

**Professor Dr. iur. Thomas Giegerich,
LL.M. (Univ. of Virginia)**

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Managing Director, Walther Schuecking Institute for International Law
Professor of Public International Law, EU Law and Public Law
at the University of Kiel

Westring 400
D-24098 Kiel
Germany

Phone: +49-(0)431-880-2189
Fax: +49-(0)431-880-1619
e-mail: tgiegerich@internat-recht.uni-kiel.de

Peer-Based Assessment Mission to Turkey (17 – 21 November 2008): Reform of the Judiciary and Anti-Corruption

Report on Independence, Impartiality and Administration of the Judiciary

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1. Introduction

1.1. Fundamental Importance of Independence and Impartiality of the Judiciary

The independence and impartiality of the judiciary are the cornerstones of constitutionalism, the protection of human rights, democracy and the rule of law, their importance having been recognized by the Council of Europe¹ and the United Nations.² According to Art. 6 (1) of the European Convention on Human Rights, to which Turkey acceded in 1954, “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law” in civil and criminal matters.

The two principles are also among the principles on which the EU is founded and which are common to the EU Member States.³ Being a union based on law, the EU becomes a reality only to the extent in which its legal order is effectively implemented. In the first and third pillars of the EU, *i.e.* the European Communities and the Judicial and Police Cooperation in

¹ Recommendation No. R (94) 12 of the Committee of Ministers to Member States on Independence, Efficiency and Role of Judges.

² Basic Principles on the Independence of the Judiciary of 1985 (endorsed by UN General Assembly Resolution 40/146 of 13 December 1985). The Bangalore Principles of Judicial Conduct of November 2002 (endorsed by the Economic and Social Council of the United Nations in 2006 [ECOSOC 2006/23]).

³ Art. 6 (1) EU.

Criminal Matters, the implementation of EU law is the primary responsibility of the courts of the Member States, including the first instance courts. Their authority and effective functioning in every Member State is therefore indispensable, and it depends largely on their independence and impartiality. This is why the importance of those principles in the process of creating an ever closer union among the peoples of Europe⁴ and, accordingly, in the enlargement process, can hardly be overrated.

On the other hand, the Member States of the EU and the Council of Europe show different approaches to secure the independence and impartiality of the judiciary, which are usually closely related with the legal and judicial traditions, but also the economic and social conditions of the respective State. Usually, there is not a single right solution but a spectrum of acceptable approaches. However, from the careful evaluation of existing models one can derive the “best European practice” as a common standard of achievement which all the EU Member States and candidate States should strive to attain, always taking into consideration the specific conditions prevailing in a certain country.

1.2. Scope and Layout of Report – Definition of Terms

My report focuses on the independence and impartiality of the judiciary. The administration of the judiciary will be discussed only to the extent in which it positively or negatively influences either independence or impartiality. This seems to be a reasonable division of labour with two other experts in the assessment mission, Mr. Albert van Delden, who is to evaluate the effectiveness of the judiciary, and Mr. Luca Perilli, who concentrates on the criminal justice system. Inevitably, our terms of reference partly overlap.

In Turkey, the judiciary comprises both judges and public prosecutors. Their status is similar, more so than in some EU Member States. Anyhow, as it is judges who ultimately decide cases, I focus on their independence and impartiality.

While the principles of independence and impartiality of the judiciary can be distinguished, they are closely related. Independence denotes the absence of external influences on the judicial decision-making process. This means first of all interferences from the political branches of government and from non-governmental entities, such as pressure groups – external threats which are likely to call in question the independence of the judiciary as a whole (institutional aspect of independence). But it also extends to internal threats – interferences from within the judiciary that are likely to steer the decisions of individual judges to a greater extent than the influence which the authority of high court precedents may legitimately exert (individual aspect of independence).⁵

Impartiality denotes the absence of favour, bias or prejudice in the performance of judicial duties. First and foremost, impartiality is an attribute of the individual judge who is called upon to render a decision. But there may also sometimes be widespread prejudices affecting so many judges that, in their projection, they “contaminate” the judiciary as a whole. Impartiality is an internal virtue of every judge, depending on his or her attitude towards the persons to be judged and the issues to be decided.⁶ Defeating partiality therefore requires that each and every judge overcomes his or her own negative instincts. Any lack of independence necessarily also impairs the impartiality of judges because the external influence induces them

⁴ See the Preambles of the EU Treaty and the EC Treaty.

⁵ See Value 1 (Independence) of the Bangalore Principles (*supra* note 2).

⁶ See Value 2 (Impartiality) of the Bangalore Principles (*supra* note 2).

to favour or disfavour one of the parties. Partiality of judges on the other hand is likely to open up the judiciary to the external influences of those forces that foster the affections or prejudices shared by the judges.

Public confidence in the judiciary is an important element of the rule of law. To preserve it, justice must not only be done, but must also be seen to be done. In our context, it is not only the objective existence of an independent and impartial judiciary that counts, but the public perception as to its existence, and that will be negatively influenced by appearances of dependence or partiality. What a reasonable observer would consider as negative appearances must therefore also be avoided.

When discussing the problem areas of the Turkish judiciary as it is presently organized, one cannot neatly partition issues of independence and impartiality. Often, both principles are affected to a different degree. This is why I decided to organize Part 2 of my report according to problem areas, always clarifying if and to what extent issues of either independence or impartiality or both arise, and making recommendations of how to move the situation closer to best European practice.

1.3. Sources and Methodology

This report, which I am writing in my capacity as an independent expert, is based on information which I gathered during my visit to Ankara (17 – 21 November 2008) where I had the opportunity to discuss issues of judicial independence and impartiality with many representatives of the Turkish judiciary and executive (Ministry of Justice and EUSG), but also representatives of NGOs and members of the Bar. On 7 November 2008, our team discussed the official part of the programme of our visit, covering the meetings with Turkish government officials, with a Turkish delegation at a preparatory meeting in Brussels. Thereafter, it was partly revised, adding some more interlocutors especially from the lower courts. I found most of my Turkish interlocutors very open and ready to speak also about touchy issues and answer critical questions. In this respect, the meetings at the High Council of Judges and Public Prosecutors and the Court of Cassation were comparatively sluggish. I understand that our interlocutors there may have had difficulties with being made subject to outside “review”. This is why we always emphasized that peer review missions concerning the judiciary are conducted in all current candidate States, not only in Turkey.

There were no talks with representatives of the legislature (Members of the Turkish Grand National Assembly), although the necessary reforms of the judiciary will often require changes in existing legislation and the enactment of new laws. This was not only for reason of time constraints. More importantly, the Turkish legislature has so far not been involved in the process of deliberations on reform of the judiciary, as neither the executive nor the judiciary itself have yet come to terms in this respect.

During my meetings I was accompanied and assisted by Dr. Frank Hoffmeister of the European Commission’s Legal Service and Ms. Sedef Dearing of the EC Delegation in Ankara, and in most cases also a pair of interpreters.⁷ Judge Ali Bilen guided us through the official part of the programme as representative of the Ministry of Justice (General Directorate for EU Affairs) and was present at most of our meetings.⁸

⁷ Where I speak of “we“ and “us“ in this report, I mean this team of five persons.

⁸ See *infra* 1.4.3.

Apart from the insights I have gained from those meetings, I am relying on a considerable number of documents provided to me by the Turkish authorities and the European Commission before and during that visit. Mostly, they are English translations of the Turkish Constitution as well as pertinent Turkish statutes. Apart from those, five documents are in particular worth mentioning here:

Firstly, the Report by Kjell Björnberg and Ross Cranston on an Advisory Visit (13 – 22 June 2005) entitled “The Functioning of the Judicial System in the Republic of Turkey” (hereinafter Third Advisory Report).

Secondly, the undated assessments of the Turkish Ministry of Justice on the recommendations of the aforementioned (third) advisory visit report.

Thirdly, the Turkey 2008 Progress Report issued by the Commission of the European Communities on 5 November 2008 (SEC(2008) 2699 final) (hereinafter Progress Report).

Fourthly, an English translation of the draft Judicial Reform Strategy of the Turkish Ministry of Justice. After having been agreed within the Ministry, the draft has only recently been sent to the high courts and the Bar for comment within the relatively short period of approximately one month. On the basis of their expected comments the draft will be finalized by the Ministry and then submitted to the Cabinet for approval. As the final version of the Strategy will be available only after my report is due, I am cautiously using the preliminary version I have.

One *caveat* is in order: I realize that a visit of one week to the Turkish capital, interviews conducted via interpreters, the study of English translations of selected documents and of earlier reports written by experts who were in a similar situation as I provide only a relatively thin basis for thoroughly assessing the judicial system of a large country. This is all the more true since that system’s theoretical layout in the legal provisions may differ from its functioning in practice, the latter often manifesting itself only to the close and long-time observer. Nevertheless, I believe having sufficient information to give a true and fair view of where the independence and impartiality of the Turkish judiciary need further improvement.

1.4. Reform Prospects: From Distrust to Cooperation between the Three Branches of the Turkish Government

1.4.1. General Background

Most of the reform projects concerning the judiciary require legislation, some even constitutional amendments. Whether the necessary majorities⁹ can be obtained, remains to be seen, but I am confident that this will ultimately happen. There seems to be a widely-shared mood in Turkey, not only in political circles, but also in the public at large, that the judiciary must be reformed, quite independently of the Turkish bid to accede to the EU.

It is hardly surprising that the recurring issues of judicial independence and impartiality discussed in the two abovementioned reports of 2005 and 2008 are also treated in my own report. None of them has yet been resolved. But I have recognized progress and a readiness on the part of both the Ministry and the Judiciary to tackle the remaining issues in earnest.

⁹ In the case of constitutional amendments, Art. 175 of the Turkish Constitution requires a majority of at least three-fifths of the total number of members of the Turkish Grand National Assembly, sometimes of a two-thirds majority and/or the approval by the voters in a referendum.

On the other hand, I noticed a deep mutual distrust between the judiciary on the one hand and the political branches of the Turkish Government on the other hand. This mistrust seems to have grown after the victory of the AKP (Justice and Development Party) over the CHP (Republican People's Party) in the last elections. The tip of the iceberg of the power struggle between the judiciary and the political branches are the judgments of the Constitutional Court in the headscarf case and in the case concerning the prohibition of the AKP, both handed down in 2008.

1.4.2. The Headscarf Case and the AKP Case in the Constitutional Court

The headscarf case was lodged by the CHP. It concerned constitutional amendments which were intended to open the public universities to female students wearing headscarves, thus allegedly removing discrimination based on religion. The majority of the Constitutional Court, however, held on 5 June 2008 that some of these amendments violated the unalterable constitutional principle of secularism and were therefore void.¹⁰ The Court's reasoning was published only on 22 October 2008.

In the AKP case, the Chief Public Prosecutor of the Court of Cassation argued that the ruling party should be outlawed and that its most important representatives, including the incumbent President and Prime Minister, should be prohibited from holding political office for a number of years, because the party had become a centre of anti-secular activities.¹¹ The looming constitutional crisis was ultimately avoided, but only by the smallest possible margin – the three-fifth majority required for Constitutional Court decisions on the closure of political parties was missed by a single vote.¹² However, the AKP was declared to have forfeited half of the financial assistance to which it was entitled from the State. The judgment was handed down on 30 July 2008, the reasoning being published on 24 October 2008. It represents a clear warning to the AKP that it is closely watched and that a new procedure to have it outlawed by the Constitutional Court could be initiated at any time. This is of course not an ideal basis from which to initiate a major reform of the judiciary.

1.4.3. Absolute Independence of the Judiciary v. System of Checks and Balances and Cooperation

Against this background, it was no wonder that the representatives of the high courts I met, especially in the High Council of Judges and Public Prosecutors and in the Court of Cassation, made it clear that their ideal was the absolute independence of the judiciary from any kind of political influence, and that they therefore wanted complete self-administration with regard to the recruitment, promotion and disciplining of judges and prosecutors. In contrast to that, the representatives of the executive were reluctant to concede such a strict separation of powers, emphasizing the necessity to maintain a system of checks and balances between all three branches of government as well as their accountability to the people. The Preamble of the Constitution indeed defines the principle of the separation of powers as division of functions *and* cooperation. In my view, a constitutional system cannot function

¹⁰ Art. 2, 4 of the Constitution. See also *infra* 2.3. on the impartiality of the Constitutional Court in handing down this decision.

¹¹ Art. 68 (4) of the Constitution obliges political parties to observe the principle of secularism. If they fail to fulfil this obligation, they can be dissolved (Art. 69 [7] of the Constitution).

¹² Art. 149 (1) of the Constitution.

properly unless all the three branches of government loyally cooperate with each other. Irrespective of the great importance of preserving the independence of the judiciary, the third branch of government must not forget that after all it is a branch of government and cannot claim total independence from the other branches of that same democratically accountable government.

The most telling incident occurred on the first day of our visit during our meeting with the High Council of Judges and Prosecutors at which Judge Ali Bilen from the Ministry of Justice¹³ was present. The Council's Deputy President read out paragraph 1.4. of the aforementioned Third Advisory Report of 2005.¹⁴ When we had left the building, Judge Bilen, to whom that challenge was obviously addressed, suggested that he would not participate in our further meetings. Judge Bilen's responsibility within the Ministry of Justice does not involve transfers or promotions of judges and public prosecutors, as he is assigned to the General Directorate for EU Affairs. We nevertheless agreed that he should not sit in our meetings with judges and prosecutors of first instance courts, who might feel as being under "observation", but that this precautionary measure was not deemed necessary when we visited the high courts, nor, of course, departments of the Ministry.

Another indication of the deep political split in Turkey is the fact that the opposition parties almost routinely challenge reform laws in the Constitutional Court. This will probably also happen to laws enacted in the future to transpose the final version of the Judicial Reform Strategy. This is the background to properly evaluate the assertion of some high-ranking members of the judiciary that the Ministry's Draft Judicial Reform Strategy was insincere and nothing but window-dressing to please the EU. Their argument that the ruling party had not yet made even those proposed changes immediately which could easily be enacted by their parliamentary majority is not entirely convincing. One must take into account the enormous resistance which the traditional establishment, including the high judiciary, has so far offered, culminating in their serious and almost successful attempt at having the AKP prohibited. Reforming the judiciary therefore is a very difficult undertaking.

1.4.4. Positive Signs of Rapprochement

And yet, despite the struggle between the executive and the judiciary, there have been positive signs of rapprochement in the wake of the AKP judgment of the Constitutional Court: The Ministry of Justice has recently (although belatedly) sought the advice of the high courts on its reform strategy,¹⁵ while the high courts have indicated their willingness to cooperate. It remains to be seen what their official reaction will be and how reform-minded they are. The deadline set to them by the Ministry is later than the deadline of my report. I have no doubt that the political branches and the judiciary in Turkey must either sink or swim together, if the obviously necessary reforms are to be realized, and that all the players know what is at stake.

¹³ See *supra* 1.3.

¹⁴ "Another point which we must raise, although we regret having to do so, concerns the unexpected presence at interviews we had with judges and prosecutors of Abdullah Cebeci, the deputy director-general of Personnel at the Ministry of Justice. Obviously we have no objection to Judge Cebeci at a personal level. However, our concern was with the signal which his presence at the interviews may have given to judges and prosecutors, a number of whom were no doubt contemplating making applications for transfer or promotion within the foreseeable future. As in the justice area generally, appearances are often as important as the reality.

¹⁵ "The Ministry finalized their Draft Judicial Reform Strategy already in May, but sent it to the high courts only after the judgment of the Constitutional Court in the AKP case.

I recommend that the political branches and the judiciary in Turkey enter into a regular dialogue. Another important stakeholder should be included in this process – the members of the Bar (represented by the Bar Associations), who function as the natural connecting link between the judiciary and society at large.

1.4.5. The EU in the Ongoing “Struggle for Law” in Turkey

During our visit, both the executive and the judiciary were more or less openly trying to make the EU their ally in the ongoing struggle with each other. I am writing my report with that in mind, trying not to “take sides”. But I do not hesitate to recommend reforms which I consider as necessary and proper even though either the executive or the judiciary may sometimes have called for that very same reform. On the other hand, I have sought to avoid recommendations which, in my view, either side might deem as unacceptable, if that was possible. However, with regard to the fundamental principles of independence and impartiality of the judiciary, there is a bottom line that simply must be accepted by every Member State of the Council of Europe and candidate for EU accession.

My recommendations are made in each chapter to address the specific points at issue. However, they should not be read in isolation. I consider them as part and parcel of a great package, where “picking and choosing” could upset the overall balance. Only when the reforms are tackled in a comprehensive way, should the EU, in my view, be satisfied that the “struggle for law” in Turkey is going into the right direction.

2. Problem Areas Regarding the Independence and Impartiality of the Turkish Judiciary

Although the Constitution of 1982 contains extensive safeguards of the independence and impartiality of the judiciary,¹⁶ questions remain concerning their implementation in practice. The first question relates to the influence of the Ministry of Justice, representing the executive branch of government, which could pose an external threat to independence. The second question relates to the oversight over the lower courts by the High Council of Judges and Public Prosecutors and by the high courts, which could pose an internal threat to independence.

2.1. External Threats to Independence Posed by the Executive (Ministry of Justice)

The senior staff of the Ministry of Justice consists entirely of judges, most of whom are only temporarily assigned to the Ministry and later return to a position within the judiciary.¹⁷ While ministerial officials, however, these judges are part of the executive, and any influences they exert on the judiciary on behalf of the Ministry may turn into external threats to judicial independence. One can certainly assume that, as judges, the ministerial officials are particularly sensitive to that issue, since they will in the future return to the judiciary. Yet, this alone does not sufficiently protect the third branch from undue political interferences by the Ministry.¹⁸

¹⁶ Art. 9, 138 – 140, 159 (1).

¹⁷ On 27 November 2008, 363 judges worked in the Ministry of Justice; there were 87 vacancies.

¹⁸ See § 2.5 of the Third Advisory Report.

2.1.1. Attachment of Judges and Public Prosecutors to the Ministry (Art. 140 [6] of the Constitution)

The first potential threat is embodied in Art. 140 (6) of the Constitution which reads: “Judges and public prosecutors shall be attached to the Ministry of Justice in so far as their administrative functions are concerned.” Previous advisory reports have identified this provision as an impediment to judicial independence because of its potential for allowing the Ministry to decide on the allocation of funds and the management of courts. The Third Advisory Report accepted assurances of the Ministry that Art. 140 (6) did not authorize it, and was not used in practice, to undermine the independence of the courts.¹⁹ Given the regulatory context in which Art. 140 (6) of the Constitution is placed, this would indeed be an obvious abuse. The Report thus confined itself to the conclusion that the removal of Art. 140 (6) from the Constitution was not essential but still desirable.

During our visit to the Court of Cassation, we were told that pursuant to the common opinion of that Court, Art. 140 (6) of the Constitution was not in line with the independence of the judiciary. As this was not explained further, that opinion was presumably based on the concept of absolute judicial independence, which I do not share.²⁰ When I specifically raised the conceptional issue, the members of the Court of Cassation who were present did not want to enter into any discussion.

As the previous experts, I have not detected any misuse of Article 140 (6) of the Constitution to the effect that the Ministry of Justice would be intervening in the everyday management of the courts. However, the text of the provision remains unduly vague and could, in my view, benefit from a clarification.

I recommend that it be expressly stated in the law that the everyday management of a court, including the allocation of cases to court chambers or individual judges, was a matter for that court alone to decide. Moreover, the (new enlarged) High Council of Judges and Public Prosecutors²¹ should be involved by the Ministry in the preparation of the budget of the judiciary. If these recommendations are taken heed of, there is no need to change Art. 140 (6) of the Constitution.

2.1.2. Role of the Ministry in Recruitment and Training of Judges

2.1.2.1. Board of Interview: Composition and Selection Criteria

Candidates for judgeships are currently recruited through a combination of a written examination and an interview. The written examination is administered by the Student Selection and Placement Centre (OSYM). The interview is done before a Panel of seven members. According to Art. 9/A of Law No. 2802 on Judges and Prosecutors, five of the seven members of the board of interview are senior officials of the Ministry of Justice and only two come from the high courts. In a judgment of 7 February 2007, the Constitutional Court confirmed that the Ministry of Justice is competent to conduct the interviews and, as far as I understand, subsequent case-law of the Council of State is based on this premise as well.

¹⁹ *Loc. cit.*, §§ 2.4 – 2.5.

²⁰ See *supra* § 1.4.3.

²¹ On my recommendation concerning the enlargement of the High Council see *infra* 2.2.2.1.

Irrespective of the fact that the present system operates in full respect of the Turkish Constitution, I think, like the Third Advisory Report, that there is considerable room for improvement. First, the criteria for evaluating the interviewee stated in Art. 9/A are so general that political motives can easily creep into the decision-making process. Second, the composition of the board should be more representative of the Turkish legal system as a whole.

The decision on appointment of those candidate judges who have passed the written exam at the end of their pre-service training is entrusted to the High Council of Judges and Public Prosecutors.²² As I understand the law, this decision is a technical one, leaving no room for “political” discretion. The influence of the Ministry on the High Council does therefore not pose a problem in this context.²³

I recommend to reduce the number of representatives of the Ministry and to add judges from one of the courts of appeal,²⁴ the lower courts and one experienced lawyer (member of the Bar) to the board of interview. Not only should the dominance of the Ministry be eliminated, if only to avoid “appearances”, it should not be replaced by a dominance of the high courts either, because I recognize the internal threat to judicial independence possibly emanating from the high courts in the current hierarchical system.²⁵ Moreover, I find it important that one lawyer (member of the Bar) be added, who would function as an extra-judicial expert and representative of the public. The newly composed board of interview should operate within the remit of either the Justice Academy or the High Council of Judges and Public Prosecutors.

Referring to the recommendations in the Third Advisory Report, I further recommend that specific and objective criteria be introduced, published and given effect which ensure that the selection of candidate judges is “based on merit, having regard to qualifications, integrity, ability and efficiency.”²⁶ An important objective criterion is obviously their ability of acting as an independent and impartial judge even in difficult and highly publicized cases in which important public interests are at stake.

2.1.2.2. Justice Academy

The Justice Academy is responsible for the pre-service training of candidate judges and the in-service training of judges. The Law on the Organisation and Duties of the Justice Academy of Turkey makes laudable efforts to ensure that the training is not improperly influenced by the Ministry. The Academy has become a legal body with scientific, administrative and financial autonomy and remains only affiliated to the Ministry of Justice. On the other hand, still more can and must be done.

²² Art. 13 of the Law No. 2802 on Judges and Prosecutors.

²³ See *infra* 3.

²⁴ I assume that the courts of appeal will start operating in practice by January 2010, as we were assured by the Ministry.

²⁵ See *infra* 2.2.1.

²⁶ The quotation is taken from Principle I 2. c. of Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe.

Apart from the President and former Presidents of the Academy, the General Assembly has 28 members, 9 of whom are high-ranking government officials (8 from the Ministry of Justice, including the Minister himself).²⁷

I recommend that the number of government officials in the General Assembly of the Justice Academy be reduced, nine being clearly excessive. A fair formula should be found to have equitable representation from the courts and the Bar as well.

The most important organ of the Academy is the Board of Directors. Among its duties are the nomination of candidates for the Presidency and the making of education and training plans.²⁸ The Board consists of the President and the Ministry's Director-General for Personnel as *ex officio* members and five additional members elected by the General Assembly.²⁹

The President and his or her two deputies are each appointed by the Council of Ministers from a list of three candidates nominated by the Board with the votes of at least five members from among either senior judges or professors of law, or experienced lawyers or notaries. In spite of the appointment power of the Council of Ministers, I find this procedure unobjectionable because the nomination process ensures that all the candidates are supported by a large majority of Board members from outside the executive.³⁰

The relationship between the President and the Board of Directors is neither properly defined in the law, nor does it work in practice. The President should have the power to manage the Academy's every-day affairs, while the Board should make the strategic decisions.

I further recommend that the Law be changed to make clear that the President has the power to manage the Academy's every-day affairs, while the Board makes the strategic decisions. Moreover, the division of labour between the President and the Vice-Presidents should be clarified to ensure efficient management of the Academy in cases of absence of the President.

2.1.3. Executive Influence on the High Council of Judges and Public Prosecutors

2.1.3.1. Influence of the Ministry of Justice

The High Council of Judges and Public Prosecutors plays a crucial role in the promotion, transfer to other locations and disciplinary proceedings against judges and public prosecutors, including their removal from office.³¹ Executive influence on the High Council thus almost immediately translates into a possible external threat to judicial independence.

While Art. 159 (1) of the Constitution provides that the High Council "shall be established and shall exercise its functions in accordance with the principles of the independence of the courts and the security of tenure of judges", its composition and practical operation gives the Ministry of Justice undue influence. Five of the Council's seven regular members come from the high courts (three from the Court of Cassation, two from the Council of State). The

²⁷ Art. 12 of the Draft Law.

²⁸ Art. 17 (a), (d) of the Draft Law.

²⁹ Art. 15 of the Draft Law.

³⁰ See also *infra* 3.

³¹ The judges and public prosecutors of the high courts are not subject to the jurisdiction of the High Council but only to internal boards of discipline.

Minister of Justice is the President of the Council and his Undersecretary is an *ex officio* member; they both have a vote.

I recommend that the presidency of the High Council be transferred to the Undersecretary and that the Minister of Justice be removed from the Council. This would reduce the ministerial influence considerably.

Contrary to the recommendation of the Third Advisory Report,³² however, I do not find it necessary to reduce the one remaining ministerial representative to a non-voting membership, and in my view the Council of Europe Recommendation³³ does not require this. One vote on the Council does not give the Ministry any critical influence, all the more since I further recommend a considerable increase in the number of judicial members.³⁴

I do not subscribe to the theory that the judiciary should have the right of complete self-administration. The principle of separation of powers does not require a total separation, making each branch of government a small state within the State. Rather, the three branches must cooperate in good faith to provide the State with “good government”. “Separation of powers” therefore essentially means a system of effective checks and balances between the three branches of government, and I see one ministerial representative with a vote on the High Council as a necessary element of such a system. Moreover, pursuant to Art. 9 of the Constitution, and in accordance with European standards, the judicial power shall be exercised by independent courts “on behalf of the Turkish Nation.” This presupposes a certain democratic legitimacy and accountability of the members of the judiciary which cannot be ensured if the judges completely insulate themselves against the political branches. For the same reason, and again contrary to the recommendation of the Third Advisory Report,³⁵ I have no objection against the limited role of the President of the Republic in the appointment of the judicial members of the High Council who selects one out of three candidates nominated by the high courts.

On the other hand, I fully share the recommendation in the Third Advisory Report that the High Council be provided with its own adequately funded secretariat and premises, that it be “granted its own budget, the members of the High Council to be both consulted in the preparation of the budget and responsible for its internal allocation and administration.”³⁶ Currently, the Directorate-General for Personnel Affairs of the Ministry of Justice functions as the High Council’s secretariat, and I was told by representatives of the Ministry that this provided a check on possible irregularities in the Council’s decision-making process. If the Council had its own secretariat, this would no longer be the case. It was indicated, however, that an increase in the membership of the Council would remove the Ministry’s concern.

I repeat the recommendation in the Third Advisory Report that the High Council be provided with its own adequately funded secretariat and premises, that it be “granted its own budget, the members of the High Council to be both consulted in the preparation of the budget and responsible for its internal allocation and administration.”

³² *Loc. cit.*, § 2.11.

³³ See *supra* note 1.

³⁴ See *infra* 2.2.2.1.

³⁵ *Loc. cit.*, § 2.13.

³⁶ *Loc. cit.*, § 2.15.

2.1.3.2. Influence of the Armed Forces?

Much more problematic than the ministerial influence, which takes place at least openly and on a statutory basis, are indications of an informal and unregulated influence of the armed forces. At least one obvious example of it (the Şemdinli case) is on record, another case (the Kayasu case) is suspicious, and I wonder whether they are only the tip of the iceberg. In the Şemdinli case, a prosecutor was dismissed in 2006 within one month after having charged soldiers, including high-ranking military commanders, with involvement in a terrorist bombing in the Southeast of Turkey. The General Staff had publicly criticized the indictment and urged those bearing constitutional responsibility to take action.³⁷ Kayasu was a prosecutor who was dismissed because he had attempted to prosecute the mastermind of the military coup of 1980 and later President of the Republic Kenan Evren and others.³⁸ There seems to have been no public interference by the military in this case, but their sympathies were of course quite obvious.

According to Art. 138 (2) of the Constitution, no organ, authority, office or individual may make recommendations or suggestions to courts or judges relating to the exercise of judicial power. This provision is obviously also addressed to the military, and it presumably covers the exercise of the powers of the High Council.

I recommend that Art. 138 (2) of the Constitution be amended to expressly extend its protection to the High Council.

The danger that the armed forces, which are still a major political player in Turkey, more or less openly exercise influence on the judiciary, cannot be removed by simply amending the laws. It is primarily a matter of the practical implementation of existing laws. It may also be a matter of showing anticipatory obedience to what the yet unarticulated wishes of the armed forces are conceived to be in certain cases. Undoubtedly, the effective civilian control of the military and its effective subjection to the constitution and laws is a *conditio sine qua non* of EU membership. But this issue is a general one, going beyond the topic of my report.

2.1.4. Inspection Board of the Ministry of Justice

According to Art. 144 of the Constitution, judges are under the supervision of judicial inspectors with regard to the performance of their duties. These inspectors, who are themselves senior judges or public prosecutors, perform both regular inspections every two years³⁹ and investigations of possible disciplinary offences with regard to all Turkish courts. They belong to the Inspection Board within the Ministry of Justice.⁴⁰ Art. 4 of the Statute on the Inspection Board of the Ministry of Justice of 1988 makes clear that the inspectors are carrying out their inspections and investigations on behalf of the Minister. The purpose of the regular inspections is to establish whether judges and prosecutors are carrying out their duties in accordance with the relevant laws, statutes, regulations and (administrative) circulars.⁴¹ The results of these inspections are important elements in the promotion process. Inspectors make assessment reports on both judges and public prosecutors, filling in special forms. One section

³⁷ Turkey 2008 Progress Report (*supra* 1.3), § 2.1. (p. 10 footnote 6).

³⁸ See *infra* note 56.

³⁹ Art. 28 of the Statute on the Inspection Board of the Ministry of Justice.

⁴⁰ Art. 99 – 101 of Law No. 2802 on Judges and Prosecutors.

⁴¹ Art. 100 (1) of Law No. 2802 on Judges and Prosecutors.

in the form has the title “Personal and Social Characteristics” and another “Professional Knowledge and Work”.

I am sceptical about the breadth of the inspectors’ task. Assessing the performance of judges in terms of management of court affairs without also evaluating the quantity and quality of judicial decisions which are protected by judges’ independence appears to me to be difficult.

I recommend removing the power of inspectors to evaluate the “performance of duties according to the laws, by-laws, regulations and circulars”, as this runs counter to Recommendation No. R 94 (12) of the Committee of Ministers of the Council of Europe.⁴² The latter expressly lays down that judges should not be obliged to report on the merits of their cases to anyone outside the judiciary (meaning the regular appeals process). The scope of activity of the Inspection Board should therefore be strictly limited to inspecting the administrative and financial management of the courts and prosecutors’ offices.

Moreover, I share the objections to having the appraisal of a judicial career conducted out of the Ministry of Justice, as are articulated in the Third Advisory Report, because it gives at least the appearance that the independence of the judiciary is threatened.⁴³

I also recommend that the Inspection Board of the Ministry be reassigned and henceforth operate under the control of the High Council of Judges and Public Prosecutors. This does not imply that the current judicial inspectors are removed and replaced by others. It only means that the Inspection Board in its present composition should be transferred from the authority of the Ministry to the authority of the reformed High Council.⁴⁴ Any replacement of personnel should be effected pursuant to the ordinary rules currently in force, with the amendments necessitated by the transfer of authority.

Some of my interlocutors argued that this would worsen the situation for those subject to the inspection because then the same body would become responsible for both the fact-finding and the decision-making. Moreover, the Inspection Board might then be covered by Art. 159 (4) of the Constitution, excluding judicial review of Council decisions, to which the Inspection Board is now subject. These arguments lose their force as soon as an effective remedy against decisions of the High Council is made available.⁴⁵ The recommended reassignment should also be considered together with a reorganization of the High Council in order to make it more representative of the judiciary as a whole.⁴⁶

During our visit of the Inspection Board, we were also told that their reattachment to the High Council would create the risk of interferences from within the Court of Cassation or the Council of State, whose members now dominate the Council. But it was admitted that an enlargement of the High Council would lessen that risk. In any event, the transfer of responsibility for the Inspection Board to the High Council alone would not eliminate the threat to judicial independence posed by the inspection system, but only transform it from an external into an internal one.

⁴² See *supra* note 1.

⁴³ *Loc. cit.*, §§ 2.17 – 2.18.

⁴⁴ On the necessary reform of the High Council see *infra* 2.2.2.

⁴⁵ See *infra* 2.2.2.3.

⁴⁶ See *infra* 2.2.2.1.

It is true that pursuant to Art. 11 lit. a of the aforementioned Statute, inspectors shall not interfere in, make recommendations or deliver opinions on matters which fall within the scope of adjudication and judicial discretion. This is obviously intended to prevent interferences with the independence of judges. On the other hand, the inspector has to fill in a form called “Certificate of Standing” for each judge and public prosecutor. Some of the assessment criteria⁴⁷ are hardly compatible with the status of an independent judge.⁴⁸

I recommend that inappropriate assessment criteria which are incompatible with the status of an independent judge (such as “appearance and outfit“; “having no bad habits“; “impression on the environment he/she and his/her family makes”) be eliminated.

More relevant, however, are the criteria for assessing the professional qualifications and performance. Here, some criteria are problematic because they could be used to interfere with judicial independence. One example is the criterion “Talent to give quick and adequate decisions, furnished with sufficient reasons and written in due time”⁴⁹ and “Writing down decisions with adequate legal basis”.⁵⁰

I further recommend that the assessment criteria used are themselves evaluated critically and, where necessary, reformulated so as to ensure that their application leaves judicial independence unaffected.

My recommendations on the content of the certificate of standing are valid no matter whether the inspectors work for the Ministry or for the High Council. The same holds true for my recommendation concerning the confidential appraisal file where the reports by the inspectors are to be filed.⁵¹ The law does not specifically state from whom the information in that file be kept confidential. The Ministry of Justice admits that the appraisal files of judicial inspectors are preserved in the secret record office because the inspection system would otherwise be prejudiced. I do not find the argument convincing and underline the recommendation of the Third Advisory Report that judges and public prosecutors must be given access to *all* appraisal files in respect of them.⁵² This should be expressly provided in Chapter V of the Law on Judges and Prosecutors and not only remain an inference which can be drawn from the Law No. 4982 on Access to Information of 2005. In this regard, I note that the Council of State apparently decided in November 2008 to grant an applicant judge full access to his file, a judgment which should be fully implemented immediately and the Law be changed accordingly.

I recommend that it be expressly provided in Chapter V of the Law on Judges and Prosecutors that judges and public prosecutors must be given access to *all* appraisal files maintained in respect of them. In the meantime, the Ministry of Justice and the High Council have apparently made the necessary decisions to extend the access to the appraisal files. I still believe that this change of practice should be accompanied by a change of the Law on Judges and Prosecutors.

⁴⁷ They are listed in the annexes to the Regulation on the Inspection Board of the Ministry of Justice of 2007.

⁴⁸ “Appearance and outfit“; “having no bad habits“; “impression on the environment he/she and his/her family makes”.

⁴⁹ Annex 7 (for judges working in regional administrative and first instance courts).

⁵⁰ Annex 8 (for judges working in administrative courts).

⁵¹ Art. 59 of the Law No. 2802 on Judges and Prosecutors.

⁵² *Loc. cit.*, § 2.19.

In more general terms, I wonder whether the centralized appraisal system in Turkey by the Inspection Board could not be replaced by a decentralized system: If each courthouse had a president supported by a presiding committee (except for the very small courthouses), these persons could annually assess the performance of the judges working in that courthouse. Their own performance could be evaluated by the president of the next higher court. The assessment reports would be sent to the High Council, together with the necessary statistics. The Inspection Board would remain responsible for disciplinary investigations only, and its personnel could accordingly be decreased. As I realize that this would deeply interfere with the system, I formulate only a suggestion to this effect and recommend no more than to seriously consider such a reform. I was told that the present inspection system was primarily needed to control small courts in remote regions. If that is true, one could imagine a separate evaluation system for those courts. However, at our meeting with the Inspection Board, it was also argued that a system of localized evaluation within each court had unsuccessfully been tried between 1960 and 1971. The reason was that the judges and prosecutors working in the same court house were too close to each other. I still believe that, if properly established and controlled by the High Council, and perhaps supported by random outside inspections for a transition period, such a system could work.

I recommend that the Turkish Government seriously consider whether the assessment of the professional performance of judges and public prosecutors could be decentralized.

Disciplinary investigations of judges and prosecutors, which can also be conducted by judicial inspectors, need prior authorization by the Ministry of Justice.⁵³ This requirement is obviously intended to provide additional protection to the judiciary from interferences by executive bodies (police *etc.*). If the Inspection Board is re-assigned to the re-organized High Council, as I have recommended, the power to authorize investigations of judges and prosecutors should also be transferred to the High Council and the executive veto eliminated.

I recommend that the ministerial veto on the initiation of disciplinary investigations against judges and public prosecutors be eliminated, as soon as the Inspection Board is reassigned to the High Council. The power to authorize investigations of judges and public prosecutors should accordingly be transferred to the High Council.

2.2. Internal Threat to Independence Posed by the High Council and the High Courts

2.2.1. Hierarchical Structure of the Judiciary – Dismissal of “Unsuitable” Members of the Judiciary

The structure of the Turkish judiciary is strictly hierarchical. With regard to ordinary judges and public prosecutors, the system of promotions distinguishes between classes and degrees of seniority and grades⁵⁴ in a way which almost reminds of military ranks. On top of that, the judges in the higher courts⁵⁵ enjoy a special status. This is relevant with regard to judicial independence. For instance, judges and public prosecutors can be dismissed in three cases: if convicted of an offence requiring dismissal from the profession, if unable to perform their duties on account of ill health, or if determined to be unsuitable to remain in the profession.⁵⁶

⁵³ Art. 82 (1) of the Law No. 2802 on Judges and Prosecutors.

⁵⁴ Art. 15 *et seq.* of the Law No. 2802 on Judges and Prosecutors.

⁵⁵ Art. 146 *et seq.* of the Constitution.

⁵⁶ Art. 139 (2) of the Constitution.

Needless to say, particularly the last variant can provide a loophole for illegitimate dismissals of non-conformist judges and prosecutors and thus become a basis for “chilling” the members of the judiciary into unquestioning conformity with the judicial mainstream or the upper echelons of the third branch which dominate the High Council. This danger could only be defused by a statutory provision clearly defining the conditions of such dismissal for being “unsuitable”. This is not the case, quite the contrary: Under Art. 69 (5) of the Law No. 2802 on Judges and Prosecutors, dismissal shall be imposed on those whose disciplinary conduct is not a criminal offence and does not require a conviction, but is considered to be of a nature that may violate the honour and dignity of the service. This makes matters worse rather than better. There have indeed been cases in which members of the judiciary were dismissed because they dared to prosecute soldiers.⁵⁷ This loophole must be closed.

I recommend that the rules on dismissing judges and public prosecutors from office for “unsuitability” be more precisely and narrowly defined by law. I further recommend with regard to the first variant of Art. 139 (2) of the Constitution that the offences requiring dismissal from the profession be defined more precisely.

Now, Art. 69 (4) of the Law No. 2802 on Judges and Prosecutors only refers to the nature of the offence being such as to violate the dignity and honour of the service or the general respect and trust in the service, which leaves too much discretion.

I further recommend that the Law expressly provide that the imposition of disciplinary sanctions is in all cases subject to the principle of proportionality.

The hierarchical structure of the Turkish judiciary is underlined by the fact that members of the high courts are subject to the disciplinary power not of the High Council, but only of disciplinary boards formed within each high court. Moreover, the members of the Constitutional Court are not subject to dismissal under the “unsuitability” variant at all.⁵⁸ With regard to disciplinary sanctions in general and the security of tenure in particular, all the members of the judiciary should have equal status, being subject to the same rules and the same decision-making body. An exception could be made for members of the Constitutional Court: They too should be subject to the same rules, but their implementation should indeed be left to the Constitutional Court, in view of its special position in the constitutional system.

I recommend that with regard to disciplinary sanctions (including removal from office) all members of the judiciary should as far as possible be subject to the same rules. These rules should be implemented by the same decision-making body, except for members of the Constitutional Court with regard to whom implementation should be entrusted to the Constitutional Court.

⁵⁷ One example is the Kayasu case (see *infra* 2.2.2.3.) in which a prosecutor was dismissed because he had attempted to prosecute the mastermind of the military coup of 1980 and later President of the Republic Kenan Evren. Another example is the Şemdinli case in which a prosecutor was dismissed within one month for charging soldiers, including high-ranking military commanders, with involvement in a terrorist bombing in the Southeast of Turkey (Turkey 2008 Progress Report [*supra* 1.3], § 2.1. [p. 10 footnote 6]). See already *supra* 2.1.3.2.

⁵⁸ Art. 147 of the Constitution.

2.2.2. High Council of Judges and Public Prosecutors – Composition, Transparency and Remedies

The High Council, in view of its enormous powers, could pose a threat to the independence of the judiciary, even if the executive influence were minimized (as I have recommended). This problem cannot be totally eliminated, but currently there are three factors unnecessarily exacerbating it: the composition of the Council does not adequately represent the judiciary as a whole; its decisions are not published; and there is no effective remedy against its decisions.

2.2.2.1. Increasing the Membership of the High Council and Reforming the Selection Process

Apart from the representatives of the Ministry, the High Council today has five regular members from the judiciary, three coming from the Court of Cassation and two from the Council of State.⁵⁹ This means that even though the Council’s supervisory functions extend to all judges and public prosecutors, only the high courts are represented in it. The lower courts are completely left out, underlining the hierarchical structure of the Turkish judiciary.

Taking into account my recommendation above that the Ministry of Justice should have only one member in the Council, one could imagine a distribution of seats along the following lines: representatives (judges or public prosecutors) of the Court of Cassation, the Council of State, the future regional Courts of Appeal, the ordinary courts of first instance, the administrative and the regional administrative courts.⁶⁰

Furthermore, a small number of seats should be given to lawyers (members of the Bar). These lawyers, although closely related to the judiciary, would bring in an extrajudicial element. This is important because I have sensed that the members of the Turkish judiciary are united by an unusually strong *esprit de corps*. They also seem to be far detached from the population at large which might impair public confidence in the judiciary. Some judges and prosecutors admit that. The inclusion of lawyers in the High Council would be a first step to counteract and ensure a certain form of public accountability of the judiciary.

Following the Third Advisory Report,⁶¹ I recommend that the Council’s membership be increased considerably. The new size should make the Council large enough to permit an adequate representation of the lower court judges and public prosecutors and the Bar, while at the same time keeping it small enough not to jeopardize its functionality.

The Ministry of Justice in principle agrees with the recommendation to increase the number of members of the High Council, the judges and public prosecutors in the lower courts favour it, while the members of the High Council I met rejected it. They pointed out that they all had worked at first instance courts earlier in their career, therefore knew the conditions there and properly represented all the courts. But that of course is only a “virtual” representation hardly acceptable for the members of the lower courts. The High Council members also argued that a lower court member could have problems on returning to his or her court, if the High Council had taken a negative decision concerning that court. This problem could easily be solved by permitting a lower court member to recuse himself or herself from participating in decisions

⁵⁹ Art. 159 (2) of the Constitution.

⁶⁰ Representatives of the military courts should not be included because the members of those courts are not subject to the supervision of the High Council.

⁶¹ *Loc. cit.*, § 2.14.

directly affecting his or her own court. At the end of our meeting with members of the High Council, one of them suggested that they might ultimately accept enlargement if their own demands were met, in particular concerning the removal of the Minister from the Council, having their own administrative substructure and budget and being given the responsibility for the Justice Academy.

Currently, each of the High Council members coming from the Court of Cassation and the Council of State are appointed by the President of the Republic from a list of three candidates nominated by the plenary assembly of these courts.⁶² The involvement of the directly-elected President provides democratic legitimacy to the High Council. The additional members could be selected along the same lines. The Draft Judicial Reform Strategy indicates, however, that the Ministry of Justice plans to involve also the legislature in the selection process,⁶³ whereas the members of the High Council are adamantly opposed to what they call a “politicization” of their body. I do not share the present Council’s concerns. As long as each member is appointed from a group of three equally qualified candidates which are nominated by the judiciary, their actual appointment by the President or the Grand National Assembly cannot “politicize” the High Council to any critical extent. How the appointment power is to be apportioned between the President and the Grand National Assembly requires further consideration.

2.2.2.2. Publication of Decisions of the High Council on Disciplinary Matters

Decisions of the High Council on disciplinary matters are presently notified only to the persons affected.⁶⁴ Reasons of legal certainty and the maintenance of (public) confidence in the proper administration of judicial discipline require that the important decisions⁶⁵ are at least distributed to all courthouses and prosecutors’ offices in the country and preferably also published. These decisions interpret the rather uncertain terms of the law, and it is necessary to put all persons subject to those provisions on notice what the High Council considers as a disciplinary offence and what sanction will be imposed for a certain kind of offence. For them, such knowledge is important. Keeping them uninformed may have a “chilling effect” and prevent them from courageously using their independence in the interest of justice.

The Draft Judicial Reform Strategy indicates that the Ministry of Justice agrees on this point,⁶⁶ while the High Council members we spoke to were opposed, insisting on the principle of data protection. However, the privacy of the defendants in disciplinary proceedings could be sufficiently protected by circulating only anonymous versions of the High Council decisions.

I recommend that anonymous versions of the important decisions of the High Council on disciplinary matters be distributed to all courthouses and prosecutors’ offices in Turkey and also published as evidence to the interested parts of society that the independence and impartiality of the judiciary is maintained.

⁶² Art. 159 (2) of the Constitution.

⁶³ *Loc. cit.*, § 1.1. (p. 6).

⁶⁴ This means the judge targeted by the disciplinary proceedings and the person who brought the complaint against him or her (if any).

⁶⁵ This means all those decisions whose importance goes beyond the individual case disposed of.

⁶⁶ *Loc. cit.*, § 2.4 (p. 15).

2.2.2.3. Availability of an Effective Remedy against Decisions of the High Council

Pursuant to Art. 159 (4) of the Constitution, “[t]here shall be no appeal to any judicial instance against the decisions of the Council.” As this applies even to Council decisions removing a judge from office, the protection of judicial independence is much too weak. The inexistence of external judicial review cannot be set off by the two-stage internal review of decisions concerning disciplinary sanctions under Art. 73 of the Law No. 2802 on Judges and Prosecutors. The first stage is initiated by a request from either the Minister of Justice or the persons concerned and leads to a new decision of the Council (*i.e.* by the same persons who made the initial decision). If an affected person raises an objection against that new decision, the Council’s Board of Objections is called upon to make the final decision. This Board consists of the seven regular and the five substitute members of the Council, so that those persons who made the challenged original decision are prominently represented in the decision-making process on both stages of the internal review. This irreparably damages the impartiality of the review bodies.

Accordingly, in the case of *Kayasu v. Turkey*, a Chamber of the European Court of Human Rights unanimously decided on 13 November 2008 that the review arrangements concerning disciplinary decisions of the High Council violate the right to an effective remedy (Art. 13 in conjunction with Art. 10 of the European Convention on Human Rights).⁶⁷ This was because the impartiality of the Board of Objections, in view of its composition, “était ... sérieusement sujette à caution”.⁶⁸

When the *Kayasu* judgment becomes final, Turkey will be under an obligation arising from Art. 46 of the Convention to introduce an effective remedy against disciplinary decisions of the High Council. Art. 13 of the Convention does not necessitate the creation of a judicial remedy, as long as the non-judicial body entrusted with the review is impartial and has sufficient powers to effectively repair any violation of a Convention right that might have occurred.

If the creation of a judicial remedy should be considered, the status of the High Council in the Turkish judicial system would probably leave no other option than according the power of review to the Constitutional Court. Taking into account that the constitutional principle of the independence of the judiciary is at stake, this solution would not be inappropriate. If a non-judicial remedy is preferred instead, only a fundamentally reshaped internal review mechanism will be suitable. In this case, an internal appellate committee would have to be established, consisting only of Council members who were not involved in the challenged decision and could thus be considered as truly impartial.⁶⁹ This would not be difficult, if the Council was enlarged, as I have recommended. The Ministry of Justice indicated that such an internal review mechanism would be acceptable, and even the High Council could live with such a reform.

⁶⁷ Application Nos. 64119/00 and 76292/01 (<http://www.echr.coe.int/echr> [judgment available in French only]). In accordance with Art. 44 (2) of the European Convention on Human Rights, this judgment has not yet become final.

⁶⁸ *Loc. cit.*, § 121.

⁶⁹ Impartiality cannot be properly ensured by providing only that the appellate committee is constituted “by a majority of new members”, as was proposed by the Third Advisory Report (*loc. cit.*, § 2.20).

I recommend that an effective remedy against the decisions of the High Council be introduced, according the review power to a truly impartial instance, either external or internal. This is particularly important with regard to disciplinary decisions, but should also extend to other decisions potentially affecting judicial independence, such as those concerning promotions and changes of location.

2.2.3. High Courts: Rating Performance of Judges and Public Prosecutors

One very peculiar feature of the Turkish system of appellate jurisdiction poses an internal threat to judicial independence, namely the giving of marks to judges and public prosecutors when their decisions are reviewed on appeal. This means that decisions appealed against are not only evaluated as to their compatibility with the law (and accordingly upheld or reversed), but also as to their “quality” (and the performance of their authors accordingly is graded from very good to poor). These marks, for which no reason is given, are an important criterion for the promotion of judges and prosecutors.

This system, which underlines the hierarchical structure of the Turkish judiciary, tends to breed conformity and hampers the progressive development of the law. During our meeting with members of the Court of Cassation we heard that the marks were based on objective criteria such as knowledge and the soundness of the legal reasoning, and not on whether the lower court followed the jurisprudence of the Court of Cassation. I readily accept that this is the good intention guiding the high courts when they give their marks. And yet, it is more difficult to find a decision “very good” which does not conform to one’s own opinion, all the more since no reasons need to be given for a bad mark. More importantly, however, lower court judges may be tempted to believe that the chance to get a good mark increases if his or her decision slavishly follows the jurisprudence of the high court, even if he or she considers it wrong or outdated. This system therefore poses a serious threat to judicial independence which is not necessarily inherent in the appellate system as such. The Draft Judicial Reform Strategy shows the readiness of the Ministry to revise that system.⁷⁰

I recommend that the practice of the high courts of giving marks to the judges and public prosecutors, rating the quality of their decisions pending on appeal, be abolished.

2.3. Constitutional Court: Composition and Impartial Exercise of Powers

Concerning independence and impartiality, two issues merit attention. The first concerns the composition of the Constitutional Court. Pursuant to Art. 146 of the Constitution, of the Court’s eleven regular members, two are military judges (one coming from the Military High Court of Appeals and the other from the Military High Administrative Court). As constitutional jurisprudence in a democratic system is a civilian matter, military judges should have no part in it. That the Turkish Constitution follows a different pattern in this respect is a further instance of the peculiar and problematic role of the armed forces in the constitutional system of Turkey. It is beyond my terms of reference to treat this topic in general. The inclusion of military judges in the Constitutional Court poses no specific problem with regard to judicial independence, because the members of the Constitutional Court enjoy life tenure,

⁷⁰ *Loc. cit.*, § 1.3. (p. 12).

so that the military judges are placed outside the chain of command of the Turkish armed forces until their retirement.

Where a constitutional court exists, the judiciary is entrusted with an eminently political function as far as that court's jurisdiction reaches. It is of the utmost importance for a constitutional court to adjudicate politically delicate cases in strict adherence to the constitution. It must not pursue a political agenda and avoid all appearances that it does. A constitutional court's impartiality consists first and foremost of political impartiality. If it gives the impression of partiality, it jeopardizes its authority. The line between the resolute exercise of constitutional jurisdiction, which is legitimate, and the usurpation of political decision-making power is indeed thin.

The provisions of the Constitution pertaining to the powers and procedures of the Constitutional Court are unobjectionable as regards the Court's impartiality.⁷¹ There has, however, been a recent instance in which the Court's application of these provisions in practice raised doubts, namely the aforementioned Headscarf Case.⁷² Pursuant to Art. 148 (1) of the Constitution, the Constitutional Court shall review the constitutionality of laws etc. as to both their form and substance, whereas constitutional amendments shall be reviewed only as to their form. This limitation of the Court's jurisdiction is based on the justifiable idea that the last word with regard to constitutional amendments should rest with the people or their directly elected representatives. In the Headscarf Case, the majority of the Court, over vigorous dissents, nevertheless undertook what amounted to a review of the substantive constitutionality of constitutional amendments which were intended to permit female students at public universities to wear headscarves on campus. These amendments were then declared unconstitutional on the basis of Art. 2 and 4 of the Constitution.

As an outside expert, I am not taking issue with the substantive interpretation of the Turkish Constitution by the Turkish Constitutional Court. But having read an English translation of the opinion, I find the way in which the majority of the Court attempted to justify their approach unconvincing. It is therefore not without reason that some members of the Turkish executive and legislature as well as parts of the general public reproach the Court with political partiality. I am also wondering what the fate of the constitutional amendments will be which Turkey must inevitably enact on its way to EU membership.

2.4. Separate Military Justice System (Art. 145, 156 and 157 of the Constitution)

The Turkish Constitution and laws establish a military justice system which is completely separate from the civilian courts. There are military courts and military administrative courts, the last instance courts of both branches (the Military High Court of Appeals and the High Military Administrative Court of Appeals) ranging among the Turkish high courts from which the members of the Constitutional Court are recruited.⁷³ This complete separation of court systems could be considered as an indication that in Turkey, the armed forces are beyond the control of the civilian government. It should therefore be looked into in the context of the political role of the Turkish armed forces.

As concerns the independence and impartiality, Art. 145 (4) of the Constitution specifically protects the independence and security of tenure of military judges. But Art. 145 (2) of the

⁷¹ Art. 146 *et seq.*

⁷² Decision of 5 June 2008 (*supra* 1.4.2.).

⁷³ Art. 145, 146, 156 and 157 of the Turkish Constitution.

Constitution permits the legislature to extend the military courts' jurisdiction to civilians. This is problematic because civilians who are tried by military courts for offences against the military have reason to doubt both the independence and the impartiality of those courts.⁷⁴ According to the Draft Judicial Reform Strategy of the Ministry of Justice, the Law No. 353 on the Establishment of Military Courts and their Procedure has already been amended to prevent trials of civilians by military courts.⁷⁵ This is a positive first step, but does not go far enough, as long as the Constitution expressly permits a return to the former system.

I recommend that the Constitution be changed so as to guarantee that military courts have jurisdiction only over military personnel and that civilians can under no circumstances be made subject to their jurisdiction.

Moreover, consideration of the aforementioned Şemdinli case induces me to make another recommendation. In that case, a first instance civilian court had sentenced a number of soldiers to imprisonment for having committed a terrorist bombing attack on a bookstore in the Southeast of Turkey. The Court of Cassation reversed that decision and transferred the case to a military court which immediately ordered the release – pending trial – of the accused.⁷⁶

Members of the military who commit crimes against civilians, no matter whether on duty or off duty, must be tried by a civilian court. For only civilian courts are sufficiently impartial, at least in the opinion of the general public, both to guarantee a fair trial of the accused and to take resolute action against transgressions by members of the armed forces and thus to avoid the appearance of impunity.

I recommend that the necessary changes be made in the laws to ensure that members of the military who commit crimes against civilians, no matter whether on duty or off duty, are prosecuted by the ordinary public prosecutors and tried by the ordinary criminal courts. The law should also oblige the armed forces to fully cooperate and render all necessary assistance.

Finally, both the ordinary and the administrative branch of the military justice system have a fully-fledged two-tier court organization, which is exceptional in Europe. I therefore wonder whether the review of military and military administrative court decisions on matters of law could instead be entrusted to a specialized chamber of the Court of Cassation and the Council of State, respectively.

I recommend that the Turkish Government consider entrusting the review of military and military administrative court decisions on matters of law to a specialized chamber of the Court of Cassation and the Council of State, respectively.

⁷⁴ See the pertinent jurisprudence of the European Court of Human Rights under Art. 6 (1) of the European Convention on Human Rights concerning the participation of military judges in the former state security courts (e.g. the Grand Chamber judgment of 12 May 2005 in the case of *Öcalan v. Turkey* [Application No. 46221/99], §§ 112 *et seq.*).

⁷⁵ *Loc. cit.*, § 1.8.

⁷⁶ See the Turkey 2008 Progress Report (*supra* 1.3), § 2.1. (p. 10).

2.5. Affiliation between Judges and Prosecutors and Role of Defence Lawyers

The Third Advisory Report extensively deals with the affiliation of judges and prosecutors in criminal cases, which raises an important issue of impartiality.⁷⁷ It also rightly criticizes the subordinate role and low effectiveness of defence lawyers.⁷⁸ I share all of these concerns but do not go into the matter in detail, because the Turkish criminal justice system is the topic of the report of another independent expert on the same peer review mission, Judge Luca Perilli.

Concerning the general issue of an institutional and functional separation of the professional rights and duties of judges and public prosecutors, which the Third Advisory Report recommended as best practice,⁷⁹ the independence and impartiality of judges in decision-making must by any means be guaranteed. This must furthermore be obvious to any rational observer.

While both judges and public prosecutors are servants of law and justice, they exercise different functions in pursuit of a common goal. Centuries of experience demonstrate that the separation of their functions is essential for the preservation of liberty, even if – as in Turkey – public prosecutors are obliged to take a neutral approach, gathering both the incriminating and the exonerating evidence. This does not mean that judges and public prosecutors cannot share the same career and that functions of public prosecutor and judge (or *vice versa*) should not be successively performed by the same person – both is quite common in continental European countries. Rather, it means that when working on specific cases, judges and public prosecutors demonstrably do so in strict separation from each other, avoiding all appearances of making common cause with each other. The Ministry of Justice is aware of this, and it is the Turkish Government's duty to ensure that each single judge and public prosecutor in Turkey bears this in mind in his or her everyday work.

The adequacy of the defence in criminal cases is a matter of public concern, and not only a private concern of the defendant, who is to be presumed innocent until proved guilty. This is why Art. 6 (3) lit. c of the European Convention on Human Rights requires the State to provide indigent defendants with a defence lawyer. Defence lawyers must always be treated with respect by the courts, otherwise the fairness of the proceedings and the impartiality of the courts will be jeopardized.

I adopt and underline the specific recommendations made by the Third Advisory Report in this context.⁸⁰ I further recommend that whenever a person changes his or her function from public prosecutor to judge or *vice versa*, he or she must always be transferred to another workplace.

2.6. Training of Judges and Public Prosecutors and Legal Education in General

The existence of a truly independent and impartial judiciary is not only contingent upon external circumstances such as the absence of undue influence from the executive. At least as important is the mentality of the individual judges. Do they consider themselves faithful servants of the government or of the law? Do they feel and behave like bureaucrats who show obedience to power or like critically-minded and courageous administrators of justice? Only

⁷⁷ *Loc. cit.*, § 3.

⁷⁸ *Loc. cit.*, § 5.

⁷⁹ *Loc. cit.*, § 3.4.

⁸⁰ *Loc. cit.*, §§ 3.5 *et seq.*

those persons who define themselves as faithful servants of law and justice are able to live up to the standards of judicial independence and impartiality.

This insight should be taken into account during recruitment and in promotion, where the relevant standards should be formulated so as to benefit the independently-minded adjudicator and not the unquestioningly “loyal” bureaucrat. It should also play an important role in pre-service and in-service training at the Justice Academy. There, candidates must be taught to become judges and prosecutors who cherish independence and impartiality, and not as faithful servants of the State. It is not sufficient to inform them of the existence of the pertinent national and international norms on the independence and impartiality of the judiciary. Rather, it must be clearly stated that the goal of pre-service and in-service training is the independently-minded adjudicator who courageously enforces the law even *vis-à-vis* the government, and not the unquestioningly “loyal” bureaucrat. As there is nothing of this kind in the Law on the Organisation and Duties of the Justice Academy of Turkey, I recommend that it be amended accordingly. I further recommend that this goal be implemented in the training practice of the Justice Academy, which presently does not seem to be the case.

I recommend that the Law on the Organisation and Duties of the Justice Academy of Turkey be amended to the effect that the goal of pre-service and in-service training is expressly stated to be the independently-minded adjudicator who courageously enforces the law without respect of person, and that this goal be implemented in the training practice of the Justice Academy.

The Draft Judicial Reform Strategy shows that the Ministry of Justice recognizes the importance of ensuring that all judges “internalize the independence of the judiciary and make it part of their culture” and also that the “principle of impartiality is internalized.”⁸¹

The groundwork for a class of independently-minded and truly impartial judges must be laid in law school. There, the educational ideal should be the development of graduates with critical minds, based on an excellent knowledge of the law, and not of graduates who uncritically memorize the letter of the law and the jurisprudence of the high courts. It is widely believed that the training provided to future lawyers in Turkish law schools needs quite generally to be improved considerably. As a necessary supporting measure, the jurisprudence of the high courts should regularly be published with critical annotations by law professors or practicing lawyers. The “culture of professional critique” – the only legitimate check on the power of the high courts – must be developed further in Turkey. This would help first instance judges and public prosecutors to treat the jurisprudence of the high courts respectfully, but not adopt it uncritically.

I recommend that the executive, the judiciary, the profession and academia develop a strategy to improve the regular publication and critical review of high court jurisprudence, e.g. in law reviews (either in print or electronic form).

As the Draft Judicial Reform Strategy demonstrates, the Ministry of Justice is working on having the judgments of the Court of Cassation and the Council of State published as such, which is an important first step.⁸²

⁸¹ *Loc. cit.*, §§ 1.5., 2 (p. 12 *et seq.*).

⁸² *Loc. cit.*, § 2.3 (p. 14 *et seq.*).

2.7. Fundamental Rights of Judges and Public Prosecutors

2.7.1. Freedom of Expression and Association

As a general rule, judges and prosecutors enjoy the fundamental rights laid down in the Constitution and the international human rights treaties, including the freedom of expression⁸³ and association. However, their special position may justify restrictions which go further than those admissible with regard to ordinary citizens. In particular, the law may oblige them to exercise political restraint so as to safeguard their impartiality and maintain public confidence in them.⁸⁴ Art. 51 (5) of the Law No. 2802 on Judges and Prosecutors, which prohibits judges and prosecutors from affiliating with any political party, is a means to ensure the political neutrality of the judiciary in the eyes of the public and is thus probably compatible with the freedom of association (Art. 11 of the European Convention on Human Rights).⁸⁵

On the other hand, judges and prosecutors must remain free to form associations for the purpose of defending their independence and protecting their interests.⁸⁶ Provisional Art. 3 (1) of the Draft Law on the Union of Turkish Judges and Public Prosecutors, which would prohibit judges and prosecutors from forming professional associations, should therefore not be enacted. It would amount to an unjustified interference with the freedom of association of the members of the judiciary.⁸⁷ Apparently, there is a tendency to eliminate this provision from the Draft Law.

Having at my disposal only the translation of a very limited number of the articles of that Draft Law, I understand that the future Union of Turkish Judges and Public Prosecutors will have the status of a public law entity. Membership is not obligatory for the members of the judiciary, but voluntary, the Union being a public professional organization in the sense of Art. 135 of the Constitution. In spite of the many objectives (duties) of the Union listed in Art. 4 of the Draft Law, I cannot clearly recognize its purpose. It might after all induce the members of the judiciary to join the “official” Union, dissuading them from joining other professional associations formed on a private basis. The Draft Law would then amount to an indirect and unjustified interference with the freedom of association.

I recommend that the project of enacting the Law on the Union of Turkish Judges and Public Prosecutors be given up, unless it can be convincingly demonstrated that its object and purpose is not hostile to the freedom of association.

⁸³ This includes professional speech, such as the filing of an indictment by a public prosecutor (see the *Kayasu* decision of the European Court of Human Rights [*supra* notes 57, 67]).

⁸⁴ See § 4.6 of the Bangalore Principles.

⁸⁵ See European Court of Human Rights (Grand Chamber), judgment of 20 May 1999, *Rekvényi v. Hungary* (Application No. 25390/94), which concerned police officers and emphasized the one-party dictatorship which had ruled Hungary until 1989.

⁸⁶ § 9 of the Basic Principles on the Independence of the Judiciary (*supra* note 2); Principle IV of Recommendation No. R (94) 12 (*supra* note 1); § 4.13 of the Bangalore Principles (*supra* note 2).

⁸⁷ See the Grand Chamber judgment of the European Court of Human Rights of 12 November 2008 in the case of *Demir and Baykara v. Turkey* (Application No. 34503/97) – concerning the right of municipal civil servants to form trade unions.

2.7.2. The Judiciary and the Media

2.7.2.1. Duty of Members of the Judiciary to Exercise Restraint

While judges and prosecutors enjoy the freedom of expression, they are under a special obligation to exercise restraint. First and foremost, they must ensure that public statements they make with regard to political issues, let alone pending court cases, do not call their impartiality in question. This is even more important when they disclose their status as judges or prosecutors in their public statements, which the public may consider as an abuse of their position. There have been cases of senior members of the judiciary making public statements of this kind.⁸⁸

I recommend that provisions be added to the Law No. 2802 on Judges and Public Prosecutors as well as the Constitution which expressly specify the duty of the members of the judiciary to exercise restraint when participating in the formation of public opinion, notwithstanding their freedom of expression.

2.7.2.2. Protection of the Judiciary from the Media?

Some of my interlocutors said that they felt bothered by overly aggressive media reports on pending cases and even more by vicious media attacks on judges and prosecutors personally. It is essential in a democratic system that government, including its third branch, operates under the watchful eyes of the media. The members of the judiciary wield governmental powers and must therefore submit to critical media reports. This is a necessary counterweight to their independence. In a pluralist society, journalists must not be subject to prosecution and conviction for critical reports on ongoing investigations or trials.⁸⁹ Nor should senior officials publicly criticize the media for fulfilling their indispensable function as “watchdogs” of democracy.

I recommend that the “watchdog” function of the media also with regard to the judiciary be scrupulously protected in law and practice.

On the other hand, the independence and impartiality of the judiciary and the fair trial rights of defendants must not be jeopardized by the media. It is the duty of government not only to respect, but also to protect the independence of the judiciary.⁹⁰ This protective duty can in extreme cases extend to media attacks. If they go beyond the limits of legitimate reporting and critique, the media can be restricted in accordance with Art. 10 (2) of the European Convention on Human Rights “for the protection of the reputation or rights of others ... or for maintaining the authority and impartiality of the judiciary.”

However, the European Court of Human Rights has always emphasized the essential role which the press plays in a democratic society. In particular with regard to reports on the administration of justice, the Court ruled that

“[t]he importance of the media’s role in the area of criminal justice is ... very widely recognized. In particular, the Court has previously found that ‘[p]rovided that it does not overstep the bounds imposed in the interests of the proper administration of justice,

⁸⁸ Turkey 2008 Progress Report (*supra* 1.3), § 2.1. (p. 10).

⁸⁹ Turkey 2008 Progress Report (*supra* 1.3), § 2.2. (p. 16).

⁹⁰ Recommendation No. R (94) 12 (*supra* note 1), principle I.1.

reporting, including comment, on court proceedings contributes to their publicity and is thus perfectly consonant with the requirement under Article 6 § 1 of the Convention that hearings be public' ... The Council of Europe's Committee of Ministers ... has adopted Recommendation Rec (2003)13 on the provision of information through the media in relation to criminal proceedings. It rightly points out that the media have the right to inform the public in view of the public's right to receive information, and stresses the importance of media reporting on criminal proceedings in order to inform the public and ensure public scrutiny of the functioning of the criminal justice system. ... Article 10 protects the right of journalists to divulge information on issues of public interest provided that they are acting in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism ...”⁹¹

Accordingly, in most instances of governmental interference with the freedom of the media, the Strasbourg Court has found a violation of Art. 10 of the European Convention on Human Rights.

I have no reason to believe that the Turkish legislation in force insufficiently protects the judiciary and its members from illegitimate media attacks or that it is not properly implemented. According to the Draft Judicial Reform Strategy, the Ministry of Justice is aware of misunderstandings between the media and the judiciary and plans to conduct training and awareness-raising activities for both judicial and media professionals as well as other activities.⁹² To me, this is the proper approach to deal with the issue.

I recommend that the plans to conduct training and awareness-raising activities for judicial and media professional so as to dispel mutual misunderstandings be speedily implemented.

3. Concluding Assessment

I share the view of the European Commission's Turkey 2008 Progress Report that while “[t]here has been some progress on the judiciary”,⁹³ much more needs to be done. The struggle between the executive and the (high) judiciary described above⁹⁴ has delayed the reform process initiated by the Ministry of Justice. The recent positive signs of rapprochement must be followed up and both sides need to cooperate much more closely on improving the administration of justice in Turkey, including the independence and impartiality of the judiciary. I had the impression that not only the executive, but also the (high) judiciary know that fundamental reforms are needed, without openly admitting it.

Obviously, a “reform on paper” is not sufficient to strengthen judicial independence and impartiality. Rather, a reform in the minds is also required – the development of a less state-centred, less hierarchical, less corporative and less detached judiciary, and “within it a culture where human rights are given full effect.”⁹⁵ Such a new judicial culture will of course need time to grow. But initial tendencies in this direction are discernible, and a concerted effort must be made now to foster them. This is one major aspect in the ongoing difficult, but

⁹¹ European Court of Human Rights, judgment of 7 June 2007 in the case of *Dupuis and others v. France* (Application No. 1914/02), §§ 42, 46.

⁹² *Loc. cit.*, § 2.2. (p. 14), § 6.3. (p. 27 *et seq.*).

⁹³ *Loc. cit.*, § 4.23. (p. 66).

⁹⁴ See *supra* § 1.4.

⁹⁵ The quotation is from the Third Advisory Report (§ 1.1).

promising process of modernisation, seeking to transform Turkey into a truly pluralist society. It can be done, but the political reform effort needs to be renewed and strengthened.

I recommend that the reform effort with regard to the judiciary be renewed and strengthened in order to develop a judicial culture more conducive to a truly independent and impartial administration of justice.

4. Executive Summary

As the cornerstones of constitutionalism, the protection of human rights, democracy and the rule of law, the independence and impartiality of the judiciary are among the principles, common to all the Member States, on which the EU is founded. While there is a certain spectrum of acceptable approaches concerning these principles, one can define the “best European practice” as a common standard of achievement for all EU Member States and candidate States. Turkey’s reform effort with regard to the judiciary should be renewed and strengthened in order to develop a judicial culture more conducive to a truly independent and impartial administration of justice.

The independence of the judiciary cannot be understood in terms of absolute separation from and independence of the political branches of government. Rather, irrespective of its special function, the judiciary remains part of a democratically accountable government and integrated in a system of checks and balances which cannot function properly unless all the branches cooperate loyally with one another.

The role of the Ministry of Justice in the selection of candidate judges should be reduced in favour of representatives of lower courts and the Bar. The selection criteria should be further specified, published and given effect, so as to ensure that the selection is based on merit only, paying particular attention to the ability of the candidates to function as independent and impartial judges. Moreover, the representation of the Ministry in the General Assembly of the Justice Academy should also be reduced and a fair formula found to have equitable representation from the courts and the Bar. The goal of pre-service and in-service training of judges should be the independently-minded adjudicator who courageously enforces the law without respect of person.

The Minister of Justice should be removed from the High Council of Judges and Public Prosecutors and the Presidency transferred to the Undersecretary. The High Council’s membership should be increased so as to permit an adequate representation of the lower court judges and public prosecutors as well as the Bar. The Council should have its own secretariat, premises and budget. It should also be expressly included in the scope of protection of Art. 138 (2) of the Constitution. Anonymous versions of the important decisions of the High Council on disciplinary matters should be distributed to all courthouses and prosecutors’ offices in Turkey and also published. An effective remedy against the decisions of the High Council must be introduced, entrusting the review power to a truly impartial instance.

The Inspection Board should be transferred to the High Council. The assessment criteria used need to be critically evaluated and, where necessary, reformulated so as to ensure that their application leaves judicial independence unaffected. Judges and public prosecutors must be guaranteed access to all appraisal files maintained in respect of them. The rules on dismissing judges and public prosecutors must be more precisely and narrowly defined and all disciplinary sanctions made subject to the principle of proportionality. The practice of the

high courts of giving marks to the judges and public prosecutors, rating the quality of their decisions pending on appeal, should be abolished.

Military courts should have jurisdiction only over military personnel and not civilians, whereas members of the military who commit crimes against civilians should be prosecuted by the ordinary public prosecutors and tried by the ordinary criminal courts. It should be considered to entrust the review of military and military administrative court decisions to a specialized chamber of the Court of Cassation and the Council of State, respectively.

While both judges and public prosecutors are servants of the law and justice, they exercise different functions and, when working on specific cases, must demonstrably do so in strict separation from each other. This is important to maintain public confidence in the impartiality of judges. It is as important that defence lawyers are always treated with respect; otherwise the fairness of the proceedings and the impartiality of the courts will be jeopardized.

Members of the judiciary enjoy the freedom of expression and association, but when exercising them, are subject to a special duty to exercise restraint so as to preserve their impartiality. The “watchdog” function of the media also with regard to the judiciary must be scrupulously protected in law and practice.