

A COMPARATIVE ANALYSIS OF THE TURKISH AND AMERICAN CRIMINAL LEGAL AID SYSTEMS

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Abstract

This article is a comparative analysis of the systems for providing criminal defense representation to the poor in the United States and in Turkey. Both the Turkish and American legal systems guarantee the right to counsel in criminal cases and have established administrative structures for delivering legal aid services. This article focuses on four key aspects that distinguish the two systems in their present forms: (1) the historical development of the right to counsel as a constitutional versus a statutory right; (2) the inclusion versus exclusion of the notion that the right to counsel necessarily entails a right to competent and effective counsel; (3) the incorporation versus the rejection of financial eligibility limitations on the invocation of the right to counsel; and (4) a complete versus a limited notion of the types of criminal charges for which the entitlement to legal aid should be automatic. The article concludes by comparing the systems for administering criminal legal aid services in America and Turkey, particularly with respect to the decentralized, patchwork system that exists in America as a result of its federalist system of government.

Özet

Bu makale, Amerika Birleşik Devletleri ve Türkiye’de ihtiyaç içerisindekilere ceza davalarında vekil ile savunma sağlanması konusunu karşılaştırmalı bir biçimde analiz etmektedir. Hem Türk hem de A.B.D hukuk sistemleri ceza

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davalarında vekil bulundurma hakkını garanti altına almışlar ve bu bağlamda adli yardım hizmeti sağlanması konusunda idari bir yapı oluşturmuşlardır. Bu makale, iki ülke sisteminin mevcut yapılarını birbirinden ayıran dört anahtar unsur üzerinde yoğunlaşmaktadır. Bunlar: (1) vekil ile savunulma hakkının tarihsel gelişiminin anayasal hak ve kanuni hak boyutlarının karşılıklı olarak incelenmesi; (2) vekil hakkının aynı zamanda da yetkin ve etkin bir vekil hakkı gerektirdiği fikrinin kabul edilmesi veya edilmemesi görüşlerinin karşılıklı incelenmesi; (3) vekil hakkı talebine ilişkin olarak finansal uygunluk sınırlamalarının dahil edilmesi veya böyle bir sınırlamanın reddedilmesi hususunun incelenmesi (4) adli yardım zorunluluğunun kendiliğinden ceza davalarının tümü ya da sınırlı türleri için uygulanması gerekliliği hususlarının karşılıklı olarak incelenmesi. Makale, Amerika ve Türkiye'deki ceza davalarına ilişkin adli yardım hizmetlerinin, Amerika'nın Federal yapısının gereği olarak oluşan yerel parçalı sisteme özel bir önem vererek karşılaştırılması ile son bulmaktadır.

Keywords: *Legal Aid, Criminal Defense, Right to Counsel*

Anahtar Kelimeler: *Adli yardım, Ceza davalarında vekil ile savunulma hakkı.*

INTRODUCTION

The right to counsel is considered to be fundamental for the protection of human rights, particular in the criminal context. In many societies, this means not only the right to have an attorney represent you but also the obligation of the state to provide one for you if you cannot afford one. This article compares this right in the context of the American and Turkish criminal defense systems, looking at not only the history of this right in Section I, but also the quality of this right in Section II. Section III deals with the issue of financial eligibility for an attorney provided by the state whereas the question as to whether this right should be automatic is addressed in Section IV. After Section V discusses the administration of legal aid systems, Section VI concludes.

I. THE HISTORY OF THE RIGHT TO COUNSEL

The Sixth Amendment to the Constitution of the United States says that “In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.” For many years in America it was not clear whether this constitutional provision meant that criminal defendants

merely had the right to hire their own attorneys or whether it meant that the government must provide attorneys to defendants who cannot afford to hire one. Beginning in the 1930s, the United States Supreme Court interpreted the Sixth Amendment right to counsel to require the government to provide attorneys to defendants who are too poor to pay a private attorney.

The first Supreme Court case to touch on this issue was *Powell v. Alabama*.¹ In 1931, nine black youths found themselves in a fight with a group of young white people on a train in Alabama. Some of the white youths were ejected from the train as a result and two of the white women subsequently accused the young black men of rape. Although one of the women later withdrew her accusation, the second accusation prompted a sheriff's posse to arrest the nine young men amidst a public frenzy that reflected the racially charged atmosphere of the American South in the early 20th century. The young men were convicted in one-day trials held within weeks of their arrest – a rushed time frame for a case with such serious potential consequences – and they were sentenced to death. Although the young men were provided with lawyers, the lawyers were appointed immediately before the trials, were given no time to prepare a defense, and unquestionably provided inadequate representation.

The Supreme Court reversed the young men's convictions, holding that the failure to provide them with attorneys capable of mounting a reasonable defense violated the United States Constitution. The Court stated that:

where the defendant is unable to employ counsel . . . it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."²

Somewhat oddly, the Court's mandate to appoint attorneys to defendants who cannot afford their own did not rest on the Sixth Amendment's guarantee of the right to counsel, but on the Fifth Amendment, which guarantees a more general right to 'due process under law.' Because of this aspect of the ruling, the Court's decision was understood to apply only in capital cases, where the death penalty is sought by the prosecution.

A few years later, the Supreme Court expanded the criminal legal aid requirement beyond death penalty cases and formally acknowledged that the

¹ 287 U.S. 45 (1932). U.S. cases cited in this article are *available at* <http://supreme.justia.com> (last visited Jul. 27 2009).

² *Id.* at 71.

Sixth Amendment requires more than just the opportunity to hire one's own attorney in criminal cases. In *Johnson v. Zerbst*,³ a man charged with passing counterfeit money requested and was denied a court-appointed attorney. He was convicted in federal court and, on appeal of that conviction, challenged the court's denial of his request for an attorney. The Supreme Court agreed with him and overturned his conviction because he was not given an attorney at trial. The Court held the right to counsel "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with the power to take his life or liberty, wherein the prosecution is represented by experienced and learned counsel."⁴ Therefore, in the Court's view, the presence of an attorney to represent a criminal defendant is "prerequisite to a federal court's authority to deprive an accused of his life or liberty."⁵

The precedent established by the *Johnson* case, however, was confined to federal crimes charged in federal courts, and thus had limited applicability to the majority of criminal cases, which are prosecuted in state courts. In 1963, the Supreme Court went further in a seminal case known as *Gideon v. Wainwright*.⁶ In that case, the Court ruled unanimously that the right to counsel for the poor applies in every criminal case, including those in state courts. Clarence Earl Gideon was charged in a Florida state court with a felony offense of breaking into a pool hall and stealing from it. He asked the court to appoint him a lawyer, but the court refused. Mr. Gideon attempted to defend himself without an attorney. He was convicted and sentenced to five years in prison. From his prison cell, Mr. Gideon appealed his case to the Supreme Court, which held that the Florida court violated his right to a fair trial by refusing to appoint him a lawyer. The Court's ruling called it an "obvious truth" that a fair trial for a poor defendant could not be guaranteed without the assistance of counsel, and stated that "lawyers in criminal cases are necessities, not luxuries."⁷

The right to counsel in Turkey has a shorter but no less interesting history. In the early 1990s, the government of Turkey faced intense internal and external criticism for instances of mass arrest, secret detention and inhumane conditions of confinement for criminal arrestees. As part of a broader reform package aimed at addressing these criticisms, the Turkish parliament passed a law in 1992 creating a right to legal aid in all criminal cases where the defendant

³ 304 U.S. 458 (1938).

⁴ *Id.* at 462-63.

⁵ *Id.* at 467.

⁶ 372 U.S. 335 (1963).

⁷ *Id.* at 344.

requests the assistance of counsel.⁸ In a smaller category of cases – i.e., those in which the defendant is mentally disabled or a minor or when the charges carry a potential sentence of 5 years or more – legal aid is automatic and assigned regardless of whether the defendant requests it or not.⁹ These laws are now embodied in the Turkish Criminal Procedure Code.

In addition, Article 6 of the European Convention on Human Rights (ECHR), which Turkey ratified in 2003, establishes the right to a fair trial and requires the appointment of legal aid attorneys to indigent criminal defendants “when the interests of justice so require.”¹⁰ The “interests of justice” include factors such as the complexity of the case, the capacity of the defendant to defend himself, and the seriousness of the charges.¹¹ European case law emphasizes that attorneys are necessary to ensure that the defendant has “a reasonable opportunity to present his case . . . under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.”¹² This concept is often referred to as the “equality of arms” principle.

The most obvious distinction that emerges from these histories is that while the American right was established by judicial interpretation of a fundamental constitutional right, the Turkish right was established by legislative declaration and exists as a statutory right. As a result, the American right is rooted in constitutional principles that are interpreted by the judicial branch, whereas the Turkish right is rooted in legislation written and enforced by the political branches of government.

At a fundamental level, this is an advantage of the American system. As a constitutional right, the fundamental scope of the right to counsel is somewhat insulated from political pressure and cannot be altered by the political branches of government. When one considers the nature of the right to counsel, this is a key fact. Poor people, accused criminals, and lawyers are not popular constituencies in any country. Thus, the expenditure of government funds to provide free lawyers to poor people who are accused of crimes is not a cause

⁸ The Act Regarding Amendments to the Code of Criminal Procedure and Code on the Establishment and Procedure of State Security Courts, No. 3842 (18 Nov. 1992, as amended 2005).

⁹ *Id.*

¹⁰ European Convention on Human Rights, Article 6.3(c). The UN Declaration on Human Rights of 1948 contains similar protections. Article 10 guarantees “full equality to a fair and public hearing . . . in the determination of . . . any criminal charge” and Article 11.1 states that “Everyone charged with a penal offence has the right to . . . a public trial at which he has had all the guarantees necessary for his defence.”

¹¹ Richard Clayton and Hugh Tomlinson, *THE LAW OF HUMAN RIGHTS* 250 (2000).

¹² *Dombo Beheer BV v. Netherlands*, 18 EHRR 213 (1994).

many politicians in either Turkey or America want to support. Protecting the right to counsel from political forces provides better assurance that the right will not be sacrificed to political expediency. Moreover, having the support of the judicial branch for the right to counsel encourages legislators to enact meaningful reform in order to avoid being held to account for failing to do so in court. It also ensures that judges themselves have respect for defendants' rights.

On the other hand, constitutional rights are not self-executing. The decision in *Gideon* is often referred to as a "trumpet call" demanding fulfillment of the right to counsel,¹³ but implementation of that right was not immediate in America and even today it remains an unfulfilled promise, largely due to political resistance from state governments.¹⁴ Without political action, the right to counsel is a right only on paper regardless of whether it is enshrined in a constitution or in a legislative enactment.

II. MEANINGFUL AND EFFECTIVE ASSISTANCE OF COUNSEL

One of the most significant differences between the right to counsel in criminal cases in America and in Turkey is that in America, the right to counsel does not simply mean the right to have an attorney physically present in the courtroom. It is also a right to *effective* assistance of counsel that is capable of putting the prosecution's case through "meaningful adversarial testing," in the words of the United States Supreme Court.¹⁵ Therefore, criminal defendants have the right to competent, well-trained attorneys capable of representing them in court against the charges they face. The Supreme Court has noted that if defense counsel are not able "to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself."¹⁶ This is a critical aspect of the right to counsel, for it means that the government violates the United States Constitution when it fails to provide attorneys whose representation of their clients meets basic professional standards. Indeed, most litigation surrounding the right to counsel focuses on the quality of the representation provided rather than whether representation was provided at all. This reflects the fact that, in most places in America, the poor are able to access attorneys, but those attorneys sometimes are incompetent, under-qualified, poorly trained, or overworked such that they are not capable of providing minimally acceptable professional representation.

¹³ See, e.g., Anthony Lewis, *GIDEON'S TRUMPET* (1964).

¹⁴ See Yale Kamisar, *Gideon's Trumpet: Book Review*, 78 HARV. L. REV. 478 (1964) (noting that many states had not yet begun to implement *Gideon*).

¹⁵ See *United States v. Cronin*, 466 U.S. 648, 656 (1984).

¹⁶ See *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

Turkey has not yet incorporated this concept into the legal right to counsel. The Criminal Procedure Code limits its scope to the provision of an attorney without mention of competence or quality and, although the ECHR includes the “equality of arms” principle, that principle has not yet been deployed as a basis for litigating or otherwise enforcing quality standards of representation in Turkish criminal legal aid services. Among advocates for criminal legal aid in Turkey, however, there is widespread recognition that this is an important issue that must be addressed as the Turkish criminal legal aid system continues to develop.

III. THE ISSUE OF FINANCIAL ELIGIBILITY FOR CRIMINAL LEGAL AID

In America, the right to counsel applies only to criminal defendants who are so poor that they cannot pay a private attorney. The definition of who is poor enough to qualify for a public defense attorney is not fixed by the Constitution or by any Supreme Court case. In some states, financial eligibility standards are set by state legislation. In other cases, it is left up to the entities who administer criminal legal aid – usually, as explained below, state or local government agencies – to set financial eligibility rules. Many jurisdictions simply use the official United States poverty line as the standard, but some states use different or more complicated guidelines. As a result of these varying standards, it may be the case that a person poor enough to qualify for a public defense attorney in, for example, San Francisco, would not meet financial eligibility standards to qualify for a public defense attorney in Oklahoma.

It is worth noting that most people accused of crimes in America are in fact too poor to be able to pay for their own attorneys. This is partly because the poor are highly represented in the criminal justice system and partly because private lawyers are generally quite expensive in America. The most recent statistics show that almost 70% of federal felony defendants and more than 80% of state felony defendants are represented by public defense attorneys.¹⁷

Despite these high statistics, the lack of fixed definitions for financial eligibility sometimes creates an unjust barrier to criminal legal aid services in America. For example, in some parts of America, owning a home disqualifies a person from access to legal aid even though Americans from a wide range of economic backgrounds are able to finance the home ownership through bank loans. Thus, a person can own title to a home but not in fact own any equity in

¹⁷ See United States Department of Justice, Bureau of Justice Statistics, *Indigent Defense Statistics*, available at <http://www.ojp.usdoj.gov/bjs/id.htm> (last visited Jul. 4, 2009).

the home and home ownership does not necessarily mean that a person has the financial resources to afford a private attorney.¹⁸ One can imagine a multitude of other ways in which financial eligibility standards can be manipulated in order to limit the number of eligible clients and thus limit the costs of a criminal legal aid system.

By contrast, in Turkey the right to a court-appointed, free attorney applies to every criminal defendant regardless of their financial circumstances. The reasons for the absence of financial eligibility restrictions are not entirely clear. On the one hand, this rule avoids the complicated question of determining proper income qualifications for free legal services. On the other hand, it opens the system to abuse or the perception of abuse by criminal defendants who may have the capacity to pay a private attorney but who nonetheless demand legal aid. Anecdotes to this effect are often told within the criminal legal aid community in Turkey, although this author has never found any evidence of an actual case of abuse. Given the strikingly low overall rate of legal aid representation and the lack of quality controls within the status quo legal aid system, it seems highly unlikely that defendants who could afford to choose their attorney would opt to do otherwise. Nonetheless, if criminal legal aid becomes a more established part of Turkey's criminal justice system, financial eligibility restrictions may become necessary in order to ensure that the limited resources of the system are directed to those who genuinely need them.

IV. SHOULD LEGAL AID BE DEPENDENT BE DEPENDENT UPON AN AFFIRMATIVE REQUEST FROM A CRIMINAL DEFENDANT?

Another key difference between the American and the Turkish criminal legal aid systems is that in America, the right to counsel is automatic; criminal defendants do not need to ask for their rights in order to benefit from them. Judges are required to inform every criminal defendant of his or her right to counsel immediately upon the first appearance of the defendant before the court. Similarly, police officers are required to inform criminal suspects of their rights by reading the 'Miranda'¹⁹ warnings made famous in American films and

¹⁸ This is one of the allegations made in a recent lawsuit filed against the State of New York, alleging that the State's criminal legal aid system fails to provide meaningful representation to poor people who are accused of crimes. *Hurrell-Harring, et al. v. State of New York, State Supreme Court of Albany County*, Index No. 8866-07, available at <http://www.nyclu.org/node/1538> (last visited Jul. 4, 2009). Author is lead counsel.

¹⁹ So named because the warning stems from the U.S. Supreme Court decision in *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that justice is best served by a warning to defendants as to their rights – the 'prophylactic' rule).

television programs. If the police or the court fail to do so or if the court fails to provide an attorney to a financially eligible defendant, that itself is considered a violation of the right to counsel.

This is not to say that every indigent defendant in American courts must have a court-appointed attorney. Defendants may waive their right to counsel, but any waiver must be made “knowingly and voluntary,” meaning that the person must be informed on the record of the right to counsel and the court must ensure that the person is fully aware of the consequences of proceeding without an attorney. Waivers of the right to counsel are extremely rare in American courts, partly because of the stringent rules mandating that every defendant understand that they have this right, partly because Americans generally understand the importance of having an attorney to assist them, and partly because judges take the right seriously and often discourage defendants from waiving their right. Indeed, generally speaking, American judges dislike having unrepresented criminal defendants in their courts because it inherently casts doubt on the fairness of the proceedings and because unrepresented defendants often do not understand criminal procedure and therefore complicate and slow down efficient judicial process.

In Turkey, criminal legal aid is automatic in a more limited set of circumstances. These include: (1) where the defendant is a minor; (2) where the defendant is deemed mentally incompetent; and (3) where the defendant is accused of a crime carrying a punishment greater than 5 years.²⁰ In the remaining criminal cases, defendants must specifically invoke their right to counsel in order to receive a legal aid attorney.

Unfortunately, public awareness of the right to counsel is low, despite the fact that the right has existed *de jure* for almost two decades.²¹ In addition, some scholars speculate that criminal defendants do not appreciate the importance of having a defense attorney to guide them through the criminal justice system and are therefore less likely to invoke their rights even if they were aware of them.²² Unlike in America, there is no legal requirement that Turkish criminal courts inform defendants of their right to an attorney or

²⁰ Turkish Criminal Procedural Law, art. 150 (2005).

²¹ Idil Elveris, Galma Jahic and Seda Kalem, ALONE IN THE COURTROOM: ACCESSIBILITY AND IMPACT OF THE CRIMINAL LEGAL AID BEFORE ISTANBUL COURTS 7 (2007) [hereinafter ALONE IN THE COURTROOM], available at http://www.justiceinitiative.org/db/resource2?res_id=104065; Immihan Yaşar, in LEGAL AID IN TURKEY: POLICY ISSUES AND A COMPARATIVE PERSPECTIVE 176 (Idil Elveriş, ed., 2004).

²² Idil Elveriş, Serçin Kutucu & Immihan Yaşar, *Basic Assessment of the Legal Aid System in Turkey*, in LEGAL AID IN TURKEY: POLICY ISSUES AND A COMPARATIVE PERSPECTIVE 207 (Idil Elveriş, ed., 2004).

explain the importance of having one. Indeed, studies show they very often do not inform defendants of their rights.²³ In theory, the police should inform arrestees of their right to an attorney; however, interviews with defense attorneys and prosecutors provide evidence that police officers “in fact do not inform the suspect of the right to a lawyer, and sometimes discourage suspects from requesting lawyers. Suspects may be told that they will be released quickly if they simply cooperate, or that they will be held for a long time if they request a lawyer.”²⁴ Some lawyers – particularly those outside of major cities like Istanbul and Ankara – report that police officers sometimes actively prevent legal aid attorneys from accessing arrested clients.²⁵ Moreover, the mandatory language of the warning police officers are required to issue is not accessible to the general population. For example, rather than the common Turkish word for attorney, *avukat*, it uses the term, *müdafî*, which is not commonly known or understood.²⁶ Unsurprisingly, therefore, genuine understanding of the warning is rare. A survey of one low-income urban population found that nearly 80% of people who heard the warning did not understand that they were entitled to free legal assistance.²⁷

Whether a result of lack of awareness of the right, lack of understanding of the need for a lawyer, or interference from police authorities, the Turkish criminal legal aid system in fact provides lawyers in only a very small number of criminal cases. In contrast to the American system where, as mentioned above, the vast majority of criminal cases are defended by legal aid attorneys, legal aid lawyers represent less than 3% of criminal defendants in Turkish courts in some areas and up to 10% in others.²⁸ These paltry numbers disguise an even more grim reality, in that many of those 3-10% had a lawyer only

²³ One study showed that judges did not inform defendants of their right to counsel in more than 90% of criminal cases in Istanbul courts. ALONE IN THE COURTROOM, *supra* note 21, at 7, 41, 61.

²⁴ ALONE IN THE COURTROOM, *supra* note 21, at 33.

²⁵ Barış Yavuz, in LEGAL AID IN TURKEY: POLICY ISSUES AND A COMPARATIVE PERSPECTIVE 170 (Idil Elveriş, ed., 2004).

²⁶ One study showed that 65% of a sample of low-income Istanbul residents did not know what *müdafî* meant. Galma Jahic & Idil Elveriş, *Pilot Study of Legal Problems and Legal Needs of the Urban Poor in Istanbul*, paper presented at the annual meeting of the Law and Society Association (July 6, 2006) (unpublished).

²⁷ *Id.*

²⁸ ALONE IN THE COURTROOM, *supra* note 21, at 26, 61 (noting that legal aid lawyers represented criminal defendants in 2.8% of sampled cases from Istanbul courts); Idil Elveriş, ed., LEGAL AID IN TURKEY: POLICY ISSUES AND A COMPARATIVE PERSPECTIVE 174 (2004) (quoting director of Diyarbakır criminal legal aid program as estimating that 10% of criminal defendants there are appointed legal aid attorneys). Nationwide statistics have never been compiled, but the overall rate likely tends toward the lower numbers, since urban areas like Istanbul and Diyarbakır have some of the better-functioning criminal legal aid systems.

during limited stages of their criminal prosecution.²⁹ Approximately three-quarters of the people sentenced to prison in Turkey never see an attorney before being convicted and incarcerated.³⁰ These statistics argue strongly in favor of expanding automatic criminal legal aid in Turkey.

V. ADMINISTERING CRIMINAL LEGAL AID SERVICES

Although the declaration of the right to counsel came about by fundamentally different means, the respective histories of developing criminal legal aid systems in America and Turkey share a great deal more in common. The series of Supreme Court decisions establishing the right to counsel were not self-executing. Even today, the project of creating adequately funded, well-administered criminal legal aid systems in America remains unfinished. Similarly, Turkey is still struggling with fundamental questions about how to structure a workable system for administering criminal legal aid services. However, Turkey benefits from its more centralized criminal justice system, in contrast to America's federalist system of government, in which each of America's 50 states has a separate and independent system for providing criminal legal aid, making comprehensive reform a more complicated endeavor.

Criminal law enforcement is traditionally a power belonging to state governments rather than the federal government of the United States. Most crimes in America are state crimes, defined by state law and prosecuted in state court systems. In modern times, there has been a trend toward creating more federal crimes, defined by federal law, enforced by federal prosecutors, and tried in federal courts. This has been especially true for serious drug crimes, large criminal conspiracies, and crimes related to terrorism. Nonetheless, it remains the case that most crimes committed in the United States – theft, murder, rape, assault, etc. – are dealt with by state law enforcement and tried in state court systems, which are separate from and independent of the federal court system.

As a result of this decentralization of criminal law, it is largely the responsibility of state governments to ensure that the right to counsel is protected. Although this responsibility is created by federal law – namely, the Constitution of the United States as interpreted by the United States Supreme Court – federal law does not dictate how state governments should administer systems for guaranteeing the right to counsel. As a result, the public defense

²⁹ *Id.*

³⁰ *Id.*

system is something of a patchwork quilt, with each state left to make its own decision about how to fund and administer its own system.

There is a pattern to this patchwork quilt, however. Public defense systems in America draw from one of three models, or some combination thereof.³¹ The first model is a *public defender system*. In this system, an independent government agency known as a Public Defender's Office is responsible for representing criminal defendants who cannot afford private attorneys. The Public Defender's Office consists of however many full-time attorneys and support staff are necessary to carry the caseload of that particular state. Typically, there is a Chief Public Defender who is ultimately responsible for supervising and ensuring the quality of the services provided by the public defense attorneys in the office. Like any government agency, its budget is provided by the state legislature, but there are procedures for insulating the office from political forces so that it can carry out its professional responsibilities to its clients without interference. For example, it is generally accepted that the Chief Public Defender should be appointed or elected for a fixed term and during that term should not be directly managed by any political actor or entity. Another example of maintaining independence is provided by the Federal Public Defender's Office, whose personnel budget is determined according to a strict formula based on how many cases it has each year, thus insulating the office from political pressure to cut its budget and transfer the funds to more politically popular causes.

The second model is a *legal aid system*. In this system, a private, non-governmental organization (NGO), often known as a Legal Aid Society, performs the functions otherwise performed by the Public Defender's Office in the first model. The Legal Aid Society acts as a government contractor, often bidding against other, competing NGOs to win a contract from the government to perform legal aid services. During the term of the Legal Aid Society's contractual period, it acts without direct supervision of any government agency, except to the extent that it is bound by the terms of its contract with the state.

The third model is a *pro bono* or *private bar system*. In this system, there are no full-time public defense attorneys hired by a Public Defender's Office or Legal Aid Society. Rather, criminal defendants who cannot afford to pay are represented by private attorneys appointed by the court who either volunteer their time and work *pro bono* or accept reduced wages in those cases. A list of willing and capable attorneys is maintained either by a small, entirely administrative government office or by the local bar association. The

³¹ See Alan W. Houseman, *The Future of Civil Legal Aid in the United States*, at http://www.clasp.org/admin/site/publications_archive/files/0188.pdf (last visited Dec. 5, 2009).

government administrator or bar association responds to requests from the court to appoint an attorney from the list if the court determines that a defendant is entitled to a public defense attorney. The state legislature allocates a budget from which the costs and fees of these attorneys are paid, although the attorneys are not employees of the state and they maintain their own private practices.

Although there remain a few American states that rely solely on the third model, in which responsibility for public defense services rests with the private bar, the modern trend in America is to rely on either a Public Defender Office or Legal Aid Society.³² This trend represents a recognition that a private bar system cannot ensure the minimum quality of representation required by federal law. Without an office or agency with hiring criteria, training requirements and supervising attorneys, there is no one dedicated to ensuring that the private volunteer attorneys who take public defense cases are competent to do their jobs. It is extremely difficult to measure the overall performance of criminal legal aid attorneys because they operate independently and are not subject to direct supervision or management. Moreover, because the rate of payment for public defense cases is less than what rich private clients pay, the most competent and in-demand attorneys often do not take public defense cases. On the other hand, lower-quality attorneys who cannot attract enough private clients are more likely to take public defense cases because it represents a source of income.

Some American states use a combination of these three systems to fulfill their responsibilities to provide criminal defense attorneys to the poor. This is often the case because there are “conflicts” rules in America that prevent the same attorney or the same legal office from representing co-defendants in the same criminal case. The most common example of a conflict is when one co-defendant agrees to provide evidence against the other defendants in exchange for a reduced sentence or lenience from the prosecutor. In such a situation, one lawyer cannot represent the interests of both the testifying co-defendant and the remaining defendants who will be harmed by the first defendant’s testimony. Conflicts rules are designed to avoid this potential conflict. Thus, for example, if three people are together accused of conspiring to commit murder, the Public Defender’s Office or Legal Aid Society may represent one of the defendants and the remaining two will be assigned separate, private attorneys selected from a list maintained by the local bar association for that purpose. In this manner, each defendant is represented by an independent attorney capable of representing purely his or her own client’s interests, even if those interests conflict with those of the co-defendants.

³² *Id.*

Turkey's current criminal legal aid system resembles the third model described above – the pro bono/private bar model. Criminal legal aid is administered through the Union of Turkish Bar Associations and local bar associations, in particular through practice groups known as Code of Criminal Procedure Practice Units or “CCPP” Units. Unfortunately, as in the American examples noted above, there is no mechanism for quality control in this system. The Union of Turkish Bar Associations does not have the authority to oversee the CCPPs because it lacks that authority over the local bar associations.³³ Neither the Union nor the local bar associations have authority to supervise attorney practice.³⁴ There are no minimum qualifications for attorneys who would like to act as criminal legal aid attorneys. The only requirement is that the attorney be licensed to practice law.³⁵ Some bar associations require participation in a one-time training program in order to be considered for criminal legal aid appointments, but beyond that there is no training requirement.³⁶ As a result, there is widespread recognition that although many criminal legal aid lawyers are very good lawyers who succeed in providing quality representation, and many more attempt to do so but simply lack the training and resources to succeed, the overall systemic performance of criminal legal aid lawyers is lacking.³⁷

Moreover, the Turkish criminal legal aid system at present lacks the requisite degree of independence from political forces, especially the prosecutorial side. Presently in Turkey, a legal aid lawyer is only assigned upon request of the police, the prosecutor or the court; criminal defendants themselves cannot directly approach the Bar to request an attorney.³⁸ Moreover, the Public Prosecutor's office administers the budget for criminal legal aid and approves all payments to legal aid attorneys.³⁹ The rates of payment are also determined by regulations established by the Ministry of Justice.⁴⁰

This role may contribute to the underutilization of legal aid services in Turkey. In a survey of opinions regarding Turkey's legal aid system, one prosecutor speculated that some criminal defendants refuse legal aid services because they are suspicious of “the idea that a lawyer appointed by the State can work to their advantage.”⁴¹ This perception can only be exacerbated by

³³ Elveriş, Kutucu & Yaşar, *supra* note 16, at 196.

³⁴ *Id.*

³⁵ *Id.* at 191-92.

³⁶ *Id.*

³⁷ ALONE IN THE COURTROOM, *supra* note 21, at 8, 56-58, 62.

³⁸ *Id.*, at 13.

³⁹ *Id.*

⁴⁰ E.g. Official Gazette No. 26528, May 21, 2007.

⁴¹ ALONE IN THE COURTROOM, *supra* note 21, at 26.

situating so much power over the administration of the legal aid system within the prosecutor's office. In some of states in America, this same lack of political independence exists. For example, the State of Nevada created a statewide Public Defender System in the 1970s, but it was not politically independent because the Chief Public Defender was directly appointed by the state's elected Governor and the Public Defender's budget was a subset of a larger state bureaucracy, ensuring that political opposition to providing lawyers to indigent accused criminals would keep the budget very small. As a result, the system is underfunded and poorly managed. Whether in America or in Turkey, only when the legal aid system is truly independent can criminal defendants develop confidence that attorneys appointed to represent them will do so zealously and fairly.

CONCLUSION

Neither America's nor Turkey's criminal legal aid systems are perfect. Indeed, both remain deeply flawed. As one American expert has noted, "No constitutional right is celebrated so much in the abstract and observed so little in reality as the right to counsel."⁴² The same could be said of the statutory right to counsel in Turkey. In both cases, the declaration of a right did not make it a reality, particularly when the realization of that right depends on the expenditure of government funds on behalf of a politically and economically marginalized group of people. Nonetheless, the principle of criminal legal aid is now well-established in both countries and, although progress toward the ideal of competent, capable counsel for all indigent criminal defendants in America and Turkey will not always be constant, reform movements exist in both countries with the capacity to keep their respective systems marching toward that ideal.

⁴² Stephen B. Bright, *Turning Celebrated Principles into Reality*, THE CHAMPION, Jan./ Feb. 2006, at 6, available at <http://www.criminaljustice.org/public.nsf/championarticles/A0301p6?OpenDocument> (last visited Jul. 4, 2009).

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