

## **Effectiveness of the Judicial System**

### **Report of a peer based assessment mission to Turkey 17-21 November 2008**

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#### **Table of contents**

Introduction	2
Earlier reports	2
Effectiveness?	3
Turkey has entered a new stage	4
International opportunities	5
Informed dissent	6
Human resource management	7
Legal education	7
Opening up the judiciary	8
The support staff is an asset	9
Restructuring the court management system	9
UYAP	11
Enforcement	11
Statistics and numbers	12
Mardin and Diyarbakir experiences	12
Administrative procedures; backlog of the Council of State	13
Penal and civil procedures; backlog of the Court of Cassation	13
Courts of Appeal	14
Big courts, small courts, merger of courts	14
Conclusion	15
Executive summary	16
Annex I	17
Annex II	22
Annex III	23

**European Commission**

**Brussels**

## **Effectiveness of the Judicial System**

### **Introduction.**

This report is the result of a peer based mission to Turkey to assess the area of the Judiciary. It should be noted that this report holds my personal opinion. Further it should be taken into account that I had to limit myself to the matter of the effectiveness of the judicial system and that other experts have covered other areas of interest as for instance the independence of the judiciary. It is good to keep in mind that the words “effective” and “efficient” have not the same connotation. A swiftly delivered decision can be termed efficient, but it will only be effective if it is accepted by the parties concerned.

For this mission I visited Ankara, Mardin and Diyarbakir. Together with colleagues from other EU countries, and representatives of the European Commission in Brussels and Ankara We had many meetings during the week of November 17-21, 2008. We spoke with representatives of NGO's, local and national bar associations, and members of the judiciary and the Ministry of Justice. The visits to the court houses in Mardin and Diarbakir were not limited to discussions with judges and prosecutors, professional staff members gave their input as well.

All the meetings took place in an open atmosphere. I do not have the idea that certain opinions were withheld from us. Everyone did his best to provide us with the information asked for.

What needs mentioning however is that the Turkish judiciary seems to be rather self contained. Contacts between for instance the judiciary and the bar are sparse and appear to be formal.

The hospitality with which we were received everywhere and by everyone was, as always in Turkey, outstanding.

### **Earlier reports**

At the outset of this report it seems appropriate to mention that the Turkish judicial system has already been the object of several reports initiated by the European Commission. In particular have to be mentioned two elaborate reports of advisory visits that have taken place in 2003 and 2005. These reports drawn up by Kjell Björnberg (2003 and 2005), Paul Richmond (2003) and Ross Cranston (2005) give an extensive overview of the state of affairs, with special emphasis on (the position of) judges, public prosecutors and lawyers. Furthermore it is important that the observations of the rapporteurs are all made against the background of Turkey's obligations as a state that is party to the European Convention of Human Rights.

An other relevant and interesting report is the joint expert report on the results of the needs assessment visits in Turkish courthouses (2008) by Manfred Buric and Bert Maan, which report was drawn up in the framework of the Project on support to the court management system in Turkey, a co-production of the European Commission and the Council of Europe. Furthermore Turkey participated in the 2008 Report on the efficiency of justice drawn up by the European Commission for the Efficiency of Justice, which compares judicial issues of all the member states of the Council of Europe and provides a lot of statistical data.

Against the background of especially the two first mentioned reports my first impression is that, although still a lot has to be done, Turkey has made serious progress and is well under way to provide its inhabitants with a judicial system that equals that of other states in modern

society. Special attention however should be given to the matter how to live up to the standards set by the various conventions and treaties Turkey has adhered to.

What is important also is to bear in mind that a judicial system can only be termed effective if the various participants have such an authority that their sayings and doings will be taken seriously and respected by the other participants.

“Participants” includes not only those directly involved in the day to day court business like judges, prosecutors and lawyers. The stage is not merely the courtroom but the nation and the international community as well.

I recommend scrutinizing carefully the already available reports about the judicial system in Turkey.

I recommend to state clearly what has been implemented already, what will be done in the near future and what will remain open. For the last matter explain why.

### **Effectiveness?**

The framework of reference for my report is circumscribed as the effectiveness of the judicial system.

#### *Inside the system?*

“Effectiveness” is something extremely difficult if not almost impossible to measure. “Justice delayed is justice denied” is a well-known slogan which points in the direction that in order to be effective a judicial system has to be efficient. True as this may be, it is not the whole truth. A quick decision is not always the right decision and it is evidence based that a well reasoned decision taking somewhat more time can take the angle out of a dispute whereas a “quickie” might only lead to frustration – and new procedures. “Justice must be seen to be done” is a slogan that is of no less importance than the first one mentioned.

#### *or outside?*

At the same time it can be advocated that the effectiveness of the judicial system seen from the point of view of the potential clients is best when there are adequate ways to withhold opposing parties from seeking justice in the court system. The party who is confronted with a government ruling against a request might be better off with a fair hearing by the relevant authorities where he will have the opportunity to bring his views forward. Even when the negative decision will remain in force, chances that he will feel “heard” are bigger and the chance that he will pursue his case in court will be less. In terms of effectiveness this would be a win-win situation. Also neighbours who have a dispute over for instance a right of way might both be better off with a friendly settlement than a court decision. And many other examples of this kind can be given. In ancient days society could profit from the insight and authority of the wise men under the oak tree. Since these romantic times have gone it is up to the government to provide the citizens with alternatives.

For that matter it is important that public officials realize that they are public servants and that it is their duty to help find solutions for the problems citizens see themselves confronted with. At the same time these citizens should be well aware of the fact that they too have responsibilities.

Against this background it would be a good thing if Turkey would go on making officials (in- and outside the judiciary) and the public at large more familiar with methods of alternative dispute resolution. In doing this it will be essential to pay special attention to the members of the bar.

I recommend studying the possibility of (further) developing Alternative Dispute Resolution.

### **Turkey has entered a new stage**

The Turkish judiciary appears to have lived for a long time a secluded life. This is not so strange for a big country with a lot of resources of its own. But over the last decades Turkey has to a certain extent opened up to the rest of the world. There has been an enormous migration from Turkish workers to Western European countries and this in itself has led to a situation that Turkey has been confronted with influences from abroad. Furthermore business-life is less constrained by national frontiers which means that Turkish companies will look for opportunities abroad, just as foreign investors will look for possibilities of doing business in Turkey. Unfortunately it is not only because of this that Turkey, like every other country, has to realise that it cannot just go its own way: criminality and terrorism too have internationalized which means that it is necessary to work closely together with other national and international police and crime prevention institutions to cope with these matters.

The various interviews have made it clear that the vast majority of people working in the judicial system are very well aware of the fact that Turkey has to take further steps on this path it is already going. Especially the professionals, judges, prosecutors, lawyers are keen to learn about developments in other countries in order to see what can be adapted to the Turkish circumstances.

#### *and needs to speak foreign languages*

With regard to this it is essential to develop the language skills of key players, in particular the knowledge of English that is widely used in the juridical world. In order to be able to correspond with colleagues from abroad, to exchange ideas and to follow developments it is essential to see to it that the relevant authorities will (where necessary) get language training to get better equipped to handle these issues. This concerns not only the authorities working in the Ministry, but also judges and prosecutors and especially the ones who are attached to the training institutes. From someone who is designated to teach and train his colleagues it may be expected that he will orient himself first of all of course about what is available in his field of interest in Turkey but, following this, also abroad.

I recommend developing the foreign language skills of key players in the judiciary.

### **International opportunities**

It is my sincere conviction that the Turkish judiciary will profit immensely if it will use the canals that are already open.

First of all I would like to mention the European Network of Councils for the Judiciary (ENCJ). All the EU countries participate in this Network, either as member or as observer, depending upon the fact if their system possesses a Council or not. Candidate countries like Turkey can acquire observer status. As a matter of fact Turkey is already an observer. In this capacity one or more members of the High Council usually attend the annual plenary assembly of the ENCJ. Since for all practical purposes there is hardly a difference between members and observers the fact that Turkey did acquire observer status means also that Turkey can participate in the various working groups of the ENCJ, and in any case can profit from the results of all the working groups that are divulged by the secretariat. The working group Quality Management for instance has recently produced a report that cannot be as of interest for the Turkish judiciary.

Also of direct importance is the European Judicial Training Network (EJTN). In this network all the institutions that occupy themselves with schooling and training are represented. The EJTN is also instrumental in providing exchange programmes between members of the judiciary of the various countries. Although with regard to the judicial structures countries will almost necessarily differ more from each other more than in many other aspects, like for instance health care, each country can only profit from getting acquainted with the training and schooling programmes of other countries. In the recitals of the 2002 Charter of the EJTN it is explicitly mentioned that for the benefit of third-party countries, and in particular candidate countries, training is an essential means of improving the efficiency of judicial systems and the reinforcing of the rule of law. As far as I know Turkey does not profit (enough) from the possibilities the EJTN has to offer.

Further I would like to point at the Consultative Council of European Judges (CCEJ), an institution of the Council of Europe. Sometime ago Sir John Thomas, Lord Justice in the Court of Appeal for England and Wales has presented to the CCEJ a report about the various Councils for the Judiciary that are operative in the EU. In discussions about the position of the High Council in Turkey this report should be food for thought and discussion.

Although there will undoubtedly be other international institutions and organisations that are of relevance I will end with mentioning the European Commission for the Efficiency of Justice, once more under the aegis of the Council of Europe. This council –better known under its French name Commission Européen pour l’Efficacité (once again “efficiency” and not “effectiveness”) de la Justice (CEPEJ) regularly provides a rather detailed insight in the way the judiciaries in the member-states of the Council operate. The already mentioned 2008 Report based on data from 2006 is good reading material. I will refer more extensively to this report further on and in Annex III.

I recommend taking good notice of the developments in the judicial systems of other (European) countries
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I recommend to make use of the canals that are already there and to become an active player in international institutions such as the European Network of Councils for the Judiciary (ENCJ) and the European Judicial Training Network (EJTN)
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**Informed dissent**

Of course the responsibility how to decide in a particular case lies primarily with the – independent- judge himself. But at the same time every judge has to realise that he belongs to the judiciary as a whole and that his decisions have to fit in a pattern. This should not mean however that junior judges, or judges from courts of first instance, have to look senior judges or a superior court at the eyes. Justice is a living institution and jurisprudence should be developed every day. In the medical world there is something called “informed consent”. For the development of the law I would advocate “informed dissent”. If a judge intends to decide a particular case in a certain way he should be well aware of the jurisprudence as it stands. He would only cause problems and costs for the parties if he would deviate without having taken good notice of the status quo. If however he is convinced that for the case at hand this jurisprudence is incorrect or because time has elapsed obsolete, and that the case should be decided differently he should do so. If his decision will be quashed later on, so be it. And of course he will then have to re-appraise his reasoning, especially in view of upcoming cases.

A specific problem in Turkey appears to be the use of expert witnesses, An expert witness can of course be of great value in technical matters where about an ordinary judge will not have sufficient knowledge of his own. But in Turkey it seems not uncommon that a judge, just to feel secure and to minimize the chance of his decision being overturned in appeal, will seek for outside guidance even in cases where he himself should be expected to have the necessary expertise. It is clear that this is far from efficient: it causes, sometimes considerable, delays and it can turn out to be a costly affair.

The effectiveness of the judiciary is greatly hampered by judges and prosecutors who are hesitant to decide on their own out of fear of running up to a drawback for their career. Therefore it is also necessary to make it clear that a judgment that is overturned in appeal will not automatically be marked up as a bad point for the judge by the High Council upon which this professional is dependent for his career. This is important not only for these professionals but also for the image of the judiciary as such. A judge will not be seen as an independent official if the bar knows quite well that he has an overriding interest in never straying away from the decisions of the superior courts, just because his career might be stake. It is therefore important that the criticisms as described in the recently published Draft Judicial Reform Strategy about the not transparent working methods and decisions of the High Council will be taken seriously.

I recommend reminding judges that they should not turn to expert witnesses on matters where they themselves can be expected to have the necessary expertise.
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## **Human resource management**

Human resource management is not only important in the business world but for the government and the judiciary as well.

The Ministry shall have to develop a recruiting and selection system that will provide the judiciary with competent members who can form a judicial elite with an “esprit de corps”, but who at the same time as individuals will not be afraid to stake out their own way and to leave common ground and deviate where necessary.

It is of the utmost importance that the Ministry will not act on its own but that it will be assured of the support of the judiciary and the ones who play a role in the judicial forum like lawyers. And why not representatives of the academic community and even the public at large?

At the same time it should be avoided that one of the parties concerned will hold another party hostage. The High Council should not retreat behind the wall of independence, just as should be avoided that politics will have the upper hand. A free and open discussion is the only way to assure that the necessary reforms will be successful.

### **Legal education.**

At the beginning of an effective judicial system stands a good legal education.

Turkey has dozens of universities that deliver people who are free to take up positions as lawyers immediately after graduation, but, as in all countries, not all universities appear to be up to standard. Medical doctors who have not learned their trade properly can ruin the lives of their patients and it goes without saying that unqualified lawyers can only cause a mess.

It is therefore of the greatest importance for a proper and efficient judicial system –which by the way encompasses more than lawmakers, courts and lawyers- that the law schools will be upgraded and that only those persons will be admitted to the bar who have stood a proper test. The introduction of a Bar exam is worth considering. And because in present day society all knowledge is soon outdated the case for a (compulsory) programme of “education permanente” for everyone working in the judicial field is easily made.

Although the government (ministries of justice and/or education) should be the frontrunner, it will have to co-operate with, and will undoubtedly profit from the input of institutions like the Union of Turkish Bar Associations. Nothing makes the work for the judiciary as easy as a well-prepared lawyer.

Once a solid juridical background will be guaranteed it is time to look further ahead.

I recommend to pay special attention to the quality of legal education and to seek for methods to ensure that only qualified professionals will be allowed to perform a role in the judicial system  
I recommend to (re)consider the introduction of a Bar exam

### **Opening up the Judiciary**

As it stands now the Turkish judiciary appears something like a closed shop. It is worthwhile to consider some restructuring if it would be only for the following reason

The interviews and the statistics provided by the Ministry have made it clear that there is a real shortage of judges and prosecutors, and if the law on the Courts of Appeal will be implemented this shortage will only worsen. At the same time Turkey counts tens of thousands of lawyers. Although it is clear that not every lawyer will possess the capacities and attitude that are necessary for a judge (there are enough examples of excellent barristers who

will not fulfil the desired profile) it is at the same time unthinkable that not a considerable amount of the members of this profession will be an asset for the judiciary.

If it would be possible to incorporate a certain number of these persons into the judiciary the sword would cut with two edges. On the one hand the gap in the judiciary would be lessened; on the other hand a different light would be shed on the judiciary as a closed entity. And that even an experienced judge can profit from the fresh views and the insight of a lawyer of good standing seems self-evident.

I am well aware of the fact that for the category of lawyers mentioned here it almost certainly would be a financial sacrifice to leave their jobs and enter the judiciary. But from experience in other countries it can be learned that there will be sufficient people willing to cross the border, even at such sacrifice. Apart from that the same experience has also showed that there are always lawyers who want to switch mid-term, around 40 years of age. This source should not be ignored. With respect to this it is necessary to develop ways of testing the abilities of the ones who want to go over. It goes without saying that even a lawyer who has left a (good) law school and has ten or more years of practice will not easily pass an exam designed for students who have recently graduated. For this category a more or less tailor-made test seems appropriate, of course without lowering the high standards that have to be set for every judge or prosecutor.

Once again: it is important not to estrange the lawyers, but to invite them to help thinking about ways to solve the specific problems of this issue.

As far as I can see the Law on Judges and Prosecutors makes it impossible for people to enter the judiciary when they are over 35 years of age, with maybe an exception for some groups of university teachers. I cannot think about a good reason for this legal rule, which excludes many of the more experienced potential candidates. In my opinion it would be good to reconsider this issue.

I recommend starting discussions about a new recruitment and selection system for the judiciary. The participation in the debate should not be limited to government officials but the (academic) legal world and civic society should be invited to take part as well

### **The support staff is an asset**

Judges –not only in Turkey- seem sometimes to think that they alone are the ones who can handle cases in an appropriate way. But just like in the medical world a lot of work can be taken out of the hand of the doctors by qualified nurses or paramedics, judges can profit from a well-trained staff.

The interviews have made it clear that all people working in the courts are proud of their professions and are eager to make things better.

It is important not to ignore the goldmine that is available here.

Therefore one should look for possibilities to give the support staff more, and more requiring, tasks. This will also lighten the burden judges and prosecutors have to carry. This means that

special training programmes for the staff have to be set in motion and also that qualified members of the staff should be given a better career perspective.

At the same time it should be made clear to the judges and prosecutors that this does not mean that they have given the steering wheel out of hand. Just like in an aircraft the captain can always take over from the automatic pilot, the judge or prosecutor will remain the ultimately responsible person. But with a well trained staff and of course good working relations a lot can be gained.

On this field the Justice Academy can play an important role, not only in providing specific courses aimed at the staff, but also developing courses making judges and prosecutors aware of the new roads that can be followed. Organizing certain courses for them together with staff personnel should seriously be taken into consideration.

I recommend making better use of qualified staff personnel.  
I recommend providing more training programmes for staff personnel

### **Restructuring the court management system**

A specific problem in Turkey is the structure that almost every judge or small group of judges seems to form a court of its own. This makes court management a very difficult issue. It is a good development that this problem is addressed in the Project on support to the court management system in Turkey referred to above.

#### *Separate budgets; presidents and chief public prosecutors*

Therefore it is necessary to have a good look at the functioning of the Judicial Commissions

As it stands now the Judicial Commission which functions in every jurisdiction is composed of (senior) judges and the (chief) public prosecutors. On the local level the commission has a say in the allocation of the available means to the various sectors. If I am well informed in practice the chief public prosecutor is the most powerful and often decisive actor.

To stress the independence of the judiciary it is worthwhile to reconsider the position and the exact role of the judicial commissions.

In the background the High Council remains present. It appears that this institution can intervene even in purely administrative and sometimes trivial matters as the division of labour in a particular court or prosecution office. In my opinion it is not very efficient that the very senior members of this important institution occupy themselves with in essence administrative affairs.

Apart from that is advisable to draw a clear line between the courts and the prosecution.

For all purposes it would be better to give the courts and the prosecution offices each their own (separate) budgets. It should be noted that according to the 2008 CEPEJ Report Turkey is the only country where courts and prosecution offices do not have separate budgets. For the prosecution office this would mean that the final responsibility for the way the appropriated funds will be allocated will lie in the hands of the chief public prosecutor. For the courts one could think about a structure wherein a president, comparable to the chief public prosecutor, with a small governing body consisting of other judges of that court, would take on the responsibility of deciding what will have to go to which "chambers". This would also mean that unlike the situation today not every "court" would have its own judge and support staff, but that the judges together will form the court and that the various "chambers" composed of

one or three judges would share the staff. And of course the specialisation of judges as well as support staff will have to be taken into account. In any case this would prevent the in my view highly inefficient situation that at the moment it is decided that for instance the judge of a principal civil court has to deal with a too heavy workload and therefore a second judge will be appointed, a new court with new support staff will have to be formed.

The creation of the function of president should lead to a situation where the High Council should be at arm's length. This too would lead to more efficiency since it seems absolutely impossible that the High Council will be as well aware of the best solutions as someone who is daily confronted with the specific needs.

I recommend reconsidering the position and the role of the Judicial Commissions.  
 I recommend to give the courts and the prosecution offices each their own budget.  
 I recommend considering merging the stand alone courts in one court house to bigger entities.

### *Professionals as managers or professional managers?*

It is of no less importance that judges and prosecutors will realise that they are there primarily to decide cases, and not to muddle through the problems of adequate housing, personnel affairs e.g. Just like in the medical world the specialists have to a certain extent retreated to leave the management of hospitals to the ones who have specific qualifications in this field, judges and prosecutors and the system as a whole would profit from the input of good administrators taking care of things that are of essence for a good functioning judiciary but that do not belong to the core business of the juridical profession.

It is quite understandable that the Turkish professionals will need some time to get accustomed to administrative reforms as advocated here. It is therefore a good initiative that in the framework of the Support to Court Management Programme a plan is developed to set up five pilot courts to test ideas of this kind. This pilot system is also important to define methods to assure that a centralized and Ankara oriented administrative bureaucracy will not be replaced by a system where the local president is holding a tight reign. The important thing should be to commit the court as a whole, enhance the professional attitude of the judges and make use of the slumbering capacities of the support staff.

I recommend following closely the project on support to the court management system.  
 I recommend to experiment with the ideas as proposed in the related pilot project

### **UYAP!**

UYAP, the national judiciary informatics system, is the great breakthrough of the last few years. Turkey apparently has taken a giant step in developing this encompassing system. According to the 2008 CEPEJ Report Turkey has at the moment one of the most computerized judiciaries

Without exception everyone who is confronted with UYAP, and that includes the professionals as well as the support staff, is elated about what it offers and what can be done with it.

The Ministry deserves praise not only for developing such a successful system but also for the way it has introduced this system. A very substantial number of people have been trained thoroughly how to use the system and due to a train-the-trainer concept all the other personnel have been able to familiarize with UYAP.

Of course, like every IT system, UYAP will need constant updating and especially the speed and the stability of the system can yet be further enhanced, but for all purposes Turkey seems to have developed a user friendly and adequate system that makes it possible to keep track of everything that is going on in the courts.

The case that the administrative procedures have speeded up immensely and that the chance of mishaps due to a lack of information is substantially diminished, and thus that the efficiency and effectiveness of the judicial system is remarkably enhanced should not make one close one's eyes however: UYAP remains a support system. But just because of UYAP the deficiencies of court operations are made clear and that in it could give the signal to reassess certain procedures.

### *UYAP as a panacea?*

I have been told that UYAP is the decisive factor in attributing cases to specific courts. The system accords a certain weight to each category of cases and this means that the workload among judges (as mentioned before in the Turkish system a court might very well be, and often is, equal to a single judge) will be divided more or less equally. This sounds fair and undoubtedly a well designed system can be of great help. Nevertheless some doubts about the weighing factors were expressed in the discussions and in any case the system, like any other system, will always need to be reappraised. Here too a restructuring of the courts in the sense that a dedicated managing professional (president) together with a professional manager can do some fine-tuning should be taken into consideration. The pilot project on court management can provide a good basis for new developments in this area.

I recommend furthering developing the successful and promising UYAP system.

### **Enforcement**

It is striking for instance that from the twenty million plus cases that are registered in UYAP about half –just under ten million- have to do with enforcement.

Enforcement as it stands in Turkey is rather specific and difficult to grasp for someone who is not familiar with the system. If I understand it correctly the Enforcement offices deal with **uncontested** (or decided) creditor-debtor relations, whereas cases in dispute will be turned over to the Enforcement courts. Apparently the Enforcement office is supposed to keep track of all payments, but it remains unclear what role it performs apart from mere administrating what is going on. Furthermore, because the involvement of the Enforcement office means paying a certain percentage of the amount due, many payments seem to take place out of sight of this office. Apparently this can lead to the result that all the money owed has been paid, whereas the enforcement file remains open.

UYAP keeps track of all the administrative formalities, but can of course not take into account what has happened in reality if the Enforcement office has not been informed.

In my opinion an in-depth research of the pros and cons of the enforcement system should be considered.

It seems fair to mention however that the Bar has expressed as its views that it sees no difference between the way an amount of money due can be recovered in Turkey or in other European countries.

It will be interesting to take notice of the Report on the enforcement of court decisions in member states of the Council of Europe, CEPEJ Studies no.8

I recommend making use of the CEPEJ studies no 8 to reconsider the enforcement system.

## **Statistics and numbers**

The statistics provided by the Ministry of Justice are attached as Annex I and II These annexes should be compared with the excerpt of the CEPEJ Report in Annex III.

Once again it is UYAP that has laid a foundation.

The chance that cases get lost somewhere in the administrative system is diminished. This means that it will be a lot easier to track down the derailed cases. It does also mean that a good insight can be gained into the duration of procedures in total, and also where things will get stuck.

The statistics make it quite clear that there is an alarming shortage of judges and prosecutors. It seems unlikely that the existing methods of recruitment and selection will give sufficient relief.

A reason the more to look for other possibilities to recruit qualified personnel

## **Mardin and Diyarbakir Experiences**

For this review the courts of Mardin and Diyarbakir have been under scrutiny. It is my impression that in these two cities the courts are doing fine. Apparently there are no serious backlogs, with, perhaps the land registry and the cases involving heritages as an exception. If the situation in the big courts in Istanbul, Ankara, Izmir e.g. is comparable to that in the visited courts remains to be seen.

With regard to the land registry and heritage cases with their specific problems about persons that never have been registered it is worth considering if these belong to the core business of the judiciary. It could be worthwhile to spend an extra effort in trying to get everyone duly registered.

I recommend reconsidering the position of land registry and heritage cases as belonging to the core business of the judiciary.

## **Administrative procedures; backlog Council of State**

It will be interesting in the coming period to follow if it is true –as has been said by local court officials and confirmed by members of the Bar- that administrative procedures do not take much time in the administrative courts of first instance, but will stay on the shelf for years when an appeal with the Council of State has been lodged. If so the establishment of Courts of Appeal for administrative cases as foreseen in the Draft Judicial Reform Strategy should be welcomed and implemented as soon as possible.

At least some evidence for the contention that the problems are concentrated at the highest level can be found in the CEPEJ report which mentions a number of 81534 cases pending before the Council of State on January 1 2006, as of 94454 cases on December 31 2006.

### *Do away with mandatory appeals*

As an important side-step: as yet an appeal procedure is mandatory if the government has been put in the wrong. It is understandable that a government is anxious about the effect a

precedent can have. But that this leads to automatic appeals does not do justice to and the courts, and the directly involved government office that should be capable of determining if a decision should be appealed or not. Automatic appeals are highly ineffective and even tend to undermine the authority of the court.

I recommend the speedy establishment of administrative courts of appeal.  
I recommend reconsidering the system of mandatory appeal for the government institution that has lost a case before an administrative court.

### **Penal and civil procedures; backlog of the Court of Cassation.**

The 2008 CEPEJ Report is rather reassuring about what is going on in first instance in civil cases. The clearance rate of civil litigious cases in first instance is 97%, and the disposition time of these cases is 209 days.

For criminal cases the CEPJ report provides as number of severe criminal cases in first instance 730.117 for January 1, 2006 and 697.686 for December 31, 2006. For misdemeanours the numbers given are 320.309 for January 1, 2006 and 440.153 for December 31, 2006.

Hence at the end of 2006 in total 1.137.839.

This last figure corresponds with the figures provided by the Ministry in Annex II, for the year 2007. This year ends with a total of 1.343.818 cases.

This rise in numbers of cases pending must be worrying, even if, as seems to be the case it is caused mainly through rising numbers of misdemeanour cases. I wonder if more and better support from staff personnel could not be of help.

Even alarming is that the average duration of Juvenile court cases is 517 days and for the cases before the Juvenile Aggravated Felony court even 619 days.

It is not clear what the bottlenecks are, but it is evident that they have to be found.

I recommend investigating the possibility of more support from staff personnel  
I recommend paying special attention to the duration of juvenile cases.

Serious problems arise with the duration of appeals, not only with the Council of State as mentioned before, but also with the Court of Cassation, both civil and criminal.

Once again the CEPEJ report provides some evidence for a growing backlog. On January 1 2006 there were 69.421 civil cases pending before the Court of Cassation and on December 31, 2006 76.707. The numbers for criminal cases for that year were 136.135 and 141.005.

Especially with regard to the Court of Cassation members of the bar refer also to the problem that it occurs too often that decisions are handed down that are not in conformity with each other. For the highest court in the country this must be a serious headache. The cause of this headache can easily be found in the enormous amount of cases the Court of Cassation has to deal with each year. It is almost unthinkable that a court of around 250 judges, seconded by about 500 rapporteur judges, that is confronted with over half a million cases a year can avoid this kind of incidents to occur. These numbers alone make it also clear that it must be sheer impossible for this court to perform its proper role: giving guidance to the judiciary and the judicial forum.

### **Courts of Appeal**

It is henceforth essential to implement the structure already laid out in the law concerning the Establishment of Courts of Appeal. High officials from the Ministry have assured that the considerably delayed- start is now set for January 2010. It will be a waste of money invested in training activities and a serious blow to the trustworthiness of Turkey if this date should not be met. It will also be difficult for instance to explain that in Diyarbakir a brand-new courthouse has been built which will remain empty, or be adapted for other purposes. According to the same officials trained judges and prosecutors who will act as frontrunners in the rollout have been designated and the waiting is only upon the confirmation of their nomination by the High Council. One can only hope that this confirmation process will be speeded up as much as possible.

In the meantime it is important to commit the Bar as well.

Especially with regard to appeals in civil cases it is worthwhile to consider a limited and acceptable threshold.

I recommend stepping up the effort for the establishment of Courts of Appeal for civil and criminal cases so that the appeal system will be functioning January 1 2010.  
 I recommend reaching out to the Bar to get the lawyers involved in this huge project.  
 I recommend considering a limited threshold for appeals in civil cases.

### **Big courts, small courts. Merger of courts**

A very difficult problem to tackle is related to the structure of Turkey as a country. There are densely populated areas where –if there is no traffic jam! - a court house always is within reach. And there are –very- remote and scarcely populated areas where there hardly will be work for a court but where on the other hand one cannot expect people seeking justice to cover great distances to get to a courthouse. According to the numbers distributed by the Ministry there are at present 705 courthouses. It is up to the politicians to strike a fair balance between accessibility and (cost) efficiency. In any case the idea to merge some courts is not without merit.

Once again the 2008 CEPEJ report is interesting: Turkey has by far the greatest number of courts (considered as legal entities) per 100.000 inhabitants, and is also the undisputed frontrunner in court locations per 100.000 inhabitants.

Rather confusing for someone who is not completely familiar with the Turkish system is the variety of civil and criminal courts.

The distinction between the Civil Peace Courts and the Principal Civil Courts seems to lead to inefficiency, if only because some of these courts are very small. For all purposes it might be better to merge these courts into one general civil court if first instance. This would give the judges of this court a better chance to specialize.

The same might be the case for the various criminal courts as well.

I recommend considering merging smaller courts.  
 I recommend investigating the possibility of merging the Civil Peace Courts with the Principal Civil Courts.  
 I recommend considering doing the same with the various Penal Courts

### **Conclusion**

In my hotel room I found a small booklet to keep, published by the Ankara Business Centre, edition 2008. It struck me that there was a chapter devoted to the legal system.

I cite one paragraph:

“Despite Turkey’s effort to reform the legal system, the courts remain under-funded and case loads are rising. The average processing time for cases at the Supreme Court was 283 days in 2003 compared to 53 days in 2000, according to the justice ministry. Backlogs at lower courts increased similarly. Legal changes passed by parliament in the last two years mean the situation is unlikely to improve as judges and prosecutors seek to adjust to new laws and regulations.”

Forget about the numbers, but ask yourself the question how many visitors will leave Turkey with this state of affairs of the judicial system in Turkey on the retina?

Where is the progress I mentioned in the beginning of this report one is inclined to ask?

I would answer in the attitude that was apparent by the vast majority of interviewees. There is awareness that things have to be undertaken and that this is the time for change.

Referring to the tulips Holland got from Turkey some centuries ago and that make my country flourish: there are a lot of bulbs under the surface and it needs only a good climate for them to blossom.

Bert van Delden

## **Executive summary**

On its way to enter the European Union Turkey is undergoing rapid changes, The Turkish judiciary has been under scrutiny by many experts from abroad. If one compares the various reports drawn up the conclusion can only be that a lot has been gained.

However the judiciary still has a tendency to be inward looking. The professionals are fully aware of the fact that they belong to the judicial system and have a tendency to adapt.

Because the language skills of most of the more senior member of the judiciary are rather weak it is difficult for them to digest what the developments in other countries are.

It is important for Turkey to become an active player in international institutions such as the European Network of Councils for the Judiciary (ENCJ) and the European Judicial Training Network (EJTN).

The Turkish judges should rely more on their own knowledge and refrain from asking for outside expert advice in fields they themselves are supposed to be familiar with.

Everything starts of course with a good legal training, but nowadays this is not enough. There should be room for “éducation permanente”.

A professional judge or prosecutor deserves a professional staff. Ways have to be found to train the staff properly. The Justice Academy can play an important role. It is worth considering developing certain courses where judges and their staff can participate together.

The existing barriers between the judges and members of the bar should be torn down. Experience from other European countries shows that this will not hamper the independence of the judiciary but that a good co-operation will be profitable for both parties, and hence for the people they both have to serve.

In order to be a good counterpart for judges and prosecutors members of the bar should be well trained. It is worth considering the introduction of a Bar exam to be sure that certain standards are met before someone can take up practice in a court of law.

The judiciary can only benefit from fresh views. Therefore ways should be sought and found to make it easier for lawyers to enter the judiciary at a later state of their career. This is the more important since the judiciary is confronted with far too many vacancies. The existing backlogs will never disappear if these vacancies cannot be filled.

Judicial professionals are there to render justice. They should not have to spend a lot of time dealing with administrative matters. For these affairs they should be able to rely on the support of professional managers.

As the saying goes “a good neighbour is better than a far friend” it would be better to have adequate staff facilities at hand with the High Council (and the Ministry of Justice) at a distance, but of course always there for really important issues.

The courts should not in any way be dependent of the prosecution offices. A separation of the finances of these two institutions is essential.

Turkey has many stand alone courts. It is worth considering bringing those courts that are in the same court house under one umbrella.

It is also worth to look into the possibility to merge Civil Peace Courts with Principal Civil Courts.

Finally it needs considering to merge small courts with other not too far away courts.

For all these matters it is essential to follow closely the pilot project as foreseen in the Project on support to the court management system in Turkey.

It is advisable that courts stick to their core business, Therefore it is useful to see if issues as enforcement cases, land registry- and heritage cases cannot be taken out of the court system.

The Turkish judiciary is confronted with an enormous amount of cases. The system should be adapted to deal with the numbers. The speedy establishment of Courts of Appeal for administrative, civil and criminal cases is of the utmost importance. A certain threshold for appeals in civil cases is worth considering.

To conclude: most of the people I have met are well aware of the urgency to take measures that can bring the judiciary further. It is essential to facilitate the reform process as much as possible.

The Ministry of Justice and the senior members of the judiciary should be the first to carry the burden and to show the way.

Annex I

## **STATISTICS RELATED TO PEER BASED MISSION<sup>1</sup>**

### **I- JUDGES AND PUBLIC PROSECUTORS IN TURKEY AND VACANCIES**

#### **1- HIGH COURTS**

<b>COURT</b>	<b>NUMBER</b>
<b>Member of Constitutional Court</b>	<b>14</b>
<b>Member of Court of Cassation</b>	<b>244</b>
<b>Member of Council of State</b>	<b>96</b>

#### **2- CIVIL AND CRIMINAL JUDICIARY**

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<sup>1</sup> As of 27.11.2008

<b>COURT</b>	<b>JUDGE</b>	<b>PROSECUTOR</b>	<b>TOTAL</b>	<b>OPEN<sup>2</sup></b>
<b>First Instance Civil and Criminal Judiciary</b>	512 1	3847	<b>8968</b>	2999
<b>Rappourteur Judges and Prosecutors in the Court of Cassation</b>	492	160	<b>652</b>	

### 3- ADMINISTRATIVE JUDICIARY

<b>COURT</b>	<b>JUDGE</b>	<b>PROSECUTOR</b>	<b>TOTAL</b>	<b>OPEN</b>
<b>Regional Administrative Courts</b>	125	NA	<b>887</b>	713
<b>Administrative Courts of First Instance</b>	530	NA		
<b>Tax Courts</b>	232			
<b>Rappourteur Judges and Prosecutors in the Council of State</b>	244	47	<b>291</b>	10

### 3- CONSTITUTIONAL COURT

<b>RAPPOURTEUR JUDGE</b>	<b>OPEN</b>
<b>23</b>	-

### 4- MINISTRY OF JUSTICE

<b>JUDGE</b>	<b>OPEN</b>
<b>363</b>	87

### 5- PRISON AND DETENTION HOUSES TRAINING CENTRES

<sup>2</sup> Open is used for vacancies. Those are allocated cadres by Law.

<b>JUDGE</b>	<b>OPEN</b>
<b>5</b>	<b>5</b>

**6- TURKEY JUSTICE ACADEMY**

<b>JUDGE</b>	<b>OPEN</b>
<b>2</b>	<b>-</b>

**7- TOTAL NUMBER OF JUDGES****11545****II- CANDIDATE JUDGES****1- CIVIL AND CRIMINAL JUDICIARY**

<b>Candidate Judge and Public Prosecurtor</b>	<b>797</b>
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**2- ADMINISTRATIVE JUDICIARY**

<b>Candidate Judge</b>	<b>117</b>
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**III- ENFORCEMENT DIRECTORS**

<b>POSITION</b>	<b>PRESENT</b>	<b>OPEN</b>
<b>Enforcement Directors</b>	<b>905</b>	<b>297</b>
<b>Deputy Enforcement Directors</b>	<b>889</b>	<b>378</b>

**IV- AUXILARY STAFF**

<b>POSITION</b>	<b>NUMBER</b>
<b>Staff in Central Organization Of the MoJ or assigned by MoJ</b>	<b>2755</b>
<b>Court Clerks</b>	<b>17743</b>
<b>Other Staff</b>	<b>9818</b>

**V- COURTHOUSES**

<b>TYPE OF COURTHOUSE</b>	<b>NUMBER</b>
<b>Aggravated Felony Court Centres</b>	<b>134</b>
<b>Affiliated Courthouses to the Aggravated Felony Court Centres</b>	<b>571</b>
<b>Courthouses in Total</b>	<b>705</b>

**VI- NUMBER OF COURTS ACCORDING TO TYPES**

<b>COURT TYPE</b>	<b>NUMBER</b>
<b>Aggravated Felony Courts</b>	226
<b>Principal Penal Courts</b>	1144
<b>Penal Peace Courts</b>	847
<b>Principal Civil Courts</b>	959
<b>Civil Peace Courts</b>	829
<b>Land Registry (Cadestre) Courts</b>	694
<b>Commercial Courts</b>	58
<b>Labour Courts</b>	150
<b>Family Courts</b>	164
<b>Consumer Courts</b>	25
<b>Intellectual Property Courts (Criminal)</b>	11
<b>Intellectual Property Courts (Civil)</b>	12

<b>Juvenile Courts</b>	68
<b>Juvenile Felony Courts</b>	13
<b>Enforcement Courts</b>	191
<b>Aggravated Felony Courts (charged with Art. 250 of PPC)</b>	19
<b>Maritime Courts</b>	1

## WORKLOAD OF PENAL COURTS

( 1 / 1 / 2007 - 31 / 12 / 2007 )

Court	Cases received				Cases rendered	Cases transferred to next year	Proportion of the cases rendered to cases received (%)	M*
	from previous year	Cases filed during the year	Received cases overturned	Total				
Specialised Aggravated Felony Court	6304	6518	984	13806	6676	7130	48,4	341
Juvenile Court	50191	30590	765	81546	35627	45919	43,7	517
Juvenile Aggravated Felony Court	7210	2673	290	10173	4521	5652	44,4	619
Aggravated Felony Court	68806	52512	10154	131472	72086	59386	54,8	342
Principal Penal Court	555081	526260	19914	1101255	547999	553256	49,8	365
Penal Peace Court	191857	366784	10450	569091	305317	263774	53,6	240
Traffic Court	47	76	1	124	66	58	53,2	264
Enforcement Penal Court	248249	883537	2777	1134563	736394	398169	64,9	143
Intellectual Property Criminal Court	10094	6445	132	16671	6197	10474	37,2	580
<b>TOTAL</b>	<b>1137839</b>	<b>1875395</b>	<b>45467</b>	<b>3058701</b>	<b>1714883</b>	<b>1343818</b>	<b>56,1</b>	<b>246</b>

\*M : Average proceeding duration (Day) is calculated as a period which begins when court receives the case and ends when case is rendered by the court

### Annex III

#### **The CEPEJ Report about the European Judicial Systems, edition 2008 (data 2006)** *Efficiency and quality of justice*

All the 47 Council of Europe member states (Turkey included) did participate in this comparison of their judicial systems.

The scope of this comparison is broader than just efficiency in a narrow sense; it also emphasizes the quality and the effectiveness of justice.

Important is that the CEPEJ has chosen to process and present only the figures which presented a high level of quality and credibility.

It is not my intention to give a digest from this Report of over 300 pages. I will only highlight some of the issues that are of specific interest with regard to the matters touched upon in my report.

First of all it is worth mentioning that between 2004 and 2006 there has been an increase in the budget allocated to the judicial system (all courts, prosecution services and legal aid) of more than 30%.

Nevertheless Turkey is lagging behind: this budget is still among the lowest, also as a percentage of per capita GDP.

According to the CEPEJ as part of a best-practice programme information for the users of the courts is available on the duration of court proceedings.

(I could not get it clear however how this information is provided.)

The CEPEJ mentions that as compared to other countries Turkey has very few special arrangements and for very few categories of vulnerable persons and victims.

It is noticeable that the number of first instance courts of general jurisdiction considered as legal entities has increased considerably (2004: 2502, 2006: 4723). This will have to do with the fact, referred to above, that quite often a single judge will have the status of a separate court.

During the same period the number of specialized courts has decreased (2004: 1135, 2006: 868).

All in all there are courts at 790 geographic locations.

(All these numbers can be outdated: the Ministry makes mention of 5405 courts of first instance in total and 705 courthouses. Furthermore the administrative courts are not included in the numbers).

#### UYAP

“An integrated approach of the court organisation can be found in Turkey. As a part of the “Turkish National Judicial Network Project all court cases are online and accessible for “judges. Criminal records and files are accessible online and connection can be made with “other registers (for example with the birth certificate register, land register, and driver license “register). Through a dedicated internet [portal lawyers are able to review cases and submit a “petition online. Court fees can be paid electronically by using online financial facilities. The “litigants have the possibility of submitting a claim before the court via an internet

“application. They can also follow cases online. Pilot projects have been started to inform parties of the state of affairs of cases by making use of SMS messages on mobile phones.”

Turkey belongs to the states with a very high level of computerization. There is a moderate level of implementation of computer equipment between the courts and their environment.

Performance indicators are defined and regularly evaluated. There is a system to measure backlogs and to analyse waiting time during the court procedure. (I could not get these matters quite clear)

Turkey belongs to the countries with the lowest number of professional judges (and Turkey has only professional judges) per 100.000 inhabitants.

The clearance rate of litigious and non litigious civil cases in first instance is 97. Pending cases in 2004: 682.186, in 2006: 724.998.

The average disposition time for a civil litigation in first instance: 209 days.

Land registry cases clearance rate 60. Pending cases in 2004: 30.458, in 2006: 51.927. Average disposition time: 577 days.

Administrative cases clearance rate 96. Pending cases 2004: 131.086, 2006: 140.370.