JUDICIAL REFORM IN TURKEY FOR EU ACCESSION: ANALYSIS OF COMMISSION RECOMMENDATIONS REGARDING MEASURES OF JUDICIAL DEPENDENCE

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İSTANBUL BİLGİ ÜNİVERSİTESİ
SOSYAL BİLİMLER ENSTİTÜSÜ
AVRUPA ETÜTLERİ YÜKSEK LİSANS PROGRAMI

İDİL ELVERİŞ LL.M.

2007

Judicial Reform in Turkey For EU Accession: Analysis Of Commission Recommendations Regarding Measures Of Judicial Dependence

Türkiye'nin Avrupa Birliği'ne Uyum Sürecinde Yargı Reformu
Yargı Bağımsızlığının Ölçüleri Çerçevesinde
Avrupa Komisyonu Tavsiye Kararlarının Yorumu

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Toplam Sayfa Sayısı: 59

Anahtar Kelimeler (Türkçe)	Key Terms (English)
1) Avrupa Birliği	1) European Union
2) Yargı Bağımsızlığı	2) Judicial Independence
3) Tavsiye	3) Recommendation
4) Bağlılık, yakın ilişki	4) Affiliation

ÖZET

Türkiye Cumhuriyeti'nin Avrupa Birliği'ne üyeliği sürecinde yargı reformaları taraflar arasında ciddi bir tartışma konusu olmaya devam etmektedir. Savcı ve hakim arasındaki yakın ilişki ve bunun bir sonucu olarak yargı tarafsızlığının zedelenmesi ihtimali bu reformlara çok önemli bir gerekçe teşkil etmektedir. Avrupa Birliği Komisyonu tarafından hazırlanan tavsiye raporunda, hakimler ve savcılar arasındaki bu yakın ilişki göz önünde bulundurularak Türkiye Cumhuriyeti Yargı sisteminin işleyişine ilişkin önerilerde bulunuldu. Bu yakın ilişki Cristopher Larkins'in tanımıyla "bağımlı bir yargı"nın var olduğuna işaret etmektedir. Avrupa Birliği Komisyonu üyelik sürecinde bu durumu Türkiye Cumhuriyeti'nin gerçekleştirmesi gerekecek reformlar için güçlü bir tartışma konusu yapmaktadır.

ABSTRACT

With the continuing drive for Turkish entrance into the EU, judicial reform continues to be an important battleground for both sides. An integral part of these reforms is the appearance of close proximity between prosecutors and judges and the possible loss of judicial impartiality. A report was presented that contained recommendations offered by the European Commission regarding the affiliation between judges and prosecutors in their Report of an Advisory Visit on The Functioning of the Judicial System in the Republic of Turkey 2005. By viewing this relationship as a form of judicial dependence defined by Christopher Larkins, it is clear that the Commission makes a strong argument for reform.

ACKNOWLEDGMENTS

The author wishes to express sincere appreciation to Emre Gönen, for his enthusiasm for EU studies. As well as Assistant Professor Dr. Gül Okutan Nilsson for sparking a real interest in EU legal issues and İdil Elveriş for her assistance in the preparation of this manuscript by challenging each premise and preconception of the author. Also to Vincent Czyz who inspires the writer in me. A special thanks to Pera Gilmore for giving me time to study. Thanks most of all to my wife who makes all things in my life possible.

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Introduction

"The Minister affirmed with justifiable pride that the Republic from the day of its birth had based its foreign relations on respect for law."[1] This quote could fit quite nicely into the rhetoric of today's public debate over judicial reforms; however, it was written 63 years ago about the opening ceremony for the Turkish Institute of International Law.[2] It appears relevant because even today the Republic of Turkey is justifying its judiciary to the West. As the European Union continues to make recommendations for reform and follow-up implementation, the Turkish government's response continues to be in large part justification rather than reform.

Turkey has had a long relationship with the European Community economically and strategically. The current accession process it is engaged in dominates all aspects of this relationship. The progress report *Enlargement Strategy and Main Challenges 2006 – 2007* with regard to the reforms the country is making has just come out and will be picked over by politicians, academics and pundits alike. In the report, it briefly mentions the progress –or lack thereof – concerning the judicial system.[3] This brevity must not be construed as a lack of interest or, on the contrary, a signal that there isn't much left to do. The real focus on the judicial system was put out

[1] Philip Marshall Brown, "The Turkish Institute of International Law," *The American Journal of International Law* 37: 4 (Oct 1943): 641

[2] Brown, "The Turkish Institute of International Law," p. 640

[3] Commission of European "Communication From the Commission to the European Parliament and the Council: Enlargement Strategy and Main Challenges 2006-2007," COM(2006)649 Brussels 8 November, pp. 10, 20, 50.

in 2005 in the third *Report of an Advisory Visit of the Functioning of the Judicial System in the Republic of Turkey* by Kjell Bjornberg and Ross Cranston. This 85-page document focuses on the Commission's recommendations that were made to Turkey in the two previous reports in addition to making a few new ones that will be discussed later in this paper.

The reforms this paper will discuss concern the special position prosecutors have with judges (listed in Section 3 of the advisory report), how this relationship came about and how this affects the judicial independence of the system. The analysis that will be used will not be based on using identifiers of judicial independence but viewing the relationship between Turkish judges and prosecutors explained by the Commission's report as occurrences of *judicial dependence* as explained by Christopher Larkins. Finally, probably most importantly, is a discussion on the resistance of the government to address the situation.

Chapter 1

Judicial Independence

In order to begin examining the relationship the Turkish Republic's Prosecutors have with judges and the possible effects this may have on the independence of the judiciary, it is important to recognize the type of threat this is to judicial independence. However, this is not so easily done because there is no ultimately accepted definition of judicial independence.[4] It is vital to keep in mind that judicial independence should not be viewed as a means unto itself, but rather as a tool, principle or value that can bring about justice, security and economic growth.[5] As with successful and not-so-successful reforms in Latin America in the 80s and Eastern Europe in the 90s, it is hoped that reform will bring about stability and a better chance for the future.[6] This fact may sometimes be overlooked due to the overall emphasis on judicial reform for the sake of EU accession, rather than for the benefit judicial independence would create. Even the Union itself neglects to make a consistently clear case about why judicial reform and independence in particular are necessary, especially when viewed in light of passages such as this from the recent enlargement progress report that came out on November 8, 2006: "There was progress in the area of *judicial*

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[4] Kate Mallerson, "Judicial Training and Performance Appraisal: The problem of Judicial Independence," *The Modern Law Review* 60: 5 (September 1997): 657.

[5] Terri Peretti, "A Normative Appraisal of Social Scientific Knowledge Regarding Judicial Independence," *Ohio State Law Journal* 64 (2003), http://moritzlaw.osu.edu./lawjournal/issues/volume64/number1/peretti.pdf p. 1.

[6] Maria Dakolias and Javiar Said, "Judicial Reform: A Progress of Change Through Pilot Courts," *European Journal of Law* Reform 2: 1 (2000): p. 95.

reform. However, implementation of the new legislation by the judiciary presents a mixed picture so far and the independence of the judiciary needs to be further established."[7] However, independence in itself is no guarantee of proper decision making on the part of judges or by what measurement will it be understood their legal interpretations have improved.

This statement calls for the creation of further judicial independence but doesn't give the rationale behind its importance. It is important to note that the EU itself does not have a binding set of legal standards for judicial independence.[8] They therefore reference many international standards in their reports that will be described later in this paper.[9]

While there is no single universally accepted definition of judicial independence, there are patterns that run through the descriptions of judicial independence starting with the more general categories of internal independence also called normative and external or institutional independence.[10] From here the definitions branch off into more detailed descriptors.

Although in this paper the definitions of the international standards espoused by the European Union and the distinctions made by Christopher

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[7] Commission of European Communities Enlargement Strategy p. 50

[8] Open Society Institute, *Monitoring the EU Accession Process: Judicial Independence* (Budapest: Central European University Press, 2001), p. 27.

[9] Open Society, *Monitoring the EU Accession,* p. 28.

[10] John Ferejohn, "Independent Judges, Dependent Judiciary: Explaining Judicial Independence," *Southern California Law Review* 72: 353 (1999): 353.

Larkins will be used to examine the recommendations of the Commission regarding the uneasily close relationship between the Republic's prosecutors and judges and the responses of the Turkish government; it is important to get a wider view of the literature concerning judicial independence. The next section will therefore help to put the study of judicial independence into a broader framework.

a) Normative/Internal Independence

Normative independence, according to John Ferejohn, concerns judges keeping their personal, ideological opinions out of the decision-making process.[11] It has also therefore been identified by some scholars as decisional independence.[12] This refers to the internal professionalism and integrity of the judge. The problem here is how it is possible to measure the internal workings of a judge's mind. Systematically evaluating this definition of independence seems fraught with the danger of creating arbitrary variables that could ultimately lead to character assassinations.

b) Institutional/External Independence

Institutional independence, on the other hand, refers to the safeguards that protect judges from institutions that might wish to sway the court's

[11] Ferejohn, "Explaining Judicial Independence," p. 353

[12] Peter Shane, "Interbranch Accountability in State Government and the Constitutional Requirement of Judicial Independence," *Law and Contemporary Problems* 61: 3 (Summer 1998): 21

decision.[13] *Theoretically* these safeguards should be designed so that judges can adjudicate in a vacuum and act according to the law without worrying about reprisals.[14] The institutions that have vested interests in cases before the court are most notably: the executive branch, the legislative branch and, as we see more and more today, the media.[15] Volcansek goes even further to list "centers of private power such as corporations, unions or religious organizations."[16] As we have seen with recent cases brought under Article 301 of the Turkish Penal Code, the pressure brought to bear by the media and big business may in fact be a road block to external independence but not necessarily justice. This brings up an interesting point regarding the ability of judges to make accurate decisions even if given internal and external independence.

This concern over the ability of judges to make accurate decisions carries over into the accountability of judges who are given external independence. This is an ongoing controversy. The question being how much independence is too much, and what guarantees do we have that justice is protected when judges are truly independent?[17] In other words, having no accountability for judges leaves open the possibility for judges to abuse their position. To counterbalance this there are many forms of checks and balances—to use the American term for accountability and oversight—

[13]Ferejohn, "Explaining Judicial Independence," p. 353.

[14] Ferejohn, "Explaining Judicial Independence," p. 354.

[15] Mallerson, "Judicial Training and Performance Appraisal," p. 657.

[16] Mary L. Volcansek, *Constitutional Politics In Italy* (New York City: Palgave Publishers, 1999), p. 7.

[17] David P. Currie, "Separating Judicial Power," *Law and Contemporary Problems* 61: 3 (Summer 1998): 10.

ranging from professional judicial boards that oversee the activities of judges and public prosecutors to the practice of hiring judges, which may also work as a de facto form of preventing overly ideological jurists from ascending to the bench. But ultimately, judicial independence has been seen as a far more valuable goal than accountability simply because accountability can often times be just another form of judicial control by competing with governmental actors. The accountability of judges, however, is not the focus of this paper, and the recommendations of the Commission in regards to reforming the High Council to deal with these concerns is another area that requires further study.

c) Further Divisions of Judicial Independence

Now that we have seen the general perspective of judicial independence from the internal to external, it is important to get more into the specifics of each of these categories. In most cases, judicial independence is viewed as a whole broken into various pieces not relating to external or internal facets but merely facets of the one judicial independence. For example, Shabbir Cheema when examining the governmental reform in developing countries breaks it down into four parts, beginning with political autonomy, which quite clearly refers to external independence, in which the decisions of the judiciary are not influenced by politics.[18] He goes on to describe

[18] Shabbir G. Cheema, *Building Democratic Institutions: Governance Reform in Developing Countries* (Bloomfield: Kumarian Press, 2005), p. 173.

"detachment" from the parties before them.[19] This looks like internal independence prima facie but here Cheema also talks about "insularity," which we can take to mean a kind of buffering from these parties who are brought before the judge.[20] The buffers could include divesting in any stocks in companies with similar interests to one or both of the parties.[21] This type of independence is clearly external in its "detachment". While judicial ethics appears to be irrelevant for judicial independence per se it is important when taking into account the public's perception of judicial independence from outside actors such as corporations.

The third is withdrawal from specific ideologies so that decisions can be made "impartially".[22] Unlike the previous two definitions, this one deals with internal independence, here only the judges themselves can withdraw from ideological activity, and it would be impossible to check what is going on in the minds of judges who wish to hide their political or religious biases from society. This is yet another problem with trying to hold jurists accountable before they have rendered their decisions. But after they have done so and supported their decisions with reasoned legal arguments, how can they then be reprimanded without the appearance of interfering with the independence of the judiciary?

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[19] Cheema, *Building Democratic Institutions*, p. 173.

[20] Cheema, *Building Democratic Institutions*, p. 173.

[21] Shimon Shetreet, "The Challenge of Judicial Independence in the Twenty-First Century," *Asia Pacific Law Review* 8: 2 (2000): 156.

[22] Cheema, *Building Democratic Institutions*, p. 173.

The fourth factor in judicial independence under Cheema's definition is keeping public pressure from the media out of the judge's decision making.[23] When issues or crimes before the court are especially controversial and/or sensational the media can reflect the mood of the public which may not be interested in justice or law but in protecting their own values and interests. In this case, one can't help but think of the recent cases involving Orhan Pamuk and Elif Safak (which pertain to both brought before the court under Article 301) for denigrating the Turkish national identity.[24] The media storm brought about by these cases drew international attention and no doubt brought pressure on the government to change the law (which it hasn't) but what can't be measured is the effect this had on the decision of the court to dismiss both cases out right. In a democratic society the need for the public to know what the judiciary is doing is important as transparency leads to trust. Cheema would ask does that need for transparency outweigh the risk of unduly influencing judges and sacrificing any chance of a fair trial. Because it seems whether you were in support of or against these writers what ever the decision, one side will blame the media for influencing the decision and thereby the judiciary is undermined.

[23] Cheema, *Building Democratic Institutions*, p. 173.

[24] There are a myriad of translations of Article 301 from Turkish into English, the most common one being "insult to Turkishness" however I find the translation I have used in this paper by Mark Petrovich more adequately depicts the perceived offenses by the two writers. This translation also mirrors the translation of other similar laws in other countries.

The Turkish Penal Code works to deter this influence under Article 288 by stipulating that a person makes an oral or written comment attempting to affect the prosecutor, judge, court, legal expert, and or witnesses in a pending investigation or prosecution is going to be punished with a prison sentence from six months to three years. If this offense is committed through the press or media, the penalty to be imposed shall be increased by half. According to advocate Fikret İlkiz, "Currently there are lots of open cases against them (journalists) for "attempting to affect" the fair trial in pending cases."[25]

Whether the decisions in these high profile cases were influenced by the media or not isn't the real concern for judicial independence; it is the appearance of dependence seen by the public which undermines the legitimacy of the courts, which in turn tarnishes one of the values judicial independence strives for, namely, public confidence in the courts. [26]

While Cheema's categories of judicial independence are illuminating, they leave out the important responsibility of the judicial system: the ability to mediate between competing branches of government. Although he does refer to "the institutional mechanisms to hold accountable those in power,"[27] that seems more to do with citizens using the courts as recourse than the institutional position within the governmental system. It therefore

[25] Fikret İlkiz, BİA Haber. www.bianet.org/2006/05/29/79684.htm

[26] Shetreet, "The Challenge of Judicial Independence in the Twenty-First Century," p. 154.

[27] Cheema, *Building Democratic Institutions*, p. 174.

appears prudent to examine another scholar's judicial independence breakdown.

d) Larkins' Categorical Analysis

Rather than focusing purely on the judges' role in judicial independence the role of the judiciary as an institution must also be taken into the independence equation. Christopher Larkins uses three categories to examine judicial independence in the American judicial system. The first he calls "insularity"[28] which is focused on "institutional safeguards" to protect judges, such as life tenure, checks and balances in appointments, and preventing their salaries from being decreased as reprisals for unfavorable decisions to the government. [29] This quite clearly refers to external independence and, like Cheema; he focuses on the judges' protection.

The second category is "impartiality," in which the judge has no bias toward the issues of the case or any relationship or favoritism toward any of the parties involved in the case.[30] This honest referee image of the judge is consistent with internal independence and again is judge centered.

The third category is where Larkins departs from other definitions of judicial independence. Here he identifies "scope of authority," which looks at the place the court has in the overall political system and how it works

[28] Christopher M. Larkins, "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis," *The American Journal of Comparative Law* 44: 4 (Autumn 1996): p. 609.

[29] Larkins, "Judicial Independence and Democratization," p. 609.

[30] Larkins, "Judicial Independence and Democratization," p. 608.

with the other branches of government.[31] Here Larkins is still working in the framework of external independence but he is no longer concerned with individual judges. Instead he wishes to point out the need for a powerful judiciary, "which has the power as an institution to regulate the legality of governmental behavior…"[32]

Larkins' "scope of authority" is not a major concern for the Commission as they only gave three recommendations in this regard.[33] This is not surprising since Turkey has had a functioning judiciary based on the European model for more than eighty years and the relationship between the branches of government are clearly differentiated in the Constitution.

It is imperative to discuss scope of authority because as Larkins offers a more practical explanation of judicial independence it requires an interconnectedness of impartiality, insularity and scope of authority. When there is an insufficient level of insularity for judges, all the scope of authority in the world will not prevent that individual judge from being reprimanded unofficially by a pay downgrade or removal from the bench.[34] In Turkey's case, being "promoted" to an undesirable area of the country is another form of intimidation that the Ministry of Justice can place on an

[31] Larkins, "Judicial Independence and Democratization," p. 611.

[32] Larkins, "Judicial Independence and Democratization," p. 611.

[33] Kjell Bjorberg and Ross Cranston European Commission, *The Functioning of the Judicial System in the Republic of Turkey: Report of an Advisory Visit 13 June – 22 June 2005* pp. 69-71.

[34] Larkins, "Judicial Independence and Democratization," p. 614.

individual judge.[35] While scope of authority isn't going to be an important component in the analysis of section 3 of the advisory report it is important to understand because Larkins illuminates these elements of judicial independence which correspond quite neatly to the types of reform suggested by the Commission. They comprise internal and external independence as well as the distinction between independence of judicial actors and the judicial system. This, therefore, will be the model definition that this paper will use to analyze the Commission's recommendations.

It must be kept in mind, as discussed at the beginning of this chapter, that the Commission is using a collection of international principles for their descriptions of judicial independence. The EU doesn't have its own standards for judicial independence. The United Nations Office of the High Commission for Human Rights came up with a list of 20 points in 1985 that were necessary to create an independent judiciary which in turn increases the human rights record of a country.[36] However, this is a list of components that a judiciary needs to be independent but gives no way to measure the level of any of the points listed. These principles help form what the EU considers to be "best European practices" for the judiciary.[37] These principles can best be described as a check list of what the government and the judiciary should and should not be able to do. Rather

[35] Idil Elveriş, "Judicial Transfers and Judicial Independent in Turkey," *Istanbul Bar Journal*: V.78 pp. 409-33.

[36] Office of the High Commissioner for Human Rights, "Basic Principles on the Independence of the Judiciary," Resolution 40/146 (13 December 1985).

[37] Bjornberg and Cranston, *Report of an Advisory Visit,* p.6.

than offering a definition of judicial independence, which could create difficulty, the UN created a list of descriptors that leave less to interpretation. The descriptors, although described in the document as all involving independence of the judiciary, are nonetheless grouped into five subheadings with independence of the judiciary as one such heading.[38] Like scholars, the UN principles have lumped descriptions into broad categories but have separated specific descriptors of independence as if the other subheadings—Freedom of Expression and Association, Qualifications, Selection and Training, Conditions of Service and Tenure and Discipline, Suspension and Removal—are not specific to independence of the judiciary. But in reality, this incongruence is only a matter of word choice. In paragraph 10 of the Basic Principles on the Independence of the Judiciary, they use the term "Independence of the judiciary" to define the judicial independence and then use the same terminology as the first subheading although the first four principles listed fit quite clearly under "insularity". These divisions shed no more light on the meaning of these principles or on judicial independence, since they correspond neatly to internal and external independence under Ferejohn as well as impartiality, insularity and scope of authority under Larkins. It is therefore unnecessary to list all the principles out in this paper.

Along with the UN Basic Principles, the Commission is also using the Bangalore Principles of Judicial Conduct 2002 as a model of how judges

[38] High Commissioner for Human Rights, Basic Principles of the Independence of the Judiciary, p.1 par. 10.

should act inside and outside the courtroom.[39] Because this paper will focus on the relationship and conduct between the prosecutor and judge, it is an essential component for the Commission and this paper. It must be noted here that the Bangalore criteria does *not* mix independence with impartiality. These are viewed as separate and distinct values needed to ensure a "proper discharge of the judicial office."[40] Also included as a separate value from independence in the Bangalore Principles is *integrity,* it states that "a judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer."[41] It goes on to say "Justice must not merely be done but must also be seen to be done"[42] This is a critical point that will become apparent later in this paper when examining the relationship between the judges and prosecutors. The possible observations from reasonable persons are the rationale of the Commissions recommendations; in this paper, it is being argued that they are observing what Larkins has called judicial dependence.[43] The recommendations made by the Commission can best be evaluated as instances of possible judicial dependence. Judicial dependence, however, must first be defined.

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[39] Open Society, *Monitoring the EU Accession,* p. 29.

[40] The Bangalore Principles of Judicial Conduct 2002 value 2 p. 3

[41] The Bangalore Principles of Judicial Conduct 2002 value 3-3.1 p. 4

[42] The Bangalore Principles of Judicial Conduct 2002 value 3-3.2 p. 4

[43] Larkins, "Judicial Independence and Democratization," p. 618

2. Judicial Dependence

From the understanding of the definitions of judicial independence cited above, the next step is to apply it to a system to check the level of judicial independence in the Turkish judicial system. However, as Larkins points out, this task is more complicated than one might expect and, in fact, true judicial independence is an abstraction.[44] If this is the case, then finding empirical evidence of judicial independence is just as problematic. For example, if we want to check that a judge is not biased by looking at his or her past decisions, we fall into the trap of assuming there must be a pattern. However, the fact is, each case will be different and therefore skew any interpretation of the data collected.[45] It is therefore Larkins's contention that scholars should be looking for examples of "dependence" in the system.[46] Rather than trying to categorize the level of judicial independence in a country the real work is in identifying where judges and/or the judicial system is dependent on other actors and/or governmental and public systems. Because EU politics refrains from overtly measuring judicial independence or placing a value judgment on another country's judiciary, the judicial dependence approach fits well into the recommendation scheme. It is this more practical approach that the Commission has taken in assessing the Turkish judicial system. So as we look at the recommendations themselves by the Commission in the chapter to come,

[44] Larkins, "Judicial Independence and Democratization," p. 618

[45] Larkins, "Judicial Independence and Democratization," p. 616

[46] Larkins, "Judicial Independence and Democratization," p. 618

we should see them in the light of judicial dependence. We should also note how these examples affect "insularity", "impartiality" or "scope of authority". But first it is important to become familiar with the development of the public prosecutor in Turkey to better understand the historical and cultural context in which they have evolved. This may also illuminate the government's response to the Commission's proposed reforms.

3. Historical Development of the Role of Prosecutors in Turkey

Prosecutors first appeared in France in 1303 because of the judicial dysfunction as a result of justice based on the aggrieved parties seeking personal revenge against the alleged perpetrators. The Parliament passed a decree on March 25th 1303 asking for the King to establish a prosecutor to take on the duty to prosecute criminals on behalf of the King rather than the victims.[47] These prosecutors were established by King Philippe Le Bel and called the King's Prosecutors.[48] Their duties were defined in the French procedure code of 1808 which then influenced the German criminal procedure code of 1877.[49] Unlike judges, the prosecutor is charged with the duty of protecting the public's rights, but they can not judge criminality. Instead, they only accept complaints and then choose to open a case or

[47] Prof. Dr. Durmuş Tezcan, "I. Fransa'da Savcılık," *Bir Adli Organ Olarak Savcılık* (Ankara: Türkiye Barolar Birliği Birinci Baskı, 2006) p. 35.

[48] Tezcan, I. Fransa'da Savcılık, p. 34.

[49] Prof. Dr. Bahri Öztürk, Yrd. Doç. Dr. Mustafa Ruhan Erdem and Yrd. Doç. Dr. Veli Ozer Özbek, *Uygulamalı Ceza Muhakemesi Hukuku* (Ankara: Seçkin Yayıncılık San. ve Tic. A.Ş., 2002), p. 38.

not.[50] They are generally in charge of directing the investigation into the filed complaint.[51]

The role of the Republic's prosecutor did not exist under the Islamic legal system (also referred to as sharia law) and therefore prosecutors weren't seen in the Ottoman legal system.[52] Under Islamic law, judges presided over both public and private legal matters.[53] The *kadı* (judge) called the accused before the court as well as decide the case before them. There was no procedure code, so the courts didn't run uniformly throughout the empire. The first procedure code was introduced in Turkey under late Ottoman rule in 1879, which was based on the French code of 1808.[54] The code was called *Usul_ü Muhakemat_ı Cezaiye Kanunu*.[55] It was at this time that the Ottomans introduced prosecutors into their system as they adopted other parts of the French system.[56]

That code was later replaced in Turkish law during the five years of legal reform after the founding of the Turkish Republic.[57] It was at this time that the reforms were based on codes from different European countries: the civil code was based on the Swiss; criminal code on the Italians; the

[50] Tezcan, I. Fransa'da Savcılık, p. 33.

[51] Tezcan, I. Fransa'da Savcılık, p. 33.

[52] Tezcan, I. Fransa'da Savcılık, p. 38.

[53] Tezcan, I. Fransa'da Savcılık, p. 39.

[54] Tezcan, I. Fransa'da Savcılık, p. 39.

[55] Prof. Dr. Erdener Yurtcan, *Ceza Yargılaması Hukuku* (Istanbul: Kazanci Kitap Tic. A.Ş., 1998), p. 130

[56] Yurtan, *Ceza Yargılaması Hukuku*, p. 130

[57] Jan Van Olden, "Legal Development Cooperation: Transplanting or Transforming Legal System?" *Seminar on Legal Development and Corruption* 2002 p. 4.

commercial code was imported from Germany and Italy.[58] The civil procedure code came from Neuf Chatel (Switzerland).[59] However, due to the complexity of the Italian criminal procedure code, it was decided that the German model would work better.[60] It was the 1877 German criminal procedure code, which was adopted in 1929, that created a permanent prosecutor position in Turkey's judicial system.[61] Therefore the practical activities of the court regarding the interplay between judges, prosecutors, and defense attorneys are based on the German model, which, in turn, has French influences. Of course there have been a number of reforms throughout the history of the modern Turkish legal system.[62] However, there is still a visible congruency between the two systems, which we will discuss in the next chapter.

For modern lawyers, The Council of Europe has set recommendations for prosecutorial powers given to public prosecutors in order to unify the European system of law because of the increased transnational nature of cases within Europe.[63] That document discusses the responsibilities and powers that should be given to prosecutors and therefore should be discussed as best practices in relation to the Commission's Advisory Report

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[58] Hilal Inalcık, "Turkey between Europe and the Middle East," *Perceptions Journal of International Affairs* 3: 1 (March – May 1998)

[59] Van Olden, "Legal Development Cooperation," p. 6.

[60] Öztürk, *Ceza Muhakemesi*, p. 38.

[61] Öztürk, *Ceza Muhakemesi*, p. 38.

[62] Öztürk, *Ceza Muhakemesi*, p. 38.

[63] Parliamentary Assembly, Recommendation 1604 (2003) para. 4.

not discussed in this paper under section four *Role and Effectiveness of Public Prosecutors* along with EU recommendation 19(2000).

Chapter 2

Commission Recommendations

In order to help Turkey emerge as a viable candidate for accession into the European Union, the judiciary not only needs reform, also, according to the Commission's latest report specifically on the subject, The Functioning of the Judicial System in the Republic of Turkey Report of an Advisory Visit -- 13 June – 22 June 2005, a serious overhaul. The report contains 48 recommendations, which encompass 5 areas of the judicial system. Section 2 of the report refers to *Judicial Independence and the Role of the Ministry of Justice,* which deals primarily with establishing insularity between judges and the Ministry of Justice as well as some areas of human rights and justice.[64] Section 4 covers the *Role and Effectiveness of Public Prosecutors,* which covers the professional responsibilities of prosecutors with regard to prosecutorial discretion and the Ministry of Justice oversight.[65] Section 5 regards the *Role of Effectiveness of Lawyers*. This chapter looks at the equality of arms between prosecutors and defense attorneys as well as the power of the Ministry to intimidate defense attorneys and the relationship between the defense lawyers and their clients.[66] The final substantive section, 6, *is Quality and Efficiency of the Justice System Human Rights Related Issues,* wherein the Commission discusses the repercussions of

[64] Bjornberg and Cranston, *Report of an Advisory Visit,* p. 8-16.

[65] Bjornberg and Cranston, *Report of an Advisory Visit,* p. 24-27.

[66] Bjornberg and Cranston, *Report of an Advisory Visit,* p. 29-40.

inefficient judicial mechanisms that cause problems of back-log, budget, organization of courts and other administrational reforms.[67] Each of these sections needs further study to determine its impact and unique character in regard to the Turkish judicial system. This paper however is only concerned with one section of the report and its impact on judicial independence and, therefore, on the justice and the stability of the country.

1. Affiliation Between Judges and Prosecutors Recommendations

Section 3 of the *Advisory Report: Affiliation Between Judges and Prosecutors* recommends significant changes to the position and training of the prosecutors and judges in relation to one another.[68]

Here the Commission has done similar work on the Turkish judiciary as Larkins did in his South American studies. It is being argued in this paper that the relationship between the Republic's Prosecutors and judges highlighted in this section of the Commission's report are all instances of *judicial dependence* and constitute a threat to justice because the prosecutors give the appearance of undue influence to sway judicial decisions.

Courtroom logistics plays a surprisingly significant role in the relationship between the prosecutor and judge. It should be kept in mind that this particular report makes it clear that it is not a single recommendation or, as

[67] Bjornberg and Cranston, *Report of an Advisory Visit,* p. 41-67

[68] Bjornberg and Cranston, *Report of an Advisory Visit,* p. 18-22

this paper stipulates, a single identifier of judicial dependence, but the accumulation of all these situations that create the impediments to judicial independence.[69] Adding together all the situations discussed below a picture emerges of two separate distinct professional roles that have far too many points of common connection to leave the public with a sense that there is no undue influence on the decision-making process in the Turkish judicial system. Again it must be reiterated that the report makes no claim that these two offices are not in fact independent; it only points to the possibility of appearance.[70] But that is enough to create distrust in the system. Generally, this does not happen when things are running smoothly, but when there is controversy these points of connectivity raise suspicion.[71]

It is probably best to go over the recommendations set out in Section 3 before proceeding into any more detail about their effect on judicial independence. In this section there are six recommendations, dealing with the relationship between prosecutors and judges, starting with a constitutional amendment to separate the rights and responsibilities of prosecutors and judges.[72]

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[69] Bjornberg and Cranston, *Report of an Advisory Visit Section 2,* p. 8.

[70] Bjornberg and Cranston, *Report of an Advisory Visit Section 3,* p. 18.

[71] Bjornberg and Cranston, *Report of an Advisory Visit Section 3,* p. 18.

[72] Bjornberg and Cranston, *Report of an Advisory Visit Section 3,* p. 18.

a) Judges, Prosecutors and the Turkish Constitution

"Aiming for best practice on an independent judiciary, we recommend that the Constitution be amended so as to provide for an institutional and functional separation of the professional rights and duties of judges and public prosecutors."[73]

The current constitution in Part Three, Chapter Three, Section C. Judges and Public Prosecutors, ARTICLE 140 reads:[74]

"*Judges and public prosecutors* shall serve as judges and public prosecutors of courts of justice and of administrative courts. These duties shall be carried out by professional judges and public prosecutors."

"Judges shall discharge their duties in accordance with the principles of the independence of the courts and the security of tenure of judges."

"The qualifications, appointments, rights and duties, salaries and allowances of *judges and public prosecutors*, their promotion, temporary or permanent change in their duties or posts, the initiation of disciplinary proceedings against them and the subsequent imposition of disciplinary penalties, the conduct of investigation concerning them and the subsequent decision to prosecute them on account of offenses committed in connection with, or in the course of, their duties, the conviction for offenses or instances of incompetence requiring their dismissal from the profession, their in-service training and other matters relating to their personnel status shall be regulated by law in accordance with the principles of independence of the courts and the security of tenure of judges."

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[73] Bjornberg and Cranston, *Report of an Advisory Visit Section 3,* p. 18.

[74] The Constitution of the Republic of Turkey Article 140

"*Judges and public prosecutors* shall exercise their duties until they reach the age of sixty-five; promotion according to age and the retirement of military judges shall be prescribed by law."

"*Judges and public prosecutors* shall not assume official or public functions other than those prescribed by law."

"*Judges and public prosecutors* shall be attached to the Ministry of Justice where their administrative functions are concerned."

"Those *judges and public prosecutors* working in administrative posts within the system of legal services shall be subject to the same provisions as other *judges and public prosecutors*. Their categories and grades shall be determined according to the principles applying to judges and public prosecutors and they shall enjoy all the rights accorded to *judges and public prosecutors*."

As can be seen, each section of the article starts with "judges and public prosecutors". It is therefore clear in this constitutional article that judges and prosecutors are linked together on a professional level and appear to be equal members within the court. This as suggested by the report can give the appearance of a more dominant position over the defense attorneys in the judicial system and therefore gives the image of an unfair advantage and should be amended. It hasn't always been this way. In the 1961 Constitution under Article 137 the prosecutor's duties were enumerated, however judges were listed separately starting with Article 132.[75] It wasn't until after the

[75] Constitution of the Turkish Republic, Article 132, 137 pp 36-37, Translated by Sadık Balkan, Ahemt E. Uysal and Kemal H. Karpat for the Committee of National Unity 1961.

coup in 1980 and the Constitution of 1982 that the judge's duties were added to the prosecutor's article together under Article 140.

The transformation of The Supreme Council of Judges (which was created by the 1961 constitution) into The High Judges and Prosecutors High Council in 1981 which placed the Minister of Justice and the Deputy of the Minister of Justice on this judicial board[76] with duties to choose the appeal court members, admission to profession, assignments, disciplinary punishments and dismissal[77] make it clear that the military junta was creating tighter control over the judiciary by the executive branch. The High Council is yet another infringement on judicial insularity and adds yet another example of judicial dependence, since there are members of the Ministry of Justice on the Council and therefore has influence on the judges' performance appraisals and working environment. This is a clear example of a violation of insularity under Larkins' definition. This is covered in section 2 of the advisory report under Independence of the Judiciary.[78] The reason it is included in this paper (which is focused on section 3 of the advisory report) is that the relationship between prosecutors and judges are professionally linked in this Council and it therefore forms one more link in the judicial dependence chain.

[76] Hakimler ve Savcılar Yüksek Kurulu Kanunu, Kanun 2461 13/05/1981.

[77] Hakimler ve Savcılar Yüksek Kurulu Kanunu, Kanun 2461, Made 4 03/06/1983

[78] Bjornberg and Cranston, *Report of an Advisory Visit Section 2,* p. 12

The Commission seems to be asking the Turkish government to separate the two positions and to identify them as distinct roles within the judiciary, as they were in the 1961 Constitution, which should have separate mechanisms, for professional training, pay and promotion. The government has resisted any call for a constitutional change in this regard with the usual argument that this is not uncommon in other European Union member states' constitutions.[79]

b) Re-assignment of prosecutors between courts

"We note the positive information given that Public prosecutors should be reassigned to different courtrooms on a regular basis. However, referring to the information we obtained we recommend that this objective is fully implemented."[80]

The next recommendation in section three is to rotate the public prosecutors between courts so they don't work with the same judges on a continuous basis.[81] This situation can most obviously be an example of judicial dependence in which a prosecutor may spend years working alongside a judge and create a relationship that interferes with the "insularity" of the judge's decision-making.

[79] Bjornberg and Cranston, *Report of an Advisory Visit Section 3,* p. 18.

[80] Bjornberg and Cranston, *Report of an Advisory Visit Section 3,* p. 19.

[81] Bjornberg and Cranston, *Report of an Advisory Visit Section 3,* p. 19

c) Separation of Judges' and Prosecutors' Offices

"We recommend that Public prosecutors either be required to have their offices outside of the courthouse or, if this is not practicable, then public prosecutors have their offices located in a completely separate part of the courthouse from that occupied by judges."[82]

The proximity of the judge's and prosecutor's offices is another point of contention that the Commission believes shows the possibility of undue influence on judges by prosecutors. They recommend that the prosecutors' offices be moved to another building, separate from judges, and, if that isn't possible, then to move them as far away from the judges' offices as possible.[83] The work of prosecutors and judges is fundamentally different with respect to different actors in society. It would seem plausible then that their working environments should reflect that difference.

d) Equality of Arms

"We recommend that measures be taken to ensure equality between prosecution and defense counsel during the course of criminal proceedings. We emphasize the importance of measures to be taken to make defense lawyers fully in position to assure their responsibilities on the subject. We underline the importance of a full implementation of the new regulation

[82] Bjornberg and Cranston, *Report of an Advisory Visit Section 3,* p. 19.

[83] Bjornberg and Cranston, *Report of an Advisory Visit Section 3,* p. 19

enabling defense lawyers to cross-examine and recommend action to be taken to ensure that this is done."[84]

The traditional view of prosecutors in Turkey, according to Turgut Kazan, the former president of the Istanbul Bar Association, is that they act as partial participants in their cases.[85] The defense attorney is on one side, and the prosecutor is on the opposite side representing the public and is therefore not an impartial actor.[86] Therefore, defense attorneys can not ask that a prosecutor remove him or herself from a case due to bias because it is expected that they are biased.[87] Mr. Kazan challenges this traditional view by pointing out a number of paragraphs from the Budapest Guidelines for prosecutors.[88] Under these guidelines, the prosecutor is obligated to seek justice as an impartial participant investigating complaints for both incriminating and exculpatory evidence; if the prosecutor believes at any time the defendant is innocent, the trial can be stopped immediately.[89] Kazan points out that if the prosecutor acts as the harmed party in the case due to the power of their position and relationship with the judge (which will be discussed in this chapter) there can be no equality of arms.[90]

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[84] Bjornberg and Cranston, *Report of an Advisory Visit Section 3,* p. 20.

[85] Av. Turgut Kazan, "1. Savcı Taraf Sayıldığı için Reddedilemeyeceği Anlayısı," *Bir Adli Organ Olarak Savcılık* (Ankara: Türkiye Barolar Birliği Birinci Baskı, 2006) p. 275.

[86] Kazan, "1. Savcı Taraf Sayıldığı için Reddedilemeyeceği Anlayısı," p. 275.

[87] Kazan, "1. Savcı Taraf Sayıldığı için Reddedilemeyeceği Anlayısı," p. 275.

[88] Kazan, "1. Savcı Taraf Sayıldığı için Reddedilemeyeceği Anlayısı," p. 276-277.

[89] Kazan, "1. Savcı Taraf Sayıldığı için Reddedilemeyeceği Anlayısı," p. 276-277.

[90] Av. Turgut Kazan, "2. Savcının Kürsüdeki Yeri ve Yargıçla Çok Farklı İlişkileri," *Bir Adli Organ Olarak Savcılık* (Ankara: Türkiye Barolar Birliği Birinci Baskı, 2006) p. 278.

e) Judges and Prosecutors entering and leaving Courtrooms

"We recommend that public prosecutors be required to enter and leave the courtroom through a door other than that used by the judge. We believe that this could be implemented at least to some extent also in existing courtrooms. "[91]

The next two recommendations involve an interesting connection between the physical design of Turkish courtrooms and the appearance of judicial dependence. In these recommendations, the Commission wishes to end the practice of judges and prosecutors entering the courtroom through the same door together before a hearing, exiting together during recesses and at the end of a hearing.[92] In addition to this, the Commission also requests that the prosecutor and defense lawyer be seated at the same level in the courtroom.[93]

f) The position in Court-rooms of Prosecutors and defense Lawyers

"We recommend that public prosecutors and defense lawyers be positioned on an equal level in court rooms; preferably with both of them sitting at ground level opposite to each other. We believe that this could be implemented at least to some extent also in existing court-rooms. "[94]

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[91] Bjornberg and Cranston, *Report of an Advisory Visit Section 3,* p. 20.

[92] Bjornberg and Cranston, *Report of an Advisory Visit Section 3,* p. 20

[93] Bjornberg and Cranston, *Report of an Advisory Visit Section 3,* p. 21

[94] Bjornberg and Cranston, *Report of an Advisory Visit Section 3,* p. 21.

To many who are familiar with popularized scenes of courtroom dramas where the prosecutor and defense attorney face off against one another before an impartial judge as referee perched high above the fray, the reality of a Turkish courtroom is a sobering experience. The public prosecutor sits next to the judge on the bench where they both face the accused and their lawyer from an elevated platform. It is this position that the Commission wishes to be changed. Because of this staging of the courtroom actors, the prosecutor is compelled to enter by the same door as the judge because they to are sitting behind the bench together. It is not uncommon to see the prosecutor, who sits silent throughout the trial, lean over and whisper in the judge's ear during the proceedings. The prosecutor appears more like the judges assistant than an independent actor of justice.[95] In fact, in an infamous Turkish case called Bariş Davası (The Peace Case), during an objection to the application of a law, the judge clarified the position of the prosecutor by stating that they belong to the court.[96] The message here can be interpreted as a solidification of the traditional perception of the public and legal community that the prosecutor is an agent of the judge and not a separate independent actor within the judicial system.[97] To refer back to the previous recommendation on equality of arms, there can be no equality of arms in any form when there exists a relationship like this between the

[95] Kazan, "1. Savcı Taraf Sayıldığı için Reddedilemeyeceği Anlayısı," p. 277.

[96] Kazan, "1. Savcı Taraf Sayıldığı için Reddedilemeyeceği Anlayısı," p. 277.

[97] Kazan, "1. Savcı Taraf Sayıldığı için Reddedilemeyeceği Anlayısı," p. 277.

prosecutor and judges. Furthermore, it damages the appearance of impartiality in the justice system.[98]

The roots of the prosecutor's position next to the judge are not common-knowledge and therefore are accompanied by an urban legend. When Turgut Kazan was asked for this paper why prosecutors are seated next to judges on the bench, he related a story common among lawyers and subsequently confirmed in numerous newspaper accounts.[99] The story goes, a disrespectful prosecutor was talking to a judge as an equal behind the bench, when the judge said, "You think we are equal because we are sitting together here, do you know why you are sitting next to me?" At which point the prosecutor didn't have an answer and the judge promptly replied, "Because of a carpenter's mistake!"[100] The questions that follow are numerous, for instance: why would a carpenter think that the prosecutor sits next to the judge? Weren't there any blueprints to follow when building the courtrooms? Who *did* design the courtrooms for the new republic? The answers to some of these questions have been lost in the sands of time, but there are extrapolations that can offer some guidance.

Since the Turkish Republic adopted the German criminal procedure code, which was influenced by the same French code previously employed by the Ottomans, it stands to reason they would adopt the designs not only of the

[98] Kazan, "1. Savcı Taraf Sayıldığı için Reddedilemeyeceği Anlayısı," p. 277.

[99] Turgut Kazan, Unpublished personal interview by Garrett Gilmore, 26 November 2006.

[100] Kazan, Unpublished interview, 26 November 2006.

procedures but also the physicality of the French and German system. Even today in France and Germany, prosecutors are seated next to the judges in courtrooms that were built before their systems were reformed.[101] Though this is no longer the norm in Germany's new courthouses, it continues in small courtrooms in small towns such as Kirchhain, which some Germans find strange.[102] In German courtrooms, the judge and prosecutor are separated by a gap of 75 centimeters, which is uniform in all courtrooms that still have prosecutors seated next to judges.[103] Although there is no regulation that stipulates the design of the criminal courtrooms there is uniformity none the less.[104] However, the prosecutor does not enter the courtroom through the same door as the judge. In fact, it is clearly stipulated in German Guidelines for Criminal Procedure issued by the Ministry of Justice that "the prosecutor shall avoid anything that can give the impression of an improper influence of the court, thus shall not enter or leave the courtroom together with the judge/s, neither shall he or she enter the jury room or talk to members of the court during breaks."[105] The implication here is that by making such a procedure, this very action could have been the norm in the past. If prosecutors sit next to judges it seems

[101] Ursus Koerner von Gustoff, "RE: A question for my research," Email to the author, 21 November 2006.

[102] Peter Broidy, This is a website denouncing human rights violation in Germany. It is interesting that the courtroom design would feature as a small part of this website. http://209.85.129.104/search?q=cache:cmljKyjfWQJ:www.eucars.de/violatio/essay/violaeng.htm+prosecutor+sits+next+to+the+judge,&hl=en&gl=uk&ct=clnk&cd=19

[103] Koerner von Gustoff, "RE: A question for my research," 21 November 2006.

[104] Koerner von Gustoff, "RE: A question for my research," 21 November 2006.

[105] Ursus Koerner von Gustoff, "RE: A follow up question for my research," Email to the author, 13 December 2006, Guidelines for Criminal Procedure Nr. 123 translated by Ursus Koerner von Gustoff.

possible that they could have entered the courtroom through the same door as they do in Turkey.

It appears there was a linear move of the physical position of the prosecutor in relation to the judge from French procedure code to German, which both influenced Turkey; not only in criminal procedure but in courtroom design. This, however, is extrapolation as there was no documentation found to explicitly describe the rationale for the Turkish design of its courts. Since the prosecutor was introduced in late Ottoman judicial history by the French Code, it may also be inferred that the prosecutor's current position could have originated from the courtroom design of either the French procedure code of 1808 which was used in 1879 or the German Procedure Code of 1877 adopted in 1929.

g) Prosecutors retiring together with Judges

"We recommend that whenever judges retire to their ante-chamber for the purpose of deliberating on their rulings, the public prosecutor be required to remain inside the courtroom. Where judges remain in the courtroom in order to conduct their deliberation, the prosecutor should not enter into any discussion with the judges during the course of their deliberation."[106]

The final recommendation of the Commission concerning the affiliation of prosecutors and judges requires the prosecutor to stay in the courtroom with

[106] Bjornberg and Cranston, *Report of an Advisory Visit Section 3,* p. 21-22.

the defense attorney when the judge retires to his/her chamber for deliberation.[107] As it stands now, when the judge leaves the courtroom, the prosecutor accompanies them. The Commission goes on to recommend that, when the judges deliberate in the courtroom, the prosecutor doesn't speak with the judge at that time.[108] It is a common belief that practice for the judge to empty the courtroom so that he or she can deliberate with the prosecution.

It is interesting to note that in an appeals decision from the Hukuk Genel Kurulu made the same month as the Commission's advisory visit (that is the basis for the recommendations this paper is discussing) the court decided to reject an appeal. The appeal was based on the argument that because the prosecutor was in the room when the judges were deliberating on the decision (whether to accept the motion to refuse one of the judges) that decision should be overturned. The rational used by the court to deny the appeal was that because of the design of the court building the three judges and the prosecutor are together, but that that didn't mean the prosecutor was speaking with the judges during their deliberation.[109] What is interesting here is we can understand then that if the Republic's Prosecutor does speak to the judges during a deliberation in which they are the only one allowed in the room then this does violate the right of the accused to a fair trial. This is another example of Larkins' insularity definition. The judges understand

[107] Bjornberg and Cranston, *Report of an Advisory Visit Section 3,* p. 22.

[108] Bjornberg and Cranston, *Report of an Advisory Visit Section 3,* p. 22.

[109] T.C. Yargitay Hukuk Genel Kurulu, E. 2005/4-342, K. 2005/433, T. 6.7.2005

that for prosecutors to speak to them during deliberations would present the Ministry of Justice with an unfair advantage of the judge. The legal loophole here appears to be that in the Criminal Procedure Code Article 227 it states that only judges who are deliberating the *final* decision can be in the courtroom. Since this appeals case was based on a decision concerning an interim matter this code doesn't apply. It gives the impression that all the interim decisions that judges make on all motions presented to them in the run up to the final decision don't affect the rights of the accused to a fair trial and therefore the prosecutor can be present in the courtroom when the judges are making their decisions as long as he/she doesn't talk. But since there are no cameras in the courtroom while judges are deliberating it is nearly impossible to know whether a prosecutor is indeed consulting with the judges and/or the judges are allowing them to do so and therefore denying the accused a fair trial. Because the prosecutor is under direction of the Ministry of Justice, their stay in the courtroom with deliberating judges is clearly a lack of insularity from the appearance of governmental pressure. This can only exacerbate the public perception that this relationship creates an undue influence on judges' decision making process. The Commission clearly doesn't make a strong enough case against this type of judicial dependence.

The close relationship between prosecutors and judges that appears to be institutionalized in the Turkish constitution and the criminal procedure code can be further illustrated with examples like the courthouse in Izmir where a

newspaper account from Milliyet describes the cafeteria as segregated.[110] The picture accompanying the article shows a sign hung above a door that reads *Hakim ve Savcı Salon* (Judges and Prosecutors Salon). There is a wall that divides the judges and prosecutors from the rest of the legal community.[111] There they can sit and eat together in continuation of everything else they do together in the courthouse. Besides work within the courthouse judges and prosecutors share lodging provided by the government. Since Turkey pays its public servants poorly they generally provide housing as part of their benefits. In this case, judges and prosecutors share the same housing complexes that the government provides. This however was overlooked by the Commission in its report. The point here is that although the judges and prosecutors *may* not be discussing cases or clients, it is the *appearance* of judges and prosecutors living together, eating together apart from everyone else that epitomizes a negative public perception of undue influence by prosecutors on judicial decision making, therefore making a breach of judicial independence.

The existence of such a relationship between a judge and a prosecutor causes dangerous results.[112] It seems improbable that a judge can not be affected by such a system. One example is the request of prosecutors to deny the defense access their clients' case file. Such a request goes through the judge for approval and with their close relationship they are more likely

[110] "Avukatlar 'duvara karsı'," *Milliyet,* Friday October 27 2006.

[111] "Avukatlar 'duvara karsı'," *Milliyet,* Friday October 27 2006.

[112] Kazan, "2. Savcının Kürsüdeki Yeri ve Yargıçla Çok Farklı İlişkileri," p. 282.

to grant such a request.[113] This is the view of Mr. Kazan, which shows distinctly how this relationship casts doubt on the independence and therefore expectation of justice from the Turkish judicial system.

As the Commission quite clearly points out, it is not any one of the recommendations listed above that prevents judicial independence. If we apply Larkins' approach, these are clear examples of judicial dependence and, taken as a whole, the very existence of these judicial dependent factors makes a strong case for a lack of judicial independence in the Turkish judicial system and is therefore a detriment to accession.

[113] Kazan, "2. Savcının Kürsüdeki Yeri ve Yargıçla Çok Farklı İlişkileri," p. 282.

Chapter 3

Government Response to Recommendations

The Turkish government's response to Chapter 23 Judicial and Fundamental Rights of the accession process has been both enthusiastic and retractile. The main argument used by the Turkish government for not changing Article 140 to separate the location of duties of judges and prosecutors within the constitution as recommended has been that other EU member countries have similar constitutional articles and therefore is not necessary to go through the difficulty of the constitutional amendment process.[114] The Commission continues to stand by the recommendation, and, on the face of it, the Turkish government makes a solid argument in comparing its own system to that of other EU members. The Commission however rebuffs all arguments based on comparative analysis of other member countries. It is their aim to set the best practices stipulated in documents like the UN Basic Principles on the Independence of the Judiciary, and the Bangalore Principles of Judicial Conduct along with Council of Europe recommendations such as the European Guidelines on Ethics and Conduct for Public Prosecutors known as "The Budapest Guidelines", which was adopted one month before the last advisory visit to Turkey took place. The Budapest Guidelines were influenced by the Committee of Ministers' Recommendation (2002) 19 on the role of public

[114] Bjornberg and Cranston, *Report of an Advisory Visit Section 3,* p. 18.

prosecution in the criminal justice system.[115] It is important to consider these documents when assessing the reforms requested by the Commission and implemented by the Turkish government. It doesn't appear that the Commission is attempting to hold the Turkish judiciary up to a European standard but rather a best practices standard that is much more difficult to achieve.

In the second Advisory report released in 2004, training was a major issue for both judges and prosecutors and took up the majority of the document. The Turkish authorities began a vigorous project to create the Justice Academy to better train judges and prosecutors. One such project was called Judicial Modernisation and Penal Reform in Turkey. The Justice Academy is to provide pre-service and on the job training for judges and prosecutors.[116] The project sent a number of Academy staff to visit other justice training centers in France, the Netherlands and Greece.[117] In May 2005 a group of instructors and students from the academy visited Strasburg to become familiar with the European institutions there and observe the training of French civil servants.[118] Along with the Justice Academy, this project worked with penal reforms, with a total price tag of ten million

[115] Council of Europe, *The Budapest Guidelines,* pg 4.

[116] Council of Europe http://www.coe.int/t/e/legal_affairs/about_us/activities/Prog_Turkey_DvpsE.pdf

[117] Council of Europe http://www.coe.int/t/e/legal_affairs/about_us/activities/Prog_Turkey_DvpsE.pdf

[118] Council of Europe http://www.coe.int/t/e/legal_affairs/about_us/activities/Prog_Turkey_DvpsE.pdf

euros.[119] In the third advisory report, the Commission makes it clear that they are pleased with the progress of the Justice Academy and have been quite patient with its continued development. The creation of this new institution for educating the judiciary was not a contentious issue for any of the actors involved. A possible reason for this could be the low threat to any position holders in the judiciary in –contrast to section three of the third report—which deals quite specifically with the position of the prosecutor in judicial procedure and threatens the appearance of their elevated position in the court. It is this area where we find considerable resistance from the Ministry of Justice.

The new Justice Academy will be given the responsibility of educating prosecutors and judges about the new criminal procedure code. The Ministry plans to instruct prosecutors in the new procedure article 227/1 which prevents any contact with the judges during their deliberations it was written to nullify a recommendation from past reports and is reiterated in section 3.[120]

In section three of the advisory report the Commission recommended a number of structural changes to the court buildings and courtrooms themselves. The government has moved to put these changes into effect in their new construction projects. The Turkish government has spent

[119] Majid Mohammadi, *Judicial Reform Projects Sponsored by International Donors in Egypt and Turkey.* http://www.policy.hu/mohammadi/Judicial%20Reform%20Projects%20Sponsored%20by%20International%20Donors%20in%20Egypt%20and%20Turkey.html

[120] Bjornberg and Cranston, *Report of an Advisory Visit Section 3,* p. 22.

237,810,665 euros to build 66 new courthouses.[121] Currently 26 courthouses are being built and by the end of 2006, six of them are expected to be finished with a total cost of 40,150,303 euros for the six courthouses and a grand total of 329,294,545 euros when the last 20 are built.[122] There are 9 more courthouses that have completed the project phase and their expected construction cost is 18,636,363 euros with another 29 courthouses still in the project phase and 15 more in the investment phase all of which is being paid for out of the Ministry of Justice's budget.[123] This is an enormous investment on the part of the Turkish government.

The design of the courthouses can alleviate some of the Commissions concerns regarding the affiliation between judges and prosecutors. As mentioned in chapter 3, judges and prosecutors currently enter the courtroom together through the same door. However, the government responds that this will change in the design of the new courtrooms.[124] Another concern that can be addressed by a courtroom design change is the position of the prosecutor in relation to the judge and the defense attorney. Currently the prosecutor is behind the bench next the judge and this seating design brings into question the integrity of the judge under the Bangalore Principles and can be construed as an instance of judicial dependence in

[121] Republic of Turkey, "*Screening Chapter 23 Judiciary and Fundamental Rights Agenda Item 1: Judiciary,"* October 12-13 2006.

[122] Republic of Turkey, "*Screening Chapter 23 Judiciary and Fundamental Rights Agenda Item 1: Judiciary,"* October 12-13 2006.

[123] Republic of Turkey, "*Screening Chapter 23 Judiciary and Fundamental Rights Agenda Item 1: Judiciary,"* October 12-13 2006.

[124] Bjornberg and Cranston, *Report of an Advisory Visit Section 3,* p. 21

which the prosecutor could violate the insularity of the court. The government has changed its approach to this problem twice—the first time in 2003, when the Ministry said it would place the prosecutor on the floor with the defense attorney.[125] This position changed however in 2004 with the Ministry now placing the defense attorney at the same level as the prosecutor in courtrooms in Ankara, Diyabakır and Erzurum Courts of Appeal, which will be open soon.[126] The solution is interesting in that, rather than lowering the prosecutors down and presenting the judge as the sole point of authority lending no question to their insularity and impartiality in appearance, the Ministry has instead chosen to elevate the defense attorney. The government may in fact be making further changes to the design in the courtrooms that are still in the project phase.[127] The question of where the defendant will be positioned has not been answered, with the defense attorney elevated to the same position as the prosecutor and by extension the judge where will the accused be and how will the positioning of their council affect the appearance of justice?

After touring the Bakırköy Adliye Sarayı (Bakırköy Courthouse), which was completed in January 2007 with an opening ceremony on the 25th of March and began working at full capacity on the 20th of April[128], it is clear the government has chosen not to include some of the recommendations

[125] Bjornberg and Cranston, *Report of an Advisory Visit Section 3* p. 21

[126] Didem Bulutlar-Ulusoy, Delegation of the European Commission to Turkey, "FW: Some Questions," Email to the Delegation of the European Commission to Turkey, 15 November 2006.

[127] Bulutlar-Ulusoy, "FW: Some Questions," 15 November 2006.

[128] Istanbul Barosu. www.istanbulbarosu.org.tr

discussed in Chapter 2 into its design. The prosecutor is still seated next to the judges behind an elevated bench. The defense lawyer is still positioned on floor level behind a separate table. However, in this courthouse the judges' chambers have been segregated from the prosecutors. The judges' chambers are adjunct to their courtrooms. The prosecutors' offices by contrast are all located in Block 4 of the immense courthouse.

In figure 1 of the appendix there is a layout of one of the courtrooms. It bears little difference to courtrooms already in existence. If the government were serious about making changes to the position of the prosecutor in respect to the recommendations of the Commission they could easily have done so in the Bakırköy Courthouse courtrooms.

The government maintains that another concern stipulated in the advisory report is prosecutors entering and exiting the courtroom through the same door as the judge. The Ministry says it will change this in the layout of the new courtrooms but resist any change in the current courtrooms.[129] As it stands now, in many cases it wouldn't be possible for prosecutors to enter and the leave the courtroom with the defense attorney and public because they are behind the bench with the judge and cannot reach the public door.

After the publication of the Commission's report the Ministry of Justice issued a circular which reiterated Article 227 which excludes prosecutors

[129] Bjornberg and Cranston, *Report of an Advisory Visit Section 3,* p. 21.

from the courtroom when judges are making their final decision.[130] However, since compliance with code to bar prosecutors (who work for the Ministry of Justice) from the courtroom is enforced by the Judges and Prosecutors High Council, which isn't fully autonomous from the Ministry of Justice, putting it into practice appears doubtful.

Along with the equality of elevation and the public prosecutor's access to the same door as the public in the design of the new courthouses the offices of the prosecutors will be changed.[131] For large complexes the prosecutors will be placed in separate blocks from the judges, while in smaller courthouse on different floors and for very small houses in another hall or down the hall from the judges' offices.[132] In the Bakırköy Courthouse for example it was feasible to completely separate the offices because of the large size of the building.

[130] Cumhuriyet savcılarının müzakerelere katılmamaları, B.03..0.CİG.0.00.00.05-659-45-2006/34332

[131] Bjornberg and Cranston, *Report of an Advisory Visit Section 3,* p. 21.

[132] Bjornberg and Cranston, *Report of an Advisory Visit Section 3,* p. 21.

Conclusion

The European Union can not directly state that Turkey has a low level of judicial independence or that judicial independence in Turkey is weak or make similar loaded statements. The nature of EU politics rightly discourages this type of discourse since value judgments such as these are difficult to prove; measuring judicial independence is a tricky business that is far too murky for politicians to wade into. They have therefore established recommendations to reform specific areas of concern in the Turkish judicial system while being very careful to appear nonjudgmental. However by identifying these recommendations as specific types of judicial dependent factors that inhibit either "insularity", "impartiality" or "scope of authority," an understanding emerges as to what degree reform is really needed in the Turkish judiciary.

The mere length of this 85 page document like *The Functioning of the Judicial System in the Republic of Turkey Report on an Advisory Visit 2005* should be a clear indicator itself of how much reform is still needed. Unlike other Chapters under negotiation the recommendations in Chapter 23 are not just simply streamlining the bureaucracy. Examination of these recommendations shows the impact they may have on the rights of citizens to a fair trial that has a significant impact on their daily lives. Looking these recommendations through the filter of *judicial dependence,* we get a clear image of a system in dire need of reform.

The reforms already made by the Ministry of Justice such as the new court building initiatives and the creation of the Justice Academy do give encouragement to the process of Turkish accession. Turkey, unlike most new member states, has a long judicial history that has been adopted from European models; therefore, it doesn't need reforms as extensive as the ex-communist states (which were the last entrants into the Union) because it was never under the Soviet system. However, because of this entrenchment, tossing out the whole system and starting from scratch isn't really an option. Although it is unclear if the Ministry of Justice has the political will to complete and implement the reforms enumerated by the Commission in anything but a surface level.

The Commission is asking the Ministry to give some of its power in the judiciary over to judges. As any governmental entity it is unlikely to want to do this. Not only as an institution but also individuals who work for the Ministry such as prosecutors will not want to give up their position in the courtroom. Nor will they want to be left out of deliberations.

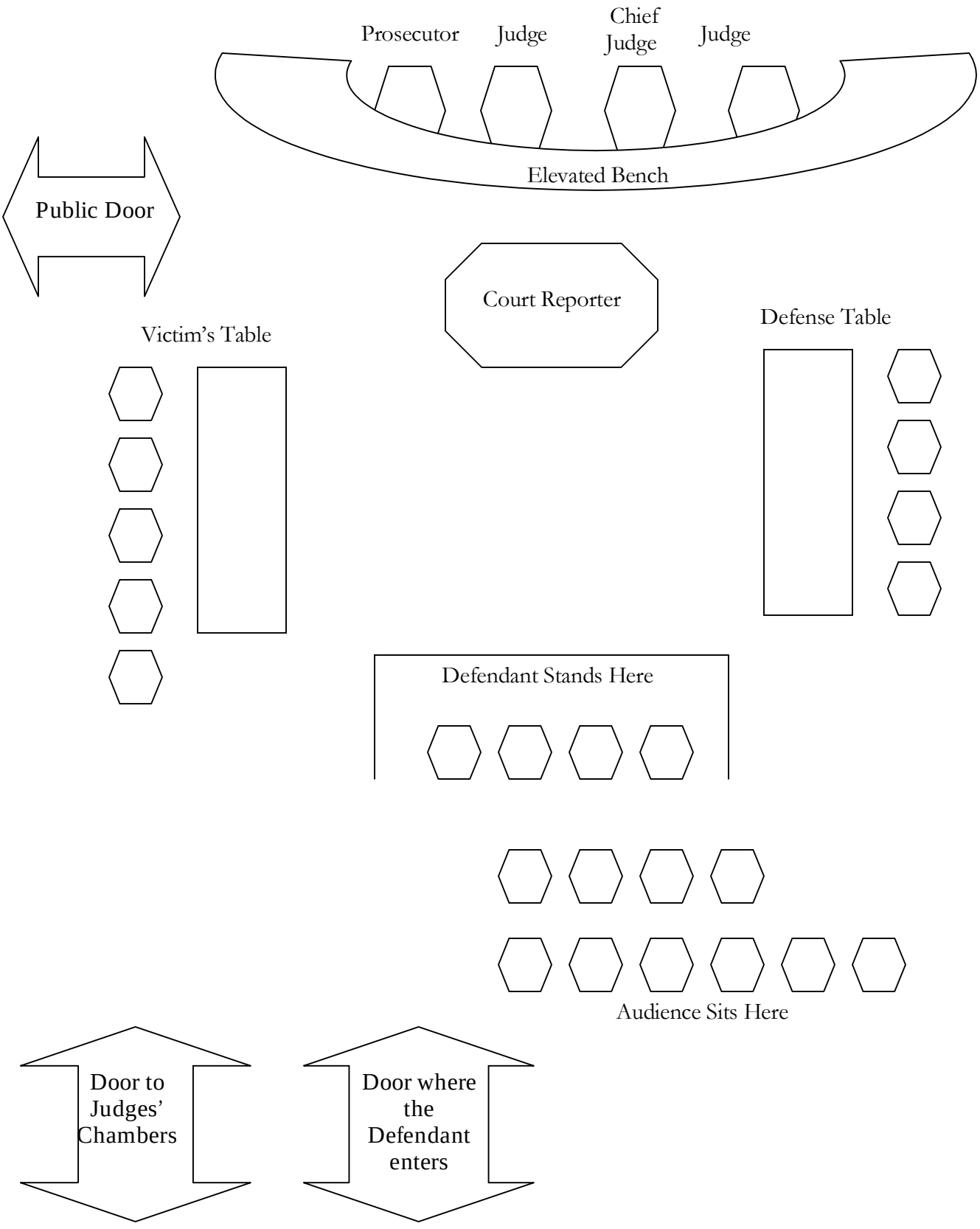
It is important to remember that it isn't the actual independence of the judiciary that is being identified in this paper. It is the dependence of the judiciary on other branches of the government that is the main concern. In this case the Ministry of Justice represented by the prosecutors specifically. Each recommendation of the Commission is not a factual indictment of the judicial system. They are not making specific claims of actual intrusion of

the Ministry of Justice into the workings of the judiciary by prosecutors toward judges. They are only pointing out where the relationship between to two appears to allow for the possibility of what Larkins identifies as Judicial Dependence.

The lack of insularity between these officers of the court through the use of *the same* door in the courtroom, same lodgings, same segregated courthouse restaurant, *same* elevated bench, *same* apparent privilege of remaining in the courtroom or retiring to judges chambers during deliberations of decisions, *same* governing body making employment and punitive decisions, *same* colored robes, *same* article of the constitution enumerating the duties of their offices, and the *same* prosecutor assigned to the *same* judge for years, is overwhelming evidence that in this area of the judicial system there is grave need to do more than the Ministry is doing to address the concerns of the Commission. The responses of the Ministry have not addressed the most pressing issues identified by the Advisory Report and therefore it is the conclusion of this paper due to the relationship between the judges and prosecutors (and the lack of insularity it shows) there is a preponderance of Judicial Dependence in the Turkish Judiciary.

Appendix

Figure 1


Prosecutor
Judge
Chief Judge
Judge
Elevated Bench
Public Door
Court Reporter
Victim's Table
Defense Table
Defendant Stands Here
Audience Sits Here
Door to Judges' Chambers
Door where the Defendant enters

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