Introductory Remarks

One focus of the ongoing accession negotiations of the EU with Turkey are the independence and impartiality of the judiciary. Since 2008, Professor Giegerich has visited Turkey several times as an independent expert of the European Commission to evaluate the independence and impartiality of the Turkish judiciary. He submitted four pertinent reports to the Commission which were transmitted to the Turkish Government as well as the Governments of the EU Member States. The first three reports have meanwhile been made public by the Turkish Government and the European Commission. They are also made available on this website. The latest report on Judicial Training Offered at Graduate and Post-Graduate Level of 25 November 2013 is still confidential and will be published here as soon as it enters the public domain.

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Peer Review Mission to Turkey (17 – 21 January 2011) – Chapter 23: Judiciary and Fundamental Rights

Report on Independence, Impartiality and Administration of the Judiciary

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Executive Summary

The constitutional reform package of 2010 has produced major progress in respect of the Constitutional Court and the High Council of Judges and Public Prosecutors. Further steps are, however, needed to ensure that the different cultural and political orientations of the Turkish society are adequately reflected in their membership. The role of the Grand National Assembly in the appointment processes of both institutions needs to be strengthened.

The ultimate success of the reform depends on whether the new High Council credibly promotes the independence, impartiality and effectiveness of the Turkish judiciary in practice. More generally, public confidence in the orderly functioning of an independent, impartial and effective judiciary must be maintained and, if necessary, restored. This requires repairing the malfunctioning appellate system and also a professional information policy of both the Government and the judiciary. The organization and competences of the separate military justice system need to be reformed further.

In view of bitter political confrontation and deep-seated mistrust, efforts made by the Government towards confidence-building and dialogue with all the stakeholders on future reform steps ("round table") need to be intensified considerably. But these other stakeholders – the opposition parties, the Bar, the media, and civil society organizations – also bear responsibility in the sense that they must be prepared to engage in a *bona fide* dialogue with the Government.

A 'reform on paper' is not sufficient to strengthen judicial independence, impartiality and effectiveness. Rather, a reform in the minds is also required – the development of a less state-centred, less hierarchical, less bureaucratic, less corporative and less detached judiciary, and within it a culture where human rights are given full effect. Such a new judicial culture will need time to grow, but has to be actively promoted.

1. Introduction

1.1. Follow-up Character of the 2011 Peer Review Mission and Scope of Report

My 2011 Peer Review Mission to Ankara was a follow-up to my previous visit in November 2008. It focussed on much the same issues and primarily examined the progress made since my last report of April 14, 2009 (2009 Report).[1] I refer to that Report concerning the fundamental importance of the independence and impartiality of the judiciary, in particular in the context of European integration based on the rule of law,[2] the scope and layout of the report, and the definition of terms.[3] Specifically, I repeat that in a democratic system of government, the independence of the judiciary cannot be defined in absolute terms. Rather, it needs to be integrated in a system of checks and balances and proper cooperation with the political branches.[4] Moreover, the independent decision-making of individual judges must be protected not only from external interferences particularly by the executive, but also as far as possible from threats coming from within the judiciary (*e.g.* the high courts or the High Council of Judges and Public Prosecutors).[5] I also underline the remarks I made in the 2009 Report on the role of the EU and myself in the ongoing "struggle for law" in Turkey.[6]

My general impression is that a considerable percentage of my 2009 recommendations have been taken seriously and used by the Turkish Government as guidance for their own judicial reform strategy.[7] Several key measures concerning the judiciary were enacted some months ago as part of the constitutional reform package of 2010, others are still pending, and yet others have so far not been taken up. It is too early to make a final assessment even of the constitutional amendments which have entered into force, especially those concerning the composition and additional functions of the Constitutional Court and the High Council of Judges and Public Prosecutors. This is partly due to the fact that the implementing legislation has not yet been fully enacted (*e.g.* the legislation concerning the Constitutional Court), partly because in those areas where it has, one has to wait for the transformation of the law into actual practice (*e.g.* concerning the functioning of the new High Council which has been operating for a few weeks only). I can therefore do no more than venturing a preliminary assessment. Much depends on whether the new powers and mechanisms are used effectively and properly, *i.e.* in a way which is credible with regard to judicial independence and impartiality and thereby instils public confidence in the functioning of the judiciary.[8]

In this Report, I concentrate on the recent reforms of the Constitutional Court and the High Council of Judges and Public Prosecutors, and also touch upon certain aspects of the military justice system. Although I do not specifically take up again several other important issues treated in my 2009 Report, certain problems which I identified there have not yet been resolved. This concerns the affiliation between judges and public prosecutors and the role of defence lawyers, the training of judges and public prosecutors and legal education in general as well as the fundamental rights of judges and public prosecutors.[9] I note that the Venice Commission has recommended a reassessment of the Turkish system in order to better reflect

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1 That report is readily available at http://www.internat-recht.uni-kiel.de/institut/opinions/Report14042009.pdf.
2 *Id.,* 1.1.
3 *Id.,* 1.2.
4 *Id.,* 1.4.3.
5 *Id.,* 2.2.
6 *Id.,* 1.4.5.
7 Republic of Turkey Ministry of Justice, Judicial Reform Strategy and Action Plan (2009).
8 See also the Interim Opinion of the Venice Commission, § 24.
9 See my 2009 Report *sub* 2.5., 2.6. and 2.7.

the distinct functions of the prosecution and the judges both in the organizational and substantive rules.[10] Moreover, I again underline that in democratic systems the armed forces have no legitimate role to play in the administration of civilian justice. Accordingly, Art. 138 (2) of the Constitution prohibits all organs, authorities, offices and individuals outside the judiciary from influencing the exercise of judicial power, including by making recommendations or suggestions.[11] Apparently, this rule is still not taken seriously enough by the military leadership.[12] The presence of military judges in the Constitutional Court as well as the organization and competences of the military court system will be dealt with in more detail below.[13] I repeat the unfulfilled recommendations of 2009 on the aforementioned and other issues in the Annex to this Report.

1.2. 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 January 2011), 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. I found all my Turkish interlocutors very open and ready to speak also about touchy issues and answer critical questions – even more this time than during my previous visit. In 2008, the representatives of the high judiciary, in particular some of the members of the old High Council of Judges and Public Prosecutors and the Court of Cassation whom we met were very reluctant, sometimes almost hostile. This time, the meeting with the new High Council was completely different, and the Court of Cassation seemed also much more ready to discuss the issues.

Two other differences to my previous visit are worth mentioning: This time, I had the opportunity to speak with Mr. Sadullah Erğin, the Turkish Minister of Justice, for three quarters of an hour. The appointment was offered by the Turkish side, and I considered it not only as an honour, but also as an indication of how seriously judicial reform, and the protection of the independence and impartiality of the judiciary in that process, is taken by the Turkish Government. Moreover, when we were preparing the visit, representatives of the Turkish military justice system indicated their interest in meeting us. They correctly pointed out that I had made some brief remarks on the Turkish military courts in my 2009 report without having provided the military judges and prosecutors the opportunity to explain their functioning to me. They believed that it was fair to listen also to them, and I readily agreed. The half-day meeting took place in the Ministry of National Defence and included the Head of the Military Judiciary Affairs Department as well as the Secretaries General of both the Military Court of Cassation and the Military High Administrative Court. To me, this also indicated the interest of the Turkish military in the ongoing judicial reform.

During my meetings I was accompanied by Mr. Christos Makridis, the Deputy Head of the Turkey Unit within the Directorate General Enlargement of the European Commission, and Ms. Didem Bulutlar Ulusoy of the EU Delegation in Ankara. Some meetings were also attended by Michael Miller, Head of the Political Affairs Section of the EU Delegation. Judge Hasan Söylemezoğlu guided us through the official part of the programme as representative of the Turkish Ministry of Justice (General Directorate for EU Affairs) and was present at most

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10 Interim Opinion, §§ 70 *et seq*.
11 See my 2009 Report *sub* 2.1.3.2.
12 See the European Commission's Turkey 2010 Progress Report, p. 10 *et seq*.
13 See *infra* 2.2.3.

of our meetings, except where his presence might impede the readiness of our Turkish interlocutors to speak openly. Also with us were representatives of the Turkish EU Secretariat-General, a department of the office of the Turkish Prime Minister, and one or more interpreters.

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 and my own 2009 Report, three documents are in particular worth mentioning here:

Firstly, the Turkey 2010 Progress Report issued by the European Commission on 9 November 2010 (SEC(2010) 1327 final) – hereinafter Progress Report.

Secondly, an official English translation of the 2009 Judicial Reform Strategy and Action Plan of the Turkish Ministry of Justice which was approved by the Turkish Cabinet.

Thirdly, the Interim Opinion on the Draft Law on the High Council for Judges and Prosecutors (of 27 September 2010) of Turkey, adopted by the European Commission for Democracy through Law (Venice Commission) of the Council of Europe at its 85th Plenary Session (17 – 18 December 2010) – hereinafter Interim Opinion.[14]

2. Constitutional Reform Package of 2010 – Elements Pertaining to Judiciary

2.1. Political Confrontation over Judicial Reform

There is a widely-shared belief in Turkey that the judiciary must be reformed, quite independently of the Turkish bid to accede to the EU. The Turkish judiciary does not yet dispense justice as reliably and as rapidly as the Turkish society expects it to do. This leads to a relatively high number of convictions by the European Court of Human Rights under Art. 5 and 6 of the European Convention on Human Rights and it tends to undermine public confidence in the judicial system.

The number of vacancies for judges and prosecutors, while gradually decreasing, is still considerable (3,875), amounting to more than a third of the number of judges and prosecutors currently working (11,394).[15] The backlog in the high courts (Court of Cassation for civil and criminal cases and Council of State for administrative cases) is enormous,[16] manifesting the malfunctioning of the appellate system. The regional courts of appeal that are intended to ease the case-load of the Court of Cassation are still not operational, almost four years after the date set by the law, and no judges have yet been selected for them by the High Council. It is estimated that roughly 1,200 judges and public prosecutors are needed to staff the courts of appeal, despite the shortage of qualified personnel which is apparent from the number of vacancies in the first-instance courts. Another issue is whether all or part of the current backlog of the Court of Cassation can be transferred to the courts of appeal without overburdening them right from the outset.

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14 Opinion no. 600/2010 – CDL-AD (2010)042 of 20 December 2010.

15 Progress Report, 76 (figures as of 1 May 2009).

16 Ca. 1.8 million cases are currently pending in the Court of Cassation.

Several new developments have taken place since my visit which are likely to contribute to increasing the effectiveness of the judiciary. Thus the number of members of both the Court of Cassation and the Council of State was increased considerably.[17] Moreover, at least the chief public prosecutors of the nine Regional Courts of Appeal have meanwhile been appointed as a first step to make these courts functional.[18] It is now envisaged that these courts will be operational by 2012.

On this background, one should expect all three branches of government to cooperate closely so as to afford immediate relief. In my last Report I identified some positive signs of rapprochement,[19] but the political struggle over the constitutional reform package showed that the spirit of cooperation and dialogue is still underdeveloped.[20] A positive step in this regard was the organization of meetings throughout Turkey by the High Council of Judges and Public Prosecutors and the Justice Academy. These provided the first instance judges and prosecutors with the opportunity to state their opinions and make suggestions concerning judicial reform. On the basis of this information the Ministry of Justice submitted amendments to the Grand National Assembly which became Law No. 6217 amending provisions of Certain Laws to Accelerate the Judiciary of 31 March 2011. This bottom-up approach is highly commendable.

During my visit, however, I also sensed a deep-seated mistrust of the Government in parts of the Bar and academia which is presumably shared by sizeable parts of the population in general. The political polarization in Turkey is manifest. In this regard, intensive confidence-building efforts by the Government are called for. This is why it is so important that in the ongoing criminal investigations into the Ergenekon and Sledgehammer subversion cases, justice is not only done but also credibly seen to be done – for all parts of the Turkish society. The impression that the investigations are but an instrument to silence criticism of the Government should by all means be avoided, in particular where journalists are prosecuted for their alleged involvement in the scheme. Taking into account that public prosecutors and judges decide independently, not only the Government but also the judiciary are under an obligation to explain to the public the status of the proceedings. This has to be done by spokespersons in a professional manner. I was informed after my visit that the High Council of Judges and Public Prosecutors plans to establish a "Public Relations Bureau" within its Secretariat General. Moreover, there is a project to create press offices in the major court houses.

In particular, the ground for major reform projects needs to be prepared by a consultation process with the opposition parties and the civil society as best as possible.[21] It should be obvious to all stakeholders that the reform of the Turkish judiciary is too important and too urgent to permit of political manoeuvring. Any move which could be interpreted as an attempt by one political camp to "seize" the judiciary and turn them into "their" partisans should therefore be avoided. I expressly underline and extend my pertinent recommendation of 2009.

I recommend that the political branches and the judiciary in Turkey enter into a regular and *bona fide* dialogue. Another important stakeholder should be included in this process – the members of the Bar (represented by the Bar Associations), who function as

[17] Law Amending Certain Laws (No. 6100) of 9 February 2011.
[18] Decision No. 322 of the High Council of Judges and Public Prosecutors of 22 February 2011.
[19] 2009 Report (note 1), 1.4.4.
[20] See also Progress Report, 6 *et seq*.
[21] This the Government neglected in the preparation of their constitutional reform package (Progress Report, 8).

the natural connecting link between the judiciary and society at large. This dialogue should also be actively used to prepare the ground for future reforms. Moreover, efforts should be increased to adequately and objectively explain reform steps to the public through the media and invalidate possible objections. Public confidence in the orderly functioning of an independent, impartial and effective judiciary must be maintained and, if necessary, restored.

2.2. Preparing the Way for an Entirely New Constitution

The 1982 Constitution, which is still in force, is the product of the military government established after the *coup d'état* of 1980. Its democratic credentials as well as its overall approach to democratic government, fundamental rights and the rule of law are therefore widely considered as problematic and outdated, in spite of its having been extensively amended in recent years. On this background, the Government has taken initial steps toward replacing the current constitution by an entirely new one which will recalibrate the balance of powers, also with regard to the position of the judicial branch.[22] While this initiative is certainly laudable,[23] the outmost care should be taken to ensure that the process leading to the formulation of the constitutional text becomes a model of transparency and inclusiveness. A "round table" with all the stakeholders, including representatives of the opposition parties, non-governmental organizations, universities, minorities, the media *etc.* may be the best form of preparing the draft and ensuring both a high voter turn-out and a high approval rate in the final referendum. The making of a new constitution of course also provides the opportunity of remedying certain shortcomings with regard to the independence and impartiality of the judiciary that are identified in this Report. We were told that the making of a new Constitution will be tackled after the June 2011 parliamentary elections.

2.3. The Fate of the Constitutional Reform Package

2.3.1. Development of Events

Part Three of the 1982 Constitution of the Republic of Turkey includes so many detailed provisions on the organization and functioning of the judiciary[24] that most reforms can only be accomplished via the cumbersome constitutional amendment process pursuant to Art. 175 of the Constitution. As a general matter, it is worth considering whether the detailed rules on the composition and functioning of judicial organs are properly included in the text of the Constitution or should rather be left to ordinary legislation. The more regulatory work one entrusts to the legislature, the easier reforms will become. Only the fundamental rules which ensure the proper and effective functioning of the judiciary should be fixed in the Constitution and thereby removed from political dispute.

I recommend that it be seriously considered to what extent the detailed rules on the composition and functioning of judicial organs could be removed from the Constitution and left to ordinary legislation that can be amended more easily, if necessary.

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22 In 2007, the ruling AKP Party established a commission of hand-picked academics which drafted a new constitution. The draft (that was ultimately shelved by the Government) is available online in Turkish (http://arsiv.ntvmsnbc.com/news/419856.asp). I am not aware of any translation into English or another language I can read. The drafting process was severely criticized as having been non-transparent and under-inclusive.

23 See also § 11 of the Venice Commission's Interim Opinion.

24 Art. 138 – 160.

In March 2010, a constitutional reform package prepared by the Government was introduced in the Grand National Assembly whose core consisted in a series of proposed amendments to Part Three of the Constitution, affecting Art. 144 – 149, 156 – 157, and 159. When put to a vote on 7 May 2010, none of these proposals obtained the two-thirds majority (367 votes) that would have enabled the President of the Republic to sign them into law immediately. However, as they were all passed by more than a three-fifths majority as Law on the Amendment of Certain Articles of the Constitution of the Republic of Turkey (No. 5982), the President was empowered to put them to a referendum. The President determined that the referendum on Law No. 5982 be held on 12 September 2010, the 30th anniversary of the military coup of 1980. With a voter turnout of approximately 74%, the amendments were adopted by a margin of 58% yes to 42% no votes.

Shortly after the parliamentary vote, a number of opposition deputies filed suit in the Constitutional Court to have the whole amendment package annulled for violation of certain procedural requirements of the Constitution. Some of the amendments were also challenged on account of substantive violations of the Constitution. The Constitutional Court thereupon struck down some parts of the amendments, so that the Turkish people could vote only on an expurgated version of Law No. 5982. Before I deal with the Constitutional Court decision,[25] the main elements of the constitutional reform package need to be explained to the extent in which they concern the judiciary.

2.3.2. Overview of Main Elements of the Constitutional Reform Package

The core of the constitutional reform package was focussed on the judiciary.[26] The pertinent constitutional amendments are directly relevant to the independence and impartiality of the judiciary, first and foremost those changing the composition and extending the powers of the Constitutional Court and the High Council of Judges and Public Prosecutors, but also those redefining the jurisdiction of the military courts. These reform elements will be dealt with in detail below.[27] Other reform elements include improvements in the fundamental rights sector, among them the extension of judicial control to the lawfulness of decisions of the Supreme Military Council regarding discharges of any kind as well as disciplinary decisions taken by the administration against public servants and other public employees.[28] Moreover, an Ombudsman Office has been established at the Presidency of the Turkish Grand National Assembly and charged with the investigation of complaints relating to the operation of the administration.[29]

One further reform item which the Government had included in their original proposal failed to obtain even the three-fifths majority in the Grand National Assembly necessary for including it in the referendum. It concerned an amendment to Art. 69 of the Constitution, aimed at making the dissolution of political parties more difficult. It would have made the launching of a closure case by the Chief Public Prosecutor of the Court of Cassation contingent on the permission of a committee of the Grand National Assembly. As a matter of fact, most party closures by Turkey are later found to violate Art. 11 ECHR by the European

25 See *infra* 2.3.3.
26 Art. 14 – 22, 25 of the 26 articles of Law No. 5982.
27 See *infra* 3.
28 Art. 125 (2) and Art. 129 (3), as amended.
29 Art. 74, as amended.

Court of Human Rights. There obviously is an urgent need to bring the Turkish practice into line with European standards, as was also emphasized by the Venice Commission.[30]

2.3.3. The Constitutional Court Decision of 7 July 2010 – an *Ultra Vires* Act?

By decision no. 2010/87 of 7 July 2010 in the Case No. 2010/49, the Constitutional Court rejected all the procedural challenges to the constitutional amendment package. However, the Court unanimously annulled certain parts of several amendments on what amounted to substantive grounds. As those parts were effectively eliminated from the law, they could not be put to the referendum and have therefore not entered into force. The Constitutional Court struck down certain rules regulating elements of the election process for candidates for both the Constitutional Court and the High Council of Judges and Public Prosecutors. It further eliminated the possibility for the President of the Republic to appoint academics serving in other than the law faculties of higher education institutions[31] and senior administrative officers who are not lawyers as members of the High Council of Judges and Public Prosecutors.

As I do not dispose of more than a partial English translation of the Constitutional Court decision, I am unable to thoroughly evaluate the Court's reasoning. As far as I can, I will consider the substance of the Court's objections below when dealing with the new composition of the Constitutional Court and the High Council of Judges and Public Prosecutors.[32] Here, I only raise an issue concerning the constitutional limits to the Court's review powers with regard to constitutional amendments, picking up on my critical remarks concerning the Headscarf Case in the 2009 Report.[33] The issue is directly linked with impartiality, because whenever a court acts *ultra vires,* overextending the review powers granted to it by law, it arouses suspicions of pursuing a political agenda of its own. It thereby neglects its true function, which is the impartial application of the law, illegitimately venturing into the political arena and ultimately jeopardizing its authority in the eyes of the general public. *Ultra vires* decisions of courts do a great disservice to the rule of law, because courts should be the ultimate guardians of the law.

According to Art. 4 of the Constitution, the following three articles of the Constitution shall not be amended, nor shall their amendment be proposed: Art. 1 establishing a Republican form of government, Art. 2 on the characteristics of the Republic (democracy, secularism, rule of law, respect for human rights *etc.*) and Art. 3 (indivisibility of the Turkish territory and nation *etc.*). It is reasonable to assume that amendments to other constitutional provisions which would affect the fundamental rules in Art. 1 to 3 of the Constitution are also prohibited. However, while the Constitutional Court shall review the constitutionality of laws etc. as to both their form and substance, constitutional amendments shall be reviewed only as to their form (*i.e.*, on procedural grounds).[34] As further specified by Art. 148 (3) of the Constitution, such a review shall be restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under the urgent procedure was complied with. These restrictive provisions are expressly repeated in

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30 See the Venice Commission Opinion No. 489/2008 on the Constitutional and Legal Provisions relevant to the Prohibition of Political Parties in Turkey of 13 March 2009 (CDL-AD (2009) 006), §§ 104 *et seq.*

31 The amendment law passed by the Grand National Assembly permitted the President to choose also academics from the economics and political science faculties.

32 See *infra* 3.1.3. and 3.2.2.1.

33 See my 2009 Report, *sub* 2.3.

34 Art. 148 (1) of the Constitution

Art. 21 (1) and (3) of the Law on the Organisation and Trial Procedures of the Constitutional Court.[35]

This obviously deliberate limitation of the Court's jurisdiction is not required by any standard of international law or general principle of constitutionalism. But it 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. There is no standard of international law or general principle of constitutionalism either which precludes such a limitation. And yet, in the Headscarf Case of 2008, the Constitutional Court struck down a constitutional amendment for violating the principle of secularism in Art. 2, and in the decision of 7 July 2010, it annulled parts of a constitutional amendment for violating the principles of democracy and the rule of law (the latter principle comprising the independence and impartiality of the judiciary) in Art. 2. I notice that while there were dissents in the Headscarf Case concerning the extent of the review powers, the Constitutional Court this time seems to have decided unanimously. In the translated excerpts of the decision at my disposal I do not find any thorough justification for what clearly amounts to a substantive review of the constitutional amendments. There is nothing to disprove my impression that the Court acted *ultra vires* and thus neglected its obligation to administer justice impartially. Anyhow, the Government had no other choice but to accept the ruling and conduct the referendum only on an expurgated version of the amendment law.

I recommend that the Constitutional Court strictly observe the constitutional and statutory limitations of its jurisdiction and scrupulously avoid even the impression of rendering *ultra vires* decisions that call into question its political impartiality and ultimately jeopardize its authority.

2.3.4. Ongoing Legislative Implementation

The process of legislative implementation of the constitutional amendments is still under way. On 11 December 2010, the Grand National Assembly adopted Law No. 6087 on the High Council of Judges and Public Prosecutors. The Venice Commission had been asked in late September 2010 to give an opinion on an earlier draft of that law. The Commission provisionally adopted their Draft Opinion on 13 December and their Interim Opinion on 20 December 2010 – after the Law No. 6087 had already been passed. However, there had been contacts between the Turkish authorities and the Venice Commission experts before. It seems that some preliminary comments by individual members of the Commission were taken into account and certain revisions made to the draft law.[36] I will use the Interim Opinion below when evaluating in more detail the impact of the new composition and powers of the High Council on the independence and impartiality of the judiciary.[37]

A new Draft Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey is currently being debated in the Grand National Assembly.[38] Moreover, a preliminary draft law has been prepared that will amend the Law on Judges and Public Prosecutors of 1983, so as to bring it into line with the recent constitutional amendments concerning the

[35] Law No. 2949 of 10 November 1983. See accordingly Art. 36 (1) and (3) of the new Draft Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey.

[36] See Venice Commission Opinion, §§ 1 – 5.

[37] See *infra* 3.2.

[38] I use an English translation distributed by the Venice Commission (Opinion No. 612/2011 of 3 February 2011). The Law has meanwhile been passed (see *infra* note 56).

judiciary. That draft is still under consideration in the Ministry of Justice. After having been finalized, it will be introduced in the Grand National Assembly as a Cabinet proposal.

3. Assessment of the Constitutional Reform Package from the Perspective of Judicial Independence and Impartiality

3.1. Constitutional Court: New Composition and Powers

The membership of the Constitutional Court as well as its powers have been extended considerably.

3.1.1. The Constitutional Court as a Representative Body of Public Institutions

The new seventeen-member Constitutional Court constitutes as much a representative body of public institutions (primarily the high courts) as the old one, with very strict rules on the representation *ratio:* now two members come from the Court of Accounts, three members from the Court of Cassation, two members from the Council of State, one member from the Military Court of Cassation and the Military High Administrative Court each, and three have to be professors of law, economics or political science from higher education institutions. Of the other five, only one must be a lawyer in private practice, whereas the other four can be selected from among lawyers or senior administrative officers, category 1 judges and prosecutors or rapporteurs of the Constitutional Court.[39] The enlargement has reduced the majority of high court representatives,[40] which is positive because it makes the composition of the Constitutional Court somewhat more representative of the legal community as well as the society at large. In this context, the replacement of the earlier life membership (until the retirement age of sixty-five) by one non-renewable twelve-year term enables more frequent replacements without jeopardizing independence.[41]

From the point of view of judicial independence and impartiality, that "representation" system is unobjectionable, all the more since the members of the high courts are all themselves accustomed to defend their independence and impartiality.[42] Moreover, since the ultimate selection is entrusted to either the President of the Republic or the Grand National Assembly, the rather narrow limitation of their choice helps to prevent the packing of the Constitutional Court with political partisans of the ruling majority. And yet, the Constitutional Court being only partly court and partly political body (and as such representative of society as a whole), I wonder whether the strict representation *ratio* could not be made more flexible and the choice of the selection organs widened somewhat. The Constitutional Court would thereby be made more representative of the Turkish legal community as a whole. One could think of a system in which a certain percentage of the members of the Constitutional Court (perhaps six or seven out of seventeen) would have to come from the high courts quite generally, without strictly reserving certain seats on the Constitutional Court bench to specific bodies. That would also reasonably reduce the continuing high court dominance and enable the inclusion of more members from outside the state institutions, such as lawyers in private practice or house counsels of businesses. When the range of candidates is widened, the question of which

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39 Art. 146 of the Constitution (as amended).

40 Now nine of seventeen members come from the high courts, whereas before the ratio was eight out of eleven.

41 Art. 147 of the Constitution (as amended).

42 But see *infra* 3.1.7. on the presence of military court judges in the Constitutional Court.

organ makes the ultimate selection and what majority is required would also have to be reconsidered.[43]

I recommend that the current strict representation *ratio* be reconsidered as to whether the composition of the Constitutional Court could be made more representative of the Turkish legal community as a whole (*e.g.* by including more lawyers in private practice) and the continuing high court dominance lessened.

3.1.2. Reform of the Appointment Process: Granting a Minor Role to the Grand National Assembly

Together with the increase in regular membership from eleven to seventeen and the abolition of substitute membership, the amendment to Art. 146 of the Constitution has also reformed the appointment process in a generally positive way. Whereas under the old system, all members of the Constitutional Court were ultimately selected and appointed by the President of the Republic, now three members (*i.e.* roughly 18% of the membership) are elected by the Grand National Assembly. This certainly constitutes a first step in the right direction. The Assembly can, however, only elect two members from the Court of Accounts and one member from among the lawyers in private practice (members of the bar), its choice being further limited to a list of three candidates for each vacant seat. The candidates for Court of Accounts seats are nominated by the general assembly of that Court, while the lawyer candidates are nominated by the bar presidents.

In my eyes, the deputies of the Grand National Assembly should not be restricted to such an extent in their choice of Constitutional Court members. After all, the Assembly constitutes the directly elected representation of the Turkish Nation and the legislative branch of government. In a parliamentary democracy, parliament is the noblest and most important state organ. Yet, having passed the constitutional reform package by a three-fifths majority, the Grand National Assembly themselves put up with just a minor role in the appointment of Constitutional Court members. I find this obvious lack of parliamentary self-confidence striking. Parliamentarianism is apparently not deeply rooted in Turkey.

One argument is sometimes made for keeping the Grand National Assembly away from judicial appointments: that otherwise the selection process, and thus the Constitutional Court, would be "politicized". That argument is unconvincing, since a constitutional court is a "political" court from the outset. Moreover, requiring a supermajority in the Grand National Assembly would prevent the election of outright political partisans.[44]

I recommend that the influence of the Grand National Assembly on the composition of the Constitutional Court be considerably increased both regarding the number of members it elects and the choice of eligible candidates.

[43] See *infra* 3.1.4. and 3.1.6.
[44] See *infra* 3.1.4.

3.1.3. The Annulment of the "One Man, One Vote"-Rule by the Constitutional Court

In the original amendment law passed by a three-fifth majority of the Grand National Assembly, the nomination process in the Court of Accounts was further specified in the sense that each member of that Court's general assembly should only vote for one candidate for each vacant seat, the three persons receiving the highest number of votes then becoming the Court of Account's three nominees. The same rule was also to apply to the nomination processes in the general assemblies of the Court of Cassation, the Council of State, the Military Court of Cassation, the Military High Administrative Court and the Higher Education Council. Similarly, with regard to the election of candidates for the lawyers in private practice, it was provided that each bar president should vote for only one candidate, the three persons receiving the highest number of votes then becoming the lawyer nominees. The "one man, one vote"-rule was intended to guarantee the utmost possible degree of pluralism in the composition of each list of three candidates and accordingly contribute to a pluralistic composition of the Constitutional Court as a whole. Together with the requirement of a secret ballot, that rule would have rendered it more difficult for the "political" forces making up the majority of each assembly to determine the entire list of that assembly and given minority candidates a better chance to be listed at all. This is a perfectly legitimate concern.

Unfortunately, the "one man, one vote"-rule fell victim to the Constitutional Court's *ultra vires* decision of 7 July 2010.[45] It was struck down for running afoul of Art. 4 of the Constitution that prohibits amendments of Art. 2 of the Constitution on the characteristics of the Republic. The Constitutional Court unanimously detected a violation of both the principle of democracy and the rule of law (more specifically: the independence and impartiality of the judiciary as a fundamental element of the rule of law). Quoting from the partial translation of the decision at my disposal, the Constitutional Court's argument concerning the principle of democracy was this: "In case of elections where three candidates will be selected, granting each member the right to vote for only one nominee candidate results [in] a failure to vote during the selection of [the] other two candidates. This type of regulation eliminates the right of the elector to vote for [the] other two candidates." The argument is unconvincing – there is nothing undemocratic about the "one man, one vote"-rule, even where more than one position is to be filled in the same ballot. For that rule gives each elector exactly the same voting power and potential influence on the outcome of the election. According to Art. 75 of the Constitution, the Turkish Grand National Assembly is composed of 550 deputies elected by universal suffrage. Are these elections really undemocratic, unless each voter can cast 550 votes?

With regard to the rule of law (independence and impartiality of the judiciary), the Constitutional Court argued that restricting the electors' will power to one vote would hamper the composition of an independent and impartial judiciary. As a matter of fact, it only means that the "political" majority in the plenary assemblies would not have their way so easily in determining all the candidates from which the members of the Constitutional Court are then to be elected by the Grand National Assembly (or selected by the President of the Republic). The Constitutional Court seems to believe that its own independence and impartiality can only be guaranteed if the "political" majorities of the high courts continue to dominate the candidate selection process. In other words: The more pluralistic its composition, the less independent and impartial the Constitutional Court will become. To me, this is strange logic, for the composition of the Constitutional Court of a pluralistic society is necessary pluralistic.

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[45] See *supra* 2.3.3.

One should not forget that the Turkish society needs to be demonstrably pluralistic and Turkey credibly committed to respecting and promoting pluralism for it to be able to fulfil the political requirements of EU membership.[46]

Due to the Constitutional Court's unfortunate interference, every member of the aforementioned plenary assemblies and every bar president now has three votes in the process of electing the three candidates of their respective body. The result is that the "political" majority of each assembly or of the bar presidents usually get all their candidates through, while the minority is not at all represented on the candidate list. As a matter of fact, the Court-imposed "three candidates, three votes" rule reflects the previous practice in the high courts, where three ballot rounds were used to separately determine each of the three candidates. That perpetuates the dominance of the high courts' "political" majorities over the composition of the Constitutional Court, narrowing the political choice of the Grand National Assembly when electing (or the President of the Republic when selecting) the one candidate to fill the vacant seat. I do not believe that this serves either the independence or the impartiality of the Constitutional Court. But the Court-created "three candidates, three votes" rule is now cast in stone, until the Turkish nation, in its capacity as *pouvoir constituant,* replaces the present Constitution by an entirely new one.

I recommend that the results of the Court-imposed candidate selection system be carefully assessed over time as to their positive or negative influence on the independence and impartiality of the Constitutional Court. If the system does not stand the test, it should be replaced by another system, such as the one originally envisaged by the Amendment Law No. 5982 of 7 May 2010. I realize, however, that this can only be done by the Turkish *pouvoir constituant* in the context of the adoption of an entirely new Constitution.

3.1.4. Election Mode (Necessary Majority) in the Grand National Assembly

Constitutional courts are called upon to decide inherently political cases and thus necessarily have considerable political influence. This makes their political independence and impartiality a prime concern. It is therefore important to devise a mechanism for selecting judges which prevents the appointment of outright political partisans and guarantees the political balance of the bench as a whole. On the other hand, the appointment process must be effective in the sense that vacant seats on the bench are filled in due course without excessive delay that might threaten the functioning of the constitutional court. On this background, Art. 146 (2) of the Constitution rightly provides that the Grand National Assembly shall elect the Constitutional Court members by a two-thirds majority of the total number of its members. In view of the political polarization of the Grand National Assembly, however, insisting on the two-thirds majority could excessively delay appointments. As a back-up rule, Art. 146 (2) therefore provides that in the second round of voting the absolute majority shall suffice. If even that cannot be attained, a third round of voting shall be conducted with the two candidates having received the most votes in the second round; the one who then receives the highest number of votes shall be elected. In other words, the relative majority ultimately suffices to place someone on the bench of the Constitutional Court. As this is clear from the outset, why should the parliamentary majority be ready to agree with the opposition on a compromise candidate? In other words, the back-up rule is hardly suitable for preventing the placement of outright political partisans in the Constitutional Court which jeopardizes the

[46] Art. 2, 49 of the Treaty on European Union, as amended by the Treaty of Lisbon (OJ 2010 C 83/1).

Court's political impartiality. It is not much of a consolation that the current opposition party may one day regain the majority in the Grand National Assembly and then be able to staff the Constitutional Court with their own partisans.

Therefore a new back-up rule is needed which furthers the readiness of the different political camps in the Grand National Assembly to find a compromise candidate who is supported by a two-thirds majority. This can perhaps be accomplished, if their inability to compromise results in their loss of decision-making power. One could think, for instance, of a back-up rule that gives the Constitutional Court (or the High Council of Judges and Prosecutors) the competence to fill any vacant seat temporarily (*e.g.* for a two-year term), if the Grand National Assembly has not elected the member by a two-thirds majority within a certain period of time (*e.g.* six months). Various other solutions could also be conceived, especially if more than one member is to be elected at the same time. The Government should actively and in good faith pursue the search for a new election mode with all the other stakeholders. This would also be important as a confidence building measure.

I recommend that the election process in the Grand National Assembly be revised in a way which better prevents the placement of outright political partisans in the Constitutional Court than the current system and thus better safeguards the Court's political impartiality.

3.1.5. Nomination of Lawyer Candidates by Bar Presidents

The three lawyer candidates are determined by a secret ballot of the presidents of the regional bars throughout Turkey who are themselves elected by the members of their bar. This system, which ensures the equal representation of all the bars throughout Turkey in the nomination process, was criticized by members of the Ankara Bar. They pointed out that the İstanbul Bar, the Ankara Bar and the İzmir Bar are by far the largest in the country with regard to membership. They believe that the large bars should have more influence on the selection of the bar candidates than the much smaller bars in the provinces. They also indicated that the Government could more easily control the presidents of small bars than the presidents of the large ones. However, Art. 146 (2) of the Constitution expressly sets forth that the bar presidents shall nominate the three candidates for the bar by secret ballot. This certainly minimizes any danger that the Government might directly control the nomination process. On the other hand, I cannot rule out that the provincial bars and their presidents are more likely to be politically affiliated with the current majority party than the metropolitan bars and their presidents.

The assured presence of a lawyer in private practice on the bench of the Constitutional Court is apparently intended to guarantee the representation of the entire membership of the Turkish bars. This raises doubts indeed as to whether the quasi-regional election system set forth in Art. 146 (2) of the Constitution is adequate. It enables the rural bars to dominate the process, selecting an entire list of candidates who are supported by only a small minority of the Turkish lawyers in private practice. On the other hand, the adequate inclusion of the non-metropolitan bars in the selection process is also important. Safeguards should therefore be introduced which ensure that at least one candidate from outside İstanbul, Ankara and İzmir is included in the list. In any event, the current system needs to be restructured in a way that properly balances number of bar members and adequate geographical representation. It has *e.g.* been suggested that the candidate selection be entrusted to the General Assembly of the Union of Turkish Bar Associations.

I recommend that the process of selecting the bar candidates be restructured in a way which both ensures that the candidate list is more representative of the overall membership of the Turkish bars and at the same time not completely dominated by the large metropolitan bars.

3.1.6. The Dominant Influence of the President of the Republic

Previously, the President of the Republic appointed all the regular (and substitute) members of the Constitutional Court. In the reformed system, he has maintained his appointment power with regard to fourteen of the seventeen members, the other three now being elected by the Grand National Assembly. The presidential choice, however, has always been limited in that most of the members (previously eight out of eleven, now ten out of fourteen) have to be selected from a list of three candidates, each of the lists drawn up by a different non-political body.[47] While in the old system, the President had a free choice with regard to three regular members (to be selected from experienced senior administrative officers and lawyers in private practice), he now can freely choose four out of seventeen members from a considerably larger candidate pool (experienced senior administrative officers, lawyers in private practice, category 1 judges and prosecutors and rapporteurs of the Constitutional Court).

There is no doubt about the democratic legitimacy of the presidential choice, the President being directly elected by the Turkish people. On the other hand, he usually is a party politician and may be inclined to exercise his appointment power in a partisan manner. Where his role is limited to the selection of one out of a list of three candidates nominated by a non-political body, partisanship is not a serious problem. It is of course more serious with regard to the four seats where the presidential choice is free. It should be considered whether the Presidential role with regard to those four seats could be reduced to nomination, the confirmation being reserved for the Grand National Assembly.[48]

When the current strict representation *ratio* of Art. 146 of the Constitution with regard to the other ten presidential appointees is reconsidered, as I have recommended,[49] the choice of the President should not be extended accordingly. Rather, a completely new system should be considered: The President could, *e.g.,* be given the power to nominate all the candidates for membership of the Constitutional Court, and the Grand National Assembly the power to confirm them by a qualified majority.

I recommend that the dominant role of the President of the Republic in the appointment process be reduced. This is especially important concerning the four seats with regard to which his choice is not reduced to a candidate list drawn up by a non-political body. More generally, the Government should consider whether to introduce a new "division of labour" between the President and the Grand National Assembly, in which the former would nominate all the candidates for membership of the Constitutional Court, and the latter would have to confirm them by a qualified majority.

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47 Such as the general assembly of the Court of Cassation or the Council of State.

48 See *supra* 3.1.4. as to the majority which should be required.

49 See *supra* 3.1.1.

3.1.7. Membership of Military Judges in the Constitutional Court

The amended Art. 146 of the Constitution increases the regular membership of the Constitutional Court to seventeen, while maintaining the two military judges (one coming from the Military Court of Cassation and the other from the Military High Administrative Court). Their influence in the General Assembly of the Court of course decreases, which I consider as a positive development. The picture changes, however, when one takes into account the two Chambers of seven members each plus the chairperson (a deputy president of the Court). The Chambers are called upon to rule on the new individual applications. For that purpose, each of the Chambers convenes as a panel of only four members under the chair of a deputy president of the Court.[50] Assuming that no more than one military judge sits in each of the two Chambers, the influence of the military justice system in a panel can reach 20%.

I wonder whether military expertise needs to be directly available inside the Constitutional Court at all times so that the permanent presence of two military judges on the bench is indispensable. Compared with other constitutional courts, this is an extraordinary feature of the Turkish system. It is true that the Turkish Constitutional Court may sometimes be called upon to decide cases concerning the military, *e.g.* when senior military commanders are tried by it in its capacity as Supreme Court for service-related offences.[51] But such cases are too few to justify the permanent membership of military judges. Whatever military expertise is needed can ordinarily be introduced with the help of external experts appointed by the Court. Should that be insufficient in an exceptional case and military expertise directly on the bench seem indispensable, perhaps in the trial of a senior military commander, one senior military judge *ad hoc* (*e.g.* the respective President of the Military Court of Cassation) could be added to the Constitutional Court panel called upon to decide that specific case. The category of those exceptional cases and the senior military judge *ad hoc* should be previously determined by law in an objective manner.

Repeating a passage from my 2009 Report, since 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 due to the peculiar and problematic role of the armed forces in the constitutional system of Turkey. It was and is beyond my terms of reference to treat this topic in general. From the point of view of judicial independence and impartiality, I did not then consider that the inclusion of military judges in the Constitutional Court posed specific problems, because the members of the Constitutional Court at that time enjoyed life tenure, so that the military judges were placed outside the chain of command of the Turkish armed forces until their retirement. Under the amended Art. 147 of the Constitution, the term of office of members of the Constitutional Court now is twelve years, with no possibility of reappointment. I was informed that the military judges appointed to the Constitutional Court are retired as military officers. Thus, they will at least normally not return to active military service after their twelve-year term on the Constitutional Court ends.

However, the introduction of the individual application procedure gives a new dimension to the issue. According to Art. 148 (5) of the Constitution, that procedure aims at securing the faithful implementation of those fundamental rights provisions of the Turkish Constitution which are also guaranteed by the European Convention on Human Rights.[52] As already mentioned, individual applications shall be decided by the Chambers convening as five-member panels. When an individual application is filed concerning either "civil rights and

50 This means that each Chamber can establish two separate panels which only share the same chairperson.
51 Art. 148 (4) of the Constitution.
52 See *infra* 3.1.8.

obligations" or "criminal charges", the Constitutional Court procedure effectively continues a lower court procedure governed by Art. 6 (1) of the European Convention on Human Rights. According to the constant jurisprudence of the European Court of Human Rights (ECtHR), the Constitutional Court procedure then also comes within the scope of Art. 6 (1) ECHR.[53] Thus, the Constitutional Court panel would have to meet the standard of being an "independent and impartial tribunal" in the sense of Art. 6 (1) ECHR, as interpreted by the ECtHR. This brings to mind the constant Strasbourg jurisprudence concerning the former Turkish State Security Courts. Their composition, which included one military judge, was held to be incompatible with Art. 6 (1) ECHR because there was legitimate cause to doubt their independence and impartiality.[54] The Strasbourg Court would probably apply the same reasoning to a future case in which a decision on an individual application handed down by a panel of the Constitutional Court that included a military judge was challenged on the basis of Art. 6 (1) ECHR. It remains to be seen whether the military judge's status as a retiree military officer would make a decisive difference in the eyes of the ECtHR.

On this background, the time has come to reconsider the composition of the Constitutional Court as concerns the membership of military judges. This question is of course closely connected with wider issue of general reform of the military court system, in particular the appellate level from which the Constitutional Court members are drawn. That issue will be dealt with below.[55]

In view of Art. 6 (1) of the European Convention on Human Rights, I recommend that – in the context of a general reform of the military court system – the two military members of the Constitutional Court be replaced by civilians. In exceptional cases where military expertise directly on the bench seems indispensable, it could be introduced by adding a senior military judge *ad hoc* to the panel called upon to decide that particular case. The category of those exceptional cases and the senior military judge *ad hoc* should be previously determined by law in an objective manner.

3.1.8. The New Individual Application to Enforce Fundamental Rights

The powers of the Constitutional Court have been extended considerably by the introduction of the new individual application procedure. Pursuant to Art. 148 (5) of the Constitution, anyone who claims that any of their fundamental rights and freedoms guaranteed by both the Constitution and the European Convention on Human Rights has been violated by the public authorities can apply to the Constitutional Court, provided that he or she has exhausted all the ordinary legal remedies. The requirement of parallel national and European guarantees reveals that the primary purpose of the new procedure is to reduce the number of applications from Turkey to, and condemnations of Turkey by, the European Court of Human Rights. It is a new national remedy functioning as an additional filter so as to ease the Strasbourg Court's considerable case load originating in Turkey, which is quite in accordance with the principle of subsidiarity, one of the cornerstones of the Strasbourg system.

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53 See, *e.g.,* ECtHR, judgment of 8 January 2004 (No. 47169/99 – Voggenreiter v. Germany), §§ 31 *et seq.* (concerning excessive length of procedure).

54 The leading case is ECtHR (Grand Chamber), judgment of 9 June 1998 (No. 22678/93 – Incal v. Turkey), §§ 65 *et seq.* (12 votes to 8, with a joint dissenting opinion). See also ECtHR, judgment of 28 October 1998 (No. 19601/92 – Çıraklar v. Turkey), §§ 37 *et seq.* (7 votes to 2, with two dissenting opinions); ECtHR, judgment of 7 November 2002 (No. 42739/98 – Özel v. Turkey), §§ 31 *et seq.* (unanimously); Grand Chamber judgment of 12 May 2005 (No. 46221/99 – Öcalan v. Turkey), §§ 112 *et seq.* (11 votes to six, with a joint partly dissenting opinion).

55 See *infra* 3.3.

The individual application procedure is not yet operative, as the new Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey is still in the works.[56] According to the last paragraph of the new provisional Art. 18 in Part VI of the Constitution, the necessary arrangements relating to individual applications have to be completed within two years. One of the yet unresolved issues is the relationship of the Constitutional Court to the Court of Cassation and the Council of States. Both these high courts do not like the idea that their own decisions may be reviewed and vacated by the Constitutional Court for fundamental rights violations. They point to the text of Art. 154 (1) and Art. 155 (1) of the Constitution, characterizing them as "last instance" courts. Of course, they are the last instance only with regard to laws other than the fundamental rights provisions of the Constitution and the European Convention, and will in due course get accustomed to that, all the more since Art. 148 (6) of the Constitution prevents the Constitutional Court from reviewing the application of statutory law by the ordinary courts. In other systems with specialized constitutional courts, their relationship with the other high courts is not always easy either.

With regard to the independence and impartiality of the judiciary, the individual application procedure certainly has positive potential. The individual right to have one's civil or criminal case heard by an independent and impartial tribunal is not only guaranteed by Art. 6 (1) ECHR. It can also be derived from the fundamental rights catalogue of the Turkish Constitution, *e.g.* Art. 36 (right to a fair trial), Art. 37 (right to be tried by the legally designated court), both read together with Art. 9. The guarantee can furthermore be deemed as implicit in all those fundamental rights provisions that make interferences with individual freedoms contingent on the decision of a judge or court (*e.g.* Art. 19 – 23 of the Constitution).

I recommend that the new individual application procedure, as soon as it becomes operative, be resolutely used to enforce the individual right to an independent and impartial tribunal embodied both in Art. 6 (1) ECHR and various provisions of the Turkish Constitution.

With regard to the administration of justice in general, it remains to be seen, if the Constitutional Court is able to cope with the probable large influx of individual applications. The draft Art. 48 (2) of the new Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey provides for quick dismissal of applications which are either insignificant for the enforcement and interpretation of the Constitution or for the determination of the scope and limits of fundamental rights, as well as applications which do not require meritorious decisions, the applicant not having sustained any significant damage. Where an individual application pursuant to Art. 34 ECHR would be well-founded because Art. 6 (1) ECHR (right to an independent and impartial tribunal) was violated according to the standards developed in the jurisprudence of the European Court of Human Rights, an individual application always requires the Turkish Constitutional Court to render a decision on the merits for the applicant. Otherwise the case would ultimately end up in Strasbourg and the main purpose of Art. 148 (5) of the Constitution be defeated.

In accordance with the main purpose of Art. 148 (5) of the Constitution, I recommend that a decision on the merits for the applicant should be rendered in any case in which

[56] Meanwhile the Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey of 3 April 2011 has been promulgated, but the individual application procedure will not become operative before 23 September 2012.

Art. 6 (1) ECHR (right to an independent and impartial tribunal) has been violated according to the standards developed in the jurisprudence of the European Court of Human Rights.

3.1.9. Internal Re-examination of Judgments Rendered as Supreme Court

When certain leading political or judicial personnel, such as the President of the Republic or members of the Court of Cassation, commit offences relating to their official functions, they will be tried by the Constitutional Court sitting in its capacity as the Supreme Court (Art. 148 [4] and [5] of the Constitution). Whereas before the judgments of the Supreme Court were expressly declared to be final, now an internal re-examination procedure has been introduced (Art. 148 [9] of the Constitution). According to Art. 58 of the Draft Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey, that re-examination procedure can be initiated by the application of the prosecution, the defence or an intervener. From a rule of law standpoint, this development is certainly positive. There is indeed no general right to an appeal in criminal cases, Turkey not having ratified the Protocol No. 7 to the European Convention on Human Rights.[57] On the other hand, Art. 13 ECHR guarantees the right to an effective remedy to everyone whose rights and freedoms set forth in the Convention are violated. Criminal trials of leading political and judicial functionaries come within the scope of application at least of Art. 5, 6 and 7 ECHR. When the respective functionary is convicted and makes an arguable claim that his or her ECHR rights were violated, he or she should therefore have an effective remedy under national law.

It is probable that Art. 13 ECHR also applies in the special case of trials of leading political and judicial personnel for offences relating to their official functions. In any event, if an appellate procedure is introduced by a Convention State, it should be ensured that the appellate decision is rendered by an independent and impartial tribunal. Currently, both the trial and the re-examination is entrusted to the same panel, namely the general assembly (*i.e.,* the plenary) of the Constitutional Court.[58] In other words, the very same judges that have rendered the original judgment are called upon to re-examine it – but can they really be impartial in this particular case, and would they appear as impartial to a neutral observer? With regard to the previous internal objection procedure against disciplinary decisions of the High Council of Judges and Prosecutors, the European Court of Human Rights held that the composition of the Council's Board of Objections was incompatible with Art. 13 ECHR, because the persons who took the original decision also participated in the decision on the objections, damaging the impartiality of the Board.[59] The same would apply to the internal re-examination procedure of the Constitutional Court.

This problem could be solved by having one Chamber of the Constitutional Court conduct the trial and entrusting the re-examination to the other Chamber. In order to avoid any appearance that one Chamber was in a subordinate position to the other, the determination which Chamber functions as trial chamber in each particular case could be made by drawing lots; the other Chamber would then automatically become the appellate chamber.

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[57] Of 22 November 1984 (CETS No. 117). Even Art. 2 of that Protocol allows for an exception where the person concerned was tried in the first instance by the highest tribunal.

[58] Art. 149 (3) and Art. 148 (9) of the Constitution; Art. 57, 58 of the Draft Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey.

[59] See my 2009 Report *sub* 2.2.2.3. See also *infra* 3.2.6.

I recommend that the newly introduced internal re-examination of judgments which the Constitutional Court renders as Supreme Court should be reconsidered: In order to ensure that the review panel is not only truly impartial, but also appears to be impartial to a neutral observer, the trial function and the appellate/review function could be entrusted to different Chambers of the Constitutional Court.

3.2. High Council of Judges and Public Prosecutors: New Composition and Powers

The High Council of Judges and Public Prosecutors is the keystone of the Turkish judicial architecture because it plays a crucial role in the promotion and transfer to other locations of, and disciplinary proceedings against judges and public prosecutors, including their removal from office.[60] This is why it has been at the centre of the judicial reform process. It already played a prominent role in my 2009 Report, and I am pleased to note that a considerable number of the recommendations which I made in accord with other experts have been taken seriously in Turkey.

3.2.1. Increase in and Diversification of Membership

According to Art. 159 of the Constitution, as amended by the constitutional reform package, the new High Council now has 22 (instead of seven) regular and twelve (instead of five) substitute members. Due to the enlargement, the High Council is now much more pluralistic and representative of the Turkish judiciary as a whole. The previous dominance of the Court of Cassation and the Council of State has been eliminated, although they still send five regular members (three coming from the Court of Cassation, two from the Council of State). This eases the hierarchical structure of the Turkish judiciary, protects judicial independence against threats from within the judiciary and is in accordance with my recommendation of 2009.[61]

In what I consider as a very positive development, the judges and public prosecutors of the lower courts, including the administrative courts, are now for the first time represented on the very body that has the power to decide about their professional fate: Seven regular and four substitute members of the Council are first category (*i.e.* experienced) judges or public prosecutors from the ordinary courts, three regular and two substitute members are now first category administrative judges or public prosecutors from the administrative judiciary. Together, they make up the largest group in the High Council.[62] All the judges and prosecutors with whom I had the chance to speak confirmed that this was major progress, not least for their independence. The reason for this is stated in the Interim Opinion of the Venice Commission: "[F]rom a comparative perspective it is clear that the powers of the Turkish [High Council] to supervise and control the judges and prosecutors are not only greater than in most other European countries, but they have also been traditionally interpreted and applied in such a manner as to exert great influence on core judicial and prosecutorial powers, in a politicised manner that has been quite controversial."[63]

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60 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.

61 See my 2009 Report *sub* 2.2.2.1.

62 See my recommendation in the 2009 Report *sub* 2.2.2.1.

63 § 50.

Four regular members, to be appointed by the President of the Republic,[64] have to be selected from the law faculties of higher education institutions or from the lawyers in private practice. Thus, the membership of lawyers in private practice in the High Council is not at all ensured. Theoretically, the President of the Republic could appoint four law professors and not a single member of the bar, even though the latter have a much greater stake in the orderly functioning of the judiciary. Judges, public prosecutors and lawyers in private practice constitute the three mainstays of any judicial system. Since the important role of lawyers seems to be underestimated in Turkey, it would be essential to have a number of representatives of the bar in the supreme judicial organ at any time. Moreover, lawyers in private practice are the only persons having no professional affiliation with the state and therefore being able to credibly represent civil society in the High Council.[65] As the everyday work of the High Council is done by the three Chambers, there should be one member of the bar in each of the Chambers. This does not necessitate any increase in the overall membership because, conversely, one law faculty representative on the High Council seems to be enough.

I recommend that the Constitution and laws be changed in a way which ensures the permanent representation of members of the bar in the High Council, preferably one member of the bar in each of the three Chambers.

3.2.2. Reform of the Selection Process

3.2.2.1. Election of the Judicial Members

The increase in membership necessitated new rules on selection and appointment; it also led to the reform of the appointment process of the traditional members. Overall, the selection of the sixteen regular and the twelve substitute judicial members of the High Council is now entirely left to judicial organs without any interference from the executive or legislative branch of government.

The regular and substitute members coming from the Court of Cassation and the Council of State were previously appointed by the President of the Republic from a list of three candidates for each vacant seat that was prepared by the plenary assembly of the respective high court. Now, the President plays no role in the selection of those high court members, their appointment being completely entrusted to the general assemblies of the high courts. Similarly, the Justice Academy member is appointed by the plenary assembly of the Justice Academy.

The ten regular and six substitute members representing the judges and public prosecutors from the ordinary courts and the administrative courts are elected by all the judges and public prosecutors in each of these two judicial branches, including those working at the Ministry of Justice, in a secret ballot. The elections are administered by the independent Supreme Election Board that also conducts the parliamentary and presidential elections. Complaints were raised against the candidacies of judges and public prosecutors working in the Ministry, but they were rejected by both the Supreme Election Board and the Council of State, because Art. 159 (3) of the Constitution provides that all first category judges and public prosecutors are eligible, no matter where they currently work.

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64 See *infra* 3.2.2.2.

65 The institutions of higher education are all in a close relationship with the state (Art. 130 of the Constitution).

For all the above mentioned sixteen regular and twelve substitute members, the amendment law originally provided for the same "one man, one vote" rule that was also set forth in Art. 146 (4) of the Constitution with regard to the election of twelve members of the Constitutional Court. It was likewise annulled by the Constitutional Court.[66] Each voter can therefore now cast as many votes as candidates for regular and substitute membership are to be elected by the respective body.[67] That Court-imposed system enables the "political" majority of those bodies to win all the available seats, whereas the "one man, one vote" system would have increased the likelihood that minority candidates are also elected, and thus of a more pluralistic composition of the High Council which would have better represented the Turkish judiciary as a whole.[68] I therefore extend to the High Council the recommendation that I have made above with regard to the Constitutional Court.[69]

I recommend that the results of the Court-imposed election system be carefully assessed over time as to their positive or negative influence on the composition of the High Council, which needs to be truly representative of the Turkish judiciary as a whole. If the system does not stand the test, it should be replaced by another system, such as the one originally envisaged by the Amendment Law No. 5982 of 7 May 2010. I realize, however, that this can only be done by the Turkish *pouvoir constituant* in the context of the adoption of an entirely new Constitution.

Last year, the elections of the ten regular and six substitute members by the lower-court judges and public prosecutors, including those from the administrative judiciary, were held pursuant to the rules of the new Law on the High Council of Judges and Prosecutors (No. 6087). According to that Law, candidates run as individuals – there are no multi-person lists sponsored by political groups. Rather, the Supreme Election Board puts all eligible candidates who are running on one official candidate list.[70] Electioneering is expressly prohibited.[71] However, as the Venice Commission correctly stated, "these rules do not exclude the possibility of informal electoral majority agreements aimed at avoiding the election of candidates who are the expression of minority orientations, which should, in any case, be present in the body ..."[72] As a matter of fact, there are two well-organized and politically active associations of the roughly 11,000 Turkish judges and public prosecutors, YARSAV and the Democratic Judiciary. Members of both associations ran. There is no evidence to support allegations of a "Government-sponsored" list of candidates. In any event, in secret ballot organized by the independent Supreme Election Board, in which over 95% of the electorate participated, it was the Deputy Undersecretary in the Ministry of Justice who received the highest number of votes. Having once been the Director for Personnel in the Ministry, he was well known by the judges and public prosecutors throughout Turkey.

3.2.2.2. Presidential Appointment of the Non-Judicial Members

The determination of the four non-judicial members of the High Council, to be selected from among the law faculties and the lawyers in private practice, is entirely left to the discretion of the President of the Republic, whereas the Grand National Assembly is not involved at all.

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66 See *supra* 2.3.3.
67 See Art. 19 of the Law on the High Council of Judges and Prosecutors (No. 6087).
68 See also the Venice Commission's Interim Opinion, §§ 36 – 38.
69 See *supra* 3.1.3.
70 Art. 21 lit. c, 24 of Law No. 6087.
71 Art. 25 of Law No. 6087.
72 Interim Opinion, § 36.

Both the President and the Grand National Assembly indeed dispose of the same democratic legitimacy, being directly elected by the people. But the participation of the Assembly would make the selection process more transparent and less partisan.[73] As the Venice Commission underlined, due to the exclusion of the Assembly from the selection process, the representation in the High Council of the different cultural and political orientations of the Turkish society is not ensured.[74] Having members elected by the Grand National Assembly instead of their appointment by the President of the Republic would decrease rather than increase the danger of "politicizing" the High Council, if the election mode was properly devised. Alternatively, one could imagine a system in which the President of the Republic nominates all four candidates who then need to be confirmed by a qualified majority of the Grand National Assembly. A combination of both methods is also conceivable. All these alternatives would enable a more pluralistic composition of the High Council than the current system. The more the composition of the High Council reflects the various cultural and political tendencies in the Turkish society, the more that society will recognize the judiciary as "their" institution and public confidence in its proper functioning will grow.

I recommend that at least two of the four members of the High Council who are now appointed by the President of the Republic should rather be elected by the Grand National Assembly in a way that promotes the representation of different cultural and political orientations of the Turkish society. Alternatively, the President could nominate all the four candidates who would then need to be confirmed by a qualified parliamentary majority. A combination of both methods could also be imagined.

3.2.2.3. Short Election Period and Possibility of Reappointment

The independence and impartiality of the judiciary as a whole can only be maintained, if the independence and impartiality of the High Council, the keystone of the Turkish judicial architecture, is ensured. In this regard, the regular term of office of High Council members of only four years and the possibility of reappointment is problematic. It could induce members to make decisions with a view to secure their own reappointment, in other words decisions pleasing the institution which has the power to reappoint them. That problem is eased by the fact that the Chambers of the High Council make majority decisions that cannot necessarily be attributed to an individual member.[75] However, the High Council plans to permit separate opinions in the future. The problem is further defused by the fact that the law makes suitable provision for Council members' reappointment to their previous posts or to appropriate positions, taking into consideration their wishes.[76] And yet, it should be considered whether an extension of the election period with no possibility of reappointment is feasible and more conducive to safeguarding the independence and impartiality of the High Council.

I recommend that it should be considered whether an extension of the election period of members together with the abolition of the possibility of reappointment is feasible and more conducive to safeguarding the independence and impartiality of the High Council.

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73 See *supra* 3.1.4. and 3.1.6. on the parallel issues concerning the selection of members of the Constitutional Court.

74 Interim Opinion, § 33.

75 Art. 30 *et seq.* of Law No. 6087.

76 Art. 28 of Law No. 6087.

3.2.3. Reduction of Ministerial Influence

In 2009, I also recommended a reduction of the ministerial influence on the High Council to counter the impression that the independence of the judiciary was threatened from the executive. At that time, the President of the High Council was the Minister of Justice, and the Undersecretary was an *ex officio* member. As there were only seven members in all, I recommended that the presidency of the High Council be transferred to the Undersecretary and the Minister be removed from the Council.[77] That recommendation was not accepted by the Turkish Government: The President of the High Council still is the Minister of Justice, and the Undersecretary still is an *ex officio* member, but due to the enlargement, the ministerial members now make up less than 10% of the total membership. Apart from those numbers, the substantive influence of the two ministerial members has also been reduced considerably: The Minister does not sit in any of the three Chambers where the regular work is done,[78] nor does he participate in Plenary meetings regarding disciplinary matter;[79] he mainly fulfils representative functions. Moreover, the Minister and the Undersecretary previously had the possibility to frustrate the High Council's decision-making by their mere absence, disposing of a kind of "empty chair" blocking power of the minority, which they actually used last year. Fortunately, this is no longer possible. In line with the assessment by the Venice Commission, I do not consider the presence of the Minister as such as an impairment of the independence of the High Council.[80] Apparently, the Grand National Assembly insisted on having a High Council President that is politically accountable to them.

But the Minister (in his capacity as the President of the High Council) still retains the power to prevent disciplinary investigations concerning judges and prosecutors.[81] The ministerial veto may have made sense when the Inspection Board (that is responsible for conducting investigations) was still affiliated with the Ministry of Justice – it then ensured that no subordinate executive functionary could interfere with judicial independence on his own initiative. Now, however, investigations can only take place upon a decision by the competent Chamber of the High Council, which has been transformed into a body truly representative of the judiciary as a whole. There is no longer any need to give the Minister the power to shield a judge or public prosecutor from an investigation that his or her peers consider as necessary and that is carried out under the supervision of the High Council.[82] I therefore agree with the Venice Commission that the Ministerial veto should be eliminated.[83] Although this veto may now be rarely used in view of the new composition of the High Council, the mere possibility gives the impression of undue executive influence on the judiciary – and that without any apparent practical need.

My disapproval of the Ministerial veto is unaffected by the availability of judicial review. As I was told, the Minister's refusal to consent to investigations can be challenged in the Council of State. Pursuant to Art. 125 (4) of the Constitution, however, the Council of State is only competent to control the lawfulness of such refusal, and not its expediency. It cannot limit the Ministerial discretion. As the Constitution or laws do not formulate any rules for the exercise of the Ministerial veto, it is difficult to imagine any normative standard by which the Council of State could assess the legality of such a veto.

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77 See my 2009 Report *sub* 2.1.3.1.
78 Art. 159 (7) of the Constitution.
79 Art. 6 (3) *lit.* a of Law No. 6087.
80 Interim Opinion, § 35.
81 Art. 159 (9) of the Constitution.
82 See my recommendation in the 2009 Report *sub* 2.1.4.
83 Interim Opinion, § 42.

It was further explained to me that the requirement of Ministerial consent was necessary to provide the affected judge or public prosecutor with a judicial remedy, because the decision of a High Council Chamber to open an investigation was not subject to judicial review as such.[84] The preferable solution to this problem of course is to subject all High Council decisions to judicial review.[85]

I recommend that the ministerial veto on the initiation of disciplinary investigations concerning judges and public prosecutors be eliminated. When the role of the Minister is reduced to a representative function, his Presidency of the enlarged Council does not in any way jeopardize the independence of the judiciary.

The fact that the Undersecretary is a member of the First Chamber – the one responsible for personnel management and thus in need of close relations with the Ministry – is unproblematic, because he can be – and has indeed already been – outvoted by the other members who are not affiliated with the executive branch of government. The law excludes his election as head of the Chamber.[86]

Concerning the membership of the Minister and the Undersecretary, I fully agree with the Venice Commission that "[t]he real test will lie in the actual functioning of this arrangement. If the position of the two members of the Government can be used for the purpose of exerting undue pressure and influence on the functioning of the [High Council], then the model should be reconsidered and, if necessary, changed in the next phase of the constitutional reform".[87]

3.2.4. Administrative and Financial Autonomy

The High Council has been transformed from a branch of the Ministry of Justice into a public legal entity with administrative and financial autonomy in mere correlation with the Ministry of Justice.[88] The Secretary General, who, together with his staff, functions as the Council's administrator, is appointed by the Minister of Justice in his capacity as President of the Council, but from a list of three candidates elected by the Plenary of the High Council without his participation.[89] The Council is assigned a special budget which it alone administers.[90] This reform takes care of the concerns which I stated in my 2009 Report.[91]

3.2.5. Supervision over Inspection System and Disciplinary Power

The Inspection Board, which was previously run by the Ministry of Justice, has now been transferred to the High Council, in accordance with one recommendation in my previous Report.[92] The Ministry of Justice maintains their own inspectors, but these are only charged with inspecting the judges and public prosecutors who work within the executive branch of government (*e.g.* in the Ministry or in the prison system) and the performance of

84 Art. 159 (10) of the Constitution.
85 See *infra* 3.2.6.
86 Art. 8 (3) of Law No. 6087.
87 Interim Opinion, § 44.
88 Art. 3 of Law No. 6087.
89 Art. 11 of Law No. 6087.
90 Art. 44 of Law No. 6087.
91 *Sub* § 2.1.3.1.
92 See my 2009 Report *sub* 2.1.4.

administrative duties (such as the maintenance of court buildings) by the public prosecutors.[93] This Ministerial inspection seems no longer to pose any threat to judicial independence. It will ultimately be for the High Council to ensure that the Ministerial inspection service does not in fact interfere with judicial independence.[94] Since the High Council now more than ever constitutes an institution of self-government of the judiciary as a whole, it should quite appropriately see its future role as defender of judicial independence and organ for publicly expressing concerns of the judiciary.[95]

With regard to the High Council inspection, the assessment criteria, which I criticized in my 2009 Report, are currently in a process of reconsideration.[96] The same applies to the grading system of the high courts. In both respects, I underline my relevant recommendations and repeat them in the Annex to this Report.[97]

Meanwhile, the matter has become even more urgent: The European Court of Human Rights has voiced serious misgivings concerning the lack of clarity of Art. 69 (4) of Law No. 2802 on Judges and Public Prosecutors. That paragraph provides that a judge or public prosecutor will be dismissed from the profession for having committed an offence "of a nature violating the dignity and honour of the profession or the general respect and trust in the profession". There is no published case-law either which could further clarify the interpretation of that paragraph.[98] Whenever the dismissal amounts to interference in a fundamental right protected by the European Convention, it must be "prescribed by law". According to the Strasbourg Court's constant jurisprudence, the essence of that requirement is foreseeability. "Thus, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[99]

More clarity will be provided by a new Code of Conduct concerning judicial ethics which is presently being elaborated on the basis of the Bangalore Principles of Judicial Conduct.[100] In this context, the recent decision of the European Court of Human Rights in the case Özpınar v. Turkey should be taken into account. There, the Court held that the criteria which were used by the High Council as a basis for a judge's dismissal from the profession amounted to a disproportionate interference with that judge's private life, in violation of Art. 8 ECHR.[101]

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93 Art. 144 of the Constitution, as amended.

94 See also the Venice Commission's Interim Opinion, §§ 62 – 63.

95 See also the Venice Commission's Interim Opinion, § 80.

96 After my visit, some of the most problematic criteria such as dressing and impression of the neighbourhood about the judge/prosecutor and his or her family have been eliminated and replaced by what were described as "objective assessment criteria". I cannot comment on those because I have not seen the exact formulation.

97 See my 2009 Report *sub* 2.1.4 and 2.2.3. After my visit, the grading system was abolished by the Law No. 6217 Amending Certain Laws to Accelerate the Functioning of the Judiciary of 31 March 2011.

98 European Court of Human Rights (Chamber), decision of 19 October 2010 (No. 20999/04 – Özpınar v. Turkey), §§ 50 *et seq*.

99 European Court of Human Rights (Grand Chamber), judgment of 20 May 1999 (No. 25390/94 – Rekvényi v. Hungary), § 34.

100 Of November 2002 (endorsed by the Economic and Social Council of the United Nations in 2006 [ECOSOC 2006/23]).

101 European Court of Human Rights (Chamber), decision of 19 October 2010 (No. 20999/04 – Özpınar v. Turkey), §§ 67 *et seq*. These criteria were attire, make-up, disputes with family members and alleged extramarital intimate relationships.

I repeat my recommendation that the rules on dismissing judges and public prosecutors from the profession be more precisely and narrowly defined. Moreover, the assessment criteria used by the inspectors need to be formulated in a way which ensures that their application leaves both judicial independence unaffected and does not improperly interfere with judges' and public prosecutors' private lives.

I also still find that the centralization of the performance assessment should be reconsidered,[102] even though I was told that in a recent survey of senior judges and chief public prosecutors, ca. 80% declared themselves for centralized inspection because they considered it more impartial.

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

Connected with the supervision of the inspections system is the responsibility for dealing with citizens' complaints against individual judges and public prosecutors. Both competences were transferred to the High Council from the Ministry and are now dealt with by the Council's Third Chamber. I was informed that 3,000 such complaints are currently pending. Many of them are so obviously ill-founded that the judge or public prosecutor concerned is not even informed. Apparently, there is a habit in Turkey of sending a complaint to the capital whenever something seems to be unsatisfactory anywhere in the country. In view of Art. 74 of the Constitution (right to petition), the complainants have the right to a written answer. It remains to be seen how the High Council copes with that influx. When the courts of appeals start operating and the current malfunctioning of the appellate system is repaired, the number of incoming complaints will probably decrease.

3.2.6. Publicity of Decisions and Availability of an Effective Remedy

In accordance with another of my recommendation,[103] the law now expressly provides that anonymous versions of the (reasoned) decisions of the Plenary and the Chambers are published on the High Council's official website.[104] This is a very positive development because it promotes legal certainty and helps maintain (public) confidence in the proper administration of judicial discipline. It also helps fulfil the requirement of the European Convention on Human Rights that any interference with fundamental rights have a sufficiently clear legal basis.[105]

Concerning effective remedies against decisions of the High Council, the constitutional reform package has changed the overly strict former Art. 159 (4) of the Constitution, according to which there was no appeal to any judicial instance against decisions of the High Council. The new Art. 159 (10) of the Constitution now permits appeals to judicial bodies at least against decision concerning dismissal from the profession. The power to review removal decisions by the Chambers or the Plenary of the High Council has been accorded to the Council of State.[106] This certainly means important progress.

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102 See also the Venice Commission's Interim Opinion, § 85.

103 See my 2009 Report *sub* 2.2.2.2.

104 Art. 32 (4) of Law No. 6087.

105 See European Court of Human Rights (Chamber), decision of 19 October 2010 (No. 20999/04 – Özpınar v. Turkey), §§ 50 *et seq.*

106 Art. 33 (5) of Law No. 6087.

On the other hand, the High Council makes a lot of other important decisions concerning promotions, change of location and disciplinary sanctions which can deeply affect the career of judges and public prosecutors and potentially interfere with their independence and impartiality. With regard to those, there has always been an internal review mechanism that previously led to a final decision by the High Council's Board of Objections, consisting of the seven regular and the five substitute members. Since the challenged original decision came from the seven regular members, the majority of the review body could not be qualified as impartial. 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 old review arrangements concerning disciplinary decisions of the High Council violated the right to an effective remedy before an impartial national authority (Art. 13 in conjunction with Art. 10 ECHR),[107] a decision recently confirmed in the case of Özpınar v. Turkey (Art. 13 in conjunction with Art. 8 ECHR).[108]

Turkey has tried to fulfil the obligation arising from the European Convention to introduce an effective remedy against decisions of the High Council by reforming the internal review mechanism. The first stage now consists of an objection lodged by the judge or prosecutor concerned to the Chamber that made the original decision. If that Chamber upholds the decision after re-examination, a further complaint can be filed with the Plenary that is then called upon to make the final decision.[109] In my opinion, this does not yet fully meet the impartiality standard of Art. 13 ECHR. The Plenary has either 21 or 22 members,[110] but it includes all the seven members of the Chamber which made the original decision. In contrast to the previous situation, now at least the majority of the review panel is impartial, but in the eyes of a neutral observer, roughly a third of the reviewers are not. And even those 14 impartial members will always be under the strong influence of their seven not impartial colleagues, who can claim to have superior knowledge of the specific case. Thus, the legal framework has certainly been improved, but is still incompatible with the European Convention. The problem could be solved easily by entrusting the re-examination of Chamber decisions to a "small" Plenary consisting only of the members of the other two Chambers.

The Plenary is also called upon to make first-instance decisions which can have a considerable impact on judicial independence and individual rights, primarily those concerning criminal and disciplinary investigation or prosecution of Council members.[111] Those decisions are only subject to re-examination by the very same Plenary – a body which is obviously not impartial in the sense of Art. 13 ECHR.

In other words, the review system concerning High Council decisions needs to be reformed further. I find that the opportunity should be seized to completely rewrite Art. 159 (10) of the Constitution to the effect that all decisions by the High Council are subject to judicial review.[112] While it is true that decisions concerning dismissal from the profession are the most serious from the perspective of judicial independence and impartiality, other Council decisions can also deeply affect the career of judges and public prosecutors. Ultimately, in my view, the differentiation between categories of High Council decisions with regard to judicial

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107 Application Nos. 64119/00 and 76292/01 (http://www.echr.coe.int/echr [judgment available in French only]).

108 Chamber Decision of 19 October 2010 (No. 20999/04).

109 Art. 33 of Law No. 6087.

110 In disciplinary matters, the President cannot participate (Art. 6 (3) of Law No. 6087), so that only 21 members remain.

111 Art. 7 (2) *lit.* f of Law No. 6087.

112 This is in accordance with the Venice Commission's Interim Opinion, § 76.

review is unjustifiable and should therefore be abandoned. At least all the first-instance decisions of the Plenary affecting either judicial independence or impartiality or individual rights must be subjected to judicial review, since there is no other way to guarantee impartial review. The fact that judicial review obviously takes time does not matter. If necessary, a special accelerated procedure could be established to deal with challenges to High Council decisions. In any event, I consider it as unobjectionable to require that an internal review mechanism be exhausted before a suit can be filed in the competent court.

I recommend that all the first-instance decisions of the High Council's Plenary affecting either judicial independence or impartiality or individual rights be subjected to judicial review. I further recommend that the review of the Chamber decisions be entrusted to an impartial body excluding the original decision-makers, such as a "small" plenary consisting of the members of the other two Chambers. Preferably, however, the judicial review should be extended to all the High Council decisions. In that case, it would be entirely proper to require the prior exhaustion of an internal review mechanism.

3.3. Military Justice System: Organization and Competences

In my 2009 Report, I already discussed certain aspects of the separate military justice system in Turkey.[113] I did not then and do not now question that system as such. It may be appropriate in a state with a large military, all the more since other democratic states also have such a system. However, I criticized certain features of the Turkish system in 2009. The constitutional amendments have dealt with some aspects of the military justice system and brought about positive reform. Most importantly, the criminal jurisdiction of the military courts has been reduced considerably. The amended Art. 145 (2) of the Constitution now provides that the military courts have no power to try civilians, except in a state of war. This exception is to be further specified by law.[114] This goes a long way to comply with one of my recommendations, at least if the exception means nothing less than the state of war in the sense of Art. 92 of the Constitution, and not the imposition of martial law or the declaration of a state of emergency short of an international armed conflict. Yet, I do not see why there is any need to try civilians in a military court at all, even if they commit acts of sabotage or treason in war time. The exception should therefore be abolished.

In another positive development, Art. 145 (1) of the Constitution restricts the criminal jurisdiction of the military courts over military personnel to military offences, offences committed against other military personnel and offences related to their military service or duties. It is now also expressly stated that offences against the security of the state, the constitutional order and the functioning of this order (in other words military coups) shall be handled by the civilian courts.[115] The respective constitutional amendments overruled a contrary Constitutional Court decision of January 2010. I am still not certain whether the criminal jurisdiction of the military and the civilian courts are properly defined, as I suggested in my 2009 Report. My scepticism is fuelled by the fact that the jurisdictional conflict in the Şemdinli case has not yet been settled.[116] In this context, it must be taken into account that pursuant to the constant jurisprudence of the European Court of Human Rights, Convention

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113 *Sub* 2.4.

114 Art. 145 (3) of the Constitution.

115 In a related development, Art. 24 of the Constitutional Amendment Law of 7 May 2010 repealed the Provisional Art. 15 of the Constitution that had granted immunity to the perpetrators of the military coup d'état of 12 September 1980.

116 See 2010 Progress Report, 11 *et seq.*

states are obliged to resolutely investigate and prosecute human rights violations by their armed forces.[117]

I therefore repeat my recommendations that it must be ensured that (1) civilians are under no circumstances subject to the criminal jurisdiction of the military courts and that (2) members of the military who commit crimes against civilians, no matter whether on duty or off duty, are subject only to the civilian public prosecutors and the civilian criminal courts. In both cases, the legal obligation of the military to fully cooperate in the investigation and prosecution of the crimes is self-evident.

With regard to one final issue, quoting my 2009 Report, I still wonder whether the two-tier military court system in civil and criminal as well as administrative matters is really indispensable. Transferring the second-instance jurisdiction to the civilian court system would demonstrate to the public that the military is but one part of the executive branch of government and no less subject to the law than the others. It would also prove the civilian control over the military. Specialized chambers of the Court of Cassation and the Council of State could develop the expertise necessary to decide on appeals against first-instance military court and military administrative court decisions. Military judges with whom I talked raised the objection that both civilian high courts already had a heavy backlog of cases and thus would not be able to decide as quickly as was necessary in cases coming from the military. This issue needs to be addressed in the context of easing the current overburdening of the Court of Cassation and the Council of State in general.

I therefore repeat my recommendation that the Turkish Government consider the feasibility of 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.

Another positive development is worth mentioning in this context: Whereas the acts of the Supreme Military Council were completely immune against judicial review, now at least judicial remedies can be introduced against those of its decisions regarding discharges of any kind (but still excepting decisions regarding promotion procedures and retirement due to shortage of cadres).[118] This is a long overdue step in the right direction, but it does not go far enough. Since Turkey defines itself as a state governed by the rule of law,[119] it should be self-evident that the Turkish military is also subject to and not above the law. The same applies to high-ranking constitutional bodies like the Supreme Military Council which consists of the Prime Minister (as the chairperson), the Chief of the General Staff, the Minister of Defence, the Commanders of the Land, Naval and Air Forces, the General Commander of the Gendarmerie, and the four-star generals of the Turkish Armed Forces and is thus obviously dominated by the highest military echelons. If the military, including the Supreme Military Council, is subject to the law, however, it also needs to be subject to judicial review as to the lawfulness of all its activities, in the sense of Art. 125 (4) of the Constitution. Otherwise, the rule of law could not be effectively enforced *vis-à-vis* the military. The courts are of course not permitted to interfere with any (perhaps far-ranging) discretion granted to the military authorities or the Supreme Military Council by the Constitutional or laws; but they should be

117 See, *e.g.,* Grand Chamber judgment of 20 May 1999 (No. 21594/93 – Oğur v. Turkey), §§ 85 *et seq*.

118 Art. 125 (2) of the Constitution, as amended.

119 Art. 2 of the Constitution.

charged with ensuring in any case that the constitutional and legal limits of such discretion are scrupulously observed.[120]

I recommend that the Constitution be changed to make all the decisions of the Supreme Military Council subject to judicial review to the extent to which its discretion is subject to constitutional and legal limits.

4. Concluding Assessment

The constitutional reform package of 2010 has produced major progress in respect of the Constitutional Court and the High Council of Judges and Public Prosecutors. Both institutions are central pillars of the Turkish judiciary. They must not only be independent and impartial themselves, but also protect and promote the independence and impartiality of the judiciary as a whole. Today, they are both better equipped for that than they were before the reform two years ago. They are now more representative of the Turkish legal community, even though with regard to both, further steps are needed to ensure that the different cultural and political orientations of the Turkish society are adequately reflected in their membership. The role of the Grand National Assembly in the appointment processes of both institutions needs to be strengthened, while taking care that the election mode in the Assembly is adequate for promoting political and cultural pluralism in their composition.

With regard to the Constitutional Court, one particularly positive development is the introduction of the individual application for the enforcement of fundamental rights which can also be employed to fend off interferences with the right to an independent and impartial tribunal – provided the Constitutional Court is able to speedily process the incoming caseload. On the other hand, the Constitutional Court has not yet recognized how important it is to avoid any appearance of making *ultra vires* decisions.

My overall assessment of the High Council reform is positive; however, its composition and functioning should be improved further. The ultimate success of the reform of course depends on whether the new High Council, which became operative just a few weeks ago, credibly promotes the independence, impartiality and effectiveness of the Turkish judiciary.[121] Having met with most of the new members, I know that they are aware of their heavy responsibility, and I was impressed by their motivation and resolve. By way of an example, the "new" High Council immediately conducted meetings in sixteen provinces with the judges and public prosecutors to collect information and discuss reform proposals. So the prospects are good.

Since the High Council now more than ever constitutes an institution of self-government of the judiciary as a whole, it should quite appropriately see its future role as defender of judicial independence and organ for publicly expressing concerns of the judiciary.

Laudable efforts have been made to extend the availability of judicial and other remedies against both the decisions of the High Council and the judgments of the Constitutional Court

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120 This is how I read the first variant of Art. 125 (2) of the Constitution, stating that the acts of the President of the Republic on his or her own competence (*i.e.* those taken within the legal limits of the President's political discretion) shall not be subject to judicial review.

121 See the Venice Commission's Interim Opinion, § 51: "The core issue with regard to the future independence, efficiency and legitimacy of the Turkish judiciary is whether the recent institutional reform will lead to a change in the way the substantial powers of the [High Council] are used, or whether the tradition for political interference will be continued within the new framework."

sitting as the Supreme Court. But it is still not guaranteed in all cases that a truly impartial panel (preferably a court) decides on objections or appeals, even though this is required by the European Convention on Human Rights.

While the competences of the military justice system have been cut back in favour of the civilian courts, the delimitation of their competences needs to be clarified further. One obvious indication of the civilian control of the armed forces would be the transfer of the appellate function with regard to military (administrative) court decisions to the civilian appellate courts (Court of Cassation and Council of State). The military appellate courts could then be dissolved. The two military judges should in any event be removed from the Constitutional Court.

The reform package of 2010 improved the superstructure of the judiciary, but the infrastructure badly needs improvements, too. In particular, the number of judges and public prosecutors must be increased and their working conditions improved. Moreover, the courts of appeals have to be opened soon to cope with the enormous influx of appeals now going directly to the Court of Cassation. Currently, the appellate system in Turkey does not function properly, although some promising reform efforts have been undertaken recently.

In view of bitter political confrontation and deep-seated mistrust, efforts made by the Government towards confidence-building and dialogue with all the stakeholders on future reform steps ("round table") need to be intensified considerably. But these other stakeholders – the opposition parties, the Bar, the media, and civil society organizations – also bear responsibility in the sense that they must be prepared to engage in a *bona fide* dialogue with the Government on their reform agenda. It should be obvious to everybody that the reform of the Turkish judiciary is too important and too urgent to permit of political manoeuvring. Any move which could be interpreted as an attempt by one political camp to "seize" the judiciary and turn them into "their" partisans should therefore be scrupulously avoided.

Public confidence in the orderly functioning of an independent, impartial and effective judiciary must be maintained and, if necessary, restored. This is an obligation incumbent also on the judiciary. One important element is the latter's information policy: Important court decisions and other important actions (*e.g.* measures taken in the course of the investigation of a sensational crime or a crime with political implications) need to be explained to the public via the media, preferably by a judge or public prosecutor who functions as the official spokesperson of the competent court or department of public prosecution.

Finally, quoting from my 2009 Report: "[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.' 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 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."[122]

[122] 2009 Report *sub* 3 (footnote omitted).

Annex: Unfulfilled Recommendations from my 2009 Report

I repeat and extend my previous recommendations:

- That the number of representatives of the Ministry of Justice on the interview board involved in the process of recruiting judges and public prosecutors be reduced and members of the judiciary, also from the lower courts, as well as one experienced member of the Bar added. The newly composed interview board should operate within the remit of either the Justice Academy or the High Council of Judges and Public Prosecutors.

- That specific and objective criteria be introduced, published and given effect which ensure that the selection of candidate judges and public prosecutors is only "based on merit, having regard to qualifications, integrity, ability and efficiency."

- That inappropriate performance assessment criteria which are incompatible with the status of an independent judge and possibly the right to privacy in Art. 8 ECHR (such as "appearance and outfit"; "having no bad habits"; "impression on the environment he/she and his/her family makes") be eliminated.[123]

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

- That the rules on dismissing judges and public prosecutors from office for "unsuitability" and the offences requiring dismissal from the profession be more precisely and narrowly defined by law.

- That the law expressly provide that the imposition of disciplinary sanctions is in all cases subject to the principle of proportionality.

- 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.

- 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.

- That defence lawyers always be treated with respect; otherwise the fairness of the proceedings and the impartiality of the courts will be jeopardized.

123 But see *supra* note 96.