Some Words for Judicial Reform…

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The discussion of an independent judiciary, judicial guarantees and the politization of the judiciary are still ongoing. The politization of judiciary has been accomplished through dependency and is without any safeguards. The following steps of politization are staffing in public offices and having proper judicial decisions to meet expectations.

Judiciary has no more norms beyond the establishment of a secular legal system. In a democracy based on the notion of separation of powers, it has been stated that the judiciary must be separated from the executive and legislature powers and there must be cooperation instead of hierarchy between the three of them. In a democracy, these three powers must be in the legal system. Moreover 'the guarantee of rights and freedom' and the judicial bodies as the symbols of justice must be only in the legal system. The duties of judicial bodies are to provide public and constitutional order, to protect individual rights and freedom and to audit the functions of political bodies. Judicial power is not so close to the other powers because of its entity. The political power, which has no control mechanism, pulls judiciary towards it and destabilizes democracy.

When we refer to *independent judiciary*, we mean judges and public prosecutors -as judiciary bodies- being free from interference of executive and legislative powers, public opinion, internal dynamics, and even themselves by being fair-minded judges and public prosecutors. The independence of attorneys shall also be examined under the same heading. However the role of the attorneys is not included in this article.

Amendments took place in almost all parts of the 1982 Constitution; however, the amendments were limited in the role of judiciary with a decision by the European Court of Human Rights; the only compulsory amendments were about the National Security Courts (DGM). This shows the perspective of the political mind to the judiciary because the 1982 Constitution has obstacles to the independence of judiciary. We always see the same statement -- 'to provide independent judiciary' -- in the plans of all political parties but somehow we have not seen any steps progressing towards such a seemingly agreed issue. Some actions have been taken but they did not meet the expectations of the judiciary.

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In our country, the picture of executive and legislature branches being close to each other in the framework of judiciary bodies is political will. This understanding has never changed in any case. Poor implementation and disorganization have been damaging the independence of the judiciary. Today, even the man in the street criticizes the situation without any legal knowledge but political power is still insensitive to the issue. These criticisms are as follows:

Political figures such as the Minister of Justice and Undersecretary of the Ministry of Justice should not serve in the High Council of Judges and Prosecutors (HSYK). The council has a total of seven members. Five of them are elected and the other two members participate as of right from office. The main criticism is that these two members are ineffective in the council; however their positions have been the members of the council for 26 years. The question is if these two natural members are ineffective why do they still insist on being a part of the HSYK? This question has not yet been answered. No matter if these two members have the right to vote or not, they should be removed from the HSYK. Furthermore the meetings of HSYK cannot be without all seven members of the Council. This is the basic rule of the High Council of Judges and Prosecutors. If any of the seven members cannot attend a meeting, including the Minister of Justice, a deputy member attends the meeting from the High Council of Judiciary. However, if the undersecretary has an excuse for attendance, only the deputy undersecretary may act as a substitute for undersecretary. Thus the meetings of the High Council of Judges and Prosecutors are dependent on the undersecretary. In conclusion, the five elected members therefore become ineffective with the position of undersecretary in the HSYK.

The secretariat of the Council is not independent as well. The whole secretariat should be separated from the Ministry of Justice, General Directorate of Personnel (PGM). The PGM holds the confidential and non-confidential records of judges and prosecutors as well as prepares the drafts of the judicial decrees and designations. The HSYK has limited time to work on the drafts and the two natural members of the Council focus on the protection of the drafts in this period of time. Thus, the control of the Council cannot be effective. The staff of the PGM is dependent on the Minister of Justice. Even if they hold the position of judges in this administrative system, they could be assigned to a judicial position upon the request of the Minister of Justice. For this reason, either the PGM should be dependent on the HSYK or the responsibilities of the PGM should be taken and an independent unit in the Council should be formed for all these duties.

The inspection board (TKB), which carries out inspections of judges and prosecutors, is also dependent on the Ministry of Justice. The HSYK is not authorized to designate inspectors. The Minister of Justice has a voice and is authorized to conduct all activities of the TKB, such as opening an investigation and designation of inspectors to conduct investigations. The selection of inspectors from among the judges cannot build up confidence for the investigation because the inspectors may also be reassigned to other missions with just a word from the Minister of Justice. The inspection board

(TKB) is also voiceless and without any confidence, like the PGM, to the Minister of Justice. The inspection board must be controlled by the HSYK.

Officials from the category of judges should not be designated for the missions of the Ministry of Justice. Specialists who have graduated from the law academy may also be designated for missions, which require legal knowledge. However judges work in such missions and thus judges are placed under the stewardship of the Minister of Justice. The HSYK has been voiceless in this designation process in the Ministry of Justice. The only person who has a voice to discharge those people is the Minister. This is the same for officials being designated by three decrees. When we compare the situation in other ministries, the bureaucrats of the Ministry of Justice are in the worst condition without any safeguard. The Ministry of Justice has a high workload regarding the judiciary and is directly dependent on the Minister. The bureaucrats working in the Ministry of Justice have lost their identities as judges. If officials should work in the Ministry of Justice in the category of judges, the number of judges should be at a minimum level and the HSYK should be responsible for their appointment or discharge and conduct these processes with safeguards.

All files of the HSYK are prepared by the Ministry of Justice and the HSYK is not authorized to participate in the process of the preparation of those files. Those files are prepared by the officials of the Ministry without any safeguards. In conclusion, the HSYK has no ability to participate in the decisions in the files.

Effective methods of application should be provided within the HSYK. The discipline rules of the HSYK should be published so that the people who have to obey and implement these rules should know the implementation, content and the outcomes of the disciplinary rules. Arbitrary implementations shall be removed with transparency.

Designation and authorization of judges and prosecutors in the on-duty courts and the elections of the Supreme Court membership should depend on written, objective and efficient documents.

The election of the members of the HSYK has been carried by the President of Turkey. The election system of the HSYK should be changed and officials who are not even a high judge should carry on an election and choose the members of the HSYK.

Official rules should be established to prevent current and former members of HSYK to be candidates, to be nominated and to be elected to the judiciary for a period of time after their service in the HSYK ends.

During disciplinary proceedings, judges and prosecutors have to defend a suit without any access to the investigation file. This system should definitely be changed. Judges and prosecutors should be able to have the access to any kind of records be used against them.

The Ministry of Justice is responsible for the examination of candidate judges. The bureaucrats of the Ministry of Justice are the 'only' authority, especially in the interviews. It seems that the HSYK should have the last word on the candidates; however, the HSYK has no right to say no to a candidate judge having completed a two-year candidate training. The HSYK should have a voice both for the decision on judges and candidate judges.

The application for interviews was created after March 12, 1972 for the candidate judges and prosecutors.[1] The designation of the candidates has been the responsibility of the Ministry since 1934; however, applicants for the vacant positions were designated based on their graduation year until 1972. Today the political will talks about judiciary reform; if they are serious, then they must change the 1972 system and revoke the authority of the Ministry. There is no place for even a little shadow on judiciary and the judiciary should stay far away from those kinds of debates. For this reason, the Ministry of Justice should have no right to say a word. UN resolutions, specialists and the regular reports of the EU and the recommendations of the Council of Europe share this same point of view.

The HSYK should decide the number of candidates by seeking the opinion of the Ministry of Justice and Turkish Justice Academy for each period of time.

Judges should not act as civil servants or become civil servants. In the period of candidacy, judges may end up feeling like the other civil servants of the Ministry of Justice; therefore at the end of the candidacy period it cannot be so easy to break free from the influence of the Ministry. The candidacy period in the Ministry is temporary. For this reason, the designation of the candidate should be according to the judiciary and those candidates should be apart from the permanent civil servants of the Ministry of Justice.

It should be understood clearly that judges are not 'civil servants.' These officials use their sovereign power and they should also use their employee personal rights in the same level with the others in legal system. Judges should not have any administrative duties but if they have an administrative job then they should not be dependent on the Ministry of Justice.

The HSYK and the high judicial bodies should control their own budgets and the 'legislative power' should not interfere with the judicial bodies during the preparation of the budgets before having a discussion in the general meeting of Turkish Grand National Assembly (TBMM).

Judges (at least the judges in the first rank) should have a geographical guarantee and should not be reassigned to another place or duty except by their own requests.

The Ministry of Justice is very active in the administration (the presidency and the general assembly) of Turkish Justice Academy. The effects can easily be seen in the education, training and appointments of the instructors at the Academy. The power of legislature should not be dominantly felt on the administration of the Justice Academy. Attending the courses in the Justice

[1] The mentioned system is preserved since September 12, 1980.

Academy may be good references for particular missions; however, the HSYK should determine the participants of those courses. Although the Department of Training in the Ministry of Justice has no such authorization according to the law of organization, the Ministry of Justice is responsible for the training of judges and prosecutors. The Ministry should not implement this training. The Turkish Justice Academy should come to the forefront.

The administrative bodies present visual and verbal information about judicial investigations to the press and the public. This is not their main mission and should definitely be discontinued. The investigations should move along far away from the administration and legislature and apart from media press.

Any kind of offense of judges and prosecutors, such as related to their duty or person, should dependent on a 'separate investigation method.' It is the natural consequence of the safeguards of judges in the framework of the principles of UN. This situation should not be the reason for revocation of the privilege of immunity. The differences between concepts and the institutions should not be confused. An iron hand should not be used in a velvet glove against the judiciary.

In the sake of independent judiciary, a 'union of judges', which is free from interference of the legislature should be established. The Ministry of Justice has been preparing a draft law for a 'Union of Judges and Prosecutors of Turkey' and it is possible to have guardianship in the judiciary. The judiciary is a necessary condition for non-governmental and free organizations and for the independence of judiciary in a more universal aspect.

Regional general courts should not be established in such a framework. Although there are not enough judges for the vacant positions in the regional general courts, the problem of vacant positions has been solved by making the conditions of the first rank separation easier by law and this creates 'sufficiency by designation.' Political power has tried to be efficient in the establishment and restructuring of regional courts. Moreover the Supreme Court of Appeals has been put out of action on this issue in this period of time. This period is such a period that all of the basic laws have been changing. This approach takes the judiciary far away from the center of the solution and makes legislating more difficult.

All case-law of the judiciary bodies should be published and there should be transparency in the judiciary. All judges and prosecutors (lawyers and the others as well) should have access to all case-law. There should be a specialization in the judiciary and the designation for the high judiciary positions should be according to the level of specialization. The activities of judges and prosecutors should not be evaluated for a "grade" by high judiciary bodies. This system shows that the high judiciary bodies are dominant and judges and prosecutors are disempowered.

The chief public prosecutors are not the representatives of the Minister of Justice in provinces. The governors should represent all the Ministers, including the Minister of Justice, in the provinces. The chief public

prosecutors represent the Minister of Justice in provinces but this should be changed immediately. When we take the universal developments around the world into consideration, an organized office of the chief public prosecutors should be established in Turkey where all public prosecutors could come together under the same roof and the administrative unit cannot be effective any more. A judicial unit should also be established dependent on the office of the chief public prosecutors.

Justice Commissions should be formed by an election based on the principles of democracy and the bar associations should have a voice for the particular issues in those commissions.

There should not be any suggestions and advice on judicial issues. Auditing tools such as parliamentary inquiry and questions should not be used by the executive power for this purpose.

Judges and prosecutors should not be administratively dependent on the Ministry of Justice.

The Ministry of Justice can issue administrative announcements (circulars) about judges. Inspectors are responsible for those circulars and the adaptation to the circulars; thus the impact of the Ministry has been increasing on judges by means of those circulars. This method of influence should definitely be removed.

When it comes to judicial issues, the Ministry of Justice has some restrictions according to Article 125 of the Turkish Constitution and Article 30 of Law No. 2992; it can only issue circulars related to the field of the Ministry. Therefore, the Ministry of Justice should not issue any circulars to prosecutors regarding the form and rules of investigations. The Ministry may only be authorized to issue circulars for judicial issues such as the transfer of cases.

The number of judges and prosecutors should definitely be increased, the problem of workload in judiciary should be solved, and right to legal remedies should be more effective. An effective judiciary is essential for the rule of law, state of law and justice. This is a fact, not a thesis, and it should not be ignored.

Being a judge and a prosecutor are not the same professions. The differences between these two professions should not be ignored and there should not be any transfers between these two professions without any request from those involved.

The political will should not be effective in the election of high judiciary bodies.

Judiciary decisions should be followed. The rules and enforcements should be complied with by the executive and legislature powers and for the judicial administration to obey the judiciary decisions and not to make any amendments.

We should use technology in the judiciary as much as possible. However, the judiciary should not be bound by technology. The Ministry of Justice has been carrying out the Project of National Judiciary Network. This situation should be ended immediately.

The organization of expertise should not have the authorization of judicial power and should not be misapplied.

It is possible to increase the number of issues beyond the abovementioned ones. Unfortunately the fact is that the number of issues shows the insensitivity for the independence of the judiciary and judicial reforms. This means, the aim seems to be to bring the judiciary closer to the political power by being insensitive and having implementations and regulations affecting the judiciary in negative ways. Even if legislature power is strong and judiciary has no safeguards, the judges are devoted to their jobs and are fair-minded in our country but of course there may be some exceptions.