

# Theories of exceptional executive powers in Turkey, 1933–1945

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## Abstract

Turkish constitutions have generally sought to limit the executive branch's emergency powers by codifying and subjecting them to judicial and parliamentary supervision. In practice, however, ever since the single-party regime of the interwar years, cabinets have wielded wide powers to suspend rights and exercise discretion concerning both security issues and property and finance regimes. The result has been a legal system that, barred from explicitly embracing executive prerogative as a matter of principle, has instead dispersed "exceptional" powers throughout the fabric of the statutes, temporary laws, regulations, and decrees with which the state articulates its authority. The task of maintaining a semblance of normality and coherence within this scattered and contradictory system has been left to legal theoreticians. This article examines how three such theoreticians—the law professors Siddık Sami Onar, Ali Fuad Başgil, and Ragıp Sarıca—responded to the cabinet's recourse to emergency powers during the troubled 1930s and 1940s. Instead of defending rule-of-law principles, I argue, these formative figures integrated prerogative into the sphere of ordinary legality, thereby transforming exceptional powers into a normal mode of governance.

Keywords: *public law; intellectuals; emergency powers; constitution; World War II.*

## Introduction

For a while, the year 2002 appeared as a turning point in the Turkish state's approach to law. That year the Justice and Development Party (*Adalet ve Kalkınma Partisi*, AKP) came to power with promises of doing away with decades of state-centered authoritarianism. Counter-majoritarian and insular state institutions such as the high judiciary and the army had been policing the boundaries of political expression and activity since the single-party regime of

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the years between World War I and World War II, with the judiciary closing dozens of parties and the army deposing four elected governments since the transition to democracy in 1950. During its first years in government, the AKP lifted the state of exception (*Olağanüstü Hâl*, OHAL) in the southeast, brought the army under civilian control, and made the high judiciary more accountable to elected officials; it also supported a series of criminal trials of suspected conspirators inside and outside of the state, including the generals who had carried out the 1980 coup d'état. For almost a decade, therefore, it seemed as if Turkey had finally left its authoritarian past behind and was heading toward a future where the government obeyed the law, and the law was made by elected representatives.

About ten years into AKP rule came a resurgence of legal instruments and institutions that many Turks assumed had been buried alongside the *étatisme* of the interwar regime and the military coups of the Cold War period. It began when the government tightened its grip on the judiciary and police in order to prevent investigations into AKP loyalists suspected of corruption,<sup>1</sup> a strategy that was dramatically expanded over the following two years. Accompanying this incursion into the judiciary came land expropriations for a variety of projects, including 7,650 hectares of forest and wetlands outside of İstanbul to build Europe's largest airport<sup>2</sup> and an 80-year-old grove of over 6,000 olive trees to build a coal-driven thermal power plant.<sup>3</sup> In March 2016—after round-the-clock curfews had dragged on for weeks at a time in the southeast, and heavy fighting between Turkish forces and Kurdish militants had left several districts in rubble—the government claimed 6,642 plots of urban land in order to rebuild it as a tourist destination along the lines of Toledo in Spain.<sup>4</sup> Most recently, after OHAL had again been declared following the failed coup d'état of July 15, 2016, the AKP government used the power granted to it in the constitution to issue several statutory decrees (*kanun hükmünde kararname*) that fired thousands of members of the armed forces and closed and confiscated the properties of hundreds of schools, universities, associations, banks, and businesses.

The context and stated goals of these decrees differed, but all, with the exception of those issued during the post-July 2016 OHAL, referred for legal

1 Gareth Jenkins, "Erdoğan's Invitation to Gülen: Reconciliation or Power Play?" *The Turkey Analyst/Central Asia-Caucasus Institute Silk Road Studies Program*, June 25, 2012, <http://www.silkroadstudies.org/new/inside/turkey/2012/120625B.html>.

2 Bakanlar Kurulu Kararı 2014/5768, in *Resmî Gazete* (hereafter RG) no. 28885, January 17, 2014.

3 Bakanlar Kurulu Kararı 2014/6272, in RG no. 28996, May 10, 2014.

4 Bakanlar Kurulu Kararı 2016/8659 and 2016/8662, in RG no. 29664, March 25, 2016. For the government's plans, see "Davutoğlu: 'Sur, Toledo gibi olacak,'" *Milliyet*, February 1, 2016, <http://www.milliyet.com.tr/davutoglu-sur-toledo-gibi-olacak-ankara-yerelhaber-1191664/>.

justification to Article 27 of the Law on Expropriation, which permits “urgent” (*acele*) expropriation under certain unspecified “exceptional” (*olağanüstü*) circumstances.<sup>5</sup> If the precise circumstances that allow such powers to come into effect are unclear, however, the circumstances under which the Law on Expropriation was enacted are well known: it was written and promulgated while most of Turkey was still under an official state of siege following the 1980 military coup d’état, not by elected lawmakers, but by the National Security Council (*Milli Güvenlik Kurulu*, MGK) of the armed forces—the same institution that the AKP would later fight to bring under civilian control. In addition to exceptional situations to be determined by the cabinet or by separate laws, art. 27 refers to the Law on Obligations for the National Defense, which empowers the government to expropriate properties and enlist labor forces in times of emergency or war.<sup>6</sup> That law’s democratic credentials are equally suspect: it was enacted in June 1939, when the single-party state of the Republican People’s Party (*Cumhuriyet Halk Partisi*, CHP) was at its most autocratic.

How does the AKP reconcile its rule-of-law rhetoric with recourse to the same methods that it has fought so long to overcome? It has become something of a cliché to point out that the “exception” constitutes a paradox for modern juridical orders. States that base their authority on the principle of legality assume that every legitimate state action must conform to preexisting laws, which ideally would form a gapless hierarchy such that no law contradicts another and no eventuality is left unaccounted for.<sup>7</sup> From the viewpoint of such an ideal, the fact that states do take recourse to “exceptional” means constitutes a logical problem, a threat to the coherence of the legal system. The idea that such powers truly are an exceptional response to temporary crises also obscures the fact that, once activated, they tend to become more or less permanent. Since the Republic of Turkey was established in 1923, Turkey’s state leaders have declared a “state of siege” (*örfî idare* or *sıkıyönetim*) 11 times, transferring the jurisdiction of the police, gendarmerie, and criminal justice system concerning certain categories of crimes to the armed forces in parts of all of the country for a total of 25 years, 9 months, and 28 days.<sup>8</sup> We may add to this OHAL, the “state of exception,” an arrangement that provides for close cooperation between centrally appointed civilian governors and military authorities, and

5 “Kamulaştırma Kanunu,” Law no. 2942, in RG no. 18215, November 19, 1983.

6 “Milli Müdafaa Mükellefiyeti Kanunu,” Law no. 3634, in RG no. 4234, June 16, 1939.

7 Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, Vol. 1, ed. Guenther Roth and Claus Wittich (Berkeley: University of California Press, 1978), 217 and Hans Kelsen, *The Pure Theory of Law*, trans. Max Knight (Berkeley and Los Angeles: University of California Press, 1967), 271.

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

which was included in the 1982 constitution and subsequently put into effect in several southeastern provinces between 1987 and 2002, bringing the total up to 40 of the republic's 78 years of existence until the AKP came to power.<sup>9</sup> More recently, we should also add the "temporary security zones" that the AKP government declared in many of the very same regions in June 2015, as well as the OHAL that was declared after the failed military coup in July the following year.<sup>10</sup> In temporal terms, therefore, exceptional executive powers are anything but exceptional in Turkey.

As François Saint-Bonnet argues, most modern legal orders have in fact overcome this aporia, not by openly embracing executive prerogative, but by dispersing powers that from a strictly legalist perspective would be described as "exceptional" throughout the infrastructure of laws and rulings with which states articulate their authority.<sup>11</sup> Far from the ideal-typical positivist system—where each government action conforms strictly to statutes which, in turn, conform to constitutional provisions—such systems rely on "elastic"<sup>12</sup> concepts such as "necessity," "emergency," "extraordinary situations," and "political questions" to assimilate the inassimilable. What varies from country to country is the extent to which the executive branch has the power to identify and respond to such situations without being restricted by the statutes and decisions of the legislature or the supervision of the courts. As a rule, Turkey's constitutions since 1924 have codified emergency powers by placing the declaration of a state of siege under the ultimate control of parliament and specifying which rights are derogable under such circumstances.<sup>13</sup> This means that Turkey generally belongs to what Kim Lane Scheppele calls the "legalist" school of emergency.<sup>14</sup> As opposed to the "extralegal" model, which recognizes the radical unpredictability of emergencies by allowing executive authorities to identify and respond to them by any means necessary, the legalist school strives to anticipate emergencies by codifying what powers can be delegated or what rights can be limited under precisely what circumstances.

The larger question, therefore, is how executive powers that have, from the earliest days of the Republic of Turkey, been framed as "exceptional" have at the same time been justified as keeping legitimately within the bounds of

9 Zafer Üskül, "Olağan Yönetilemiyoruz," *Radikal*, December 27, 2001.

10 "Zafer Üskül: OHAL yönetimi olağanlaştırıldı," *Agos*, August 20, 2015, <http://www.agos.com.tr/tr/yazi/12537/zafer-uskul-ohal-yonetimi-olaganlastirildi>.

11 F. Saint-Bonnet, *L'état d'exception* (Paris: Presses universitaires de France, 2001), 261.

12 H.P. Lee, *Emergency Powers* (Sydney: Law Book Company, 1984), 4.

13 Selin Esen, *Karşılaştırmalı Hukukta ve Türkiye'de Olağanüstü Hal Rejimi* (Ankara: Adalet, 2008), 139.

14 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.

Turkey's constitutional architecture. As I will argue, instead of actually preventing executive authorities from violating the constitution or deeper rule-of-law principles, the legalist school has manifested itself in Turkey as a preoccupation with maintaining a semblance of systematic coherence at the theoretical level. The lawyer-politicians who draft laws, the legislators who pass them, the government leaders who exercise exceptional powers, and the courts that evaluate challenges to their acts have all been more than capable of living with ambiguity and contradiction, as long as they received the approval of legal scholars. The theories of Turkey's formative law professors thus illustrate Andrew Abbott's argument that academic scholarship "legitimizes professional work by clarifying its foundations and tracing them to major cultural values," values which for most modern professions center on "rationality, logic, and science."<sup>15</sup> In the 1930s, when Turkey's single-party regime moved to establish its own Republican and *étatiste* tradition of juristic scholarship, the jurists responsible for educating future lawyers and civil servants saw it as one of their central tasks to provide the state with such legitimization. They were capable of doing so in part because their discourse of "scientific" (*ilmi*) jurisprudence resonated with the major cultural values of the CHP regime, in particular the latter's emphasis on erecting a "contemporary" (*çağdaş*) state. The law professors of the 1930s and 1940 thus integrated executive prerogative into the broad and diffuse body of ordinary legal sources of temporary laws, regulations, and decrees through their doctrinal commentary. The effect of their work has been to transform exceptional powers into normal governance, enabling and perpetuating what Leonard Feldman calls a "prosaic politics of emergency"<sup>16</sup> that continues even today.

In this article, I focus on the writings of three particularly prominent theorists of state legality from the 1930s and 1940s: Sıddık Sami Onar, Ali Fuad Başgil, and Ragıp Sarıca, all of whom viewed radically indeterminate concepts like "exceptional situation" as a doctrinal "mini state of emergency"<sup>17</sup> which it was their task to normalize. Their work on exceptional executive powers responded to a political and economic context that worsened from the early 1940s until the end of World War II, prompting them to gradually refine the conceptual apparatus of Turkey's doctrine until it could accommodate almost any assertion of executive prerogative. They did so in an implicit

15 Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (Chicago: University of Chicago Press, 1993), 54.

16 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.

17 David Dyzenhaus, "Introduction: Why Carl Schmitt?," in *Law as Politics: Carl Schmitt's Critique of Liberalism*, ed. David Dyzenhaus (Durham, NC: Duke University Press, 1998), 12.

dialogue with state leaders and in an explicit dialogue with each other's work, with Onar identifying the problem and Başgil and Onar's younger protégé Sarıca seeking ways to solve it without giving up the principle of parliamentary sovereignty that served as the interwar regime's founding myth. Their scholarship was thus supplementary in the sense that it came after state leaders had already asserted and exercised their powers; yet it was and remains symbolically important in that it has enabled successive Turkish governments to build on an established tradition of legal interpretation that views such powers not as exceptional but as part and parcel of established Turkish legal principles. The result is that nearly every invocation of exceptional executive powers—to expropriate land, tear down houses, uproot villages, pave over nature reserves, declare war on one's own citizens, or otherwise suspend basic rights—finds validation in a legal tradition that functions more like an enabling legal environment than a constricting normative structure.

### The power and the professors

In January 1943, as Turkey's "National Leader" (*Milli Şef*) İsmet İnönü was reluctantly agreeing to let the Allies use Turkish airbases for their increasing bombing raids on Nazi Germany,<sup>18</sup> Professor Sıddık Sami Onar of İstanbul University gave a guest lecture at Ankara University. Turkey was entering its third decade under the leadership of the single-party regime of the CHP, which in 1931 had adopted *étatisme* (*devletçilik*) as an official regime policy, thereby making state interventionism in the economy for the sake of the public interest into a privileged governing principle. In his talk in Ankara, to which I will return later, Onar discussed recent developments in Turkish expropriation law. Listing a number of statutes that had ended up on the books since the time of Sultan Abdülhamid II (r. 1876–1909), Onar lamented the "scattered" and "unbalanced" way in which central and local administrations' power to claim property for the public interest had been codified.<sup>19</sup> He was particularly worried that the different procedures that had been adopted for determining the value of properties paved the way for abuse by the administration and profiteering by property owners, and that contradictory wordings and court rulings created a confusing situation for any ordinary citizen who wished to challenge an expropriation order in the courts.

18 Selim Deringil, *Turkish Foreign Policy during the Second World War: An "Active" Neutrality* (Cambridge: Cambridge University Press, 1989), 149.

19 Sıddık Sami Onar, *İstımlâk Mevzuatımız ve Tatbikatımız Üzerinde Bazı Düşünceler* (Ankara: Türk Hukuk Kurumu, 1943). All translations from Turkish and French, unless otherwise noted, are my own.

Onar's concern for the incoherence of Turkey's expropriation laws is remarkable considering the lengths to which he and his colleagues had previously gone to normalize far more dramatic forms of state intervention. By 1943, the Republic of Turkey had gone through twenty years of political and social upheaval, with a state whose founders had themselves emerged from a decade of continuous warfare, from the Balkan Wars through World War I and on to the War of Independence that paved the way for the establishment of the republic in 1923. This decades-long fluidity led to deep contradictions in the legal framework with which jurists such as Onar were expected to develop coherent doctrines. During the War of Independence (1919–1921), the nationalists who fled British-occupied İstanbul established a parallel government in Ankara, a constitutive act that threw the entire existing constitutional framework for exceptional powers into question. Before the Ankara government's Grand National Assembly (*Büyük Millet Meclisi*) passed a wartime Basic Law, it passed several laws conferring exceptional powers on itself and other organs of the provisional state. These included the April 1920 Law on Treason Against the Nation,<sup>20</sup> which prescribed the death penalty for opposition to the Ankara government, and a September 1920 law establishing a number of so-called "Independence Courts"<sup>21</sup> (*İstiklâl Mahkemeleri*) which, although initially created to try army deserters, were soon expanded to clamp down on anyone suspected of violating the former law.<sup>22</sup> The Independence Courts were mainly staffed by members of the Assembly itself, and several of the courts were both efficient and ruthless, handing out harsh penalties to offenders and in some cases even their families.<sup>23</sup> Even after the constitutional Basic Law passed on January 20, 1921, though, the Assembly granted General Mustafa Kemal's wish to defend the fledgling state however he saw fit by passing the Law on the Commander-in-Chief (*Başkumandanlık Kanunu*) in August 1921, conferring almost unlimited powers on him until the war was won and the Republic of Turkey established on October 29, 1923.

The new regime soon began the work of consolidating its power and streamlining its legal system in order to create a unitary, centralized, and rational-legal state—a quintessentially "Bonapartist"<sup>24</sup> project that paradoxically required state leaders to maintain ambiguity concerning their own

20 "Hiyanet-i Vataniye Kanunu," Law no. 2, in *Ceride-yi Resmîye* no. 1, February 7, 1921.

21 "İstiklâl Mahakimi Kanunu," Law no. 249, July 31, 1922, in *Kanunlar Dergisi*, vol. 1, 295–296.

22 For the history of the Independence Courts, see Ergun Aybars, *İstiklâl Mahkemeleri* (Ankara: Ayraç, 2009), 43–155.

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

24 Ahmet Samim [Murat Belge], "The Tragedy of the Turkish Left," *New Left Review* I, no. 126 (April 1981), 64.

relation to legality. The Assembly promulgated the republic's first peacetime constitution in April 1924.<sup>25</sup> Article 5 of the constitution concentrated legislative and executive power in the Grand National Assembly, thus rejecting the separation of powers in principle. The executive cabinet, called the "Council of Commissioners" (*İcra Vekiller Heyeti*), was to be selected from among the members of the Assembly by a council president who, in turn, was to be selected by the President of the Republic—himself elected by and from among the members of the Assembly—and it remained fully accountable to the Assembly (arts. 7 and 44–46). Although it has been argued that the constitution's concentration of powers in the Assembly was so extreme that it did not recognize an executive organ at all,<sup>26</sup> in reality the CHP's leadership largely controlled both the Assembly and the cabinet and only tolerated limited opposition during the Assembly's general sessions.

Not surprisingly, therefore, significant ambiguity remained concerning the delimitation of the executive cabinet's powers. For example, section 5 of the constitution (arts. 68–88) enumerated Turkish citizens' rights,<sup>27</sup> including the inviolability of the person, life, and property; freedom of conscience, speech, and the press; and the prohibition of torture and corporeal punishment. At the same time, art. 74 stated that "no one may be dispossessed of property or deprived of the possession of property except in the public interest [*menafı-i umumiye*]" and that "no one shall be constrained to make any sort of sacrifice other than such as may be imposed in extraordinary circumstances [*fevkalâde ahval*]."<sup>28</sup> What might such extraordinary circumstances be? One specification was found in art. 86, which stated that the cabinet could, after identifying "the danger or imminence of war, or of internal sedition or conspiracy or intrigues directed against the nation or against the Republic," declare a "state of siege" for the duration of one month.<sup>29</sup> The declaration was to be submitted for approval

25 "Teşkilat-ı Esasiye Kanunu," Law no. 491, in RG no. 71, May 24, 1924. For an English translation, from which my citations are taken, see Edward Mead Earle, "The New Constitution of Turkey," *Political Science Quarterly* 40, no. 1 (1925): 73–100.

26 Orhan Aldıkaçtı, *Anayasa Hukukumuzun Gelişmesi ve 1961 Anayasası (Ders Notları)* (İstanbul: Fakülteler Matbaası, 1970), 83.

27 Earle translates the title of section 5, *Türklerin hukuku âmmesi*, as "Public Law of the Turks," but the 1945 version "purified" *hukuk* (the Arabic plural of the word *hakk*) to *haklar*, "rights"; it reverted again to *hukuk* in 1952. To compare the versions, see Boğaç Erozan, ed., *Ahmet Ağaoğlu ve Hukuk-ı Esasiye Ders Notları (1926–1927)* (İstanbul: Koç Üniversitesi Yayınları, 2012), 329–405.

28 Art. 74 included the subheading "requisition and expropriation" (*istimval ve istimlak*) in the constitutional commission's proposal, but the final version excluded it. *Ibid.*, 384.

29 I here translate both the *idare-i örfiyye* of the 1924 constitution and the *sıkıyönetim* of the updated 1945 version as "state of siege" rather than "martial law," as the Turkish mode of emergency government lies closer to the French *état de siege* than to the common-law tradition of martial law. Earle uses both terms interchangeably. For comparison of the two traditions, see Scheppele, "Legal and Extralegal Emergencies."

as soon as possible to the Assembly, which could prolong or shorten the state of siege. Art. 86 deferred to “special law” to determine the specific measures that could be taken within a state of siege, but provided a rough outline, including “the suspension or temporary restriction of the inviolability of the person, the home, freedom of the press, correspondence, association, and incorporation.” Other articles—including 72, 76, and 79—also referred to “legally determined” circumstances in which certain rights could be limited.

A new law for the state of siege was not passed until 1940. In the meantime, a number of decrees by the defunct Ottoman government remained on the books as the only framework for regulating the state of siege.<sup>30</sup> Attempts at clarifying the ambiguity regarding the cabinet’s powers by the Progressive Republican Party (*Terakkiperver Cumhuriyet Fırkası*), an oppositional party which Mustafa Kemal had asked a colleague to establish in order to provide an outlet for discontent, only resulted in backlash from the CHP.<sup>31</sup> In February 1925, the cabinet seized the opportunity of a religious rebellion among Kurdish tribes in the southeast to establish a martial regime in fourteen provinces, obtaining the Assembly’s approval for this two days later. Lacking a formal statutory basis with which to determine what it could do under the new constitution, the government drafted the Law on the Maintenance of Order (*Takrir-i Sükûn Kanunu*), which would introduce a form of martial law, enable the government to ban publications and organizations, and reestablish the Independence Courts.<sup>32</sup> Although Professor Ahmet Ağaoğlu taught that both the Independence Courts and the Law on the Maintenance of Order were based on the constitution’s art. 86,<sup>33</sup> several members of the Assembly, in particular those connected to the Progressive Republican Party, saw it as unconstitutional due to the very wide powers it gave the cabinet.<sup>34</sup> The law nevertheless passed the tightly controlled Assembly by a wide majority, and following an assassination attempt on Mustafa Kemal in 1926, the

30 Bülent Daver, *İcra Organının İstisnai Yetkileri Bakımından Fevkalâde Hal Reyimleri: (Türkiye’de – Yabancı Memleketlerde)* (Ankara: Sevinç Matbaası, 1961), 116–117.

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

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

33 Erozan, *Ahmet Ağaoğlu*, 324.

34 Aybars, *İstiklal Mahkemeleri*, 215–220. For the debates in the Grand National Assembly, during which several members of the Progressive Republican Party spoke up, see *TBMM Zabıt Ceridesi*, March 4, 1925. Ağaoğlu would himself become involved in another short-lived oppositional party, the Free Republican Party (*Serbest Cumhuriyet Fırkası*) of 1930. For more on his career, see Walter F. Weiker, *Political Tutelage and Democracy in Turkey: The Free Party and Its Aftermath* (Leiden: Brill, 1973), 76–7; Hilmi Ozan Özavcı, *Intellectual Origins of the Republic: Ahmet Ağaoğlu and the Genealogy of Liberalism in Turkey* (Leiden and Boston: Brill, 2015); and A. Holly Shissler, *Between Two Empires: Ahmet Ağaoğlu and the New Turkey* (London and New York: I.B. Tauris, 2003).

Independence Courts went far beyond their initial mandate, arresting 7,446 people and having 660 executed before the last of them was removed in 1927. The Progressive Republican Party was dissolved, strict media censorship was introduced, and rivals from among Mustafa Kemal's former colleagues, some of whom had opposed the Law on the Maintenance of Order when it was debated in the Assembly, were sidelined or eliminated.<sup>35</sup>

Because the statutory framework that might have further detailed what the "public interest" and "extraordinary circumstances" of the constitution's arts. 74 and 86 might mean remained scattered and vague, it was largely up to jurists to determine how the legal system was to deal with its own ambiguities. Yet the courts were in no position to rectify the situation. Although arts. 8 and 54 described courts as independent, they had no power to invalidate unconstitutional laws, and art. 52 reserved the right to supervise the legality of government regulations to the Assembly itself. From a judicial viewpoint, therefore, the 1924 constitution had in a sense replaced the absolutism of the sultan with the absolutism of a parliamentary majority.<sup>36</sup> Legal scholars such as Onar, on the other hand, enjoyed a crucial degree of freedom that judges did not have, although they too were in a contradictory position. As academic jurists in a system inspired by the French legal tradition, Turkish law professors were expected to play an important role both in mediating access to the field of legal practice and in shaping practitioners' legal interpretation.<sup>37</sup> As in France, the legislation produced by Turkish politicians and the verdicts written by Turkish judges tend to be narrow and succinct, while the all-important task of critiquing and integrating them in an "ongoing project to perfect the legal system"<sup>38</sup> is left to legal scholars. In theory, therefore, the republic's early academics were meant to be independent and creative.

At the same time, hardliners within the CHP regime soon realized the value of harnessing their minds in order to nurture "organic intellectuals," scholars who would support an expansive state in an idiom of science, law, and rationality.<sup>39</sup> Bringing the professors into line became all the more important when the Great Depression reached the shores of Turkey, leading the CHP to

35 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), 160.

36 Ernst E. Hirsch, *Die Verfassung der Türkischen Republik*, *Die Staatsverfassungen der Welt* 7 (Frankfurt am Main and Berlin: Alfred Metzner Verlag, 1966), 31.

37 Terence Halliday and Richard L. Abel, "Lawyers in the Civil Law World," in *Lawyers in Society: The Civil Law World*, ed. Richard L. Abel and Philip C. Lewis (Berkeley, London, and Los Angeles: University of California Press, 1988), 12–16.

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

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

end its “limited state-led entrepreneurial phase”<sup>40</sup> and turn to protectionism and state-led industrialization. “*Étatisme*” (*devletçilik*) and “reformism” (*inkılapçılık*) emerged as useful umbrella concepts with which to legitimate a wide range of intervention into all aspects of society; they were added to the CHP’s list of official party principles in 1931 and eventually incorporated into the constitution in 1937.

### Powers in search of a theory

The measures that successive Turkish cabinets took in response to the confluence of worldwide economic unrest and military buildup required both a significant transfer of power to the executive branch and a derogation of rights which, for certain parts of the population, had dramatic consequences. In December 1929, for example, the value of the Turkish lira dipped dangerously low, leading the government to request wider powers to control the movement of capital both into and out of the country.<sup>41</sup> In February of the following year, an acquiescent Assembly passed Law 1567 on the Protection of the Value of the Turkish Currency,<sup>42</sup> providing the cabinet with the power to “take measures concerning the regulation and restriction of sales and purchases of foreign exchange, coins, shares, and bonds.” Law 1567 effectively empowered the government to shut down the Turkish business sector’s “exit option”<sup>43</sup> by authorizing it to enact “decrees” (*kararlar*) regarding the protection of the value of the Turkish currency. Included in the law was also the possibility of imposing sanctions on anyone acting contrary to the decrees. “Characterized,” as Ayşe Buğra puts it, “by the extreme ambiguity of its text, this particular law clearly demonstrates some of the most crucial characteristics of the policy process in Turkey”<sup>44</sup>—and, we might add, of the process by which such expansive executive powers could be incorporated into the sphere of normal legality through academic discourse.

As educators of the republic’s future jurists and civil servants, it was particularly important that law professors be supportive of such departures from liberal individualism. When Minister of Justice Mahmut Esat Bozkurt

40 Ayşe Trak, “Liberalizm-Devletçilik Tartışması, 1923–1939,” in *Cumhuriyet Dönemi Türkiye Ansiklopedisi*, ed. Murat Belge (İstanbul: İletişim, 1986), 1986–1987.

41 Weiker, *Political Tutelage and Democracy*, 63.

42 “Türk Parasının Kıymetini Koruma Hakkında Kanun,” Law no. 1567, in RG no. 1433, February 25, 1930. For the parliamentary session in which it was passed, see *TBMM Zabıt Ceridesi*, February 20, 1930, 42–48.

43 Işık Özel, *State-Business Alliances and Economic Development: Turkey, Mexico and North Africa* (London: Routledge, 2014), 60.

44 Ayşe Buğra, *State and Business in Modern Turkey: A Comparative Study* (Albany, NY: State University of New York Press, 1994), 101.

established what would eventually become Ankara University in 1925, therefore, the Faculty of Law was its first department.<sup>45</sup> Yet the new capital's university could not yet compare in prestige with the *Darülfünûn*, the Ottoman capital's first Western-style university, where most of the faculty had held positions since before the fall of the empire. Though most of the faculty members supported the new state, radicals within the regime preferred to wipe the slate clean in order to remove the last traces of Ottoman liberalism. In June 1933, therefore, the Assembly closed the *Darülfünûn* and replaced it with İstanbul University, in the process purging 15 of the Faculty of Law's 26 members.<sup>46</sup> Securing a foothold within the republic's legal academe now required enthusiastically reinforcing the state's turn toward greater executive discretion.

Among the professors to accept the challenge was Siddık Sami Onar. Born in İstanbul in 1898, Onar studied law at the *Darülfünûn* and then spent a year studying in Paris before returning to teach for the new republic at the School of Public Service (*Mülkiye Mektebi*) in Ankara. He initially lectured and wrote on a variety of subjects, including private and international law. When the *Darülfünûn* was replaced by İstanbul University in 1933, Onar was appointed to the chair of administrative law; from then on, he focused almost exclusively on administrative jurisprudence, rising to become Turkey's formative expert in the field. He was appointed dean of the Faculty of Law twice, and after the new Universities Law was passed in 1946, he became the university's first rector before founding and heading the Institute for Administrative Law and Sciences in 1949.

Perhaps Onar's most important contribution to Turkish administrative jurisprudence was his insistence from the beginning of his career that "science" (*ilim*), and in particular the science of administrative law, must remain the ultimate guide to governance, regardless of how much power was concentrated in the executive.<sup>47</sup> In his first textbook on administrative law, for example, he specified that acts such as expropriations for public services were always subject to challenge in the administrative courts.<sup>48</sup> As the CHP regime began placing increasingly larger fields of state activity outside of the purview of the Assembly and the judiciary, Onar adapted to the political circumstances by nuancing his views on judicial supervision, but without relinquishing the tenet that the ultimate arbiter between politics and law must be located within the field of

45 Hakkı Uyar, "Mahmut Esat Bozkurt," in *Modern Türkiye'de Siyasî Düşünce, Cilt 2: Kemalizm*, ed. Murat Gültekinil and Tanıl Bora (İstanbul: İletişim Yayınları, 2009), 214–219.

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

47 Siddık Sami Onar, "İlim ve Tatbikat," *Mülkiye Mektebi Mecmuası* 5 (August 1931): 5–8.

48 Siddık Sami Onar, *İdare Hukuku (Sömestre 3–4)* (İstanbul: Güneş Matbaası, 1933), 327.

law. Reasoning that the concept of “public service” (*âmmе hizmeti*) functioned as the touchstone of administrative law, he argued that although it was up to state leaders to determine the extent to which individual rights must yield to make room for state intervention, widening the state’s understanding of “public interest” also implied widening the purview of administrative law.<sup>49</sup> When speaking on the subject of expropriations at Ankara University in 1943, therefore, he critiqued a recent ruling by the Council of State (*Danıştay*) which defined expropriations as “acts of government” (*hükûmet tasarrufları*); that is, as entirely political acts outside of the purview of the courts. Instead, he argued, only the act of *identifying* a public interest was entirely political, while the substance, procedure, and jurisdiction of expropriation orders were ordinary “acts of administration” (*idari tasarruflar*) and were therefore within the jurisdiction of the administrative courts.<sup>50</sup>

Yet Onar struggled to accommodate the exceptional executive powers granted by Law 1567 without blurring the separation of powers. In a 1937 article for the İzmir Bar Association’s journal, Onar tried to determine the extent to which the cabinet could encroach upon the sovereignty of the Assembly. Since the 1924 constitution did not explicitly mention “decrees,” Onar, like several other prominent jurists, centered his discussion of the limits of executive powers on the closest term he could find in it: “regulations” [*nizamnameler*], which art. 52 stated the cabinet should promulgate “for the administration and execution of the law.”<sup>51</sup> Important limitations were that regulations be produced with “the advice of the Council of State” and that they “shall not contain new clauses [*hükümler*],” since adding or amending statutory clauses would violate the Assembly’s absolute monopoly on legislation. Art. 52 also reserved for the Assembly the right to determine the legality of regulations.

Onar noted that it was “very difficult” to find *a priori* criteria separating regulations from laws, because even regulations must by necessity introduce new rules and thus create new legal situations.<sup>52</sup> Because the constitution reserved the right to legislate to the Assembly, therefore, government regulations could be considered a form of “delegated” or “mandated” legislative power (*vekâlet*).<sup>53</sup> The fact that the legality of regulations could only be challenged by the Assembly also made this interpretation probable. Important limitations on such delegated legislation were that regulations could not place limits on the

49 Siddık Sami Onar, *Devletçilik ve İdare Hukuku*, Hukuk İlmini Yayma Kurumu Konferanslar Serisi 54 (Ankara: Hukuk İlmini Yayma Kurumu, 1937).

50 Onar, *İstimplâk Mevzuatımız*, 12–14.

51 For “regulations,” I here use the English terminology found in Adnan Güriz, “Sources of Turkish Law,” in *Introduction to Turkish Law*, ed. T. Ansary and D. Wallace Jr. (New York: Kluwer, 2005), 1–18.

52 Siddık Sami Onar, “Nizamname ve Talimatnameler,” *İzmir Barosu Dergisi* 2, no. 3–7 (1937): 261.

53 *Ibid.*, 267–268.

freedoms and rights mentioned in section 5 of the constitution and could never introduce new definitions of crimes, as this would violate the principle of “no punishment without law” (*nulla poena sine lege*). The only exceptions to these limitations were, firstly, disciplinary punishments for infractions by administrators, and secondly, laws that explicitly empowered the cabinet to impose sanctions within certain areas. Onar gave only one example of such a law, without elaborating his views on its constitutionality: Law 1567 on the Protection of the Value of the Turkish Currency.<sup>54</sup>

While Onar strove to locate the conceptual resources for incorporating exceptional government powers into doctrine within the doctrinal tradition itself, his colleague Ali Fuad Başgil took a more practical approach. Like Onar, Başgil had studied law in İstanbul as well as in Paris; he then began teaching at the new Faculty of Law in Ankara, where he stayed until the purge of the *Darülfünûn* in 1933. Başgil was then given the chair in constitutional law, a field where he soon became the regime’s primary apologist. He was an enthusiastic supporter of *étatisme*, which he saw as an unavoidable principle in Turkey, a country where it was “necessary to discipline a people abandoned to itself for more than a century, to organize and modernize the economic and social life of the country.”<sup>55</sup> Because he viewed Turkey’s constitution as the expression of a fundamentally “realistic” regime,<sup>56</sup> he argued that it was the “necessities of national order” and “not doctrinal fantasies” that made *étatisme* into the republic’s principle of action.<sup>57</sup>

Like Onar, Başgil approached the problem of decree powers through a discussion of the concept of “regulations,” but he decidedly rejected the notion that they could be explained as a form of “delegation” of legislative powers, as Onar had argued. Başgil contended that, unlike the silence on the subject of regulations in the wartime 1921 Basic Law, art. 52 of the 1924 constitution—a constitution for “a normal state during a normal time of peace”—clearly described regulations as a form of executive action delimited by the framework of statutes produced by the Assembly.<sup>58</sup> It thus provided a conceptual bulwark to maintain the legislative sovereignty of the Assembly, the only legitimate representation of the nation. Law 1567, on the other hand, challenged this neat division by granting the government “very wide and very important powers” to regulate trade in all kinds of assets through decisions which, according to Başgil,

54 Ibid., 266.

55 Ali Fuad Başgil, “La Constitution et le Régime politique,” in *La vie juridique des peuples*, Vol. 7, ed. H. Lévy-Ullmann and B. Mirkiné-Guetzévitch (Paris: Librairie Delagrave, 1939), 22.

56 Ibid., 19.

57 Ibid., 23.

58 Ali Fuad Başgil, *Türkiye Teşkilat Hukukunda Nizamname Mefhumu ve Nizamnamelerin Mahiyeti ve Tabi olduğu Hukuki Rejim* (İstanbul: Kenan Basımevi ve Kışe Fabrikası, 1939), 64.

were properly speaking not regulations but “decrees in a style reminiscent of the temporary laws [*kanun-ı muvakkatleri*]” that art. 26 of the 1876 Ottoman constitution (*Kânûn-ı Esâsî* or “basic law”) had allowed the executive cabinet to issue if the parliament was not in session during an emergency.<sup>59</sup> Although Başgîl had previously argued that even “temporary laws” corresponding to “extraordinary situations” (*fevkalâde ahval*) need not necessarily violate the legal principle of continuity as long as they were applied to the issues they encompassed in a consistent way,<sup>60</sup> he did see Law 1567 as an “exception” (*istisna*) in the context of the republic’s constitutional architecture. For a pragmatist such as Başgîl, however, the fact that these powers did not fit into the constitutional framework simply indicated that the particularly sensitive global economic situation necessitated a sort of financial state-of-siege regime. He thus concluded that the problem lay not in the law itself, but rather in the lack of provisions in Turkey’s constitution for extraordinary decree powers. His thoughts are worth quoting in full:

It seems certain to me that this law and these decrees have uncovered a gap [*noksan*] in our current constitution: the gap of extraordinary powers [*fevkalade selahiyet*], or of temporary law regimes. Our constitution restricts the question of extraordinary powers to situations that require the declaration of a state of siege. It does not recognize anything called a temporary law. Yet events and realities make such a regime necessary. Situations may emerge in the life of a state that cannot be foreseen and determined by law. Conditions may arise that require extinguishing the source of the danger and evil with speed, force, and determination. Neither history nor the law will exonerate a government that, faced with such a situation, fails to act because of the lack of a legal provision. A regime of extraordinary powers is based on these considerations. Recall the dangerous state of affairs in which Turkey was faced with the enormous economic crisis toward the end of the winter of 1930, when the aforementioned law came into effect. For the Grand National Assembly to give the government such extraordinary powers in such a situation practically means permitting a kind of economic and fiscal state of siege [*iktisadî ve malî bir idarei örfiye*]. And this permission was an undeniable necessity. This, then, is the idea on which a legal [*kanunî*] regime of extraordinary powers relies: the measures that the government by necessity took based on the extraordinary powers it obtained from the Assembly, and the Assembly’s approval, validation, and legalization [*kanunileştirmesi*] of the decrees in the short or long term.<sup>61</sup>

59 Ibid., 76.

60 Ali Fuad Başgîl, “Kanunun hâkimiyeti prensibi,” *İzmir Barosu Dergisi* 2, no. 1–5 (1936), 65.

61 Başgîl, *Türkiye Teşkilat Hukukunda Nizamname*, 79–80.

For Başgil, then, Law 1567 was acceptable and even necessary from a historical and political viewpoint, but could only be incorporated into the framework of Turkish constitutional law by invoking a situation so exceptionally dangerous that it would otherwise have justified declaring a state of siege.

It is worth noting, however, that even as he justified bending doctrine in order to make room for political realities, Başgil took pains to avoid introducing a concept such as “delegation” into Turkish constitutional doctrine. In France, he noted, some legal scholars had developed a doctrine of *délégation* which, although it constituted a radical departure from the traditional French emphasis on the separation of powers, had gained more traction during World War I and the postwar economic turbulence of the 1920s.<sup>62</sup> In Turkey, however, delegation would violate both the text and the spirit of the Turkish constitution, which clearly stated that “sovereignty belongs without restriction to the nation” (art. 3); moreover, it was logically impossible, as legislation was a “representative” (*müessil*) function, while the executive was an “appointed” (*memur*) branch. Nor was it necessary to explain as a variety of delegation such extraordinary powers as Law 1567 implied, since the government, in issuing decrees pursuant to the law, was simply carrying out the regulatory duties it had been “invited” to carry out by the Assembly.<sup>63</sup>

### Preparations for war

Until the outbreak of World War II, jurists such as Başgil and Onar focused mainly on executive powers within the field of finance, expropriation, and requisition, issues that lay close to the concerns of the *étatiste* ideologues of the CHP. Once war broke out, however, the Assembly passed a number of laws that more explicitly tied powers to intervene in the market to the realm of security and military preparation. Two of these were particularly important. The first was the National Defense Law (Law 3780), which gave the cabinet very wide powers to interfere in the market with regard to both goods and labor.<sup>64</sup> The law delimited its own applicability to “extraordinary conditions” such as war, the possibility of war, or general mobilization, and left it to the executive to decide when the conditions necessitating the law were present (arts. 1–3). When in effect, Law 3780 empowered the government to

62 Başgil here cited Adhémar Esmein’s discussion of the state of siege that the Italian prime minister Francesco Crispi had declared in order to crack down on the Fasci Siciliani in 1894: “De la délégation du pouvoir législatif. A l’occasion du projet dit ‘des pleins pouvoirs’ présenté par M. Crispi au Parlement italien,” *Revue politique et parlementaire* 1, no. 1 (1894): 200–224; for postwar doctrinal developments, he cited Jean Devaux, *Le régime des décrets* (Paris: Librairie Arthur Rousseau, 1927).

63 Başgil, *Türkiye Teşkilat Hukukunda Nizamname*, 80–86.

64 “Milli Korunma Kanunu,” Law no. 3780, in RG no. 4417, January 26, 1940.

requisition materials and private vehicles, temporarily seize properties and stocks, enlist *corvée* labor forces, lengthen work hours and cancel holidays, and regulate imports and consumption as well as prices and rents.<sup>65</sup> The law also introduced specific prohibitions on hoarding, overstocking, and other forms of manipulating the market for purposes of profiteering, and it allowed the Ministry of the Interior to close newspapers for printing stories deemed detrimental to the nation. To oversee the large number of violations of these decrees, the government eventually established—also by decree—a number of specialized courts, called “National Defense Courts” (*Milli Korunma Mahkemeleri*), which would try tens of thousands of cases before they were removed in 1948,<sup>66</sup> while Law 3780 itself remained in effect until the 1960 coup d’état. Later the same year, the Assembly finally passed a new Law on the State of Siege to replace the scattered decrees that remained from Ottoman times.<sup>67</sup> This new law detailed the procedures for declaring a state of siege, as well as the particular executive and judicial powers that such a legal situation created and the rights that could be derogated in keeping with art. 86 of the constitution. Although Turkey did not actually enter the war until 1945, the government invoked Law 3832 in November 1940, declaring a state of siege that would not be lifted until November 1947, long after the war had ended.

Perhaps because of his pragmatic approach to legal theory, Başgil had little to say about such laws, preferring instead to focus on the wider lessons he believed the war had for legal practitioners. In 1940, for example, he argued that the concept of “state law” (*devlet hukuku*) would have to be reconfigured after the war to pave way for a post-individualist era where rights would be subordinated to discipline for the sake of a strong nation.<sup>68</sup> He also argued that the best guarantee of the rule of law was not an independent judiciary but patriotic and justice-minded state servants.<sup>69</sup> Onar, on the other hand, made an effort to incorporate exceptional powers into a comprehensive methodology of administrative jurisprudence. In 1942, he made a connection between, on the

65 For an overview of the law, see John VanderLippe, *The Politics of Turkish Democracy: İsmet İnönü and the Formation of the Multi-Party System, 1938–1950* (Albany, NY: State University of New York Press, 2005), 49–53.

66 Kararname no. 17450, February 26, 1942, in RG no. 5047, March 3, 1942. Statistics on the number of cases overseen by these courts are found in *Adalet İstatistik Özetleri, 1933–1947* (Ankara: T.C. Başbakanlık İstatistik Genel Müdüğü, 1950), 3.

67 “Örfi idare kanunu,” Law no. 3832, in RG no. 4518, May 25, 1940.

68 Ali Fuad Başgil, “Vatandaşların Amme Hakları ve Millî Camianın Emniyet ve Disiplin Meselesi,” in *Üniversite Haftası, Erzurum, 13-7-1940–19-7-1940* (İstanbul: İstanbul Üniversitesi Yayınları, 1941), 101–14.

69 Ali Fuad Başgil, “Muasır Devlette Memur Meselesi ve Memurların Mesleki Vazife ve Terbiyesi,” *İstanbul Hukuk Fakültesi Mecmuası* 7, no. 4 (1941): 790–803.

one hand, the security-related concerns that gave rise to such regimes as the state of siege, and, on the other hand, the economic conditions that led the CHP to pass Laws 1567 and 3780. What connected them, in Onar's view, was the "very delicate and important" issue of "extraordinary situations" (*fevkalâde haller*).<sup>70</sup> The term "extraordinary situation," as we have seen, was mentioned in art. 74 of the constitution, which stated that no citizen shall be forced to make any material sacrifice except in extraordinary situations (*fevkalâde ahval*); beyond that gnomic utterance, however, it appeared neither in the constitution's art. 86 on martial law nor in the 1940 Law on the State of Siege. Onar conceded that state leaders must have wide discretion to deal with extraordinary situations, but emphatically warned that allowing leaders *themselves* to determine the limitations of that discretion could have "very dangerous consequences."<sup>71</sup> Instead, he built on the same distinction he had made within the field of expropriation law between "acts of government," which were not subject to judicial oversight, and "acts of administration," which were. By defining decrees issued on the basis of Law 3780 as well as the declaration of a state of siege as "acts of government," he placed them outside the purview of the courts and provided the cabinet with wide powers, but could also argue that the state of siege remained within "the state's ordinarily available powers" and thus did not violate the principle of legality, to which it remained committed "even in the most dangerous moments of national defense."<sup>72</sup>

While Onar and Başgil thus both tackled emergency powers by defining them as political issues with a nominal but symbolically important connection to legality, it took Onar's protégé Ragıp Sarıca to fully incorporate them into a doctrinal system. Like his older colleagues Onar and Başgil, Sarıca studied law in Paris; when the Germans invaded the city in June 1940, he and fellow expatriate student Mehmet Ali Aybar escaped the city on a tandem bicycle and returned to Turkey to teach at the İstanbul Faculty of Law.<sup>73</sup> During the war, Sarıca went on to produce a number of articles and books dealing with the thorny question of precisely how much discretion the executive could claim in dealing with questions of great exigency, whether they be related to the economy or to national security. Having chosen administrative law as his specialization, Sarıca naturally followed in Onar's footsteps, but also engaged with Başgil's thinking. His eye for the subtlest technical distinctions of

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

71 *Ibid.*, 383.

72 *Ibid.*, 381, 384.

73 Uğur Mumcu, *Aybar ile Söyleşi: Sosyalizm ve Bağımsızlık* (Ankara: Tekin Yayınevi, 1986), 29–30. Aybar would later become the chairman of the Workers Party of Turkey (*Türkiye İşçi Partisi*, TİP), though neither he nor Sarıca appear to have identified with any particular political movement during the war.

administrative doctrine enabled him to dissect issues into such a finely grained texture that the difference between ordinary executive duties and dictatorial powers became a matter of degree. In this sense, Sarıca perhaps best illustrates the almost limitless flexibility of administrative law, a flexibility that allowed even German administrative courts to maintain jurisdiction until the end of the war.<sup>74</sup>

In his 1943 book *Türkiyede İcra Uzrunun Tanzim Salâhiyeti* ("The Executive Branch's Powers of Regulation in Turkey"), Sarıca continued the theme of regulations and their relation to Law 1567, on the protection of the Turkish currency, but also devoted a separate chapter to the National Defense Law, which had come into effect since Onar and Başgil's contributions.<sup>75</sup> Sarıca's point of departure was that situations sometimes arise that make governing through ordinary legislative processes impractical. These situations may be fluid and changing, and so they may require rapid or technical solutions or demand the use of compulsion or secrecy. Although the constitution provided few guidelines as to the limits of executive discretion in such circumstances, Sarıca believed that art. 52 provided the cabinet with "general regulatory powers"; the question regarded exactly what the nature of these powers was. He agreed with Başgil that the prohibition on introducing new clauses through regulations meant that these regulatory powers could only come into effect in areas where the Assembly had already provided statutes, but he also agreed with Onar that "new clauses" could not refer to legal rules (*kaideler*) in general, as regulations, ordinances, and decrees not only *could* introduce new rules, but *must*—indeed, as he pointed out, "they do nothing but introduce new rules."<sup>76</sup>

However, Sarıca disagreed with his senior colleagues on the question of whether the executive could introduce new definitions of crimes. While both Başgil and Onar had argued that such powers would violate the principle of *nulla poena sine lege*, Sarıca argued that, first of all, this principle could not be considered intrinsic to Turkish constitutional law, as art. 72 simply prohibited detaining or arresting someone without statutory basis, not sentencing them. Secondly, the Assembly might pass statutes that actually *required* the executive to sanction violations of the regulations or decrees issued pursuant to them, effectively providing the executive with "a kind of *carte blanche*." Even if some

74 Michael Stolleis, *The Law under the Swastika: Studies on Legal History in Nazi Germany*, trans. Thomas Dunlap (Chicago: University of Chicago Press, 1998), 127–144.

75 Ragıp Sarıca, *Türkiyede İcra Uzrunun Tanzim Salâhiyeti: Nizamnameler, Talimatnameler, Türk Parasının Kıymetini Koruma Kararnameleri, Milli Korunma Kanununa Müstenit Kararnameler* (Istanbul: Cumhuriyet Matbaası, 1943).

76 Ragıp Sarıca, "Türk Devlet Şurası İçtihatlarına Göre Hükümet Tasarrufları," *Istanbul Üniversitesi Hukuk Fakültesi Mecmuası* 9, no. 1–3 (1943), 57, 66.

were to argue that such statutes would be unconstitutional, the courts would have to accept them, as they had no power to question the unconstitutionality of laws anyway.<sup>77</sup>

Having thus stretched the executive's ordinarily available regulatory powers to include both rule-making and the introduction of new crimes, Sarıca was in a position to argue that Turkish law had little use for the kinds of conceptual innovations found in contemporary Germany or France. Thus, he rejected the view of French theorists like Carré de Malberg that maintaining the separation between legislative and executive powers required explicitly "mandating" that the executive exercise legislative powers, whether urgent or otherwise.<sup>78</sup> On the same note, he also rejected the approach of German jurists like Carl Schmitt, who approved of Malberg's solution but ultimately defended empowering the executive with such wide-ranging enabling acts as the infamous *Ermächtigungsgesetz* of 1933, thereby introducing, in Schmitt's words, "a new concept of law, no longer inspired by the concept of the separation of powers."<sup>79</sup> For Sarıca, empowering the executive through a "mandate" (*vekâlet*) was "neither necessary nor possible" within Turkish law.<sup>80</sup> Firstly, he argued that the term *vekâlet* had no applicability in the field of public law but rather belonged to private law, where it denoted a particular kind of agreement between two contracting parties. Secondly, art. 6 of the constitution categorically reserved the power of legislation to the Assembly, while art. 52 explicitly gave the executive regulatory powers. And lastly, if it were possible to interpret art. 7 in such a way that the executive's powers were "mandated" by the Assembly, all executive actions must be a kind of legislation, with the result that administrative law would be left with no jurisdiction.<sup>81</sup> He therefore concluded that regulations, ordinances, and decrees were always executive acts, regardless of how many new rules they introduced.

What then of Law 1567 or 3780? Sarıca conceded that both laws "almost" (*âdeta*) provided the executive with legislative power, a situation he considered both "exceptional" (*istisnâî*) and "extraordinary" (*fevkalâde*).<sup>82</sup> Nevertheless, since he had exhaustively established that any act of government based on

77 Sarıca, *Türkiyede İcra Uzununu*, 69–79.

78 Carré de Malberg, *La loi, expression de la volonté générale: Étude sur le concept de la loi dans la Constitution de 1875* (Paris: Sirey, 1931).

79 Sarıca, *Türkiyede İcra Uzununu*, 204–206. For the contemporary German take, Sarıca relied on a translated essay by Carl Schmitt, which he thanked Mehmet Ali Aybar for procuring: Carl Schmitt, "Une étude de droit constitutionnel comparé: L'évolution récente du problème des délégations législatives," in *Introduction à l'étude du droit comparé: Recueil d'études en l'honneur d'Edouard Lambert*, Vol. 2, trans. H. Mankiewicz and Paul Roubier, (Paris: Sirey, 1938), 200–210.

80 Sarıca, *Türkiyede İcra Uzununu*, 189.

81 *Ibid.*, 159–218.

82 *Ibid.*, 256, 284.

statute, however vague, was within the ordinary powers of the executive, even such extraordinary powers were simply a matter of degree. He therefore had no need for Onar's argument that Law 1567 "delegated" legislative power to the cabinet; instead, he argued, Law 1567 simply meant that the Assembly had removed an entire field of issues from the sphere of legislation and placed it in the sphere of executive acts: "In a word, foreign exchange, coins, shares, and bonds have severed their relationship with statutes."<sup>83</sup> Since even these powers remained executive in nature, of course, all decrees issued on their basis could be subject to supervision by the judiciary. The same was valid for Law 3780, on national defense. Sarıca noted that, during this law's drafting stage, some CHP representatives suggested giving the government "wholesale powers" (*toptan bir selahiyet*) to do as it wished, while others preferred amending art. 74 of the constitution so as to read "no one can be forced to make any sacrifice *except for material and labor obligations imposed by law* in extraordinary situations."<sup>84</sup> A third group, which won out, argued that because the constitution did not explicitly define the power to regulate goods, money, and labor, the executive should be provided with wide powers through the statute that eventually became Law 3780. As a result, Sarıca argued, just as with Law 1567, decrees issued pursuant to Law 3780 were subject to judicial supervision—just like other ordinary administrative powers.

### Conclusion: from doctrinal problem to constitutional provision

In 1950, Turkey held its first free multiparty elections, sweeping the Democrat Party (*Demokrat Parti*, DP) into power and ending the nearly three-decade reign of the CHP.<sup>85</sup> The transition to democracy marked an important milestone in Turkey's transformation from a single-party regime whose leaders flirted with fascism to a democracy constantly troubled by the institutional legacy of its authoritarian past. This transition had an immediate effect on the discourse of Turkish jurists. In Ali Fuad Başgil's postwar writings, he distanced himself from his interwar *étatisme*, supported the DP, and began advocating for human rights and a state that interfered as little as possible in society.<sup>86</sup> Although Onar remained loyal to the CHP, at the same time he lamented the

83 Ibid., 275.

84 Emphasis mine. Sarıca obtained this information from an unpublished presentation by Kemal Turan, which he thanked Ernst Hirsch, an exiled German professor of law, for giving him; *ibid.*, 315–317.

85 Multiparty elections had been held for the first time in 1946, but they were widely considered to have been manipulated by the CHP, which therefore remained in power.

86 E.g., Ali Fuad Başgil, *Cihan Sulhu ve İnsan Hakları* (İstanbul: Hür Fikirleri Yayma Cemiyeti, 1948); 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.

deleterious effects that the autocratic single-party regime had had on respect for the rule of law<sup>87</sup>—though he would soon find the DP abusing its powers in a similar fashion. Ten years later, in the early hours of May 27, 1960, Onar received a call for assistance from a group of army officers who had just suspended the constitution, dissolved the Grand National Assembly, and arrested all the DP's leading members. Onar and Sarıca both accepted the invitation because, as Onar put it months before the coup, the 1924 constitution had allowed an "egotistic" and "ignorant" parliamentary majority to produce unconstitutional laws with no regard for the public interest.<sup>88</sup>

The 1961 constitution that resulted from the drawn-out transition process that followed introduced new checks on the ability of the Assembly to pass unconstitutional laws, including Turkey's first Constitutional Court (*Anayasa Mahkemesi*). Even so, art. 107 of the new constitution largely reproduced the 1924 constitution's definition of government regulations that had caused Onar and his colleagues such trouble during the war. When political unrest picked up pace toward the end of the 1960s, therefore, a succession of governments led by the Justice Party (*Adalet Partisi*, AP), the DP's successor, complained of their need for a freer hand. Their call was answered in March 1971, when the army installed a technocratic cabinet led by law professor and CHP member Nihat Erim. Meeting under a state of siege, the cabinet drafted several amendments to the 1961 constitution, among them an amendment<sup>89</sup> to art. 64 providing for the possibility of empowering the executive to issue statutory decrees (*kanun hükmünde kararname*); that is, executive decrees with the force of law.<sup>90</sup> Several members of the Assembly and the Senate—among them Mehmet Ali Aybar, Ragıp Sarıca's friend from their student days in Paris—warned that such powers were unconstitutional and might be misused by future cabinets.<sup>91</sup> However, although a couple senators of the AP admitted that the amendment went one step further than the Law on the Protection of the Value of the Turkish Currency in providing the executive with legislative

87 Siddık Sami Onar, "Hukuk Telakkimizin Geçirdiği Buhranlar," *Siyasi İlimler Mecmuası* 20, no. 233 (August 1950): 173–78.

88 From the preface to the February 1960 edition of Onar's *İdare Hukukunun Umumi Esasları*, Vol. 1 (İstanbul: İsmail Akgün, 1960), xi–xii.

89 Law no. 1488, in RG 13964, September 22, 1971.

90 Özbudun calls such statutory decrees "law-amending ordinances" and "decree laws"; see Ergun Özbudun, *The Constitutional System of Turkey: 1876 to the Present* (New York: Palgrave Macmillan, 2011), 70–72, 115.

91 Aybar had by then resigned from the chairmanship of the TIP. The TIP was subsequently closed by the Constitutional Court on July 20, 1971, though Aybar retained his parliamentary seat as an independent deputy. For Aybar's argument, see *Millet Meclisi Tutanak Dergisi*, August 28, 1971, 369–70.

powers, it nonetheless was passed.<sup>92</sup> Once present in the constitution, statutory decrees also came to be included, with a few modifications, in the 1982 constitution that followed on the heels of the 1980 military coup, and which is still in effect as of 2016.<sup>93</sup> Thus, the scattered statutes and rulings with which Turkish governments exercised near-dictatorial powers in the past are now accompanied by a legal solution that had previously only existed in the wartime theoretical maneuverings of law professors like Onar and Sarıca. Today, the power to issue such statutory decrees are, as Kemal Gözler notes, “not an exceptional situation”—though he neglects to mention that, in Turkey, it was armed forces’ General Staff (*Genelkurmay*) that said so.<sup>94</sup>

The sweep of the statutory decrees issued by the AKP government in the wake of the failed coup attempt of July 2016 is dramatic, even in the context of the exceptional circumstances to which the government claims to be responding. And yet, seen in the context of the longer historical trajectory discussed in this article, perhaps what is most remarkable about the AKP’s recent use of exceptional executive powers is how quotidian such powers in fact are. As I argued at the beginning of the article, despite presenting itself as the party that would once and for all rid Turkey of its authoritarian and state-centered past, the AKP has made good use of legal instruments whose roots lie in the single-party regime of the 1930s and 1940s. The AKP’s increasing reliance on a majoritarian discourse is thus proving to be a legitimizing myth quite similar to the role that parliamentary sovereignty played for the early republican regime. Much as Alain Bancaud writes of the Vichy government, therefore, the AKP regime is inscribing itself “in a tradition of judicial exception, not constructing a new judicial order.”<sup>95</sup> When the AKP government invokes art. 27 of the 1983 Law on Expropriation to carry out an “urgent” expropriation, for example, it is relying on an article that passed the National Security Council with no discussion whatsoever and has since quietly taken its place alongside the numerous other threads constituting the legal fabric from which Turkish governments derive their power.<sup>96</sup> In fact, the AKP had already invoked art. 27 several times before 2012, in particular when expropriating inhabited land to use for vast energy dams,<sup>97</sup> actions which observers have argued combine

92 For the debates and voting in the Senate, see *Cumhuriyet Senatosu Tutanak Dergisi*, September 13, 1971, 391–399, and September 20, 1971, in particular 590–600 for the AP’s argument.

93 For details, see Burhan Kuzu, *Türk Anayasa Hukukunda Kanun Hükmünde Kararnameler* (İstanbul: Üçdal Neşriyat, 1985) and Kemal Gözler, *Kanun Hükmünde Kararnameler* (Bursa: Ekin Kitabevi, 2000).

94 Gözler, *Kanun Hükmünde Kararnameler*, 14.

95 Alain Bancaud, *Une exception ordinaire* (Paris: Gallimard, 2002), 85–86.

96 For the discussions on the Law on Expropriation, see *Milli Güvenlik Konseyi Tutanak Dergisi*, Vol. 11, Session 180, November 4, 1983.

97 E.g., Bakanlar Kurulu Kararı 2006/10642, in RG no. 26226, July 12, 2006, expropriating land on which at least 11,000 people lived in order to build the Ilisu Dam.

Turkey's real energy needs with politically charged security objectives.<sup>98</sup> Other controversial expropriation orders have relied on statutes that have generally been considered completely uncontroversial, including the acquisition of 90 hectares of protected forest in Ankara, which the government set aside in 2012 in order to build a gargantuan palace for soon-to-be President Recep Tayyip Erdoğan.<sup>99</sup> As opposed to the "urgent" expropriation of land for energy and infrastructure projects, the 2012 decree derived its legal force from the seemingly innocuous 2005 Municipal Code.<sup>100</sup> However, it also transferred ownership of the land to the Ankara Municipality free of charge, thanks to a line buried in a wide-ranging statutory decree issued by the government in July 2011, ostensibly to reorganize the Ministry of European Union Affairs (*Avrupa Birliği Bakanlığı*).<sup>101</sup> If we ask how the AKP-dominated Grand National Assembly could empower<sup>102</sup> the AKP government to pass such urgent statutory decrees, we may be asking the wrong question: emergency powers are no accidental, contingent feature of the Turkish legal tradition; they have been intrinsic to it since the very beginning of the republic.

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98 Joost Jongerden, "Dams and Politics in Turkey: Utilizing Water, Developing Conflict," *Middle East Policy* 17, no. 1 (2010): 137–143.

99 Bakanlar Kurulu Kararı 2012/3074, in RG no. 28276, April 27, 2012.

100 "Belediye Kanunu," Law no. 5395, in RG 25874, July 13, 2005.

101 Art. 21 of Kanun Hükmünde Kararname 661, in RG 28103 (Mükerrer), November 2, 2011. For a highly critical discussion of the AKP's statutory decrees, see the report by the Union of Chambers of Turkish Engineers and Architects, *AKP'nin KHK'leri ve TMMOB* (Ankara: Türk Mühendis ve Mimarlar Odaları Birliği, 2011).

102 Law no. 6223, in RG 27923, May 3, 2011.

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