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JUDICIAL TRAINING IN TURKEY IN LIGHT OF CONSTITUTIONAL TRADITIONS AND EUROPEANIZATION

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ABSTRACT

In recent years, the strengthening in Turkish constitutional culture of the rule of law and pluralism appeared as a further breach of the Kemalist ideology of “sacralization” of the State. Nevertheless, the principle of statehood, characterizing the Republic of Turkey since its creation in 1923 and now affirmed in art. 1 of the Constitution still influences Turkish institutions. With regard to judicial system, while Euro-driven reforms and the application of the conditionality principle led to its modernization, the Constitution sketches an organization based on both

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institutional dependence and corporatism. These features are reflected also in judicial education, notwithstanding the establishment of a judicial academy in 2003 and the reform of training catalogues.

Referring to legal and political science literature, as well as to documents and reports of the Council of Europe and of the European Union, this paper examines through the lens of training policies the evolution of Turkish judicial culture in relation to independence and pluralism, sketching a first hypothesis on the effectiveness of judicial training reforms in the perspective of European enlargement. Taking into account three typical elements of any judicial training system—institutions, contents and methods—it highlights the difficulties encountered in reforming judicial training. In particular, it argues that the resistance to open up the judicial elite to social pluralism in order to allow the judiciary to act as an interface with civil society is due to the peculiarities of the Turkish socio-political system (*i.e.* a non-homogeneous society and the need of “lay” guardians of the Republic). As a consequence, European influence is still limited to the introduction of specific training catalogues, such as human rights and EU law, but (still) do not really affect the institutional framework, nor adapts judicial training contents and methods to social and political pluralism.

I. INTRODUCTION

This paper focuses on the changes in the Turkish judicial training system in the context of the European convergence, which has also involved other major legal reforms or projects such as the harmonization packages adopted between 2002 and 2004 and the Judicial Reform Strategy Action Plan launched by the Turkish Government in 2009. The recent evolution of Turkish judicial training is strictly related to the Europeanization of the national legal system since the Helsinki European Council held in December 1999, recognizing Turkey as an EU candidate country. Thus, a joint programme between the Council of Europe and the European Union on “Modernization of the Judiciary and Penal

Reform” has been implemented from 2004 to 2007.¹ Among its specific objectives, the programme included the “Training of judicial staff strengthened according to European standards and practices.” Furthermore, Turkish judges and prosecutors participated in specific programmes aimed at providing training in sensitive areas. In this paper, I investigate the relation between changes in judicial training and the judicial culture,² arguing that the Turkish-European convergence in the field of judicial training is generating changes in specific areas of legal knowledge and allowing a transnational *diffusion* of rules, but does not deeply affect the judicial mentality nor involve the contaminations of judicial cultures.

For this purpose, I will briefly outline some distinctive features of the Turkish judiciary, and then analyze closer the judicial training system. As a preliminary remark, it is necessary to stress that I limit my discussion to the ordinary courts and judges, without considering administrative courts, military courts and the Constitutional Court. However, these different judicial branches are partly interconnected and are characterized by a partially common training.

II. DISTINCTIVE FEATURES OF THE TURKISH JUDICIARY

The Turkish constitutional system is founded on Kemalism, as ideology marked by the unity of the State. As a consequence, Turkish constitutionalism is rooted in the (partial) opposition between government (*hükümet*) and State (*devlet*), that is between institutions endowed with representative legitimization—Grand National Assembly *in primis*—and State structures and elites—

1. ALFRED E. KELLERMANN ET AL., *THE IMPACT OF EU ACCESSION ON THE LEGAL ORDERS OF NEW EU MEMBER STATES AND (PRE-)CANDIDATE COUNTRIES: HOPES AND FEARS* 215 (The Hague: TMC Asser Press, 2006).

2. Judicial culture is intended here as legal and political culture of judges and prosecutors. I refer to the definition given by Tamara Capeta of legal culture as “the prevailing opinion in a society on the purpose of the law and the role of different institutions within the legal order” in relation to judges and prosecutors. Tamara Capeta, *Courts and Legal Culture and EU Enlargement*, 1 CROATIAN Y.B. OF EUR. L. AND POL’Y 10 (University of Zagreb, 2005). Political culture is the general political principles to which judges refer as well as the opinion on the relations between political institutions.

among which the judicial body and mainly its hierarchy have a relevant place—led by the military and playing the role of “guardians” of the Republic. Three distinctive features of the Turkish judiciary are strictly connected with the inclusion of the judiciary among the State elites. The first is the centrality of the judiciary within the legal and the constitutional system (i). The second is its political insulation and corporatism (ii). The third, which has a substantive character, pertains to the specific legal and political cultures marking the judiciary (iii). On the basis of these three features, the Turkish politico-legal system outlines a “strong” and highly hierarchical judiciary, as a result of an historical hybridism blending a traditionally relevant judicial role in the legal and the constitutional system and a French-derived judicial organization, characterized by hierarchy and corporatism. In this framework, “statist” ideology is a crucial factor in shaping the Turkish judiciary.

A. Centrality of the Judiciary

The importance of the Turkish judiciary, which is the result of a gradual evolution and, in a measure, of a certain “casualness” on which any legal system is often grounded, can be pointed out from different perspectives. With regard to the legal tradition, the Turkish legal system stems from Western continental legal systems founded on the predominance of statutory law and codification, since the adoption of the Swiss civil code and the Italian criminal code, while in the administrative field the French influence has prevailed;³ in this context, the hierarchy of the sources of law lies in the civil law tradition. However, the Turkish civil code includes an “important revolutionary principle,” drawn from the Swiss civil code, which expressly authorizes the judge to act as a law-maker when any interpretative method is ineffective.⁴ On this basis, Turkish judges expressed a certain judicial activism, complying with the model of the “interstitial legislator,” where judicial

3. TUGRUL ANSAY & DON WALLACE, INTRODUCTION TO TURKISH LAW 9 (5th ed., Kluwer Law International, The Hague, 2005).

4. *Id.*

activity does not differ qualitatively from that of the legislator.⁵ Secondly, the Turkish legal system accepts exceptionally the principle of *stare decisis*, binding lower courts as well as each single division of the Supreme Court of Appeals, whereas the decision is taken by the General Assembly of the Court.⁶

From a constitutional point of view, the centrality of the judiciary is rooted in the Constitution of 1961 and then renewed to some extent by the Constitution of 1982. While the first establishes the principle of the rule of law, formally considering the judiciary as a guardian of the Republic, the second assigns the judiciary an active role, aimed at regulating “the political arena and [at] facilitat[ing] the transformation of the society through state action.”⁷ This particular position of the judiciary, which is typical in authoritarian military regimes,⁸ can be also explained through the will of “political elites whose hegemonic interests are threatened by popular politicians to delegate some of their power to constitutionally empowered judicial institutions in order to preserve their privileges.”⁹ However, since 1982, this position is closely linked with the will of the military elite to carry out a programme of transformation of society, and the proper role of the judiciary is “not to oppose the executive but to support it in the performance of its constitutional duties.”¹⁰

5. JOHN BELL, *POLICY ARGUMENTS IN JUDICIAL DECISIONS* 17 (Oxford University Press, 1983). Meaningfully, the Constitution of 1961, which introduces the incidental review, also allows the courts to directly interpret the Constitution in the absence of a decision of the Constitutional court within three months from its submission, CONSTITUTION OF THE TURKISH REPUBLIC Art. 151. The 1982 Constitution bans this practice, establishing that the lower courts have to decide in conformity with the existing interpretation.

6. See *supra* text accompanying note 3.

7. Hootan Shambayati & Esen Kirdis, *In Pursuit of “Contemporary Civilization:” Judicial Empowerment in Turkey*, 62 POL. RES. Q. 767 (2009). A different spirit animates art. 8 of the Constitution of 1924: “The judicial power is exercised in the name of the Assembly by independent tribunals constituted in accordance with the law.” Edward M. Earle, *The New Constitution of Turkey*, 40 POL. SCI. Q. 73-100 (1925).

8. See *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* (Tom Ginsburg & Tamir Moustafa eds., Cambridge University Press, 2008).

9. G. M. Teczür, *Judicial Activism in Perilous Times: The Turkish Case*, 2 L. & SOC’Y REV. 245, 309 (2009).

10. Shambayati & Kirdis, *supra* note 7, at 775.

B. Political Insulation, Corporatism, Hierarchy

At this stage the issue of the specific legal and political culture of Turkish judges arises. However, I want first to briefly point out the second distinctive feature—or bulk of features—consisting of the political insulation, corporatism and “hierarchization” of the judiciary. Indeed, insulation and corporatism are the core of the notion of the independence of courts in Turkish constitutionalism.

Insulation is first of all declined in terms of neutralization of the judicial function, which permeates several constitutional provisions: as examples, I can recall the prohibition for judges and prosecutors of becoming members of political parties (art. 68, fifth paragraph); the conformity of the judicial activity to the Constitution and the law (art. 138, first paragraph); the prohibition of any direct or indirect influence on the exercise of the judicial function (art. 138, second and third paragraphs); the possibility of conducting all or part of the hearings in closed session “in cases where absolutely required for reasons of public morality or public security” (art. 141, first paragraph); and the election of the members of the Supreme Court of Appeals by secret ballot (art. 154, second paragraph).¹¹ On the other hand, corporatism and “hierarchization” shape the institutional organization and the *status* of judges and prosecutors, which is built on the French-derived bureaucratic organization.¹²

The connection with the extrajudicial—political—sphere is realized through the President of the Republic and the Ministry of Justice, while the recently adopted constitutional reform of the Supreme Council of Judges and Prosecutors (HSYK), which encountered the opposition of the higher judges, has broadened the links with external institutions. Therefore, the former appoints the

11. Meaningfully, the Turkish legal system does not envisage the jury, as a means to “introduce” society within the judicial system, and has excluded until recent times the possibility for judges and prosecutors to create judicial associations.

12. CARLO GUARNIERI & PATRIZIA PEDERZOLI, *THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY* (Cheryl A. Thomas ed., Oxford University Press, 2002). The Turkish judicial organization is based on four different ranks, while the career processes are broadly determined by magistrates’ superiors.

Chief Public Prosecutor and the Deputy Chief Public Prosecutor among the members of the Supreme Court of Appeals (art. 154, first paragraph);¹³ the Ministry of Justice, to which judges and public prosecutors are attached “where their administrative functions are concerned” (art. 140, sixth paragraph), authorizes inquiries and investigations by judiciary inspectors or senior judges or prosecutors (art. 144) and presides over the Supreme Council of Judges and Prosecutors (art. 159, second paragraph).¹⁴

C. Judicial Culture

The third feature is the legal and political cultures of Turkish judges, bringing up three points. The first relates to the guardianship role carried on by the judiciary as a part of a group of elites¹⁵ and to the above-mentioned importance of the judiciary within the Constitution of 1961 and 1982. These characteristics are linked to the safeguard (either active or passive) of the integrity of the Kemalist Republic against any religious, ethnic or social enemy. In this regard, it is common to speak in terms of “strategic alliance between the judiciary and the military,”¹⁶ while some authors consider that “the case of Turkey offers a fascinating study of a judiciary used in the service of the executive [military] branch.”¹⁷ The existence of a so-called Republican Alliance including—besides the military and the judiciary—other sectors of the society and the State such as the Universities and the Republican People’s Party (CHP) is generally accepted,¹⁸ even though this picture is not completely sharp, as there have been

13. Before the above-mentioned reform, the President of the Republic also appointed the five members of the HSYK, on the basis of lists established by the Supreme Court of Appeals and the Council of State.

14. Other non-constitutional provisions give the Ministry of Justice an important influence on the judiciary. As an example, a ministerial commission controls the admission to the Justice Academy through an oral exam.

15. This principle “entails that a group of elites governs by reason of its unique knowledge, wisdom, and virtue.” Teczür, *supra* note 9, at 307.

16. *Id.* at 309.

17. Lisa Hiblink & Patricia J. Woods, *Comparative Sources of Judicial Empowerment*, 62 POL. RES. Q. 745, 748 (2009).

18. Ceren Belge, *Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey*, 40 L. & SOC’Y REV. 653, 691 (2006).

divergences to some extent between the military and the judiciary during the 1960's and 70's.¹⁹

The second point is the specific “statist” ideology of the judiciary, as can be inferred both from the jurisprudence of the last decade in some sensitive areas, such as freedom of expression and freedom of association or in cases involving members of the military, and from the surveys conducted on judicial culture.²⁰ Case law analysis and studies on judicial culture show that judicial ideology is grounded on the defense of state interests (secularism, integrity of the state, etc.), rather than on the inclusion of social and political pluralism. Actually, a certain opening-up can be found in courts’ decisions relating to human rights, showing a fracture between sections of the lower judiciary and the high judiciary.²¹ In this regard, the Şemdinli case is exemplar.²² Nevertheless, this opening-up does not change the general tendencies,²³ and it has been further observed that “the nature of

19. Shambayati & Kirdis, *supra* note 7, at 773.

20. Daniella Kuzmanovic, *Finally Insights into the Judicial Culture in Turkey*, available at <http://cuminet.blogs.ku.dk> (Last visited October 24, 2011) (referring to two in-depth studies published in May 2009 by the Turkish Economic and Social Studies Foundation (TESEV)).

21. Tezcür holds that:

this [jurisprudence] is rather a collective expression of professional commitments and ethics of the judges and prosecutors. Since the 1980s, the state security forces executed people under the pretext of war on terror and were acquitted in the courts. This generated a trauma within the judiciary. Now the judges are claiming, ‘Do not execute people on behalf of the state and demand our complicity. This time, we will not comply.’

Tezcür, *supra* note 9, at 328.

22. I refer to the bombing of a Kurdish bookshop in November 2005 by noncommissioned officers of the army and an ex-PKK militant working for the army, who were carrying out one of their “routine” counterinsurgency operations. The accused were convicted by the Criminal Court of Van, but the Supreme Court of Appeals revoked the verdict and transferred the case to a military court. *Id.* at 318.

23. In 2005, the European Commission observed:

There are signs that the judiciary is increasingly integrating the new provisions. Several court judgments have been issued suggesting a positive development in areas such as freedom of expression, freedom of religion, and the fight against torture and ill-treatment and honour crimes. This trend also applies to the decisions of the Council of State. On the other hand, courts have issued judgments in the opposite direction in the area of freedom of expression, including against journalists.

the alliance between the TSK [Army] and the higher courts became more pronounced after the Justice and Development Party . . . came to power in 2002.”²⁴

Thirdly, consistently with the adherence of Turkish judge to the model of the interstitial legislator, judicial discretion tends to be very broad in order to implement the Kemalist principles, thanks also to constitutional and legal provisions.²⁵ The broad attitude of the Constitutional Court in defining, for example in relation to the Kurdish issue, the boundaries between what is cultural (*i.e.* nonpolitical) and what is political²⁶ can be extended to

European Comm’n, *Turkey 2005 Progress Report* 17, Sept. 11, 2005, available at <http://www.unhcr.org/refworld/docid/43956b6d4.html> (Last visited November 24, 2011). In an advisory report on the functioning of Turkish judicial system, it has been noted that, “of course, it is one thing for judges and public prosecutors to say that they apply the ECHR in their decisions and for them to cite a selection of their judgments by way of example but that does not necessarily reflect the general situation or mean that the predominant mentality of the judiciary has changed.” European Comm’n, *The Functioning of the Judicial System in the Republic of Turkey: Report of an Advisory Visit* 132, July 1119, 2004 (prepared by Paul Richmond & Kjell Björnberg); see also European Comm’n, *The Functioning of the Judicial System in the Republic of Turkey: Report of an Advisory Visit*, Sept. 29–Oct. 10, 2003 (prepared by Paul Richmond & Kjell Björnberg).

24. Tezcür, *supra* note 9, at 309 (observing that changes in lower court’s jurisprudence can be the result of the influence of a plurality of actors—government, public opinion, and civil organizations—rather than of a more supportive attitude towards human rights).

25. Even if the 2001 constitutional changes limited the grounds of admissibility of the limitation of fundamental rights and freedoms, by eliminating a series of general clauses included in article 13 (“public order,” “general peace,” “public interest,” “public morality,” etc.), and introduced the principle of proportionality, such clauses reappeared in other articles concerning specific rights and freedoms (for example, art. 22 on freedom of communication) and judges have the last word in evaluating proportionality.

26. Shambayati & Kirdiş, *supra* note 7, at 776. It is worth noting that even judges and prosecutors who question the traditional pro-military predominance use the same political arguments. Thus, in relation to the Şemdinli incident, the prosecutor, indicting the trio who bombed the bookstore on charges of disrupting the unity of the state and undermining the integrity of the country (Article 302 of the Turkish Penal Code), made reference to political arguments, such as the fact that “the employment of illegal means in the war on terror undercut public confidence in the state and contributed to the goals of the PKK by undermining state authority, creating disorder, and crystallizing divisive ethnic identities,” or that, considering the conflict between elected politicians and appointed bureaucrats, “the elements in the TSK pursued a deliberate ‘strategy of tension’ to preserve their prerogatives and block the reformist agenda of the AKP government.” It has been observed that this public

ordinary courts. In this regard, the example of article 301 of the new Penal Code introduced in 2005 and successively modified in 2008 is meaningful.²⁷ Despite a considerable decrease in

prosecutor “had good connections with the government.” Tezcür, *supra* note 9, at 320.

27. The modified text of the Penal Code reads:

1. A person who publicly denigrates Turkishness, the Republic or the Grand National Assembly of Turkey, shall be sentenced a penalty of imprisonment for a term of six months to three years. 2. A person who publicly denigrates the Government of the Republic of Turkey, the judicial bodies of the State, the military or security organizations, shall be sentenced to a penalty of imprisonment for a term of six months to two years. 3. Where denigrating of Turkishness is committed by a Turkish citizen in another country, the penalty to be imposed shall be increased by one third. 4. Expressions of thought intended to criticize shall not constitute a crime.” The last paragraph is the most relevant innovation of the reform. According to Algan, “this statement had also been drafted to bring to law enforcement personnel’s attention that ‘denigration’ should be demarcated from free expression.” Seen from this angle, it was an open warning directed to the public attorneys and to the judges.

Bülent Algan, *The Brand New Version of Article 301 of Turkish Penal Code and the Future of Freedom of Expression Cases in Turkey*, 9 GER. L. REV 2081, 2241 (2008). Further on, the word “*asağlamak*” (to denigrate) replaces other terms meaning “to insult” (*tahkir*) and “to deride” (*tezyif*), used in the former version of article 159. For some authors, the old terms are more precise. The article has been modified again in 2008 in order to bring it in line with European standards:

Denigrating the Turkish Nation, the State of the Turkish Republic, the Institutions and Organs of the State 1. A person who publicly denigrates Turkish Nation, the State of the Republic of Turkey, the Grand National Assembly of Turkey, the Government of the Republic of Turkey or the judicial bodies of the State, shall be sentenced a penalty of imprisonment for a term of six months and two years. 2. A person who publicly denigrates the military or security structures shall be punishable according to the first paragraph. 3. Expressions of thought intended to criticize shall not constitute a crime. 4. The prosecution under this article shall be subject to the approval of the Minister of Justice.

The introduction of the last paragraph is explained by the will to discourage any arbitrary use of the article by prosecutors. *Id.* at 2238.

In the 2005 Regular Progress Report, the European Commission stated that:

the abovementioned Article 301 cases raise serious concerns about the capacity of certain judges and prosecutors to make decisions in accordance with Article 10 ECHR and the relevant case law of the ECtHR. If the code continues to be interpreted in a restrictive manner, then it may need to be

indictments or convictions based on this article,²⁸ which has been often used “as a political weapon of the judiciary against freedom of expression”²⁹ thanks to the extremely general character of its provisions, judges and prosecutors showed a certain degree of resistance to normative changes through making reference to other unchanged provisions;³⁰ in some cases they even continued to behave as if the provisions were unchanged. Thus, in 2006 the General Assemblies of the Civil and Criminal Divisions of the Supreme Court of Appeals established highly restrictive jurisprudence on article 301.³¹ This decision highlighted the autonomy of the judiciary with respect to the legislative branch.

In conclusion, despite the breaches in their jurisprudence, courts—and the Supreme Court *in primis*—hold a strongly conservative attitude in the most sensitive political cases, and judges and prosecutors still have broad discretionary power to limit fundamental rights and freedoms, while often using policy arguments in their decisions.³²

amended in order to safeguard freedom of expression in Turkey. In this context court proceedings based on Article 301 will be closely monitored.

Turkey 2005 Progress Report, supra note 23 at 26.

28. *Id.* at 17.

29. Algan *supra* note 27, at 2240, n.17.

30. It is the case of the provisions included in art. 169 of the Penal Code, concerning the support to illegal armed organizations, or in art. 288 on the prohibition of influencing a fair trial. European Comm’n, *Turkey 2008 Progress Report* 16, May 11, 2008, available at http://ec.europa.eu/enlargement/pdf/press_corner/key_documents/reports_nov_2008/turkey_progress_report_en.pdf (Last visited October 24, 2011); see also European Comm’n, *2002 Regular Report on Turkey’s Progress Towards Accession* 21, Sept. 10, 2002, available at <http://ekutup.dpt.gov.tr/ab/uyelik/progre02.pdf> (Last visited December 13, 2011); *2003 Regular Report on Turkey’s Progress Towards Accession* 30, available at http://ec.europa.eu/enlargement/archives/pdf/key_documents/2003/rr_tk_final_en.pdf (Last visited December 13, 2011).

31. On the basis of Article 301 of the new Penal Code, the Court confirmed a six-month suspended prison sentence for journalist Hrant Dink for insulting “Turkishness” in a series of articles he wrote on Armenian identity, European Comm’n, *Turkey 2006 Progress Report* 14, Aug. 11 2006, available at http://ec.europa.eu/enlargement/pdf/key_documents/2006/nov/tr_sec_1390_en.pdf (Last visited December 13, 2011).

32. As an example, in October 2005 the Council of State rendered a decision sentencing a teacher wearing the headscarf on the way from home to

III. JUDICIAL TRAINING

The conservative attitude of judges and prosecutors and the peculiarity of their legal reasoning questions the characteristics of judicial training, which plays an essential role in knowledge, practices and behavior transmission and socialization. As the judicial culture raises the issue of the proper implementation of the recent Euro-driven reforms, the European Commission has underlined the

[i]mportance [of] sustained efforts . . . with respect to training judges [and] prosecutors,” as well as the fact that judges and prosecutors “are reminded by the responsible authorities about their duties and obligations to respect the relevant provisions stemming from International and European conventions in the area of human rights and fundamental freedoms, as required under Article 90 of the Turkish Constitution.³³

The Turkish judicial training system falls within the typical continental model, hinging at the same time, at least since 1982, on

school, while the law prohibited wearing headscarf only in public places (in this case, the school). Hootan Shambayati, *Semi-Democratic/Authoritarian Regimes: The Judicialization of Turkish (and Iranian) Politics*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 286, 297 (Tom Ginsburg & Tamir Moustafa eds., Cambridge University Press, 2008).

33. *Turkey 2005 Progress Report*, *supra* note 23, at 17. In the European Commission’s eyes, this should be even more necessary in consideration of the corporatist character of some reform proposals raised by European Commission experts. See European Comm’n, *The Functioning of the Judicial System in the Republic of Turkey: Report of an Advisory Visit* (July 11-19, 2005) (prepared by Paul Richmond & Kjell Björnberg). According to art. 90 of the Constitution, as amended on May 22, 2004,

International agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.

THE CONSTITUTION OF THE REPUBLIC OF TURKEY May 22, 2004, art. 90.

the above-mentioned “civilizing mission” of the judiciary. Therefore, the judicial training system resulted in a hybridism between the French (bureaucratic) idea of the judge as a “law technician” and the specifically Turkish tradition of the judge as “ideology guardian.” This system, allowing internal hierarchical and non-dialogical reproduction-transmission of knowledge and connection with the executive, was consistent with the “top-down attempt to enforce the *ideas* . . . and to inculcate the resulting cultural values and norms, that the military regime believed should direct state institutions as well as the individual lives of citizens.”³⁴ At the same time, such a hierarchical training system was an instrument to indirectly control the lower courts, because, as has been observed, “while the military may have strong informal influence over the high judiciary, the military’s ability to control the behavior of the lower court judges cannot be assumed.”³⁵ It seems that the even consistent changes in the Turkish judicial training system have not radically modified this picture. This is clear if we look at the different elements constituting the notion of “judicial training system,” *i.e.* the structures making up the training process (i) and the training contents and methods (ii).

A. Justice Academy

Before the creation in 1987 of a School for Candidate Judges and Public Prosecutors under the control of the Minister of Justice, the training process was essentially managed on the one hand by the academic institutions,³⁶ on the other by the judiciary itself. In this framework, courts constituted the main agents of

34. “The goal was to create a Liberal Turkish state and society along a French historical model of Liberalism.” Patricia J. Woods & Lisa Hilbink, *Comparative Sources of Judicial Empowerment: Ideas and Interests*, 62 POL. RES. Q. 745, 748 (2009).

35. Tezcür, *supra* note 9, at 311. It is worth noting that in France the creation of a judicial school after the Second World War was supported by lower judges and the *Union fédérale de la magistrature* (UFM), while the older judges “optaient plutôt pour la simple reproduction sans école et, plus globalement, les magistrats palcés en haut de la hiérarchie judiciaire, à la Cour de cassation, en tenaient pour le *statu quo*.” JEAN-PIERRE ROYER, *HISTOIRE DE LA JUSTICE EN FRANCE*, 876 (3d ed., Presses Universitaires de France, 2001).

36. These are under the supervision of the military through the Higher Education Board (*Yükseköğretim Kurulu*, YÖK).

socialization. The creation of the School during the liberal period of Turgut Özal slightly weakened the internal influence, because the training catalogues were under the control of the Education Department of the Ministry of Justice and the School as a whole was subordinated to the Ministry of Justice.³⁷ Nevertheless, judges and prosecutors undertook two-thirds of the two-year period of vocational training in general courts and in the Supreme Court of Appeals (or the Council of State), which, therefore, still determined the form of the training.

The creation of the Justice Academy in 2003—in view of the gradual compliance of the Turkish legal system to the European standards—did not bring about major substantial changes, apart from opting for a multi-professional training institution.³⁸ On the one hand, dependence from the Ministry of justice has been confirmed, notwithstanding the mixed composition of the General Assembly of the Academy (which somehow minimizes the presence of representatives of the judiciary).³⁹ This entailed some criticism by the highest

37. *The Functioning of the Judicial System in the Republic of Turkey: Report of an Advisory Visit*, *supra* note 33, at 44.

38. The Academy is also in charge of the training of administrative and military judges, lawyers, notaries. Regarding judges and prosecutors, the initial training path varies depending on the judicial career (ordinary, administrative, military).

39. The President of the Justice Academy is appointed by the Ministry of Justice from among three candidates proposed by the Board of Directors. The Board of Directors consists of a President, the General Director for Personnel from the Ministry of Justice and five members elected by the General Assembly. The General Assembly is composed of 27 members, eleven of whom depend on the executive power. Of the remainder, five are members of the judiciary, five are academics from the universities, four are representatives of the Academy staff and two represent the other legal professions. In addition, three members appointed by the Ministry of Justice constitute the Board of Auditors. The Presidency of the Centre for the Training of Candidate Judges and Public Prosecutors, which is incorporated within the Academy once established, are appointed by the Ministry of Justice on proposal of the President of the Academy who, in turn, is appointed by the Ministry. *See, The Functioning of the Judicial System in the Republic of Turkey: Report of an Advisory Visit*, *supra* note 33, at 45. The Ministry of Justice also influences recruitment. Graduates seeking entry to the judicial profession as either judges or prosecutors first take a written examination administered by the School Selection and Placement Centre, which administers all examinations for entry to higher education institutes in Turkey. Candidates who pass the written examination are interviewed by a panel composed of representatives of the Ministry of Justice, and successful candidates are admitted to the Judicial Academy for two years of

representatives of the judiciary against the law founding the Academy, as well as by important members of the Union of Turkish Bar Associations and of the Istanbul Bar Association.⁴⁰ On the other hand, two-thirds of the training period continued to be held within the courts, including the Supreme Court of Appeals.⁴¹

Therefore, notwithstanding the existence of an institution external to the judiciary, the current system reiterates forms of internal hierarchical dependence and knowledge reproduction. On the contrary, Turkey did not accept the suggestion of extending—following the practice in the French training system—practical experience to extrajudicial institutions, such as bar associations or enterprises, as measures allowing the opening-up of the judiciary towards the civil society.⁴² In the same sense, the suggestion rising from the Council of Europe to include representatives of other legal professions and members of civil society in the teaching staff, which is now composed mainly of academicians and members of the higher courts, is not followed.⁴³ In conclusion, referring to the Justice Academy as an autonomous institution—as the Turkish

training. The oral examination enables the Ministry of Justice to exercise considerable influence over the recruitment of candidate judges and prosecutors. *Id.* at 19.

40. *Id.* at 27.

41. The training period for future ordinary judges lasts two years and includes two main phases. In the first, candidates follow a four-month preparatory training programme within the Academy and an eight-month stage within the so-called *internship courts* or prosecutor offices or ministerial departments. The second phase is characterized by a specific training (judge/prosecutor), also including a four-month training programme and an eight-month stage within different courts (including the Supreme Court of Appeals).

42. HAROLD ÉPINEUSE, ÉVALUATION DE LA FORMATION DES MAGISTRATS EN FRANCE ET EN EUROPE. BILAN ET PERSPECTIVES 20 (Institut des hautes études sur la justice., 2008).

43. CoE Lisbon Network, *Questionnaire "A" on the structural and functional features of training institutions of judges and prosecutors. Turkey*, available at

www.coe.int/t/dghl/cooperation/lisbonnetwork/questionnaires/Turkey-reply-A.pdf (Last visited December 13, 2011). Furthermore, faced with the necessity of integrating the judicial body in order to fulfill the many vacant posts, a law allowing for practicing lawyers to become judges or prosecutors was rejected. The many vacant posts have been filled every year through standard recruitment procedures, *The Functioning of the Judicial System in the Republic of Turkey: Report of an Advisory Visit*, *supra* note 33, at 58.

Minister of Justice does⁴⁴—without taking into account the reality of the different internal and external influences on the training process could be misleading.

B. Training Contents and Methods

Concerning training contents and methods, three preliminary observations have to be made pertaining to the general situation of legal education in Turkey. The first is the lack of satisfactory legal education within universities, which has been highlighted by different reports as well as by judges themselves,⁴⁵ and the persistence of outdated teaching methods in initial training. The second is that training contents and methods owe much to the Roman law tradition, where the center of interest is not the student, but the law, and legal education aims at presenting a coherent system covered by general political principles which will enable the judge to understand and apply the law.⁴⁶ This is common to other systems, like the Italian system, where, starting with university studies, teaching is essentially technical and theoretical and law and politics are seen as two completely distinct areas.⁴⁷ The third is that education and training are ideologically-oriented. Indeed, the military kept always in mind the importance of

44. See European Comm'n for the Efficiency of Justice, *Scheme for Evaluating Judicial Systems 2007* (March 9, 2008) (prepared by Mert Harun & Turker Gökçen).

45. As the former President of the Supreme Court of Appeals stated, one of the most important conditions of improving the quality and reducing errors is to employ well-educated and competent jurists who are able to make sound interpretations and correct conclusions. Unfortunately, the ever-increasing Faculties of Law, which are only so in name, are rapidly corrupting law education. Unless radical measures are taken, this corruption will increase. Professional ethics and the objectivity of judges are only possible through quality education.

The Functioning of the Judicial System in the Republic of Turkey: Report of an Advisory Visit, *supra* note 33, at 100. In 2006, there were thirty Law Faculties in Turkey.

46. This applies also to the legal education in Law faculties. See Elliot E. Cheatham, *Legal Education in Turkey: Some Thoughts on Education for Foreign Students*, 2 J. LEGAL ED. 21, 23 (1949).

47. Shambayati, *supra* note 32, at 286.

training⁴⁸ and, to mention some examples, it organized “special briefings for judges and prosecutors in 1997 to ensure that they shared the priorities of the TSK [the military] in its fight against the ‘internal enemies’ (*i.e.* Islamic political actors),”⁴⁹ while law school curricula included until recently a course on the history and purposes of the revolutionary reforms in the fourth year.⁵⁰ Yet, one could refer to the narrow notion of impartiality of judges that was outlined on occasion of the opening ceremony of the Justice Academy’s 2007-2008 academic year by the Chief Justice of the Supreme Court of Appeals, for whom judges must be partial to protect and sustain the Republic.⁵¹

Avoiding any review of the courses held at the Justice Academy, I would like to point out one essential facet of the current situation, questioning if recent reforms have brought (or have the potential to bring) any change in Turkish judicial culture. I think the response should be twofold. It is unquestionable that the Ministry of Justice has suitably updated training catalogues in more sensitive areas in accordance with the convergence with European standards. The update concerned mainly EU law and human rights through ECHR provisions and ECtHR case law, consisting also in specific programmes aimed at training judges and public prosecutors as trainers. The overall impact of these

48. As highlighted by the creation in 1982 of the Higher Education Board and the statement that “it is natural that developments pertaining to the national education system, which is of vital importance for Turkey, are followed by the General Staff.” *Id.* at 289.

49. Tezcür, *supra* note 9, at 308. The briefing routine procedure involved also other component parts of the state and social structures, HAMIT BOZARSLAN, HISTOIRE DE LA TURQUIE CONTEMPORAINE 88 (La Découverte, 2006).

50. Cheatham, *supra* note 46, at 22.

51. Chief Justice of the Supreme Court of Appeals stated

The main component of judgeship is impartiality. However, you will be partial in your decisions to protect and sustain the Republic of Turkey. If we are here today, it is because of the rights secured by our Republic. You should, and have to, know that the Republic form of government is the most appropriate regime suitable for human dignity and honor. You will be partial to claiming ownership of a democratic and secular system and the rule of law; you will be partial to owning our crescent and star flag, and to raising the flag even higher. You do not have the luxury of being impartial to these issues.

Kemal Şahin, *Impartiality of the Judiciary*, 1 ANKARA B. REV. 16 (2008).

measures was deemed largely satisfactory by several lawyers' associations, and it is also indirectly confirmed by some analysis of the courts' jurisprudence. Certain attention was given to judicial ethics in relation to corruption phenomena, and foreign languages, although some concerns have been expressed on the quality and the extension of the relative courses.⁵² Specific ongoing training courses focused on law reforms, falling within ordinary legal adjournment. Moreover, several judges participated in exchange programmes, allowing the potential opening of the judicial body. In this regard, European convergence has then given noticeable results.

Nevertheless, there is ground for more critical remarks in relation to other disciplinary areas. The training catalogues for the pre-service training are essentially oriented towards traditional law subjects and technical issues, with scarce or no attention to social sciences and comparative law as well as on subjects and learning methods aimed at developing a critical attitude in the judge, allowing the introjection of a culture of independence and pluralism and the making of what has been called a "thinking judge," able to participate in European constitutional discourse.⁵³ In a word, no attention is given to what the European Judicial Training Network calls "Society Issues," a catalogue including courses such as "The judge's role and self-image today," "The judge as arbiter of value," "On the independence of the judiciary—A European comparison," and so on. Therefore, a better balance should be established between strictly technical issues and societal, constitutional and comparative subjects—more in general, what is

52. *The Functioning of the Judicial System in the Republic of Turkey: Report of an Advisory Visit*, *supra* note 23, at 96, 101.

53. Capeta, *supra* note 2, at 53, for which constitutional discourse "requires not only mechanical application of the principles learned, but also a critical assessment of them, either in relation to the internal legal order or as part of the European legal order." Within the pre-service *curriculum* for ordinary judges there are six training catalogues. Two training catalogues concerns respectively "Professional Culture" and "General Culture and Personal Development;" the first one includes essentially technical subjects, while the second, which has a residual character, includes essentially courses related to personal abilities rather than general culture. A further catalogue focus on "Courses and Hobbies," which includes, among others, courses on "Applied Turkish music," "Folkloric dances," "Traditional Turkish handicrafts" and "Foreign language."

indicated as “complex curricula.”⁵⁴ Further on, one could question the inclusion in Turkish training catalogues of subjects concerning Turkish national culture and the still scarce attention to foreign languages and other cultures.

Lastly, training methods also reflect a traditional approach, similar to legal university education, where teaching methods are based on “lecturer centered system-conferencing courses” of a theoretical character, consisting mainly in memorizing legal principles and rules.⁵⁵ Thus, not much attention is yet paid to suggestions coming from the European Commission on the need to integrate lectures and seminars with “methods allowing broader dissemination of the results of training.”⁵⁶ While this problem is more serious concerning university legal education rather than judicial vocational training, nonetheless it still exists.

In conclusion, we can look at the French judicial training system, which is generally used as a reference model for candidate countries, in particular in relation to training catalogues. The French system responds to three main objectives: acquisition of technical competence; understanding the social and economic milieu in which judges operate; and developing critical reflection

54. “The types of judicial education programmes that fall under “complex curricula” include those that suggest judges explore different dimensions to their role or explore their attitudes, values and beliefs. Judges’ learning style preferences generally mean these types of courses are more difficult to implement. Most judges’ learning preferences are for concise, logical analysis, abstract ideas, technical tasks and practical solutions. In contrast, complex curricula programmes (such as those designed to explore diversity or the social and cultural context to litigation) often do not fit these learning preferences,” Daniela Piana, Cheryl Thomas, Harold Epineuse, Carlo Guarnieri, *Judicial Training & Education Assessment Tool. Meeting the Changing Training Needs of Judges in Europe*, JUDICIAL STUDIES ALLIANCE 14 (2007).

55. A. Başözen, *New Method in Turkish Legal Education: Internship During the Law Faculty*, available at <http://www.e-akademi.org/incele.asp?konu=New%20Method%20in%20Turkish%20Legal%20Education:%20Internship%20During%20the%20Law%20Faculty&kimlik=1271314793&url=makaleler/abasozen-3.htm> (Last visited November 5, 2011).

56. *Communication from the Commission to the European Parliament and the Council on judicial training in the European Union*, COM/2006/0356 final, section 25, where it is added: “Moreover, the introduction of a multidisciplinary element in compliance with national traditions should facilitate exchanges of views and experience between, for example, judges, prosecutors, lawyers and police officers.”

on the judicial function.⁵⁷ As I have briefly pointed out, the improvement of the Turkish judicial training system is essentially oriented towards the first objective.

IV. CONCLUSION

As we have seen, changes in the Turkish judicial training system do not achieve a shift from a traditionally bureaucratic conception of judicial education to a pluralist one, where the “law is defined not by the letter of the law, but by its meaning,” drawing from interaction between multiple actors.⁵⁸ European influence is limited to the introduction of training catalogues connected with contingent needs, such as human rights and EU law, but (still) does not affect the institutional framework, nor does it adapt judicial training contents and methods to social and political pluralism.⁵⁹

This situation has tangible effects on judicial culture. The above-mentioned analysis of courts’ jurisprudence and surveys of judicial ideology seem to confirm a certain resistance in opening-up the judicial elite to social pluralism in order to allow the judiciary to act as an interface with civil society, due to the peculiarities of the Turkish socio-political system. The result is a

57. *Questionnaire "B" on the role of training institutions in recruitment and initial training of judges and prosecutors*. Council of Europe, Lisbon Network, available at <http://www.coe.int/t/dghl/cooperation/lisbonnetwork/questionnaires/France-reply-B.pdf>. (Last visited October 24, 2011).

58. Sinisa Rodin, *Discourse and Authority in European and Post-Communist Legal Culture*, 1 CROATIAN YEARBOOK OF EUROPEAN L. AND POL’Y 3 (University of Zagreb, 2005).

59. An indirect confirmation comes from the observation that Turkey is not an active player in international networks permitting broader socialization and the opening-up of the judiciary. B. van Delden, *Effectiveness of the Judicial System. Report of a peer based assessment mission to Turkey*, November 17-21, 2008 (European Commission, 2008). This seems to confirm what has been observed by Daniela Piana in relation to Central and Eastern European recent accession Countries, *i.e.* that the adoption of any judicial training reform is highly dependent from the national actors which are involved. D. Piana, *Unpacking Policy Transfer, Discovering Actors: The French Model of Judicial Education Between Enlargement and Judicial Cooperation in the EU*, FRENCH POL. 5, 33-65 (2007). In fact, judicial training reforms in Turkey were essentially conducted by the Government through its Ministry of Justice and the High Judiciary, with scarce participation of lower court judges and judicial association, whose constitution has been authorized only in 2006.

judge who is still separate from society.⁶⁰ The issue has been recently raised by Osman Can, co-chairman of the “Judges and Prosecutors Association for Democracy and Freedom.” According to Can, the Turkish judiciary should have a mental transformation, which passes also through an appropriate consideration of training needs. Thus, he suggests that “members of the judiciary should know about comparative political history and about non-democratic movements and their implications for the world and also for Turkey.”⁶¹ The lack of a comprehensive training strategy aimed at effectively shaping independent judges through the ability to reason, taking into account normative and extra-normative elements, is also reflected in the type of legal argumentation used, characterized as authoritarian rather than authoritative legal discourse:⁶² thus, courts often refer to ECHR provisions or ECtHR case law simply as a mere support of their decision rather than as a reasoning instrument, excluding any constructive disagreement. In this regard, it has been observed that “Turkish courts very often pretend to consider the case law of the European Court of Human Rights, but then conclude that national laws and their interpretation

60. Interesting evidence is given by a columnist of the English language newspaper Today's Zaman:

Even for practical family matters, they [the judges] treated the people opposite them as just a part of problem. In the case in which I was a witness, after answering the judge's questions, I tried to raise some points which had not occurred to him to ask and which were very important to the subject; however, he silenced me. In all three cases, instead of my own sentences, the judges asked the record keepers to write whatever they dictated on my behalf . . . I have heard several times that when candidates are chosen to be future judges, they are told they should keep their distance from ordinary people. They are asked not go to places everybody goes—they should not carry shopping bags, and they should not bargain when they buy apples. Of course, not only are they learning some manners, they are taught that they are the defenders of the republic, especially secularism.

Ayşe Karabat, *A Face Like a Court(room) Wall*, in TODAY'S ZAMAN, Feb. 21, 2010.

61. Karabat, *Taboo-Breaking Jurist Osman Can: Judiciary Cannot be Supra Political*, in TODAY'S ZAMAN, Jan. 10, 2010.

62. M. Bobek, *The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries*, 1 EUR. PUB. L. 109 (2008).

of the present case is in full conformity with them.”⁶³ That means a rhetorical use of ECHR provisions and ECtHR case law.

The Turkish-European convergence, which I have considered through the lens of judicial training, is then generating changes in specific areas of legal knowledge, not in judicial mentality. This observation confirms what has been noted by some authors in relation to the Centre and East European former candidate and candidate Countries, concerning the ability of judges not only to refer in their decision to European law, but also to fully participate in the “constitutional discourse.” For these authors, European convergence brings about the former, but not the latter. As a consequence, major changes in legal education are needed and, “provided this transformation does not remain merely formal, but also brings changes in the curricula, syllabuses and methods of legal education, future . . . judges will be prepared to participate in European constitutional discourse.”⁶⁴ Regarding training structures, the path that has been sketched through the creation of the Justice Academy consists to a certain extent of the shift from judicial influence to the ministerial influence. Rather, a settling of the internal balance of the judicial training system involving a breach of the vertical/hierarchical logic, that is typical of any bureaucratic organization, would be more suitable. This new milieu could profit from the greater reactivity to opening-up towards civil society of the lower courts.

63. “In plain words, Turkish Courts should bring their understanding of freedom of expression in line with that of the European Court of Human Rights. Otherwise, no amendment of law will contribute to the protection of that freedom. The solution to the problem mainly depends on a change in mentality, not in the law.” B. Algan, *supra* note 27, at 2250.

64. Capeta, *supra* note 2, at 53. The task is not at all easy, by reason of the high number of judges and prosecutors—more than 9000—for a country of more than 75 million of inhabitants.