mahkemesi*).¹⁹

When the Court of Jurisdictional Conflict (*Uyuşmazlık Mahkemesi*) was finally established in 1945, its responsibilities were limited to conflicts of jurisdiction between ordinary and administrative courts.²⁰ Only with Art. 142 of the 1961 Constitution, which Onar co-wrote, were its responsibilities widened to include the jurisdiction of military courts. Like several of the promises of the 1961 Constitution, however, a new law re-establishing the CJC under the terms of the new charter was delayed for many years. Once the Army began pressing to expand its own courts to deal with civilian leftists from

18 "Adliye Mahkemeleri ile Divan-ı Harpler arasında dava merciine dair çıkacak ihtilafların, Şura-yı Devlet Reisinin başkanlığındaki bir encümen tarafından halledilmesi," February 7, 1920. 30.18.1.1/1.6.14. BCA.

19 Letter from President of the Council of State Reşat Mimaroglu to the Prime Ministry, January 11, 1936. 30.1.000/12.69.5. BCA.

20 *Uyuşmazlık Mahkemesi Kurulması Hakkında Kanun*, Law no. 4788, in *Resmi Gazete* no. 6057, July 14, 1945.

1970 onward, therefore, the ensuing struggles over military court jurisdiction happened in the newspapers, courtrooms, and streets, and increasingly took the shape of political contestation.

The CJC that was established in 1979 can thus be seen as an expert solution to an essentially political problem. According to François-Paul Benoit, the French *Tribunal of Conflicts*, which was established in 1848, enabled the French state to transition from “the political age to the technical age.”²¹ In his view, the Tribunal is an institutional technology designed to de-politicize the issue of jurisdiction, to move it from the level of explicit political conflict to the level of what Mariana Valverde calls “the governance of legal governance.”²² Similarly, when the law establishing the new Turkish CJC was passed in February 1979, MPs described the CJC law as “entirely technical” and “beyond all partisan and political debates.”²³

The new CJC was thus an institutional embodiment of Onar’s doctrinal ethos of negotiating jurisdiction in a flexible and technical idiom instead of establishing it once and for all through statutory law. Challenges to military courts’ jurisdiction could no longer result in stalled trials, but would be referred to the CJC to be determined by top-level judges from both the civilian and military court systems on a case-by-case basis.

Not surprisingly, the expansion of the CJC’s responsibilities opened the floodgates to a

21 François-Paul Benoit, *Le Droit Administratif Français* (Paris: Librairie Dalloz, 1968); cited in Soraya Amrani Mekki, “La procédure de jugement devant le Tribunal des conflits,” in *Le Tribunal des conflits. Bilan et perspectives*, ed. Pascale Gonod and Loïc Cadiet (Paris: Dalloz, 2009), 326.

22 Mariana Valverde, “Jurisdiction and Scale: Legal ‘Technicalities’ as Resources for Social Theory,” *Social & Legal Studies* 18, no. 2 (2009): 141.

23 Minutes of the National Assembly (*Millet Meclisi Tutanak Dergisi*), Session 44, February 6, 1979.

wave of backlogged cases. Although the CJC's inconsistent publishing practices makes it difficult to determine exactly how much of its work was devoted to military court jurisdiction, its decision to publish 98 verdicts that dealt directly with the issue dating from December 1979 until June 1980 indicates that the judges themselves considered it a salient matter.²⁴

An example will suffice: Three months before the military coup, on June 9, 1980, the CJC reviewed the case of two individuals who had been tried in a civilian assize court years earlier on charges of hanging up banners and posters with the intention of inciting violence.²⁵ The defendants had been arrested in Sivas after the state of siege was lifted from the province, but they were soon proven to be connected to a secret leftist organization whose other members had been tried before a military court while the province was still under a state of siege.²⁶ Unwilling to take responsibility for the trial, the civilian court interpreted the scope of Art. 13 of the Law on the State of Siege (Law no. 1402) widely, arguing that the "general and collective" connection between the defendants and the illegal organization placed them under the jurisdiction of military courts. The military court, on the other hand, interpreted Art. 13 narrowly, arguing that the defendants could not be tried in a military court as they had been apprehended outside of a state of siege region.

24 The verdicts are published in the Official Gazette (*Resmi Gazete*) no. 16945, 16983, 17008, 17122, 17150, and 17152. Some of the cases concern trials with more than 100 defendants.

25 Esas 1980/121, Karar 1980/178. Reprinted in İ. Köker and İ. Dinç, *Uyuşmazlık Mahkemesi Kararları (Hukuk-Ceza) 1961-1987* (Ankara: Yargıtay Yayınları, 1988), 564–67.

26 Before the September 1980 coup, Sivas was under martial law between December 12, 1978 and February 20, 1980.

The CJC's majority opinion ruled the case to be within the jurisdiction of the military court due to the apparent link between the arrested individuals and the previously dissolved organization. The single dissenting judge argued that Art. 13 of the Law on the State of Siege was to be interpreted as outlining the *necessary* conditions for a case to fall under the jurisdiction of a military court, and that because the two individuals had been arrested *after* the lifting of the state of siege, proving their association with the organization was not sufficient; their connection to the organization's *actions* also had to be settled.

In this and at least 97 other cases, then, the CJC negotiated the boundaries of exceptional justice during a period when civilian government continued to function uneasily beside state of siege authorities. Its true significance, however, would only emerge a few months later, in the early morning of September 12, 1980, when a group of generals led by the Chief of General Staff appeared on television declaring that the 1961 Constitution was suspended, the Government and the National Assembly dissolved, all political parties were banned, and that the state of siege was expanded to the entire country. The junta's incursion into politics would eventually lead to a drastic restructuring of the state, including a new constitution in 1982. In the mean time, however, the army had more pressing matters to attend to.

One week after the coup, the junta further amended the Law on the State of Siege to give state of siege commanders the power to ban public meetings, suspend publications, and dismiss suspicious government staff at their discretion, with no right of

appeal before administrative or civilian courts. It also expanded Art. 13 so that State of Siege military courts were competent to try any offense that had been committed within three months before the declaration of a state of siege, as long as the acts were committed with the aim of contributing “in a general and collective sense” to the conditions that had made the declaration necessary.

One might expect the coup d'état to have made the CJC less willing to insist on jurists' authority to decide on the jurisdiction of military courts. The junta had, after all, made clear its intention to expel and even jail university professors, bureaucrats, or judges who set themselves against the Army. One of the first cases to come before the CJC after the coup did explicitly acknowledge the Army's sovereign power to set aside legality in the interest of state security, but the impact of this sovereignty was significantly dulled in the process of its juridical articulation. On February 2, 1981 the CJC received a case where a leftist activist had been charged with having a “connection” with the events that had necessitated the coup d'état because of an article he had written.²⁷ This time, however, the majority of the CJC's judges rejected the civilian court's recusal because the offense had been committed more than three months prior to the proclamation of a State of Siege and did not have a clear enough organizational connection to any crimes falling under the jurisdiction of military courts. Instead of settling for a broad interpretation of Art. 13 as they had in several previous cases, then, the majority opinion opted to circumscribe the coup's impact on military court

²⁷ Esas 1980/541, Karar 1981/16, reprinted in Köker and Dinç, *Uyuşmazlık Mahkemesi Kararları*, 578–87.

competence by staying close to a strict, technical understanding of jurisdiction.

The response from the three dissenting judges, on the other hand, was a textbook example of Schmittian decisionism. In their minority opinion, the judges argued that the coup necessitated interpreting Art. 13 in the widest possible way by “keeping in mind the National Security Council’s decisions and declarations,” in particular the declaration of the coup itself, in which the junta had charged in the most sweeping, symbolically laden terms “the internal and external enemies” who had “produced perverted and reactionary ideologies in place of Atatürkism” in order to attack the country’s entire political, judicial and educational system.²⁸ The junta, a sovereign power, had identified an enemy so insidious that it required suspending the legal order. In view of the junta’s actions, the judges opined, the substance of the offense was irrelevant as long as its ultimate aim was to overthrow the Republican order of Kemal Atatürk.²⁹ Therefore, any activity that could be interpreted as encouraging the ideological movements that had caused the coup d’état should fall under the jurisdiction of the military courts.

The minority opinion was vindicated in a case just two weeks later, where a group of activists who had been apprehended for giving courses in Marxist theory and posting slogans against NATO in 1976 were arrested by the state of siege authorities despite the fact that the events in question had taken place years prior to the proclamation of a state of siege.³⁰ The military court reviewing the case recused itself, as did the civilian court it

28 Ibid., 585.

29 Ibid., 586.

30 Esas 1981/631, Karar 1981/66. The courses had taken place in Istanbul in April 1976; martial law was not declared in Istanbul until December 26, 1978. Ibid., 587–90.

was transferred to. Upon receiving the case files the CJC decided in favor of military trial by simple majority, referring with little explanation to the “general and collective” connection between the defendants’ political activities and the violence that necessitated the coup. In their minority opinion, the three opposing judges protested that the wording of Art. 13 of the Law on the State of Siege had given rise to such a wide scope of discretion that “offenses committed years before, even outside of the State of Siege regions, have been sent to military courts.” In their opinion, a crime that could not be proven to fulfill the criteria stipulated in Art. 13 could not fall under the jurisdiction of military courts, “notwithstanding the fact that the amendments were made by the National Security Council.”

If the military junta was a sovereign power, however, its sovereignty was deeply entangled in the intricacies of jurisdictional deliberation. About three months after the February verdicts, the conflicts within the CJC over the correct way to interpret the scope of Art. 13 of the Law on the State of Siege eventually led the CJC’s judges to request a session of its General Committee in order to resolve the discrepancies once and for all. All of the verdicts in question were related to offenses that had been committed more than three months prior to the declaration of the state of siege.³¹ In some of the verdicts, the CJC had delegated cases falling under the Law on the State of Siege to military courts in compliance with Art. 13, while other cases had been delegated to civilian courts in compliance with a stricter interpretation of the proof needed to establish a connection “in

³¹ Esas 1981/1, Karar 1981/1, *Resmi Gazete* no. 17411, July 25, 1981. One of the previous cases mentioned is Esas 1980/541, Karar 1981/16, discussed above.

a general and collective sense” to offenses falling under the jurisdiction of military courts.

Nine of the General Committee’s twelve judges eventually settled on a restrictive interpretation of Art. 13. They accepted the fact that the military junta had *de facto* taken the place of both the legislative and executive branches of government, but concluded on the basis of the junta’s decree laws that its purpose in amending the laws affecting the jurisdiction of military courts was to limit the courts’ workload in order to increase their efficiency. They thus concluded that in cases where the purported offense had been committed more than three months prior to the declaration of a state of siege and therefore failed to meet the temporal criteria of military court jurisdiction, the substantive criterion which allowed for exceptions to the temporal criterion was only to be considered fulfilled if there was “concrete evidence” that the offense had an “organizational and organic” connection to an offense falling under the military court’s jurisdiction.

The minority opinion, on the other hand, reiterated the need to interpret all amendments concerning the jurisdiction of military courts in light of the dangers identified by the military junta in its various communiqués. It was not sufficient, these judges argued, to deduce the junta’s intentions from amendments to a single law; to understand what was at stake, the junta’s amendments and various communiqués must be seen as a whole. In order to clarify the implications of their approach for future verdicts, they analyzed in detail the notion of “organizational connection” which had been the

bone of contention in many of the previous cases. The judges argued that the definitions found in the Turkish Language Association's authoritative dictionary for the terms "organizational" (*örgütsel*), "organic" (*organik*) and "connection" (*irtibat*) allowed for far wider interpretations than the majority opinion permitted, an approach that was also in keeping with Turkish doctrine in cases of "uprisings against the government." They thus concluded that in light of the junta's sovereign power to identify an existential threat, establishing a "connection" between different defendants required "absolutely no evidence."

By reaching a "verdict of principle," the CJC's General Committee formally required itself and all subordinate courts to follow its precedent in similar cases. Nevertheless, almost identical cases continued to cause dissent within the CJC until the State of Siege was lifted from the entire country. For example, on June 26, 1983, a case was heard in which a group of youngsters connected to a leftist organization had been arrested for organizing seminars prior to the coup, as well as being in possession of illegal books and spreading posters and fliers against the military regime after the coup.³² The majority opinion decided in favor of military jurisdiction, with a single judge dissenting because of the difficulty in establishing a "connection" between some of the individuals and the organization. Just two years after the CJC had attempted to resolve the chronic ambiguities surrounding military court jurisdiction through a "verdict of principle," then, it had quietly forgotten its previous verdict restricting the competence of military courts.

³² Esas 1983/143, Karar 1983/337. Köker and Dinç, *Uyuşmazlık Mahkemesi Kararları*, 647–54.

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In “forgetting” its previous rulings, I suggest, the CJC was doing exactly what Onar, writing in 1934, wanted it to do. The CJC was not meant to clarify and settle the lines of jurisdiction separating military from civilian jurisdiction; it was there to prevent such clarification and thereby maintain both the discretion of military leaders and the authority of jurists within the field of jurisdictional negotiations. The CJC enabled Turkish judges to absorb the impact of the 1980 coup by treating the junta’s various proclamations much as would treat any other extralegal considerations: by dissecting, analyzing, and partially or completely rejecting or accepting them. Far from suspending the legal order, then, the CJC’s negotiations reproduced Onar’s ambiguous approach to state power in the form of adjudication that straddled the divide between the legal and the political, the theoretical and the practical, and the continuous and the discontinuous, all while maintaining the judiciary’s final say over the jurisdictional thresholds of the military courts.

In terms of the professional jurisdiction of the Turkish judiciary, therefore, the re-establishment CJC in June 1979 *prevented* the suspension of legality that many have identified with the September 1980 coup. While the CJC secured the judiciary’s power to determine the jurisdiction of military courts, however, it also closed off the informal avenues through which defense attorneys and the wider legal profession had been able to obstruct the Army’s use of military courts during the 1970s. In these terms, the

depoliticization of the Turkish legal field was not caused by the military coup but by the resurgence of a jurisdictional ethos that had been prepared several decades before in the doctrinal work of the Turkish law professors of the single-party period.

My dissertation thus ends with the creation of an institution that still exists today. This may seem like something of an anti-climax, an inconclusive narrative that fizzles out in a series of jurisdictional pronouncements couched in the dry, technical jargon of senior Turkish judges. If my argument regarding the the CJC is correct, however, its purpose is precisely to preclude neat conclusions. The CJC does not permit final verdicts; it is there to prevent finality. What it establishes in place of conclusions is a contained pattern of conflict, one in which extrajudicial state violence, military trials of civilians and other phenomena on the margins of the law are able to maintain a tenuous but crucial link to Turkish lawyers' understanding of legality. Like Onar himself, the CJC is obscure, quiet, and operates on the margins of the Turkish legal system, and much like Onar, its obscurity and marginality makes it an important part of the puzzle of why Turkey still appears as an ambiguous regime, caught in a transition without end.

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Hürriyet (daily newspaper)

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The New York Times

Türkiye Barolar Birliği Bülteni (TBBB) (Bulletin of the Union of Turkish Bar Associations)

Ulus (daily newspaper)

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