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Peer Review Mission to Turkey (25 – 27 April 2012) – Chapter 23: Judiciary and Fundamental Rights

Report on

The Turkish High Council of Judges and Public Prosecutors: Assessment of Its Initial Track Record of Operation

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Executive Summary

The initial track record of the new High Council demonstrates practical improvements and enhanced credibility with regard to the independence and impartiality of the judiciary in Turkey. The newly elected members and their staff are making a sincere effort to advance and accelerate the administration of justice in Turkey. Yet, there is room for further improvements in the practical operations of the High Council and a need for further constitutional and legislative reform. The fact that the Ministry of Justice is working on a Revision of the Judicial Reform Strategy and the High Council has recently adopted a Strategic Plan 2012 – 2016 demonstrates the presence of the necessary determination in this regard.

1. Introduction

1.1. Specific Focus of the 2012 Peer Review Mission

My 2012 Peer Review Mission to Ankara was a follow-up to my previous visit in January 2011. It concentrated on one major aspect of the constitutional reform package of 2010: the reform of the High Council of Judges and Public Prosecutors and its impact on the independence and impartiality of the Turkish judiciary. The High Council 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. While the 2010 High Council reform as such was extensively dealt with in paragraph 3.2. (pp. 21 – 30) of my last report of August 1, 2011 (2011 Report),[1] my 2012 mission had a more practical focus. Its purpose was to carry out a thorough assessment of the implementation of that reform, as reflected in the first eighteen months of operation of the "new" High Council: does its initial track record provide evidence of practical improvements and enhanced credibility with regard to the independence and

[1] That report is readily available at http://www.internat-recht.uni-kiel.de/de/forschung/opinions/report-on-independence-impartiality-and-administration-of-the-judiciary.

impartiality of the judiciary in Turkey? Does it show shortcomings which can be eliminated by improvements in the practical operations of the High Council? Or are further legislative or constitutional reforms necessary for instilling public confidence in the independence and impartiality of the Turkish judiciary?

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 short visit to Ankara (26 and 27 April 2012), where I had the opportunity to discuss the practical functioning of the new High Council and possible future reforms with the presidents and members of all its three chambers as well as its secretariat and inspection board. I also met the Undersecretary of the Ministry of Justice, members of the Council of State and the Court of Cassation as well as judges and public prosecutors working at the Ankara Courthouse. Moreover, I spoke with representatives of the Turkey Bar Association and various non-governmental organizations.

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 representatives of the EU Delegation in Ankara. 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 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 Ministry and one or more interpreters.

Moreover, I am relying on the recent Report "Administration of Justice and Protection of Human Rights in Turkey" by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe,[2] and the Preliminary observations by the UN Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, who visited Turkey in October 2011.[3]

1.3. Revision of Judicial Reform Strategy

The 2009 Judicial Reform Strategy of the Ministry of Justice is currently under revision. In what I consider a very positive development, the Ministry tries to include all the stakeholders in the revision process which is to be finalized in June 2012. New titles on the prevention of violations of the European Convention on Human Rights, the international relations of the judiciary and the protection of the rights of women, children and the elderly will be included in the revised strategy. This is certainly commendable.

1.4. Initial Steps toward a New Constitution

The Government has also initiated a process of drafting an entirely new constitution which is to replace the current 1982 Constitution – a product of the military government established after the *coup d'état* of 1980. In contrast to an earlier attempt in 2007, when a commission of experts was unilaterally established by the Government and charged with producing a comprehensive draft, this time a Parliamentary Constitutional Conciliation Commission has

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[2] Of 10 January 2012, CommDH(2012)2 – original version, available at https://wcd.coe.int/ViewDoc.jsp?id=1892381 (visited on 18 June 2012) – hereinafter Hammarberg Report.

[3] Preliminary observations by the Special Rapporteur on the Independence of Judges and Lawyers: Visit to Turkey (10-14 October), available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11495&LangID=E (visited on 19 May 2012).

been set up which includes representatives of all the opposition parties represented in the Turkish National Assembly. This indicates that the Government is taking seriously recommendations that the process of drafting a new constitution should be as transparent and inclusive as possible so as to ensure public confidence. The making of a new constitution of course also provides the opportunity of remedying certain remaining shortcomings with regard to the independence and impartiality of the judiciary.

2. The Functioning of the New High Council

2.1. General Account

The new Law No. 6087 on the High Council of Judges and Public Prosecutors repeatedly emphasizes the principles of independence and impartiality. Art. 1 states that the purpose of the Law is to ensure that the High Council is established, organized and functioning in compliance with the principle of independence of courts and the security of tenure of judges. Pursuant to Art. 3 (6), the Council as such shall be independent in the exercise of its duties and competences. No organ, authority, office or individual is permitted to give orders or instructions to the High Council. On the other hand, when performing its duties the High Council is bound to take into consideration the principle of independence of courts and the security of tenure of judges and prosecutors and required to act within the framework of the principle of impartiality, among others (Art. 3 [7] of Law No. 6087).

The reform's practical effects have been mostly positive, according to the impression of most of my interlocutors as well as my own. The High Council is now more accessible. Its decision-making processes have been accelerated considerably and are more transparent. The criteria the High Council uses in making decisions on appointments and promotions are regulated more clearly, while problematic criteria have largely been eliminated. The High Council has also improved its public relations efforts, which is an important element in building and maintaining public confidence. Thus, it has published an attractive bilingual brochure in Turkish and English describing its tasks and operations in comparison with the previous situation. It has issued a comprehensive report on its activities in 2011. Moreover, it has approved and published a strategic five-year-plan (2012-2016) whose implementation is to be supervised by the Council's plenary.[4] The High Council now also publishes anonymised versions of decisions on disciplinary matters on its website. Some of my interlocutors criticised the small number of those decisions and the poor quality of the anonymisation. I assume that these are initial problems which will be solved speedily.

One further step is still missing: the High Council has not yet appointed one of its members as the official spokesperson and liaison with the media. This should be done as soon as possible. The spokesperson should be responsible for issuing press releases on all important decisions made by the High Council, in particular those pertaining to high-profile cases; those press releases should also be published on the website of the High Council. The spokesperson should also be available for interviews. He or she should be given professional assistance by someone with media experience, such as a journalist to be employed by the High Council. This media expert would also be responsible for constantly monitoring the media coverage of the judiciary and alert the High Council to instances calling for an official reaction. The negative publicity created by, among others, the Deniz Feneri Case and the Hrant Dink Case[5] demonstrates the urgent need for a "media offensive" by the High Council.

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4 See below para. 2.4.5.

5 See below para. 2.5.2.2.2. and 2.5.3.4.

I recommend that the High Council appoint one of its members as the official spokesperson that should be responsible for issuing press releases and giving interviews on all important decisions made by the High Council. The spokesperson should be given professional assistance by a media expert employed by the High Council.

2.2. The High Council's New Composition

The new 22-member High Council has a much greater working capacity than the previous 7-member High Council, but is still small enough to function effectively. This is not the least due to the establishment of three chambers of seven members each. The Council's duties and competences are clearly allocated either to the plenary or mostly to one of the chambers.[6] The establishment of specialized Chambers which are able to develop special expertise guarantees quicker, better and more foreseeable decisions.

In general, all my interlocutors applauded the larger and more diversified membership of the High Council, in particular the sizeable representation of the judges and public prosecutors from the lower courts. This has improved the communication and the relations of the High Council with the courts in the provinces, in other words the "social legitimacy" of the High Council within the judiciary as a whole. On the other hand, the high courts that have lost their previous dominance consider their own representation to be adequate. There is a general feeling that the reform of the High Council constitutes an important element of the democratisation process which is currently taking place in Turkey.

One effect of the increase in the membership as well as the adequate staffing with rapporteur judges (currently 44[7]) is the acceleration of the High Council's decision-making. The improved legitimacy of the new High Council has also turned it into a veritable representation of the judiciary and thus enhanced its standing vis-à-vis the government. As one of my interlocutors remarked, the new system is more resistant to threats to the independence and impartiality which might come from the government.

Some members of the judiciary criticized the presence of currently two members of the bar which in their opinion introduce a "foreign" element into the membership of the High Council. These critics also doubted whether lawyers in private practice that were not sufficiently familiar with the functioning of the judiciary could make any positive contribution to the operation of the High Council. The critics moreover suggested that for purposes of maintaining reciprocity the judges and public prosecutors should have their own representatives in the bars and bar associations. The lawyers in private practice with whom I spoke, however, applauded the presence of their representatives in the High Council. They believe that this was gradually ameliorating the standing of their profession within the judicial system which has traditionally been unsatisfactory. For instance, lawyers are now invited to join projects on judicial management and reform and even to attend regional meetings of public prosecutors. The lawyers did not ask for any increase of the number of their representatives. However, they suggested that the lawyers in the High Council should be elected by the General Assembly of the Union of Turkish Bar Associations.[8]

Within the High Council, the presence of lawyers and professors as outsiders to the judicial profession is generally considered as a positive element because it prevents organisational blindness, promotes thinking "outside the box" and helps to improve the public confidence in the functioning of the Council and ultimately the judiciary as a whole. In the daily practice of

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6 See in more detail below para. 2.4.1.1. and 2.5.

7 Of these, 14 previously worked in the Ministry of Justice, 4 in the Council of State, 2 in the Court of Cassation and 24 come from the first instance courts.

8 See para. 3.1.5. of my 2011 Report.

the High Council's Plenary and Chambers, the two lawyers and the two law professors are not in any way "sidelined" by the judicial members. It seems, however, that more needs to be done by the High Council to actively inform the judges and public prosecutors about the positive contribution of the non-judicial members to the work of the High Council and the positive influence of their presence on the public esteem of the judiciary.

In my view, the criticism raised against the presence of non-judicial members in the High Council expresses a corporatist view of the judiciary as an exclusive club of insiders, a state within the state which is to be kept entirely separate not only from the other branches of government but also from the governed. It seems to be based on an ultimately undemocratic conception of a government of experts superimposed on and detached from the uninformed populace put under tutelage, whereas democratic government rests on a system of checks and balances between the branches and the continuous control by and support of the people in a "daily plebiscite".[9] Since the judicial branch exercises governmental powers, it requires democratic legitimation and must operate under the watchful eye of the public. It is therefore entirely legitimate that a small number of representatives of the public also participate in the work of the High Council which is rightly dominated by the representatives of the judiciary. In contrast to this, the lawyers in private practice exercise their fundamental rights when they establish professional associations. These are part of the civil society and must remain free of interferences from the government, including the judicial branch. It would be incompatible with Article 11 of the European Convention on Human Rights to force civil society organizations to have a governmental representative on their boards.

I recommend that the High Council should do more to inform the judges and public prosecutors about the positive contribution of the non-judicial members to the work of the High Council and the positive influence of their presence on the public esteem of the judiciary.

2.3. Proposals for Further Reforms

2.3.1. Reintroduction of the "One Man, One Vote" System

Several of my interlocutors expressed their support for the reintroduction of the "one man, one vote" system for the elections of the representatives of the judges and public prosecutors. In their view, which I share, that would increase the likelihood that minority candidates are also elected, and thus of a more pluralistic composition of the High Council which would better represent the Turkish judiciary as a whole. Since the Constitutional Court, in a problematic and inadequately reasoned opinion of 7 July 2010,[10] decided that the "one man, one vote" system amounted to an "undemocratic" and thus impermissible amendment to the 1982 Constitution, that system could only be reintroduced by the new constitution which is currently being drafted. In this respect, I reiterate the recommendation which I made in my 2011 Report.

I recommend that the election system imposed by the Constitutional Court be carefully assessed as to its 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 proves inadequate in this respect, it should be replaced by another system, such as the

[9] See Ernest Renan, Qu'est-ce qu'une nation?

[10] See my 2011 Report para. 3.2.3.

one originally envisaged by the Amendment Law No. 5982 of 7 May 2010. This could be done by the Turkish *pouvoir constituant* in the context of the adoption of an entirely new Constitution.

2.3.2. Separate High Councils for Judges and Public Prosecutors?

Judges and public prosecutors in Turkey have traditionally had the same judicial career from appointment until retirement. They have always considered themselves as members of one profession within the judicial branch of government, their common hallmark being their personal and substantive independence. However, while both judges and public prosecutors are independent servants of law and justice, they exercise different functions in pursuit of a common goal, even if – as in Turkey – public prosecutors are obliged to take a neutral approach, gathering both the incriminating and the exonerating evidence. Centuries of experience demonstrate that the separation of their functions is essential for the preservation of liberty. Thus, when working on specific cases in their different roles, judges and public prosecutors must demonstrably do so in strict separation from each other, avoiding all appearances of making common cause with each other. Otherwise, the impartiality of the judges will be compromised and the right of the accused to a fair trial undermined, in clear violation of the requirements of Art. 6 (1) of the European Convention on Human Rights. Especially in the small provincial courts of Turkey, that iron rule is not always strictly observed. The defence lawyers keep complaining about it and that problem needs to be solved as a matter of urgency because it seriously affects public confidence in the orderly functioning of the judiciary.

The United Nations Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, who visited Turkey in October 2011, observed that "[t]here are debates concerning the proximity of judges and prosecutors, as a matter of concern vis-à-vis the principles of impartiality and equality of arms."[11] In this respect she also emphasized that "lawyers need to be treated as equal counterparts of judges and prosecutors within the legal profession".[12] It is true that the European Court of Human Rights has recently held that the seating arrangements in many Turkish courtrooms which place the prosecutor on a raised platform and thus on a higher level than the accused and his or her defence lawyer did not as such violate the principle of equality of arms embodied in Art. 6 (1) of the European Convention on Human Rights.[13] But this alone does not dispel the concerns which are not only based on outward symbols. Rather, these symbols are expressions of a mentality problem which Thomas Hammarberg, the Commissioner for Human Rights of the Council of Europe, has characterised as "the state-centred attitudes of judges and prosecutors",[14] an entrenched culture of protecting the state rather than the rights of individuals[15] as well as the overly-close professional and personal relations between judges and public prosecutors in Turkey.[16] Moreover, for inspiring public confidence in the impartiality of a judiciary whose credibility is contested it may be advisable to go beyond the bare minimum required by the European Convention. In other words, investing money in the remodelling of Turkish courtrooms may after all be money well spent because it is bound to generate interest in the form of improved social legitimacy of the Turkish judiciary.

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11 Above note 3.

12 Press Release of 14 October 2011 (available at http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11496&LangID=E [visited on 19 May 2012]).

13 Chamber judgment of 31 May 2012 in the case Diriöz v. Turkey (No. 38560/04).

14 Hammarberg Report (above note 2), pp. 4, 24 *et seq.*

15 *Id.*, p. 27, para. 127.

16 *Id.*, p. 26, paras 120 *et seq.*

On this background, the bars seem to favour a clearer separation of the careers of judges and public prosecutors. As a kind of symbolic move in that direction, it was suggested to me that two separate High Councils should be established, one for the judges and the other one for the public prosecutors, as had been the case under the Turkish Constitution of 1961. It was also suggested that the new High Council for Public Prosecutors should be chaired by the Minister since the prosecution of criminals was a governmental responsibility while the new High Council for Judges should have no ministerial members. Such a separation, for which there are examples in other European countries, is also advocated by some persons both within the Ministry of Justice and the High Council.

Other persons with whom I spoke vigorously opposed it because they fear that in the specific conditions of Turkey, such a move could jeopardize the independence of the public prosecutors. Their argument was that once the prosecutors were separated from the judges, they would more easily become exposed to the influence of the government which would then more easily be able to prevent the prosecution of their "friends" and initiate the prosecution of their "enemies". I do not know how realistic such a threat would be. In any event, since the High Council has just recently undergone a radical reform, the new system should be given time to prove itself before it is subjected to another fundamental upheaval such as the creation of two separate High Councils for judges and public prosecutors. The legitimate and serious concerns expressed by the lawyer in private practice should be addressed where they arise – in the everyday conduct of judicial business in the courthouses across Turkey. There everything that is necessary and appropriate should be done to avoid the impression that judges and public prosecutors form a united front against suspected criminals. While those reforms "on the ground" should be initiated immediately and carried out with determination, including during the pre-service and in-service training of judges and public prosecutors, a symbolic split of the High Council in two with no direct remedial effect on the actual problem of guaranteeing the delivery of impartial justice should be avoided for the time being. Moreover, if it is taken up later, the negative impact on the independence of the public prosecutors which the establishment of a separate High Council of Public Prosecutors might have should be carefully assessed before any decision is made in this regard. In this context, the relationship between the chief public prosecutors and the government as well as the public prosecutors working under their supervision would have to be looked into thoroughly in terms of the independence and impartiality of the prosecution.

I recommend that the new High Council should be given time to prove itself and not be immediately subjected to another radical reform such as the split into two separate High Councils for Judges and Public Prosecutors. The problem of excessive proximity between judges and public prosecutors should be solved "on the ground" and not on the symbolic level of the High Council. I also recommend that before any decision is made on the creation of a separate High Council of Public Prosecutors at a later stage, the negative impact such a move might have on the independence of the public prosecutors should be carefully assessed. In this context, the relationship between the chief public prosecutors and the government as well as the public prosecutors working under their supervision should be looked into thoroughly in terms of the independence and impartiality of the prosecution.

2.3.3. Further Enlargement and Increase of Number of Non-Judicial Members?

There are discussions within the Ministry of Justice as to whether the High Council should be enlarged further to 27 members which would increase the membership of each of three

Chambers to nine. It was proposed that the five additional members should all come from outside the judiciary so that the number of non-judicial members would be raised to nine, three of them being allocated to each Chamber. Such a plan is apparently based on the dissatisfaction with the speed in which the High Council is changing the Turkish judiciary.

In my view, such a move would certainly disconcert many judges and public prosecutors who would consider it as an attempt by the government to increase its influence on the High Council and thus on the judiciary as a whole. This impression would be further reinforced if the five additional outsiders would also be appointed by the President of the Republic, like the current four non-judicial members. I also think that recruiting a full third of the members of the High Council from outside the judiciary is *per se* problematic. It would in any event amount to another radical reform within a very short period of time. I would advise against making such a move.

Since the new High Council should be given time to prove itself and not be immediately subjected to another radical reform, I advise against increasing the number of non-judicial members considerably.

2.3.4. Involvement of Grand National Assembly in the Election of Members

In my 2011 Report, I criticised the fact that the selection of the four non-judicial members of the High Council is entirely left to the discretion of the President of the Republic, whereas the Grand National Assembly is not involved at all.[17] The participation of the Assembly would make the selection process more transparent and less partisan and also better ensure the representation in the High Council of the different cultural and political orientations of the Turkish society. Within the Ministry of Justice, there seems to be a tendency to give the Assembly a role in the selection of High Council members. In my 2011 Report I mentioned several alternatives of how the Assembly could be involved. I encourage those discussions within the Ministry, all the more since any such plan could be realized without affecting the operations of the High Council, in contrast to the suggestions discussed above under 2.3.2. and 2.3.3. Involving the National Assembly in the election of the non-judicial members of the High Council does not require any increase in their number (see above under 2.3.3.).

I recommend that the Grand National Assembly be given an important role in the election of the non-judicial members of the High Council.

2.3.5. Additional Competences

2.3.5.1. Recruitment of Candidate Judges and Public Prosecutors

There is one important area of management of judicial personnel in which the High Council does not play any role: the recruitment of candidates for the position of judges and public prosecutors. The High Council should assume part of the responsibility for recruiting those judicial trainees. As I already explained in my 2009 Report,[18] candidates for judgeships are

[17] See my 2011 Report para. 3.2.2.2.

[18] Peer-Based Assessment Mission to Turkey (17 – 21 November 2008): Reform of the Judiciary and Anti-Corruption – Report on Independence, Impartiality and Administration of the Judiciary of 14 April 2009, para. 2.1.2.1. (available at http://www.internat-recht.uni-kiel.de/de/forschung/opinions/Report_Turkey_2009-04-14.pdf).

selected through a combination of a written examination and an interview. The written examination is (and should continue to be) administered by the Student Selection and Placement Centre (OSYM). The interview is conducted by a board of seven members. Currently, five of them are senior officials of the Ministry of Justice and the other two come from the Justice Academy. Three years ago, I already criticized the ministerial dominance of the board of interview and recommended that it should be made more representative of the Turkish judiciary as a whole. During my recent talks, however, the current system was defended by reference to the principles of separation of powers and checks and balances. According to this view, the transfer of the selection of candidates to the High Council would create a closed system of judicial self-recruitment and lead to a "rule of the judges".

In my view, the Ministry of Justice should appoint no more than one of the seven members of the board of interview. The Justice Academy should continue to delegate two. One experienced member of the Bar should also be included. The High Council should select the remaining three members from the judges and public prosecutors. The new board should operate under the auspices of the High Council but make its decisions independently, using specific and objective criteria laid down by law which ensure that the selection of candidate judges is "based on merit, having regard to qualifications, integrity, ability and efficiency."[19] This would give the High Council an important but ultimately limited role. It would indeed reduce the disproportionate role of the Ministry but not in any way jeopardize the system of checks and balances.

I recommend transferring part of the responsibility for recruiting the candidates for the position of judges and public prosecutors to the High Council. The number of representatives of the Ministry in the board of interview should be reduced to one, the Justice Academy should delegate two members and a fourth one should be an experienced member of the Bar. The remaining three members should be selected by the High Council from the judges and public prosecutors. The new board should operate under the auspices of the High Council but make its decisions independently, using specific and objective criteria laid down by law which ensure that the selection of candidate judges is based on merit, having regard to qualifications, integrity, ability and efficiency.

2.3.5.2. Disciplinary Powers over Members of the High Courts

As I wrote in my 2009 Report,[20] that the hierarchical structure of the Turkish judiciary was underlined by the fact that members of the high courts were subject to the disciplinary power not of the High Council, but only of disciplinary boards formed within each high court. With regard to disciplinary sanctions in general and the security of tenure in particular, all the members of the judiciary should have equal status, being subject to the same rules and the same decision-making body. If the High Council can elect the members of the Court of Cassation and the Council of State, it can as well exercise disciplinary powers over them. An exception could be made for members of the Constitutional Court: They too should be subject to the same rules, but their implementation should indeed be left to the Constitutional Court, in view of its special position in the constitutional system.

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

[20] See para. 2.2.1. of that Report.

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

2.4. The Plenary

2.4.1. Competences

2.4.1.1. General Survey

The Plenary has established a proper working rhythm during the first eighteen months, in accordance with adequate rules of procedure. The division of labour between the Plenary and the three Chambers is clearly and adequately regulated by Art. 7 (2) of Law No. 6087. The Plenary's competence to decide on objections against Chamber decisions, however, requires further critical comment.[21] Apart from that problematic competence, the Plenary's main competences are:

- the determination of which member works in which of the three Chambers, subject to criteria set forth in Art. 8 (1) of Law No. 6087

- the election of the Deputy President of the High Council and the heads of the Chambers

- the determination of the competent decision-making authority within the High Council in cases of uncertainty

- the responsibility for criminal and disciplinary investigations or prosecutions of High Council members

- the final decision-making on proposals by the Ministry as to the abolition of a court or a change in a court's jurisdiction

- the election of members of the Court of Cassation and the Council of State

- the proposal of three candidates to the President for the office of the Secretary General

- the appointment of the inspectors, chief inspectors as well as the President and Deputy Presidents of the Inspection Board

- the adoption and implementation of the High Council's strategic plan

One other competence of the Plenary is worth mentioning: according to Provisional Art. 3 of Law No. 6087, judges and public prosecutors who were dismissed from the profession by the previous High Council can apply to the Plenary to be readmitted. If their application is dismissed, the can bring an action in the Council of State. As a matter of fact, the public prosecutor who had been dismissed in 2006 after citing the name of the then Commander of the Turkish Land Forces in the "Şemdinli" indictment concerning a terrorist bombing of a Kurdish book shop, was readmitted in 2011.[22]

[21] See below para. 3.

[22] See the Hammarberg Report (above note 2), p. 24 note 71.

2.4.1.2. Election of Members of High Courts

The power to elect the members of the two high courts, the Court of Cassation and the Council of State is of particular importance. Whenever vacancies open up, all first-class judges and public prosecutors (ca. 5,000 out of ca. 11,000) are eligible and automatically considered as candidates unless they object. The High Council now publishes the vacancies and the list of candidates. The selection is then made by the High Council without the involvement of any other body. However, it was criticised by some of my interlocutors that there are no clearly defined and published criteria to further narrow the number of candidates.

It is indeed hard to imagine how one can make a well-grounded selection of the best qualified candidates for a few vacant positions within a reasonable period of time when the pool of candidates comprises several thousands. I was explained that the following procedure had been determined by the Plenary: On the basis of the performance and disciplinary records, the number of candidates is reduced to approximately 1,000. Each High Council member is allocated the number of votes corresponding to the number of vacant positions to be filled. The first vote then produces a shorter list which is continuously shortened through several further rounds of voting until the final list is established.

In my view, an alternative system should be devised in which the number of serious candidates is reduced to a manageable level before any vote is taken, for instance by requiring active applications with letters of motivation within a reasonably short period of time. The eligibility criteria should also be clearly defined and published. Otherwise the risk of arbitrary decision-making cannot be eliminated. Moreover, the appointment to a judicial position as important as the membership of the high courts cannot be properly made without an interview of the shortlisted candidates.

I recommend that with regard to the election of members of the Court of Cassation and the Council of State, the eligibility criteria should be clearly defined and published. A system should also be devised to reduce the number of candidates to a manageable level before any vote is taken in the Plenary of the High Council. Moreover, the procedure should include an interview of the shortlisted candidates.

After changes in the laws had enabled the increase of the number of high court judges in order to clear the extraordinary backlog of cases pending in the Court of Cassation and the Council of State, the new High Council managed to speedily elect 137 new members of the Court of Cassation and also appoint approximately 250 new rapporteur judges to support them. This has increased the membership of the Court of Cassation by more than 50 per cent and the number of rapporteur judges by almost 50 per cent. While this certainly is an extraordinary accomplishment in a situation which almost amounted to a judicial state of necessity, it is hard to imagine how that procedure could have been conducted thoroughly. On the other hand, the new members and rapporteurs were apparently easily integrated in the Court of Cassation. Of the new members of the Court of Cassation and the Council of State, the large majority was between 42 and 50 years of age and (except for one) had more than 16 years of experience while over a third of them had more than 21 years of experience.

Only 75 % of the members of the Council of State are elected by the High Council while the other 25 % are appointed by the President of the Republic. This is because the Council of State exercises not only judicial but also advisory functions. In my view, the executive should not have the discretionary power to determine a quarter of the members of the highest administrative court. This should be the responsibility of the High Council alone. The executive is of course entirely free to decide on the composition of its advisory bodies. But if

a body like the Turkish Council of State exercises two functions – one of them judicial and the other advisory – it must be ensured that the judicial function is exercised only by members that have been elected by the High Council.

I recommend that the law ensure that the judicial functions of the Council of State are exercised only by members that have been elected by the High Council and not by members that have been appointed by the President of the Republic.

2.4.2. *Ex Officio* Membership of the Minister of Justice and the Undersecretary

The *ex officio* membership as such of the Minister of Justice in the plenary as President of the High Council and of the Undersecretary in the Plenary and the First Chamber was not considered as a problem by my interlocutors, unlike the Minister's veto with regard to investigations and disciplinary proceedings.[23] On the other hand, I was told that the Minister almost never participates in the Plenary meetings. As a matter of fact, he is by law prevented from participating in Plenary meeting regarding disciplinary procedures and may not participate in the work of the Chambers at all.[24] Most of the tasks of the Presidency of the High Council have been delegated to the Deputy President who was elected by the Plenary from among the Presidents of the three Chambers. The Undersecretary attends half of the meetings of the First Chamber at most. This indicates that the membership of the two leading representatives of the Ministry of Justice in the High Council has a mostly symbolic character.

On the other hand, many observers consider that ministerial presence as a negative symbol of continuous interference of the government in the affairs of the judiciary.[25] In my 2011 Report I agreed with the Venice Commission that proposed to make the actual functioning of the High Council the real test in respect of the Governmental presence.[26] The Venice Commission referred to the danger that the Minister and the Undersecretary might abuse their position for the purpose of exerting undue pressure and influence on the functioning of the High Council. As yet, there is no indication of any such abuse. But during the first eighteen months of actual functioning of the High Council, it has become obvious that the Undersecretary is often prevented by his many other duties from attending the meetings of the First Chamber. Art. 3 (4) of Law No. 6087 provides that his or her acting deputy shall then attend the meetings. But I do not see any reason why the Ministry should thus always have a vote in the First Chamber. There are other ways to ensure that the High Council in general and the First Chamber in particular cooperates with the Ministry to the extent necessary for instance with regard to human resources planning. The Undersecretary's *ex officio* membership could therefore be terminated without negatively affecting the functioning of the High Council. This would at the same time have a positive impact by removing a symbol of governmental influence on the supreme body of the judiciary.

As I already wrote in my 2011 Report, and 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, provided that he is no more than the representative chair

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[23] On the problematic Ministerial veto see below para. 2.5.3.3.

[24] Art. 6 (3) of Law No. 6087 on the High Council of Judges and Public Prosecutors of 11 December 2010.

[25] It was criticised by the UN Special Rapporteur who believes "that it would be necessary to go one step further in this respect to ensure that the High Council be totally independent from the Executive - structurally, functionally and in practice." (Preliminary Observations [above note 3]).

[26] See my 2011 Report para. 2.3.3.

of the High Council without any influence on substantive decision-making.[27] Apparently, the Grand National Assembly insisted on having a High Council President that is politically accountable to them. On this background, the Minister's presidency of the High Council constitutes both a negative and a positive symbol: negative because it symbolizes the executive influence on the judiciary, positive because it symbolizes the participation of the highest judicial institution in a system of checks and balances in which no branch of the government is strictly separate and a world of its own. In my view, those negative and positive symbolisms with regard to the independence and impartiality of the judiciary neutralize each other so that the decision on whether the Minister should continue to function as the President of the High Council is within the discretion of the Turkish legislature, provided that his influence does not extend beyond the exercise of a representative function as the nominal head of the High Council.

I recommend that the *ex officio* membership of the Undersecretary in the High Council be terminated. The decision as to whether the Presidency of the High Council should continuously be entrusted to the Minister of Justice is within the discretion of the Turkish legislature, provided that the Minister's influence does not extend beyond the exercise of a representative function as the nominal chair of the High Council.

2.4.3. Membership of Judges and Public Prosecutors Coming from the Ministry of Justice

In her Preliminary Observations, the United Nations Special Rapporteur on the Independence of Judges and Lawyers stated that the total independence of the High Council from the Executive should be ensured. In this context, she noted "that a good part of the current members of the Council have had tasks within the Ministry of Justice in the recent past."[28] In my 2011 Report, I mentioned that complaints had been raised against the candidacies for membership in the High Council of judges and public prosecutors working in the Ministry. These complaints had, however, been 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.[29] I also wrote that there was no evidence to support allegations of a "Government-sponsored" list of candidates. The members of the High Council who had previously worked at the Ministry were elected in secret ballot organized by the independent Supreme Election Board, in which over 95% of the electorate participated. Their professional affiliation with the Ministry was known to the electorate. The practical work of the High Council provides no evidence either that those members are functioning as the Ministry's "fifth column" or the High Council is the "extended arm" of the Ministry.

On the other hand, more general questions concerning the Turkish practice of frequent career interchanges between the executive and the judiciary and their consequences for the independence and impartiality of the judiciary have been raised by both the Venice Commission and the Commissioner for Human Rights of the Council of Europe.[30] These

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27 See my 2011 Report para. 3.2.3. and § 35 of 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) – Opinion no. 600/2010 – CDL-AD (2010)042 of 20 December 2010.

28 See above note 3.

29 See my 2011 Report para. 3.2.2.1.

30 See the Hammarberg Report (above note 2), p. 24, para. 111.

questions are beyond my current terms of reference. But having been raised both in Turkey and on the European level, they should be dealt with shortly.

2.4.4. Short Election Period and Possibility of Re-election/Reappointment of High Council Members

In my 2011 Report, I already pointed out that a short election period in conjunction with the possibility of reappointment and the permissibility of adding a dissenting opinion to the majority decisions may pose a problem with regard to independent and impartial decision-making.[31] I also underlined that 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. The regular term of office of High Council members is four years and their re-election/reappointment is possible.[32] Moreover, members are permitted to add dissenting opinions to the decisions of the Plenary and the Chambers.[33] As a general rule, these decisions are made public.[34] It cannot be ruled out that these arrangements, taken together, 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 re-elect or reappoint them. The problem is somewhat defused by the fact that the law makes provision for Council members' reappointment to their previous posts (for the members coming from the high courts) or to appropriate positions (for the members coming from the first instance courts), taking into consideration their wishes, after their Council membership terminates. The appointment power is vested in the Plenary in the new composition after the next round of elections.[35] Some of my interlocutors, however, voiced concern as to whether that system might pose a threat to the independence of the High Council members. Thus, 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.

Moreover, under the current system the regular election period of all the High Council members terminates at the same time. It is therefore conceivable that the next elections will lead to a completely new composition of the High Council. All the experience gained in the course of the previous election period would then be lost. To prevent such an unfortunate result, it should be considered whether the election period of members could be staggered in a way that ensures that no more than half of the membership is replaced at the same time.

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. The election periods of members should be staggered in a way that ensures that no more than half of the membership is replaced at the same time. Moreover, the practical application of the system of reintegration into the judicial career after the termination of High Council membership should be closely monitored as to its possible impact on the independence and impartiality of High Council decision-making.

31 See my 2011 Report para. 3.2.2.3.
32 Art. 18 of Law No. 6087.
33 Art. 32 (2) (b) of Law No. 6087.
34 See Art. 32 (4) of Law No. 6087.
35 Art. 28 of Law No. 6087.

2.4.5. The Strategic Plan 2012 – 2016

The High Council's Strategic Plan 2012 – 2016, a book of more than 170 pages, is available in Turkish only. But the Secretariat of the High Council kindly provided me with an English translation of the aims and objectives part. The plan prescribes four superior "aims" and elaborates between four and seven subordinate "objectives" to substantiate them further. It then formulates concrete activities on how to attain those objectives within a certain period of time.

Aim 1 is to strengthen the independence and impartiality of the judiciary. For this purpose, the High Council plans to cooperate with the Ministry of Justice, the Justice Academy, universities and non-governmental organizations, including the Turkish Bar Association. One important step consists of comparative studies to examine how countries safeguard the independence and impartiality of the judiciary in practice. Even more importantly, the High Council intends to ensure that each and every judge and public prosecutor internalizes the concepts of independence and impartiality by including the pertinent case-law of the European Court of Human Rights in the curricula of their pre-service and in-service training. The High Council also plans to increase public awareness of the importance of the independence and impartiality of the judiciary already at school level.

In close relation with aim 1, aim 2 is to strengthen the tenure of judges and public prosecutors. Without security of tenure and adequate remuneration, it is indeed impossible to implement judicial independence and impartiality in practice.

Aim 3 is to increase public confidence in the judiciary, among others by developing judicial ethics, in cooperation with the Turkish Bar Association and others. In this way, the High Council also hopes to decrease the amount of complaints against judges and public prosecutors which are lodged by litigants and currently place a considerable burden on the Third Chamber.

Aim 4 is to increase the effectiveness and efficiency of the judiciary. One important factor which explains the current backlogs and delays in the Turkish system is the excessive workload of the individual judges and public prosecutors at all levels. During my discussions in Turkey that issue invariably came up. The High Council plans to conduct studies to identify the reasons for this, to strengthen alternative dispute resolution methods and to eradicate avoidable errors which lead to unnecessary appeals overburdening the high courts. While these activities are reasonable, the most important factor causing backlogs and delays certainly is the shortage of judges and public prosecutors and the delays in the long overdue establishment of the regional courts of appeal. While the High Council is not in a position to remedy those problems which have to do with the lack of suitable candidates and proper buildings, it should at least identify them and commit itself to making whatever contribution it can make to solve them.

The overall aims and more concrete objectives of the Strategic Plan are commendable and realistic. If the planned activities are resolutely carried out, the Turkish judiciary will become more independent and impartial as well as more effective and efficient also in practice. This will then automatically increase public confidence in the judiciary. But there are certain problems in this regard which the High Council cannot solve, such as the shortage of judges and public prosecutors and the non-existence of regional courts of appeal. Being the top institution of the Turkish judiciary, it should, however, consider how it could make a contribution to that solution while remaining within the sphere of its competences.

I recommend that the aims, objectives and activities set forth in the Strategic Plan with regard to the independence, impartiality, effectiveness and efficiency of the judiciary be

resolutely implemented. I also recommend that the High Council consider how it could actively contribute to solving the problems with regard to the shortage of judges and public prosecutors and the delays in the establishment of the regional courts of appeal.

2.5. The Chambers

The Law No. 6087 on the High Council for Judges and Public Prosecutors precisely allocates the duties and competences of the High Council mostly to one of the three Chambers and for the rest to the Plenary. The latter elects the seven members of each of the individual Chambers and the heads of these Chambers on the basis of the rather strict parameters set forth in Art. 8 of Law No. 6087. The Plenary is charged with determining the competent authority within the High Council for a matter which falls within the jurisdiction of the High Council, but has not been explicitly allocated to one Chamber or the Plenary.[36] The Plenary is also competent to redistribute the workload among the Chambers in exceptional cases where one of them has an excessive workload which can no longer be handled.[37] This has not yet been necessary. If it turns out that there is permanent problem regarding differences in the workload of the Chambers, the legislature would of course be required to reallocate the duties among them so as to preserve the proper functioning of the High Council as a whole.

With regard to the disciplinary competences, there is a separation of powers between the Third Chamber that is responsible for the examinations and investigations through the Inspection Board, and the Second Chamber that evaluates the evidence gathered by the inspectors and decides on disciplinary sanctions. This system of separation of powers provides additional safeguards with regard to the independence and security of tenure of judges and public prosecutors and is therefore a positive element.[38]

2.5.1. The First Chamber

The First Chamber is primarily responsible for the appointments and transfers of judges and public prosecutors and the granting of permissions for attending in-service training sessions conducted by the Turkish Justice Academy. I was told by my interlocutors that since the appointment and transfer power affects the vast majority of judges and public prosecutors and their families, the First Chamber constitutes the most important division of the High Council.

In Turkey, every judge and public prosecutor is assigned to one of the 701 judicial locations in the country which are grouped into five geographical regions, the fifth region being the most provincial and thus least attractive and the first region (which includes Ankara, İstanbul and İzmir) being the most attractive. While the first appointment is made by lot (computerized drawing), later transfer decisions are made by an order of preference based on criteria which are laid down in a regulation that was made by the previous High Council. The new High Council is currently preparing a new regulation. Transfers to more attractive judicial regions are made after two years at the earliest, upon the application of the individual judge or public prosecutor, provided that there are vacancies. In 2011, there were ca. 4,000 applications of which ca. 2,500 were granted. Since then, the criteria have been made known which has resulted in a drop of applications to 2,500 in 2012. A few days ago, the First Chamber routinely relocated 2,335 judges and public prosecutors. The vacancies and the decision-making calendar of the First Chamber are now made public so that the process has become more transparent and planning easier for the families affected.

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36 Art. 7 (2) (ç) of Law No. 6087.

37 Art. 7 (2) (d) of Law No. 6087.

38 Art. 9 (2) (a) (2) – (4), Art. 9 (3) (b) – (ç) of Law No. 6087.

When a judge or public prosecutor is ultimately assigned to a first region judicial location after at least ten years of experience, provided he or she has a good record, he or she attains security of location. Any further transfer to another location will only be made for disciplinary reasons as a penalty imposed by the Second Chamber of the High Council. Recently, however, there were several instances in which the First Chamber transferred public prosecutors from Ankara to other first region locations. I was told that this was done on the initiative of the responsible chief public prosecutor because of poor work performance but not in the sense of a disciplinary sanction for which the Second Chamber would have been competent.[39] According to other sources, the relocations were ordered in reaction to trade union activities of the persons concerned. Since judges and public prosecutors are free to form associations for the purpose of defending their independence and protecting their interests[40] that might have amounted to an illicit interference with their freedom of association in violation of Art. 11 of the European Convention on Human Rights, depending on the concrete circumstances.

While I am not in a position to assess the reasons for the transfers in the concrete cases, I underline that after a period of time not exceeding ten years both judges and public prosecutors need to be given security of tenure and location. Otherwise, their independence is jeopardised. It must be ensured that the High Council can only remove or relocate those tenured judges or public prosecutors against their will for disciplinary reasons on a clearly formulated statutory basis and subject to judicial review.[41] Instances of continuous and serious bad work performance may justify disciplinary sanctions proportionate to the severity of the offence.

I recommend that for the sake of safeguarding their independence in law and practice both judges and public prosecutors be guaranteed security of tenure and location after a period of time not exceeding ten years. It must be ensured that the High Council can only remove or relocate those tenured judges or public prosecutors against their will for disciplinary reasons on a clearly formulated statutory basis and subject to judicial review.

Another responsibility of the First Chamber is to send judges and public prosecutors to in-service training sessions of the Turkish Justice Academy. According to a recent amendment to Art. 119 of Law No. 2802 on Judges and Public Prosecutors, they are now obliged to participate in in-service training under the supervision of the High Council. This is certainly a positive development, all the more since courses on the European Convention on Human Rights are also increasingly taught.

2.5.2. The Second Chamber

The two main responsibilities of the Second Chamber concern promotions and the imposition of disciplinary sanctions, both obviously relevant with regard to the independence and impartiality of the judiciary.

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39 Art. 9 (2) (a) of Law No. 6087.

40 § 9 of the Basic Principles on the Independence of the Judiciary of 1985 (endorsed by UN General Assembly Resolution 40/146 of 13 December 1985); Principle IV of Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe to Member States on Independence, Efficiency and Role of Judges; § 4.13 of the Bangalore Principles of Judicial Conduct of November 2002 (endorsed by the Economic and Social Council of the United Nations in 2006 [ECOSOC 2006/23]).

41 On judicial remedies against High Council decisions, see below para. 3.

2.5.2.1 Promotions

Judges and public prosecutors are up for regular promotions every two years. Promotion decisions are made in April, August and December of every year. On 14 April 2011, the new assessment criteria which the Second Chamber uses in the promotion process were published in the Official Gazette. The assessment reports by the inspectors operating under the supervision of the Third Chamber have a major impact on promotion decisions. Another relevant factor is how the judges' or public prosecutors' decisions fared on appeal. While the system of marks given by the high courts was abolished, their appraisal of the lower courts' decisions in the form of either affirmation or reversal has remained important for either positively or negatively assessing the performance of the judges or public prosecutors. The criterion of how decisions made by a certain judge or public prosecutor fared on appeal is not illegitimate but needs to be implemented with great caution so as to safeguard judicial and prosecutorial independence.

In this context, the Plenary of the High Council decided on 30 September 2011 that the result of an eventual review of judicial and prosecutorial decisions by the European Court of Human Rights should also be taken into consideration. The High Council requested the Ministry of Justice[42] to report the names of those judges and public prosecutors to the High Council who are responsible for Turkey's convictions for violations of the Convention. This is because the Second Chamber intends to use such an occurrence as a negative assessment criterion with regard to the responsible judges and public prosecutors. It has not yet done so because the criterion is so new that a certain transition period seems to be called for so that the judges and public prosecutors are able to adapt to the change. I was told that in the future the Second Chamber plans to use the criterion in the following way: there are three promotion categories, a (the lowest), b (the middle) and c (the highest category). Being responsible for a conviction of Turkey by the European Court of Human Rights would result in downgrading the judge or public prosecutor by one category.

The new criterion is intended to improve the disastrous Turkish record in Strasbourg which is indeed an urgent national, international and EU concern. Substantively, the criterion implements the amended Art. 90 (5) of the Turkish Constitution[43] according to which international human rights agreements duly put into effect in Turkey, such as the European Convention, shall not only have the force of law but even prevail over incompatible domestic laws. Apparently, the Turkish judges and public prosecutors, including those at the high courts and the Constitutional Court, do not yet sufficiently take the European Convention and the Strasbourg case law into account in their daily practice.[44] On this background, the High Council's initiative is laudable because it provides an important incentive for the judges and public prosecutors to familiarise themselves with and subsequently apply the international human rights standards. But it needs to be implemented cautiously so as to safeguard judicial and prosecutorial independence.

Like the other continental European civil law systems, and in contrast to the common law systems, the Turkish legal system does not adhere to the rule of binding precedents *(stare decisis)*. This means that, as a general rule, the lower courts are not legally bound to follow the case law of the higher courts; rather, they can make their judgments independently. Nor are the national courts strictly required by the European Convention on Human Rights to uncritically follow the Strasbourg jurisprudence. On the other hand, the principles of legal

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42 More precisely the Directorate General of International Law and Foreign Affairs to which the responsibility to represent Turkey in proceedings before the European Court of Human Rights was recently transferred from the Foreign Ministry. This was done to de-politicise and professionalise the representation.

43 The amendment took effect in 2004.

44 See p. 6, para. 11 of the Hammarberg Report (above note 2).

unity, legal equality and legal certainty push the lower courts toward complying with the jurisprudence of the high courts and the European Court of Human Rights. They should not reopen a legal issue settled by the latter, except for very good reasons. But if there are such reasons, they should have the courage to reopen the issue, give their own thoroughly reasoned opinion deviating from the case law of the high courts or the European Court of Human Rights and thus provide them with the opportunity to reconsider that issue on appeal. Even if it ultimately remains unsuccessful, such a critical stance vis-à-vis established authorities constitutes an important factor in the progressive development of the law and should therefore be encouraged rather than discouraged by the promotion system. In the particular situation of Turkey where an excessively high degree of conformism among the judges and public prosecutors exists, this seems all the more important.[45]

The mere fact that a decision was reversed on appeal or led to a conviction in Strasbourg does not necessarily imply that the judge or public prosecutor involved did a poor job and should thus not automatically be qualified as a negative factor with regard to their promotion. Rather, the courage to question the case law of the high courts or even the Strasbourg Court in a thoroughly reasoned opinion for the sake of initiating the progressive development of the law should be a rated as a positive factor.

If, on the other hand, a decision is reversed on appeal or leads to a conviction in Strasbourg because it was based on inexcusable ignorance of the properly published relevant case law of the high courts or the European Court of Human Rights or because it recklessly disregarded or arbitrarily applied that case law, one can speak of an abuse of judicial or prosecutorial independence and qualify it as bad performance for promotion purposes.

I recommend that the promotion criterion of how decisions made by a certain judge or public prosecutor fared on appeal or in the European Court of Human Rights be implemented cautiously in a way which safeguards judicial and prosecutorial independence. The mere fact of a reversal on appeal or a conviction in Strasbourg should not automatically be qualified as a negative factor with regard to promotion. Rather, the courage to question the case law of the high courts or the Strasbourg Court in a thoroughly reasoned opinion for the sake of initiating the progressive development of the law should be a rated as a positive factor. If, however, the reversal on appeal or the conviction in Strasbourg occurred because the judicial or prosecutorial decision was based on the inexcusable ignorance or reckless disregard or arbitrary application of the duly published relevant case law, this can be qualified as bad performance for promotion purposes.

There currently is an important complementary capacity-building project which provides regularly updated translations of the case law of the European Court of Human Rights related to Turkey as well as relevant rulings against other parties to the Convention into Turkish on the website of the Turkish Ministry of Justice[46] as well as a textbook on the law of the European Convention in Turkish. It is also to be expected that the Convention and the Strasbourg case law will also become increasingly important in the pre-service and in-service training of the Turkish Justice Academy.

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45 See p. 25, para. 118 of the Hammarberg Report (above note 2).

46 The website is run by the International Law and Foreign Affairs Directorate General of the Ministry. More than 1,400 decisions are already available.

I recommend that the project of providing translations of the relevant decisions of the European Court of Human Rights to the judges and public prosecutors be continued on a permanent basis. The European Convention on Human Rights and the Strasbourg case law should also be made a prominent and permanent feature of the pre-service and in-service training of the Turkish Justice Academy.

2.5.2.2. Disciplinary Sanctions

2.5.2.2.1. General Aspects

The Law No. 2802 provides for a hierarchy of disciplinary sanctions beginning with a warning and ending with the removal from the profession, depending on the gravity of the offence committed by the judge or public prosecutor. While the judge or public prosecutor subject to disciplinary proceedings has the right to file a written defence, there is no hearing before the Second Chamber decides on the imposition of a sanction. In my view, such a hearing should be compulsory, because disciplinary sanctions deeply affect the career of those on whom they are imposed. I was informed that it was planned to change the law to introduce such a hearing.

I recommend that a hearing of the judges or public prosecutors accused of an offence be made a compulsory part of the disciplinary proceedings.

Under Art. 68 of Law No. 2802, the severe disciplinary sanction of change of location can be imposed for the mere suspicion that a judge or public prosecutor accepted a bribe even if the bribery cannot be proven. I was told that there are four to five such cases annually. This state of the law poses a threat to judicial independence and impartiality and should therefore be changed. Judges and public prosecutors are made vulnerable to pressure in the sense that by planting rumours anyone can destroy their careers and uproot them and their families.

I recommend that the law be changed so as to ensure that disciplinary sanctions can only be imposed on judges and public prosecutors if it can be proven beyond reasonable doubt that they committed an offence clearly defined by the law at the time when it was committed. Unproven rumours can never provide a sufficient basis for any disciplinary sanction.

2.5.2.2.2. The Deniz Feneri Case

With regard to the imposition of disciplinary sanctions, one focus of my talks was the Deniz Feneri (Lighthouse) case because it has been the subject of much public debate in Turkey. I was given the following explanations: Deniz Feneri is an Islamic charity. Alleged financial irregularities involving Deniz Feneri have been investigated for a number of years, reportedly much to the chagrin of the ruling political party. The defence counsel of persons suspected of having committed fraud in this context filed a complaint against three public prosecutors responsible for the investigation, accusing them of illegal acts. The Third Chamber thereupon charged the Inspection Board with examining the accusations. The investigation report of the chief inspectors put in charge of the examination identified misconduct by the public prosecutors: they had applied to a court to have the property of the nineteen suspects attached. The court issued an attachment order which also included the shares of a certain company

held by the suspects but refused also to attach the property of that company. Despite this, the public prosecutors allegedly had property of the company anyhow attached by the competent authorities, sending them a version of the court warrant which excluded the part refusing the attachment of the company property. Although the defence counsel complained, the public prosecutors allegedly insisted on continuing with the illegal attachment.

On this basis, the chief inspectors suggested that the Second Chamber impose disciplinary sanctions on the public prosecutors, give permission to initiate a criminal investigation in their conduct and also, as an interim measure, relocate them pursuant to Art. 77 of Law No. 2802. The Second Chamber thereupon, by a majority vote and after lengthy discussions, found sufficient reasons to permit the criminal investigation of the three public prosecutors by the Public Prosecutor's Office of the nearest High Penal Court (Sincan), a decision not subject to the approval of the Minister of Justice. But the Second Chamber unanimously refused to order the public prosecutors' interim relocation. This was considered as unnecessary since the investigation into their conduct had already been completed. Thus, the public prosecutors' continued presence could not impede that investigation. The Second Chamber was of course aware that even the interim relocation is a very serious interference. The Ankara Chief Public Prosecutor, however, decided to transfer the responsibility for the Deniz Feneri investigation to other public prosecutors in his office in order to prevent speculation which might damage public confidence in the orderly functioning of the judiciary. This decision was within the Chief Public Prosecutor's discretion and made independently of the concurrent High Council procedure.

The competent Sincan Public Prosecutor's Office has meanwhile issued an indictment for forgery and professional misconduct against the three public prosecutors, demanding a sentence of 11 years imprisonment. If accepted by the High Penal Court, they will be tried by a Penal Chamber of the Court of Cassation. Depending on the outcome of that trial, the Second Chamber of the High Council will decide on disciplinary sanctions.

Although the behaviour of which the three public prosecutors are accused is indeed hard to believe, the plausibility of the accusation has been confirmed by several independently operating judicial bodies. On the other hand, the negative public impression generated by the proceedings should not be underestimated, all the more since the Deniz Feneri Case is a high-profile case. The Hammarberg Report rightly encourages the competent authorities to refrain from disciplinary actions against prosecutors and judges which may affect the appearance of independence of the judiciary.[47] This encouragement is also aimed at the High Council whose responsibility it is to protect the credibility of the judicial system and maintain public confidence in its orderly functioning in terms of independence and impartiality. Part of that responsibility is to explain to the public why certain disciplinary actions are in line with the principles of independence and impartiality.

I recommend that the High Council take seriously the responsibility to protect the credibility of the judicial system and maintain public confidence in its orderly functioning in terms of independence and impartiality, especially in high-profile cases. It should immediately explain its decisions in those cases to the public.

[47] Above note 2, p. 3.

2.5.3. The Third Chamber

2.5.3.1. Access to the Judicial Profession for Persons with Disabilities

The competences of the Third Chamber comprise the admission of candidate judges and public prosecutors to the profession, the handling of citizens' complaints against judges and public prosecutors and the supervision of the inspection system run by the Inspection Board.

The admission to the profession of candidate judges and public prosecutors who have passed the written exam at the end of their pre-service training has a mostly technical character. As a matter of fact, of the 857 candidates in the most recent round, only one was not admitted because of a disciplinary offence. Besides the exam requirement, the candidates are by law also required to present a health certificate. In view of this, I was informed that persons with disabilities are generally ineligible to become judges and public prosecutors. Such a general exclusion without any attempt at reasonable accommodation is incompatible with Turkey's obligations under Art. 27 of the (United Nations) Convention on the Rights of Persons with Disabilities of 13 December 2006 which Turkey ratified on 28 September 2009.[48] It is probably also incompatible with the European Convention on Human Rights. Although the High Council is not responsible for the exclusion of persons with disabilities from the judicial professions, I add a pertinent recommendation, all the more since Art. 21 of the Charter of Fundamental Rights of the European Union prohibits any discrimination based on disability. Moreover, in Art. 26 of that Charter the EU recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their occupational integration.

I recommend that the Turkish laws be changed so as to provide persons with disabilities access to the position of judges and public prosecutors without discrimination.

2.5.3.2. Citizens' Complaints

Most of the workload of the Third Chamber comes from thousands of citizens' complaints against individual judges and public prosecutors which are lodged on the basis of Art. 97 of Law No. 2802. Many of them are inadmissible because they concern matters within the appellate jurisdiction of the high courts. As I explained in my 2011 Report, the high number of these complaints indicates a malfunctioning of the appellate system in Turkey.[49] There has been some progress in this respect, since the number of judges and rapporteur judges at both the Court of Cassation and the Council of State has recently been increased considerably. On the other hand, the regional courts of appeal are still not operational. Those courts should be promptly established, all the more since the European Court of Human Rights recently applied the pilot judgment procedure to length of judicial proceedings cases from Turkey.[50] The parties to lower court proceedings should also be informed *ex officio* by those courts about the legal remedies available to them and the fact that complaints to the High Council are no viable means, neither in the sense of an alternative nor in the sense of an additional extraordinary remedy concurrent with or after the exhaustion of the ordinary legal remedies (because of the principles of litispendence and *res judicata*). For the exceptional cases in which complaints about personal misconduct of a judge or public prosecutor are appropriate beside the ordinary legal remedies, a regional filtering system (such as a president of the local court) should be established to ease the burden on the Third Chamber.

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48 United Nations Treaty Series Vol. 2515, 3.

49 See para. 3.2.5. of my 2011 Report.

50 ECtHR, Chamber judgment of 20 March 2012, Ümmühan Kaplan v. Turkey (No. 24240/07).

I recommend that the regional courts of appeal be promptly established. The parties to lower court proceedings should be informed *ex officio* by those courts about the legal remedies available to them and the fact that complaints to the High Council are no viable means. For the exceptional cases in which complaints about personal misconduct of a judge or public prosecutor are appropriate beyond the ordinary legal remedies, a regional filtering system should be established to ease the burden on the Third Chamber.

A considerable number of complaints are lodged while the principal proceedings are still continuing so that the Third Chamber is practically invited to intervene in on-going proceedings. This, for instance, happened in the notorious and still pending Ergenekon case where several complaints against the judges were lodged and rejected by the Third Chamber. In my view the law should make clear that complaints to the High Council concerning cases currently pending in the competent court are inadmissible and will not be dealt with in substance. It is part and parcel of the principle of independent and impartial adjudication that the competent court can make its decision without interference from the outside, including other judicial bodies. The principle of legal certainty requires that final decisions *(res judicatae)* cannot be reopened. This principle also limits the constitutional right to petition.

I recommend that the law should make clear that complaints to the High Council concerning pending cases and settled cases *(res judicatae)* are inadmissible and will not be dealt with in substance.

2.5.3.3. Ministerial Veto against Routine Inspections and *Ad Hoc* Investigations

From the perspective of the independence and impartiality of the judiciary, the most important competence of the Third Chamber is the supervision of the Inspection Board which undertakes both regular (routine) inspections as to whether judges and public prosecutors perform their duties in accordance with the laws, regulations etc. as well as *ad hoc* inspections when a judge or public prosecutor is suspected of having committed an offence during the exercise of his or her duties.

With regard to routine inspections, the Inspection Board submits a scheme in January of every year. After having been adopted by the Third Chamber, it has to be approved by the Minister of Justice in his capacity as the President of the High Council under Art. 6 (2) (ç) of Law No. 6087. The Minister has never denied his approval. The High Council considers the involvement of the Minister as an unnecessary bureaucratic impediment which only causes delays. This is why the Strategic Plan 2012-2016[51] proposes the abolition of the Ministerial approval. There is indeed no need to involve the Minister in this regard. As a matter of fact, the Ministerial approval constitutes a negative symbol of undue executive influence on the judiciary which should be eliminated.

I recommend that the requirement of approval by the Minister of Justice of the annual routine inspection schemes be abolished.

[51] See above para. 2.4.5.

The Third Chamber also has the power to scrutinize *ad hoc* whether a judge or public prosecutor has committed an offence during the exercise of his or her duties. For these *ad hoc* inspections, either inspectors from the Inspection Board or senior judges or public prosecutors are used. They are also subject to the prior approval of the Minister of Justice. The Minister has, however, not exercised his veto since the new High Council was established. In a recent well-publicised case the Minister approved the examination of a public prosecutor who had summoned the Undersecretary supervising the National Intelligence Organisation (MIT) for questioning in the context of an investigation into Kurdish terrorism (KCK investigation). The Third Chamber had decided to launch the examination on its own motion because various versions of a protocol allegedly signed by the MIT and the former leader of the PKK terrorist organisation had been published in a number of newspapers. The Third Chamber acted upon the suspicion that the public prosecutor had violated the secrecy of the investigation. The competent Chief Public Prosecutor thereupon removed that public prosecutor from the KCK investigation. While those decisions may be reasonable, they raise the same issue as the Deniz Feneri Case.[52]

In my 2011 Report,[53] I wrote that the Ministerial veto might 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. Since now, however, investigations can only take place upon a decision by the Third Chamber of the High Council, 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. Although this veto may now be rarely used, the mere possibility gives the impression of undue executive influence on the judiciary – and that without any apparent practical need. I therefore repeat the recommendation I already made in my 2011 Report.

I recommend that the ministerial veto on the initiation of disciplinary examinations and investigations concerning judges and public prosecutors be eliminated.

2.5.3.4. The Hrant Dink Case

This case concerns the prosecution and conviction of the murderers of the Armenian writer and journalist Hrant Dink. It is another high-profile case, not least because the European Court of Human Rights already found Turkey guilty of violations of the right to life enshrined in Art. 2 of the European Convention on Human Rights because it had failed to protect Dink's life and to conduct an effective investigation into his murder.[54] The immediate perpetrator of the murder has meanwhile been convicted and sentenced to long prison term. At the end of the trial of 19 other principal suspects (including public officials), however, the competent penal court decided that the murder had not been carried out by any illegal organisation. The presiding judge and the public prosecutor involved thereupon made critical statements to the media concerning the evaluation of the pertinent evidence. I was explained that because of these statements (and not because of the outcome of the trial which is still subject to appeal), the Third Chamber decided to initiate an examination as to whether the presiding judge and the public prosecutor had violated their official duties. That decision may generate the negative public impression that members of the judiciary will be disciplined if they are

52 See above para. 2.5.2.2.2.
53 See para. 3.2.3. of my 2011 Report.
54 Dink v. Turkey, judgment of 14 September 2010 (No. 2668/07 and others).

courageous enough to challenge possible instances of partial justice which guarantee impunity to those involved with the "deep state". Therefore, the examination should proceed with great caution. In this case, too, the High Council should take seriously the responsibility to protect the credibility of the judicial system and maintain public confidence in its orderly functioning in terms of independence and impartiality. It should accordingly have immediately explained its actions to the public.[55]

I repeat my recommendation that the High Council take seriously the responsibility to protect the credibility of the judicial system and maintain public confidence in its orderly functioning in terms of independence and impartiality, especially in high-profile cases. It should immediately explain its decisions in those cases to the public.

2.6. The Inspection Board

The Inspection Board which had previously been attached to the Ministry of Justice now operates under the supervision of the Third Chamber of the High Council. This is an important step to safeguard judicial independence from executive influences and avoid any such appearance. Even though most of the inspectors who had previously worked for the Ministry have been retained by the High Council for lack of other experienced personnel, they have no final decision-making power but are doing the preliminary work for the Third Chamber that instructs and supervises them.

The inspectors, who are themselves experienced senior judges or public prosecutors, perform both regular inspections every two years and examinations and investigations of possible disciplinary offences with regard to all Turkish courts and public prosecutors offices. The purpose of the regular inspections which are now conducted according to annual schemes that are published on the website of the High Council is to establish whether judges and public prosecutors are carrying out their duties in accordance with the relevant laws, statutes, regulations by-laws and (administrative) circulars.[56] Inspectors produce assessment reports on both judges and public prosecutors which constitute important elements in the promotion process.

The inappropriate personal assessment criteria which I criticised in my 2009 Report[57] and which also led to a conviction of Turkey by the European Court of Human Rights[58] have meanwhile been replaced by more objective criteria pertaining to the functional competence of the judges and public prosecutors. With regard to judges, such criteria are for instance the duration of proceedings, the validity of the reasons for postponing hearings and the thorough preparation of those hearings; with regard to public prosecutors, such criteria are for instance the speedy conduct of investigations and the thorough preparation of indictments.

Art. 17 (4) of Law No. 6087 expressly prohibits inspectors from interfering with the judicial power and judicial discretion or making recommendations or suggestions in this regard. This is of course a tightrope walk. Yet, approximately two thirds of the judges and public prosecutors are in favour of the centralised performance assessment system by inspectors operating under the supervision of the High Council. They apparently believe that it is

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55 See above para. 2.5.2.2.2. on the Deniz Feneri Case.

56 Art. 17 (1) (a) of Law No. 6087. The Inspection Board of the High Council only inspects the prosecutorial functions of the public prosecutors, while their administrative functions continue to be inspected by the Ministry of Justice.

57 See para. 2.1.4. of my 2009 Report.

58 European Court of Human Rights (Chamber), decision of 19 October 2010 (No. 20999/04 – Özpınar v. Turkey). See also para. 3.2.5. of my 2011 Report.

objective and does not jeopardise their independence. Objectively, however, regular inspections and performance assessments of judicial work processes pose a problem for judicial independence. This is why it is indispensable to introduce a legal remedy against performance assessment reports by inspectors and High Council decisions based on those reports specifically for the purpose of fending off illicit interferences with judicial independence.[59]

I recommend that a legal remedy be introduced against performance assessment reports by inspectors and High Council decisions based on those reports for the purpose of fending off illicit interferences with judicial independence.

When conducting *ad hoc* inspections for investigating possible offences, inspectors have prosecutorial powers. Like prosecutors, they need a court warrant for the most serious interferences like the wiretapping of telephones of judges and public prosecutors. Otherwise the information gathered cannot be used, except when it is a chance find made in connection with the court-ordered wiretapping of another person. It would then serve as the starting point of a separate investigation to gather additional evidence.

2.7. Office of the Secretary-General

While the secretarial, administrative and budgetary support work for the High Council had previously been performed by the Ministry of Justice, the new High Council disposes of its own Office of the Secretary-General. This makes the High Council independent of the executive in administrative respects.

The Secretary-General is appointed by the Minister of Justice in his capacity as President of the High Council from among three candidates proposed by the Plenary of the High Council. The four Deputy Secretaries-General (who are all experienced judges) are appointed by the Plenary upon proposal by the Secretary-General. The Plenary also appoints the rapporteur judges who assist the High Council whereas the administrative personnel is appointed by the Deputy President of the High Council (that is the Undersecretary of the Ministry of Justice) upon proposal by the Secretary-General. In practice, most of the support personnel that had previously worked for the old High Council within the Ministry of Justice were retained so as to enable a smooth transfer of the operations from the old to the new High Council.

The new High Council disposes of its own budget (currently with a surplus). In the budget negotiations in the Grand National Assembly, however, the High Council needs to be represented by the Ministry of Justice.

In terms of the independence and impartiality of the judiciary, the administrative and budgetary independence of the High Council that is now housed in its own building is an important step forward, both practically and symbolically.

3. Remedies against Decisions of the High Council

The new Art. 159 (10) of the Constitution 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 has been accorded to the Council of State.[60] This certainly means

[59] On the issue of legal remedies against High Council decisions see below para. 3.

[60] Art. 33 (5) of Law No. 6087.

important progress. But I criticised the half-hearted character of that reform in my 2011 Report.[61]

The High Council makes many 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 is no more than a reformed internal review mechanism. The first stage consists of an objection lodged by the judge or public prosecutor concerned to the Chamber that made the original decision. If that Chamber upholds the decision after re-examination, a further complaint can be lodged with the Plenary that is then called upon to make the final decision.[62] This does not fully meet the impartiality standard of Art. 13 ECHR.[63] The Plenary has either 21 or 22 members,[64] but it includes all the seven members of the Chamber which made the original decision. Roughly a third of the reviewers are thus not impartial. 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. I was told that the presence of those members who made the original decision in the review panel was necessary: they could explain their decision and be held to account. However, Chamber decisions need to be so well reasoned that they are self-explanatory, and the accountability of the original decision-makers is sufficiently ensured, if they are informed about whether or not their decision was upheld by the review panel and why.

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.[65] 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.

Art. 159 (10) of the Constitution should therefore be rewritten to the effect that all decisions by the High Council which potentially interfere with the independence or impartiality or individual rights of judges and public prosecutors are subject to judicial review.[66] This is particularly important with regard to decisions which impose disciplinary sanctions other than dismissal from the profession. The fact that judicial review obviously takes time does not matter – it is the inevitable price to be paid for the rule of law. If necessary, a special accelerated procedure could be established to deal with challenges to High Council decisions, together with the power of the Council of State to indicate provisional measures, if necessary. It would in any event be entirely proper to require that an internal review mechanism be exhausted before an action can be brought in the Council of State. The internal review board must, however, be truly impartial, as I have emphasized above.

I was explained that the High Council makes numerous routine decisions in other than disciplinary matters, such as decisions concerning the regular transfer of location of hundreds of judges and public prosecutors. If every dissatisfied judge or public prosecutor was entitled to bring an action in court against those routine decisions, the whole system could be brought to a halt. However, the independence and impartiality as well as the human rights of judges and public prosecutors can be effectively protected against possible threats from within the judiciary only, if they are accorded a judicial remedy whenever they can make an arguable

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61 See para. 3.2.6. of my 2011 Report.

62 Art. 33 of Law No. 6087.

63 See European Court of Human Rights, decision of 13 November 2008 in the case of Kayasu v. Turkey (Nos. 64119/00 and 76292/01).

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

65 Art. 7 (2) *lit.* e of Law No. 6087.

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

claim that a High Council decision, no matter whether disciplinary or other, violates either the principles of independence and impartiality or their individual rights. If the decision-making process of the High Council as well as the internal review mechanism functions properly, it is not to be expected that many judges and public prosecutors will ultimately make the extraordinary decision to take the High Council to court. If, contrary to my expectations, the recommended extension of judicial remedies against High Council decisions leads to problems for the judicial system as a whole, the pertinent provisions could be readjusted. To make readjustments easy, should they prove necessary, the rules on judicial remedies should be included in the law and not the Constitution. The Constitution should include no more than a general reference to the statutory provisions.

I recommend that the judicial review should be extended to all the High Council decisions which potentially interfere with the independence or impartiality or individual rights of judges and public prosecutors. Actions brought by judges or public prosecutors against High Council decisions, no matter whether disciplinary or other, are admissible only if they can make an arguable claim that either the principles of independence and impartiality or their individual rights have been violated by the challenged decision. The prior exhaustion of an internal review mechanism can, however, be required, provided that the internal review board is truly impartial. To make necessary readjustments easy, the rules on judicial remedies should be included in the law and not the Constitution.

4. Concluding Assessment

The initial track record of the new High Council demonstrates practical improvements and enhanced credibility with regard to the independence and impartiality of the judiciary in Turkey. The newly elected High Council members and their staff are making a sincere effort to advance and accelerate the administration of justice in Turkey. Yet, there is room for further improvements in the practical operations of the High Council and a need for further constitutional and legislative reform.

Specifically, the media presence of the High Council needs to be upgraded, perpetuated and professionalised. The High Council's procedure for electing members of the Court of Cassation and the Council of State is in need of reform.

The High Council should actively inform the judges and public prosecutors about the important contributions made and beneficial role played by its non-judicial members. The return to the original "one man, one vote" system for the election of the judicial members and an important role for the Grand National Assembly in the appointment of the non-judicial members should be envisaged when the new constitution is drafted. Part of the responsibility for recruiting the candidates for the position of judges and public prosecutors should be transferred to the High Council. The laws need to be brought in line with Turkey's international obligations in terms of providing persons with disabilities access to the position of judges and public prosecutors without discrimination.

While the *ex officio* membership of the Undersecretary in the Ministry of Justice should be terminated, the Minister of Justice could continue to be the President of the High Council, provided that his influence were reduced to the exercise of representative functions as the nominal head of the High Council. In particular, the ministerial veto on the initiation of disciplinary examinations and investigations concerning judges and public prosecutors should be eliminated.

For the sake of safeguarding their independence in law and practice both judges and public prosecutors must be guaranteed security of tenure and location after a period of time not exceeding ten years. While the promotion criterion of how decisions made by a certain judge or public prosecutor fared on appeal in the high courts or in the European Court of Human Rights is legitimate, it should be implemented cautiously in a way which safeguards judicial and prosecutorial independence and prevents excessive conformism. The European Convention on Human Rights and the Strasbourg case law must be made a prominent and permanent feature of the pre-service and in-service training of the Turkish Justice Academy.

A hearing of the judges or public prosecutors accused of an offence should be made a compulsory part of the disciplinary proceedings. Disciplinary sanctions should never be imposed on any of them unless it can be proven beyond reasonable doubt that they committed an offence clearly defined by the law at the time when it was committed. When launching examinations or investigations, especially in high-profile cases, the High Council should take seriously the responsibility to protect the credibility of the judicial system and maintain public confidence in its orderly functioning in terms of independence and impartiality. All High Council decisions which potentially interfere with the independence or impartiality or individual rights of judges and public prosecutors should be made subject to judicial review.

Complaints to the High Council concerning the exercise of the official functions of judges and public prosecutors are no viable alternative to effective appellate procedures and should be treated as inadmissible when they concern either pending cases or *res judicatae.* The increasing number of such complaints should be a further incentive for those responsible to enhance the judicial infrastructure by increasing the number of judges and public prosecutors, improve their working conditions and actually open the courts of appeal.

Overall, the practical functioning of the new High Council indicates that the process of reforming the minds of those who are called upon to 'dispense justice' in the name of the Turkish people is making progress. Turkey has moved further toward a less state-centred, less hierarchical, less corporative and less detached judiciary, and 'within it a culture where human rights are given full effect.'[67] It should resolutely continue to move along this path. The fact that the Ministry of Justice is working on a Revision of the Judicial Reform Strategy and the High Council has recently adopted a Strategic Plan 2012 – 2016 demonstrates the presence of the necessary determination.

[67] See my 2009 Report para. 3.