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The Administration of Justice in Turkey: The Role of the Lawyers

ABSTRACT – In this article, at first, I will make general explanations about the administration of the Turkish Judicial system and the relevant subjects. Secondly, I want to point out the role of the lawyers among these subjects in this system.

KEYWORDS – Turkish Judicial system, Faculty of law, Lawyers, Legal Professions.

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1. Introduction

After the establishment of the Turkish Republic in 1923, the Turkish legal system underwent a very important transformation thanks to secularism. In addition to this step, Turkey has faced other major law codification efforts to make its system compatible with the European Union, thanks to the agenda of EU membership which has been expected for more than 50 years. As of today, there are four different types of proceedings in Turkey. These are constitutional judiciary, administrative judiciary, judicial judiciary and dispute judiciary. Judges and prosecutors in these judicial systems have different duties and powers. On the other hand, they are in the same organization in administrative terms. This leads to drawbacks in terms of the independence of the judiciary. Lawyers have an indispensable position within the Turkish judicial system. Significant changes have been planned with the Judicial Reform Strategy Document, which was accepted as a road map by the political will regarding the entry into the profession of

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law, which was regulated by a special code (Advocacy Act). In this article, at first, I will make general explanations about the administration of the Turkish Judicial system and the relevant subjects. Secondly, I want to point out the role of the lawyers among these subjects in this system.

2. A Brief Information About the History of the Turkish Law System

Modernization movements which can be mentioned as westernization in Turkish Law started in the first half of the 19th century. Kanunnamei Ticaret (Code of Commerce) of 1850 was the first commercial code and consisted of the exact translation of the French Code de Commerce of 1807. Besides, Mecelle came into force in 1877 as the first Civil Code.¹ Mecelle, prepared by the commission headed by the Minister of Justice of the period, Ahmet Cevdet Pasha, was an original code unlike the other important codifications and is still considered as a remarkable workshop for law historians even today.² In 1876, Kanuni Esasi was adopted as the first constitution in terms of contemporary requirements³. However, in Turkey, the real meaning of the codification efforts of the reforms for modernisation was carried out after the Republic of Turkey was founded in 1923. During this period, the legal system was secularized, the continental European legal system was adopted in both private and public law disciplines and codification movements were inspired by contemporary European laws. For example, the Civil Code (1926), the Code of Obligations (1926) and the Commercial Code (1926) were inspired by Swiss law, the Criminal Code

¹ Mecelle was prepared by a commission headed by Ahmet Cevdet Pasha, a lawyer and historian during the Ottoman Empire.

² O. ÖZTÜRK, *Mecellenin Külli Kaideleri*, İstanbul, 2019, 21.

³ Kanuni Esasi was a result of the constitutional efforts that started in 1807 by Senedi İttifak. Thanks to Kanuni Esasi, the governance of the Empire was transformed into constitutional monarchy from autocracy.

(1926) was inspired by Italian criminal law, the Code of Administrative Judiciary (1982) was inspired by French law and the Code of Civil Procedure (1927) was inspired by German law. For all these reformations, the first minister of justice Mahmut Esat Bozkurt's contribution and leadership should be underlined.⁴

Various amendments have been made to these legislations over time. However, the most significant and effective step of these amendments and renewal efforts took place in Turkey just after Turkey had gained the European Union candidate country status in 1999. Turkey got the European Union candidate country status in the Helsinki Summit in 1999. This Summit was a very important turning point in EU and Turkey relations which started in 1959. By this summit, Turkey undertook to harmonize its legal system with the European Union legislation. The first concrete result of this was the abolition of death penalty, which had not been implemented since 1984, by a constitutional amendment in 1999.⁵ In order to harmonize with the European Union legislation, the political authorities preferred to amend the legal system in full instead of making changes in the legislation. For this reason, renovation efforts were carried out in the basic and major codes in addition to the specific ones. The New Turkish Civil Code⁶ (No. 4721) entered in to force in 2002, the New Turkish Penal Code⁷ (No. 5237) in 2005, the New Civil Procedure Code⁸ (No. 6100) in 2011, the New Turkish Code of Obligations⁹ (No. 6098) and the new Turkish Code of Commerce¹⁰ (No. 6102) in 2012. To put it briefly, after graduating from Ankara University Faculty of Law in 1996, I had to re-learn and study all the basic

⁴ E. BOZKURT, *Bozkurt Lotus Davası*, Ankara, 2012.

⁵ For more detailed information, M. A. ÖZER, *Avrupa Birliğine Tam Üyeliğin Eşinde Türkiye*, in *The Journal of Management and Economics*, 16, 1/2009, 89–105.

⁶ Official Gazette Date: 08.12.2001, No: 24607.

⁷ Official Gazette Date: 12.10.2004, No: 25611.

⁸ Official Gazette Date: 04.02.2011, No: 27836.

⁹ Official Gazette Date: 04.02.2011, No: 27836.

¹⁰ Official Gazette Date: 14.02.2011, No: 27846.

codes that I had already learned during my studentship years. Some of the codification efforts in these basic codes were successful as the means of reformation. Unfortunately, in some, stability has not been achieved. As an example, after the Turkish Penal Code was enacted in 2004, it had to be amended again fully although it had come in to force in 2005. Another example of the failure is the Turkish Code of Commerce (TCC). TCC emerged as a worse codification effort. As a matter of fact, after the publication of the TCC in the Official Gazette in 2011, it had been amended two times even before it entered into force in 2012 and nearly one hundred articles were amended. After its entry into force, the TCC has been subject to amendments sixteen times within seven years. As a commercial lawyer, I must admit that this situation is an absolute failure and disappointment for the codification of TCC.¹¹

3. The Principles of the Turkish Judicial System

There are 4 judicial sections in the Turkish judicial system. These are the Constitutional Judiciary, Judicial Judiciary, Administrative Judiciary and Conflicts Judiciary.¹² The Constitutional Court is the authorized judiciary organ in the Constitutional Judiciary. It is located in the capital city of Turkey, Ankara. The Court consists of a 15-member judicial committee. Twelve of these members are appointed by the President. Three of them are elected by the Turkish Grand National Assembly. This structure of the court results in serious question marks related to the independence and reliability of the constitutional judiciary. The reason for these question marks is that the constitutional court members are elected by the president, who is the head of the executive body. In addition to that, the risk is that the

¹¹ M. BAHTIYAR, *Ticari İşletme Hukuku*, İstanbul, 2019, 10; M. YASAN, *Ticaret Hukuku I*, Sakarya, 2020, 11.

¹² H. KALABALIK, *Temel Hukuk Bilgisi*, Ankara, 2019, 451.

priority of qualification can be ignored in case the presidency uses its authority for the election.

The Constitutional Court has the duty to supervise the constitutionality of codes, decrees and statutes. In addition to this traditional fundamental task, the Constitutional Court also functions as a high council for judging a number of specific officials on specific crimes. The closure of political parties and the financial control of political parties are among the other duties of the Constitutional Court. Another task of the Constitutional Court is to examine individual applications based on alleged violations of the right to a fair trial.

Judicial judiciary consists of a three-stage structure. The first instance courts are divided into two groups: civil and criminal courts. The courts of appeal are the second instance judicial judiciary body. The Supreme Court (Yargıtay) which is in the capital city serves as the appellate court. There is a similar structure in administrative jurisdiction. The first instance administrative courts are general administrative courts and tax courts. The courts of appeal of the administrative courts are the second instance judiciary organ of administrative judiciary. The high court (Danıştay) in administrative jurisdiction is the Council of State in Ankara. This Council functions as both jurisdiction and consultancy. The dispute judiciary consists of the Dispute Court. The Dispute Court resolves the disputes between authorities and judgments of the courts of different jurisdictions within the judicial organization.¹³

4. The Administration of Judges and Prosecutors in Turkish Law

In Turkey, judges and prosecutors have separated powers but on the other hand, the judicature and the prosecutor are situated in the same

¹³ *Ibidem*, 465.

organization in the administrative sense. The entrance exam to the profession is titled as judgeship and prosecution exam. Internship, which is required to be completed after passing the exam, is called judgeship and prosecution internship. Judges and prosecutors can get informed that they will serve as judges or prosecutors only after the internship is completed. This administrative structure is strongly criticized by the professional and academic platforms.¹⁴ According to these critics, it is inconvenient for judges and prosecutors to be in the same administrative organization in terms of judicial independence and impartiality of the judges. But unfortunately, there has not been any attempt in changing it yet. Even the judicial reform strategy document which has been accepted as a road map by the Government does not contain any improvements in this issue. Another point which is much criticised is the structure of the professional organization of judges and prosecutors. The professional organization to which judges and prosecutors are affiliated is the Council of Judges and Prosecutors. The chairman of the board is the Minister of Justice. As a representative of the political power, the minister's having such a significant role is also criticized by the academic environments. Candidates accepted to the professions of judges and prosecutors are determined by the Board of Judges and Prosecutors. The presence of the Minister of Justice as chairman in this board and the appointment of the members of the board by the President, who is the head of the executive, can also be considered as a violation of the principle of separation of powers that became valid in the Constitution.¹⁵ This distorted structure of the professional organisation causes an unignorable handicap for Turkey's path to the European Union membership.

¹⁴ For a detailed study, K. T. ÇALIŞIR, *Teoride ve Pratikte Yargı Bağımsızlığı*, Ankara, 2016.

¹⁵ Y. OĞURLU, B. GÜRPINAR, *Introduction to Turkish Law*, İstanbul, 2010, 68.

5. *The Role of the Lawyers (Advocates, Attorneys) in Turkish Law*

In the Turkish legal system, the provisions related to lawyers are contained in both the Civil Procedure Code (No. 6100) and Code of Criminal Procedure¹⁶ (No. 5271). In addition to these, there is a special code which is specific to the lawyers in Turkish law. Lawyers' Code¹⁷ (Legal Practitioners' Act) came into force in 1969, numbered as 1136. Lawyers have been recognized as one of the indispensable elements of the proceedings in Turkish law. In criminal proceedings, defence with support of lawyers has been accepted as a necessity in cases related to certain crimes. Again, during the criminal investigation and prosecution phase, it is regulated as a legal obligation to take the statements of the suspects with the representation of a lawyer. However, in judicial proceedings, there is no obligation to be represented by a lawyer.

5.1. *Requirements for Being Lawyer (Advocate, Attorney)*

In Turkish Law, the primary and first legal requirement of the law profession (advocacy) is to be graduated from a faculty of law. As of October 2019, Turkey has seventy-nine faculties of law. Thirty-seven of these faculties are in public universities and forty-two of them are in private universities.¹⁸ This number is really high, especially compared to countries which follow traditional and institutionalised law education such as Germany, France and Italy.¹⁹ In fact, the quality of education did not follow a parallel course with the increase in the number of faculties. Considering

¹⁶ Official Gazette Date: 17.12.2004, No: 25673.

¹⁷ Official Gazette Date: 07.04.1969, No: 13168.

¹⁸ <http://hukuk.sdu.edu.tr/tr/baglantilar/diger-hukuk-fakulteleri-1665s.html>

¹⁹ R. KARASU, *Türkiye ve Almanya'da Hukuk Eğitimi Diplomaların Denklığı*, in *Gazi University Journal of Law Faculty*, 20, 1/2016, 3–26.

the total number of law faculties was just six when I started at Ankara University Faculty of Law as a student in 1992, the recent number of law faculties is conspicuous, which is criticized by all sectors of law professions.²⁰ Unfortunately, the current situation leads to a decrease in the quality of education in law faculties for the populist approaches. Political will has considered the law faculties as an election investment card, so many law faculties have been established in a short time. Turkish Higher Education Council (YOK) has not reacted to this attitude. Instead, YOK has ignored academic and scientific priorities. Adequate academics in terms of both quality and quantity could not be employed in the newly established law faculties.²¹ The increase in the number of law faculties in private universities has led academics to leave public universities because of the financial expectations. The number of professors is insufficient and because of this, in law faculties of some public universities the courses have to be conducted by research assistants. Unfortunately, this deficiency is such that it cannot be eliminated in a short time. On the other hand, the most important problem of law faculties in private universities is low standards in terms of scoring in student selection. Lack of library services and not being tied to the European Union accreditation system yet are other reasons for the handicaps in terms of the quality of education in law faculties in particular in public universities.

After graduating from the faculty of law, a one-year internship must be completed in order to practice law as a lawyer. The first six months of this 1-year internship are trained in the courts and prosecutor offices and the second six months in a law office under the supervision of a 10-year experienced lawyer. Upon completion of the internship, a lawyer license is

²⁰ K. GÖZLER, *Akademik Değersizleşmesi Üzerine*, <http://www.anayasa.gen.tr/degersizlesme.htm>, 02.04.2020.

²¹ K. GÖZLER, *Hukukçu Olmayan Hukuk Dekanları, Türkiye’de Bazı Hukuk Fakültelerine Hukukçu Olmayan Dekan Atanması Hakkında Eleştiriler*, <http://www.anayasa.gen.tr/dekanlar.htm>, 04.04.2020.

obtained and the title of a lawyer is acquired. In contrary to the British system, there is no rating or classification method of solicitor and barrister among lawyers. In other words, a person who gains the title of lawyer (attorney, advocate) can work with the attorney robe at the Supreme Court even the following day of being licenced. Unfortunately, at present, there is no requirement for a bar or advocacy exam to start or complete the internship. On the other hand, at the end of the internship bar are allowed to organise an oral exam which is considered only as a procedural step. In the 2000s, the advocacy (attorneyship) exam was enacted but the provision was annulled by the Constitutional Court. This has been criticized for many years. Thereupon, an exam condition was elaborated in order to start a legal internship in the Judicial Reform Strategy Program.²² As of 31 October 2019, the Entrance to Legal Profession Exam entered into force as a condition of qualification exam in order to start the internship of the lawyer profession. Unfortunately, this test requirement has been accepted for graduates of the law faculties starting from 2020. In other words, the qualification exam will be applied for the graduates after five years as the first time, of course, unless another populist approach is followed and the exam condition is repealed by that date.

5.2. The Professional Organisation of the Lawyers

The professional organisation structure of the lawyers has two levels. On top, the Union of Turkey Bar Associations exists.²³ The Union has a legal personality and it is legally accepted as a public institution. The Union of Turkey Bar Associations is a supreme body. As a matter of fact, Bar Associations have been established in each provincial centre and Bar Associations are also professional organizations having a legal personality

²² http://www.sgb.adalet.gov.tr/ekler/pdf/YRS_TR.pdf

²³ <https://www.barobirlik.org.tr/en>

as public institutions. Lawyers are required to be registered in bar associations. Otherwise, they cannot exercise the rights and powers conferred by the title of lawyer. The lawyers of the state institutions which have the status of civil servants are the exception to this rule. Although these lawyers have all the rights and powers of the lawyer title, they do not have to register to the Bar Associations.

5.3. The Relationship Between Lawyers and Other Legal Professions

Lawyers can also act as mediators in civil law disputes. Mediation can be performed after the pre-training and examination requirements are met, provided that you are a lawyer (graduate of a law faculty) with five years of professional experience. Lawyers can work as conciliators for criminal law disputes too. The requirements are similar, such as getting a pre-training course and succeeding in the central exam. However, unlike mediators, conciliators do not need to be lawyers. Graduates of a faculty other than law faculty may be conciliators, too, as long as they provide that they meet the extra requirement as succeeding in certain law courses during their bachelor studies. Lawyers may get licenced as notary, too. But for practising as a notary, lawyers should give up their law practising as a profession. In other words, advocacy and notary are not professions that can be carried out simultaneously. Attorneys can also take the Judges and Prosecutors' exams provided that they have five years of professional experience. The lawyers who meet this experience requirement can start the internship after succeeding central and oral examinations. Another profession related to advocacy is an academic position. In Turkey, the academicians who have associate professorship and full professorship title in law faculties can act as professional lawyers, too. In other words, advocacy (attorneyship) and

academic professions can be performed simultaneously by academicians who have at least associate professorship titles in law faculties.

5.4. Statistics Related to the Legal Professionals

Currently in Turkey, as of October 2019, the number of active lawyers is 116,779.²⁴ 65,423 of the lawyers are male and 51,356 are female. There are 14,131 judges and 6,588 prosecutors. Approximately 65% of judges and prosecutors are male and 35% are female.²⁵ The number of notaries is around 1,900.²⁶ However, the number of students in law faculties is over 90,000. This situation causes the graduates of law faculties to turn to occupations other than lawyers, judges, prosecutors and academicians.²⁷ As a matter of fact, with the Judicial Reform Strategy Program, it is aimed to employ a certain proportion of law school graduates as chiefs in the Police Organization.²⁸

6. Conclusion

In comparison to the previous decades, the professional situation of lawyers raises many question marks in the mind. Especially for the new graduates, these question marks are deeper and stronger in economic aspects. Decreasing the number of law faculties, closure or restriction of the

²⁴ <https://www.barobirlik.org.tr/Haberler/avukat-sayilari-31122018-80448>

²⁵ <https://www.hsk.gov.tr/Eklentiler/Dosyalar/a062014e-6b7b-4ff7-bc47-4ba6a4478b6b.pdf>

²⁶ <https://www.sabah.com.tr/gundem/2018/05/25/binlerce-kisi-bunu-bekliyordu-noter-olabilmek-icin>

²⁷ U. AKTAR, *Türkiye’de Hukuk Eğitimi ve Avukatlık Mesleği*, <http://blog.milliyet.com.tr/turkiye-de-hukuk-egitimi-ve-avukatlik-meslegi/Blog/?BlogNo=594613>, 19.09.2018.

²⁸ http://www.sgb.adalet.gov.tr/ekler/pdf/YRS_TR.pdf

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law faculties in private universities or decreasing the capacity of newcomer students in law faculties may be considered as suggestions. On the other hand, advocacy could be organized as a profession which can be performed only by professional and instructional law firms too. But in my opinion, all these solutions would have just temporary effects. For a permanent and long-term resolution, the political power and the governmental administrative body of law professions must give up acting under the effect of populist approaches as first. Secondly, the problems related to law professions must be evaluated by scientific priorities. Finally, it is certain that universal law principles such as the rule of law, the hierarchy of norms, the independency of law, the presumption of innocence and the separation of powers must be provided in the highest level.