daha iyi yargı

Proposal for Establishing a SUPREME AUTHORITY of JUSTICE for Judicial Independence

As the members of the Better Justice Association, we hereby declare and undertake that: We shall work to improve our Judicial System, which is one of the essential pillars of democracy, and is a keystone to lead our country to a better future, as well as to its functioning;

During our activities to that effect, we shall make every effort to embrace all stakeholders in the Judicial System, including related official and private bodies, non-governmental organizations, judges, prosecutors, advocates, other judicial officers, and academicians and representatives from the business world, to have them meet on common ground, as well as to generate innovative, progressive and reformative solutions, through multi-voice thinking and harmonizing different ideas, and to put these theoretical solutions into practice;

We shall contribute to the Constitution and law-making activities by bringing forward proposals aimed to reform the Judicial System;
Within the scope of our activities:

1. We shall abide by the fundamental and universal judicial principles;
2. We shall safeguard our country's greatest interests;
3. The Rule of Law, Honesty, Transparency and Accountability are our highest priority values;
4. We shall take a stand against misconduct in judicial proceedings, and shall make every effort towards honesty, as well as full and frank disclosure of all facts of disputes and evidence;
5. We shall take a conciliatory position in every kind of public dispute;
6. We shall make concerted efforts to ensure that our Association embraces all segments of society;
7. We shall be impartial and treat equally all public, private institutions and organizations, non-governmental organizations and political parties;
8. We fully support the ten fundamental principles addressing matters of Human Rights, Environment, Fight against Corruption and Labor Law, which constitute the basis for the UN Global Compact initiative.

Contents

List of Figures

The Problem of the Separation and Independence of the Judicial Branch:

The fundamental philosophy of “Justice means the impartial application of a rule or law.” which is dominant over the Turkish-Islamic state tradition requires that even rulers would be accountable before the law; and this tradition puts the judicial power assigned and authorized to execute the law to a special and respected place which is superior even to that of the sultan (and the legislative and executive power united in the personality of the sultan).

In the Great Seljuq Empire, the khan was under obligation to hear complaints two days a week. In the Anatolian Seljuq Empire, the sultan attended the ecclesiastical court once a year, where he was required to appear before the Muslim judge, and then any sentence given by the Muslim judge concerning the sultan was enforced and executed if any plaintiff against him existed.

In the Ottoman Empire, the Imperial Council (Divân’I Hümâyûn) chaired by the padishah, was considered to be a supreme court of justice, wherein even an ordinary citizen was allowed to personally express their complaints against representatives of the state.

This practical state theory that places Muslim judges against the absolutist power, the sultan, and adopts the fundamental principle that justice is the foundation of state was reflected in symbolic structures called the Dâru’l-’Adl (Tower of Justice) and the Cihân-nümâ (Pinnacle), these being the most prominent and striking parts of the palace. In Edirne and Istanbul, these symbolic structures dominated the entirety of the palaces, and they are said to have supervised the entire country.

In periods of stagnation and regression, the judiciary aspect and functions of the Ottoman Empire also gradually deteriorated and fell behind those of its concurrent Western counterparts. But, nevertheless, both the rule of law and the belief in the requirement of holding the judiciary power independent and separate from (and even superior to) other powers of the state are almost engraved on the governmental culture of the Turks. Society’s strong belief that the sole way to further improve the state is through justice emanates from this sound and robust cultural code.

The principle of the independence of the judiciary and the concept of the separation of powers which are generally accepted to have constituted the basis for a great many national constitutions, particularly those of the USA and Canada, were developed by great contributions by British philosopher John Locke and French philosopher Montesquieu, in the process of the modernization of political systems in the Western world in the 17th century.

In the present day, the independence of the judiciary is accepted and committed to by all world states under the umbrella of the United Nations (UN) as one of the fundamental conditions of democratic state governance. The fundamental principles of the independence of the judiciary are formulated in an international document (“Convention”) entitled “Basic Principles on the Independence of the Judiciary” approved by the General Assembly of the UN through its Decision No. 40/32, dated 29 November 1985 and Decision No. 40/146, dated 13 December 1985.

The Convention lists the fundamental principles of the independence of the judiciary power required for the protection of basic rights and freedoms of individuals, secured by international treaties and conventions, such as the “International Covenant on Civil and Political Rights”, the “Universal Declaration of Human Rights” and the “International Covenant on Economic, Social and Cultural Rights”, adopted by the UN.

For this reason, at least the basic principles set forth in this Convention are required to be strictly complied with for the sake of the independence of the judiciary power, and in order to demonstrate and prove it.

According to Article 1 of the Convention, the judiciary shall, as a whole, be independent from the executive and other powers, the executive and all other powers shall respect and observe the independence of the judiciary, and judges shall independently decide on matters before them, impartially.

According to Article 2 of the Convention, the judiciary shall decide, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter, or for any reason.

According to Article 3 of the Convention, the judiciary shall have jurisdiction over all issues of a judicial nature, and shall have the exclusive authority to decide whether or not an issue that is submitted for its decision is within its competence. Whether the “independence of the judiciary” purpose set down in Article 1 is achieved or not is checked and confirmed by this Article 3. As per Article 3, if the judiciary fails to decide on whether an issue submitted for its decision is within its competence or not, the independence of the judiciary envisaged in Article 1 cannot be achieved.

The Convention also stipulates certain other measures and actions in order to assure the independence of the judiciary and to ensure that judges make their decisions free from any influence or pressure. The Convention imposes rules and provisions as to the freedom of expression and association of judges, particularly in Articles 8 and 9; as to safeguarding against judicial appointments for improper motives, in Article 10; and as to the appointment, term of office, security, adequate remuneration, conditions of service, pensions and rights of retirement of judges that are required to be secured by law, as to the assignment and distribution of cases, and as to the principle that the actions for damages caused by the fault of judges shall be brought forward against the government, in Articles 11 and 12.

The IBA (International Bar Association), has adopted the basic substantive principles regarding judicial independence, as listed in its document entitled “Minimum Standards of Judicial Independence” published in 1982, and attaches special importance to the independence of the judiciary from the executive power.

The IBA’s document of minimum standards states in Article1 that individual judges should enjoy personal independence and assurances precluding them from being subject to executive control, and that in the discharge of their judicial functions, judges should be subject to nothing but the law and to the commands of their minds and conscience; and, in Article 2, that the judiciary body as a whole should enjoy autonomy and collective independence vis-à-vis the executive power.

The same document states in Article 3 that appointments and promotions of judges should be vested in a judicial body in which members of the judiciary and legal profession form a majority, free from any participation, involvement or influence of the executive or legislature bodies therein – but that, nevertheless, exceptions to this rule may be acceptable in countries where judicial appointments and promotions operate satisfactorily due to long historic and democratic traditions thereof; and, in Article 4, that the executive may participate in the disciplining of judges only in referring complaints against judges, but not in the initiation of disciplinary proceedings and the adjudication of such matters, and that the power to discipline or remove a judge must be vested in an institution or judicial commission which is independent of the executive body.

Article 5 provides that the executive shall not have control over judicial functions; Article 6 states that rules of procedure and practice shall be made through legislation or by the judiciary in cooperation with the legal profession, subject to parliamentary approval; Article 7 states that the state shall have a duty to provide for the execution of judgments of the courts, and the judiciary shall exercise supervision over the execution process thereof; Article 8 states that all judicial matters are required to be exclusively within the responsibility of the judiciary; Article 9 states that the central responsibility for judicial administration, preferably, shall be vested in the judiciary, or jointly, in the judiciary and executive bodies; Article 10 states that it is the duty of the state to provide adequate financial resources to allow for the due administration of justice; Article 11 states that division of work among judges should be at the discretion of the judges themselves; Article 12 states that the power to transfer a judge from

one court to another shall be vested in judicial authority and shall, preferably, be subject to the judge's consent.

According to these two important documents one of which is also binding for Turkey in the international area, the judiciary should be separate and independent from both the executive power and other powers of the state. In addition, judges should be allowed to decide upon and judge, independently, all matters submitted to them, free from any influence or pressure. To put it differently, for the sake of the independence of the judiciary, first and foremost, the judiciary should be separated and independent from both the executive power and other powers of the state, and judges should be allowed to decide, independently and free from any influences or pressures.

For the sake of the institutional independence of the judiciary, the judicial organs and elements should be capable of performing their duties and functions free from any direct or indirect pressures from other elected or appointed organs and authorities, and without the requirement for any permission or consent from them. The second vital requirement of the independence of the judiciary is that the courts should make their decisions and reach their verdicts in reliance upon material facts, by enforcing the laws, impartially, and free from all external effects and influences, and that court judgments should not be held subject to any control or supervision, save for internal objections and appeal processes.

At this point, we deem it necessary to add that ensuring judges do not feel any influence or pressure on them is a must in order to sustain the independence of the judiciary. In particular, the domination by the executive organ over legislative power, the enactment of legislative instruments making concessions from the independence of the judiciary, and the restriction of resources allocated to the judiciary should be absolutely prevented (preferably by means of strong constitutional protection).

A parallelism exists between the West's development of its state governance (political) systems by adopting the principles of separation of powers and the independence of the judiciary, on the one hand, and its economic and social growth and development, on the other hand. In the Islamic and Ottoman world, there exists an opposite parallelism – between its political regression, on one the one hand, and economic and social stagnation and regression, on the other hand. In recent times, some economists, including Daron Acemoğlu, have

verified that the rise and fall of countries and civilizations is closely linked to the aw, and that welfare is also enhanced in countries with a developed democracy. On the basis of this fact, it may be concluded that the real cause underlying the regression of the Ottoman and Islamic world is its failure to develop its state governance systems, as has been done by the West. While some authors think that the cause of regression is the West's finding new trade routes, thereby leading to a decline in economic resources, it is more realistic to accept that the primary and real cause of regression is the failure of the state governance to assure the development of society. The Ottoman Empire, holding all of the major trade routes under its control at one time, could easily have been expected to organize greater geographical expeditions and to achieve greater successes than the West, thanks to the relatively rich resources it owned. It may thus be concluded that for the sake of being successful in international competition, it is of vital importance to establish the separation of powers and the independence of the judiciary.

The Independence of the Judiciary Can Be Protected by Accountability

Certain complaints led to the enactment of the 1961 Constitution, and that have resulted in the restriction of the independence of the judiciary weare right and legitimate, just as are the reasons and justifications given for the full independence of the judiciary. The delicate balance needed between these two positions can be built and protected only through the accountability of the judiciary.

As a matter of fact, the judiciary can protect its independence only if, and to the extent that, it receives support from the public, and adopts and protects its independence by resisting amendments that are proposed to be made to the Constitution or the laws that would restrict its independence. This support of the public may be won by the judiciary only by rendering judicial services that respond to the needs of and conform to the policies, preferences, principles and priorities of the people with regard to the carrying out of justice and the hearing of trials. To this end, the judiciary should be entirely accountable about the extent to which it is capable of performing its duties and functions, and the extent to which it uses its powers and privileges for the intended purposes thereof. In order to be accountable and to comply with its raison d'être, the judiciary should function independently, its activities and operations should be entirely free from any kind of influence, and it should perform its duties neutrally and impartially. Otherwise, the accountable party should be not the judiciary itself but those influencing it.

Judicial review methods and channels are needed that assure the compliance of all judicial transactions and decisions with these basic principles. Judicial review should not be seen as a mechanism that is composed only of auditing the decrees or sentences of judges by such means as intermediate and final appeals. The judiciary organization, its corporate functions, and the decisions and transactions of all judiciary elements are absolutely required to be subject to and compliant with judicial review. To this end, the elements of the judiciary that provide services should have a say in the system of which they are a part, and problems identified in this way must be resolved.

Finally, like other institutions the judiciary exists not for itself but for the society it is a part of, and to serve the society is its raison d'être, and it is therefore a sine qua non requirement for the whole judicial organization and its bodies and elements to be fully coordinated so as to be able to offer high-quality services to society.

Each country has developed unique procedures and methods in the course of its own historical development to achieve the goals mentioned above. Although no uniform judicial structure and organizational model exists that can be taken as a model, some work conducted by the UN, the European Union and international non-governmental organizations does exist with regard to the criteria that must be satisfied by judicial systems, in countries that are constituted as democracies.

Among the internationally accepted basic documents issued thus far in connection therewith, we may refer to the aforementioned “Basic Principles on the Independence of the Judiciary,” which was ratified by the decision of the United Nations dated November 29, 1985 and numbered 40/146 and the “Minimum Standards of Judicial Independence” adopted by the IBA in 1982, and the “European Charter on the Statute for Judges” of the European Council, issued July 8–10,1998.

On the other hand, it is a natural requirement and, at the same time, a social obligation, for each sovereign country to do its best with regard to judiciary powers and functions, being the most important element of its sovereignty, and to form an organizational structure resolving any problems and complaints reported or foreseeable. This is to say that in designing a structural mechanism for Turkey, it is required not only that the standards imposed by the aforesaid basic documents are complied with but also that any problems reported or foreseeable are dealt with, and that a solution is sought that is fit and responsive to the characteristics, needs and requirements of the country.

Complaints, Requests and Suggestions Regarding the Judiciary in Turkey

The criticisms and complaints voiced by the national and international public regarding the judiciary power and functions in Turkey may be summarized as follows:

(i) Given that the elements (judges, prosecutors and lawyers) of the judiciary are different in nature, and that lawyers are organized in a separate professional organization composed of bar associations and the unions of bar associations, it is incorrect for judges and prosecutors to have only one single professional organization. The professional boards and organizations of judges and prosecutors should be separated.

In relation to the same point, it should be noted that making a separation between lawyers and prosecutors is entirely artificial, these two professional groups serve the same function of representing one side before the court; vesting a different status and range of powers in those who deal with the prosecution of crimes in the defense of the public is by no means fit and appropriate to the requirements of their functions, and it would be more appropriate and rational to group these professions according to their functions in the judiciary, not according to whether or not they represent the state.

(ii) The judiciary power is not fully independent (in structural, functional or personal terms), but has always been dependent upon the executive and legislative organs, and has even come under the tutelage of different (military or civilian) powers in the past.

(iii) The judiciary power is exposed to the influence of the executive organ. Though the roles and actions of the Minister of Justice and his/her Undersecretary in the Council of Judges and Prosecutors ("CoJP"), the executive organ interferes with the activities of the judiciary power.

(iv) The Ministry of Justice has influence, and even tutelage, over lawyers and their bar associations, which indeed should represent the fully independent element of the judiciary.

(v) The judicial bodies; the CoJP, the Court of Appeals (CoA),the Council of State (CoS) and their elements (judges and prosecutors) are not accountable for their functions, decisions and actions, and the prosecution and investigation powers and permissions granted to them, and the processes thereof, may cause them to morph into a privileged clan – or, at the very least, leads to a perception of them as such. This is why the powers vested in judicial bodies may, from time to time, be used arbitrarily, job duties may occasionally be performed arbitrarily or not as expected, and decisions and rulings may lack adequate justification.

(vi) The prosecution and defense sides are not at a balanced level, and prosecutors are granted more powers than lawyers. The functions of lawyers (particularly in the collection of evidence and free presentation of their defense to the court in civil and criminal cases) are restricted in favor of the judges and prosecutors and, in criminal cases and proceedings, prosecutors have a position superior to that of lawyers; they are close to the judges, and are even interwoven with them; for all these reasons, the principle of equality of arms has been imbalanced in favor of the prosecution side (prosecutor) at the expense of the defense side (attorney).

(vii) The judiciary organ is failing to render high-quality judicial services, and has become a burden and a cost, not producing any added value for society but having a detrimental effect on it.

(viii) The supreme courts are failing to perform their duties; a high workload is alleged as a pretext and excuse for this failure, and for their making a compromise in what the services expected from them require due to their significance and they tend to find palliative and personal solutions even where these are not in compliance with the law (as they are by no means accountable). This approach also prevents the creation of public awareness about the extent and significance of these judicial problems, and the finding of solutions to them in a timely manner.

(ix) The judiciary organ grinds slowly, it falls short in keeping itself up-to-date with the latest developments, and its decisions and rulings are not predictable and foreseeable but may vary according to persons and situations; it therefore lags behind the current changes in the country and in society, prevents the swift and effective conduct of governmental affairs and activities, and in some ways encumbers and impedes development.

(x) It is believed that in disputes between citizens and the state, the judiciary organ acts with an instinct to protect the state and public interests and, thus, when the counterparty is the public, the equality of arms is disrupted, with the judiciary organ tending to protect the government in preference to the public.

The information summarized in the preceding paragraphs is by nature not a determination as to whether these criticisms and complaints concerning the judiciary are correct or not, but only a determination as to the existence of such complaints. At this point, it should be remembered that some of these types of complaints, and others too, are expressed about the judiciary organs of other developed nations as well.

The broad range of criticisms concerning the judiciary as summarized above could probably be further increased or varied, but we believe that the points listed here are adequate for the formulation of a reasonable idea about the overall dissatisfaction level of society towards the judiciary organ.

The suggested solutions that have actually been put into words for the correction or remedy of such a wide range of criticisms and complaints about the judiciary organ are rather limited, and are far from being integrated in nature. These suggestions can be summarized, briefly, as follows:

(i) Justice and judiciary policy should be determined and formulated by social consensus and agreement and using an “arm’s length” approach, and the executive organ should not have a say alone. All differing and conflicting views and suggestions should be evaluated, and the financial means and human resources of the judiciary should be developed accordingly, so as to smooth the way for high-quality production of service.

(ii) The stage of formulation of justice and judiciary policy should be separated from the stage of formulation of executive decisions in keeping with said policy. In addition, these two stages should further be clearly separated from the judiciary organ's service production activities – i.e. from its operational aspects. As to regulations and activities regarding service production, the professional actors and their institutions and organizations should have a say and be responsible, but at the same time should be effectively accountable for the compliance of their activities and services with policies, principles and priorities.

(iii) So long as they are not entirely independent, the minister of justice and his/her undersecretary, appointed by the executive organ, should not be members of the CoJP and, particularly, should in no event be involved in or interfere with the appointment, assignment, disciplinary issues or promotion of judges; they should not have a say in or any effect on the council, and their roles and functions should be limited to making contributions and providing appropriate and adequate budgeting and ancillary services for the formulation of judicial policies.

(iv) The professional organization of prosecutors should be separated from that of the judges, and a separate professional organization should be established under the name of the "Supreme Council of Prosecutors."

(v) All transactions and decisions of the CoJP should be justified, and all of them should be open to appeal, or other resorts to the jurisdiction. This appeal or resort should be directed to- wards a special and specialized place of jurisdiction as- signed in strict conformity with the characteristics of the CoJP and its functions, and should by no means be the administrative or civil courts managed or run by judges appointed directly by the CoJP.

(vi) The tenure of judges (in terms of job security, place of assignment and revenues) should be further strengthened and, accordingly, judges should not be appointed to a place other than their existing place or court of assignment without their consent.

(vii) The members of professional organizations of judges and prosecutors, the judges and prosecutors themselves, and the members of supreme courts should be selected on the principle of merit and as a result of public debate; politicians should in no event have any say or influence thereon. All elements of the judicial organ, including judges, prosecutors, lawyers and ancillary service providers, should be subject to performance management and should be effectively accountable for their acts.

(viii) Supreme courts should not be entrusted with responsibility for judicial accountability and the investigation of their own members in relation to it, and decisions or rulings thereon should not be final but should be open to appeal. This appeal or resort should also be directed towards a special and specialized place of jurisdiction, assigned in strict conformity to the characteristics and significance of these organs and their members, and, accordingly, judges on the bench and those prosecuted should not be colleagues in the same organ.

(ix) Civil and criminal trial processes should be revised, and laws dealing with civil, criminal and administrative trial procedures should be compared with those of contemporary and advanced systems, so as to be able to offer the best and the most cost-effective services to system users, and should then be developed in such a manner as to reach said levels of services provision.

It is, however, unequivocally obvious that such wishes and suggestions are not adequate to respond to and resolve all criticisms and complaints as a whole; they are incidental, and tend not to be focused on resolving the root causes and underlying problems but rather on diminishing the complaints resulting therefrom. It is invariably gleaned from social experiences that some of these solutions that are put into practice fail to fully correct and remedy the related complaints and that, what is more, they pave the way for other and even more serious complaints. For example, the 1961 Constitution that provides for the election of one-third of eighteen members of the Supreme Council of Judges (“Supreme CoJ”) by judges, one-third by the legislative body and one-third by the CoA was amended in 1971 to create a system of election of all of the members of the Supreme CoJ by the CoA, and during the 1971–1981

period, the Supreme CoJ elected members of the CoA: this structure led, in turn, to domination of the whole judiciary by the CoA, thereby creating a privileged judicial caste in the judiciary. Thereafter, in 1981, with the intention of limiting the domination of the CoA, the CoS was authorized to appoint members to the Supreme CoJ, thereby sharing the domination between these supreme courts. But then, so as to create balance therein, the minister of justice and his/her undersecretary were also made natural members thereof, thus allowing the direct involvement of the executive organ in the judiciary. However, the real root cause of the problems and complaints faced in those days was the fact that the independence of the judiciary led to arbitrariness and deterioration in judicial services, solely due to negligence of the accountability of the judicial organs. The solutions brought in after 1981 in the name of judicial reform have also remained only incidental and, thus, have been rendered ineffective. The intention to make the judiciary accountable that lies behind these inadequate and unsuccessful amendments has, in actual fact, resulted in an increase in the weight of the executive organ in the judiciary. All of these experiences that have accumulated since 1961 clearly reveal that we have to approach the problems of the judiciary with a holistic view, and must produce solutions accordingly.

The Need for a Structure Fit to Produce High-Quality Services:

Another criterion required to be taken into consideration and to be underlined in the course of the development of suggested solutions is that the suggested organizational structure should by all means support the positive cooperation and solidarity needed for high-quality service production.

The existing superstructure of the judicial bodies and organizational units does not support solidarity, positive cooperation or efficient service production among professionals, on the contrary, it encourages them to disregard and exclude each other, to act alone, and to refrain from corporate and individual accountability, thereby causing a paralyzed, contradictory and non-compliant relationship between them. For instance, even though lawyers are said to be an entirely independent constituent element of the judiciary, the Union of Turkish Bar Associations (TBB) is under the tutelage of the Ministry of Justice in terms of personnel affairs. This is to say that the Ministry of Justice renders decisions on the personal affairs of lawyers. The Ministry of Justice, which is an administrative organ that is part of the executive power, manages and represents the CoJP, and further has the authority to appoint and the final say in the appointment of judges to the administrative courts having jurisdiction in the judicial review of the Ministry of Justice. Judges of administrative courts, who are theoretically at an equal level with lawyers in the three pillars of the justice system, are entrusted with the task of supervising and reviewing the administrative decisions taken by the Ministry of Justice concerning lawyers. Furthermore, lawyers have the right to resort to the courts against decisions or actions concerning their personal affairs, while judges and prosecutors have no such right. Accordingly, legal channels and remedies are available against decisions of the Ministry of Justice and the TBB with respect to the lawyer element of the judiciary but, on the other hand, no such legal channels and remedies are available against decisions taken by the CoJP concerning judges and prosecutors, and the decisions of the CoJP are final.

One of the problems that is generally contentious among legal professionals, that creates doubts about the system, judges and prosecutors on the part of both the professionals and citizens, that wears away confidence in the judiciary, and that is encountered and criticized in almost each incident and almost every day, is that in court trials, prosecutors who represent the public share the same bench as judges, and they are in a separate, superior position in comparison with the lawyers representing the defense side. This causes further contests and conflicts among professionals and judicial organs and units from time to time.

It is this type of organization, and the complex, unprincipled and contradictory order of interrelations caused by such organization, that inhibits the positive cooperation and atmosphere of solidarity required for efficient service production among legal professionals.

In such an environment, which is by no means fit for high-quality service production, it is not surprising to hear complaints about failures of the judiciary in the production of good services, or that it produces injustice itself, rather than advocating and administering justice.

Another important problem is that the TBB, the professional organization of the lawyer element of the judiciary, and the CoJP are disconnected from each other to such an extent as to prevent the cooperation, solidarity and even the basic communication needed for the performance of their functions. Hence, cooperation and interrelations between these two organizations, in the absence of the corporate link required for at least basic coordination between them, are fully dependent upon the personal initiative of their management.

The Ministry of Justice, being in direct and close relations with the CoJP, and despite having an administrative tutelage and custody role over the TBB, is not entrusted with the task or role of creating synergy and coordination between these two fundamental organs of the judiciary towards the achievement of a joint objective. A tangible example of the inefficiencies caused by this problem is the judicial reform initiatives The Ministry of Justice seeing itself as the owner of the judicial reform strategy works but considering the TBB as one of the affected stakeholders, has given weight to its ministerial bureaucrats and judges and prosecutors and has excluded the lawyers (and others) from reform preparations. Leaving aside the fact that service providers can by no means take any reform steps in services alone, without even understanding the needs, choices and demands of service recipients, it may easily be concluded that to exclude from the judicial reform initiative one of the segments in charge of providing legal services is in no event a healthy choice, and will surely lead to further worsening in the very areas that are under contemplation for reformation and rehabilitation.

Such a mechanism can under no circumstances be expected to realize judicial reform that is capable of resolving complaints, fulfilling the demands and wishes of society, and being adopted and respected both locally and in the international arena. This unhealthy structuring is directly responsible for the limited conclusions derived from the reform initiatives taken to date, and for their failure to make the desired improvements and rehabilitations in the judicial system. Due to this structure, the social segments seeking justice have been left out of the reform process and, as a result, the solutions suggested – for problems that are perceived only partially and erroneously, in reliance upon only the complaints of the judges and prosecutors – cannot be successful. In the end, regulations have been issued and enacted that only strengthen the status of segments failing in judicial services, and enhance and upgrade their personal affairs, while on the other hand reducing their duties and responsibilities and eliminating their accountability to a great extent.

The lack of a corporate structure or an environment of cooperation and solidarity that could bring service-providing professionals together, even in the production of such an extremely important document as part of a reform strategy on this most urgent and vital need of society is a critical and extremely upsetting and worrisome picture for Turkey.

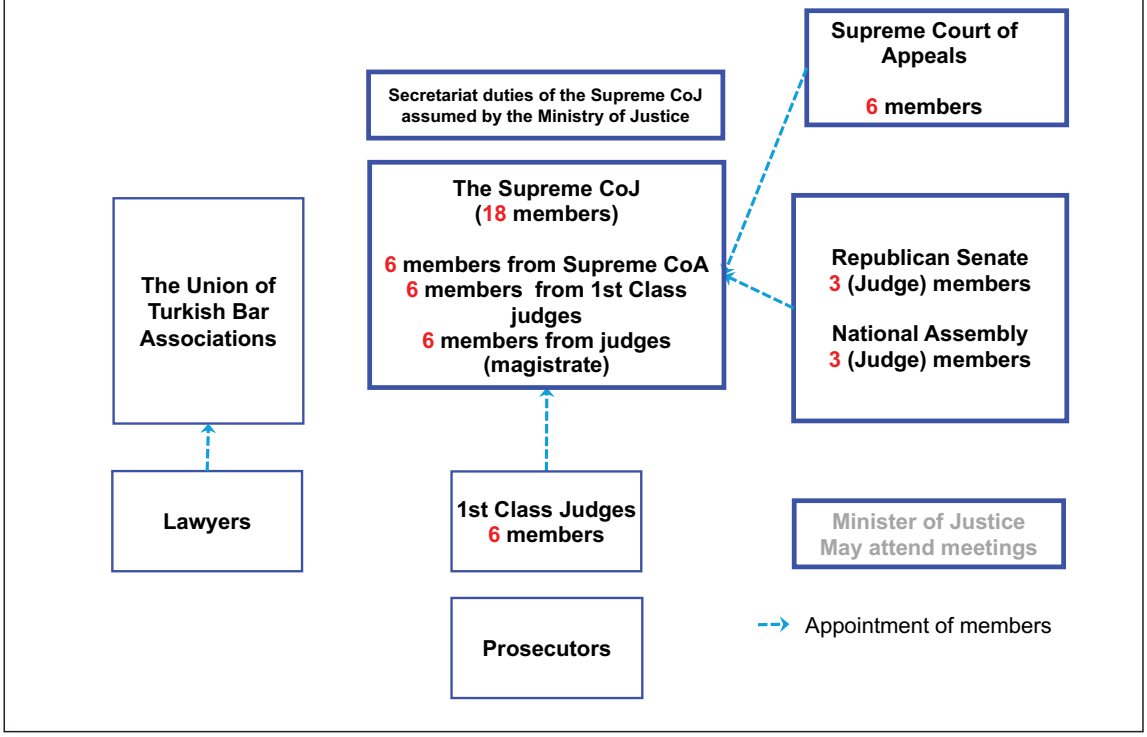
Amendments adopted as a result of the 2017 referendum are in no manner adequate or appropriate for the improvement of this picture. The increase of the weight and influence of the executive organ in the CoJP and the reauthorizing of the legislative organ to appoint members thereto, although this system was repealed in 1971, demonstrate that attempts to solve the existing problems will be made through individuals elected to the CoJP. However, it may easily be contemplated that these compromises made from the principle of the separation and independence of the judiciary from the executive and legislative organs will further increase the existing problems, rather than rehabilitating and curing the diseases, just like all of the previous amendments. Indeed, the reduction of the number of chambers in the the CoJP from three to two, the removal of the word “Supreme” from its name and the re-emphasizing of its “impartiality” principle, which is already an imperative requirement thereof, cannot be considered as reformative steps. What is more, the election of members of the CoJP by the legislative and executive organs is rather a worsening, which is contradictory to the basic principles of the independence of the judiciary adopted by the UN.

A Brief History of the Judiciary Superstructure in Turkey:

Turkey has been of two minds for a long time concerning the judiciary and its superstructure, and has still not been able to establish an ideal, robust and sustainable superstructure. The judiciary, which must absolutely remain out of politics, and must even supervise and oversee politics, has thus far remained at the very epicenter of the struggle between the political parties and sides seeking to dominate and gain control of governmental power. Political power struggles not focused on high-quality service production have resulted in an increase of the influence of the executive organ over the judiciary. This can easily be seen from the constitutional amendments in the recent history of the country.

According to the 1961 Constitution, and Law No. 45 dated 22 April 1962, enacted thereunder, the Supreme Council of Judges (Supreme CoJ) was composed of 18 members, six of whom were elected by the CoA from among its own members, six members by the 1 st Class judges from among themselves, three members by the Turkish Grand National Assembly (TGNA), and three members by the Republican Senate from among candidates who had served as a judge or magistrate. The Supreme CoJ elected its own chairperson, and its decisions were open to appeal and other remedies. The minister of justice could, if he/she so wished, attend the meetings of, but could not vote in, the Supreme CoJ.

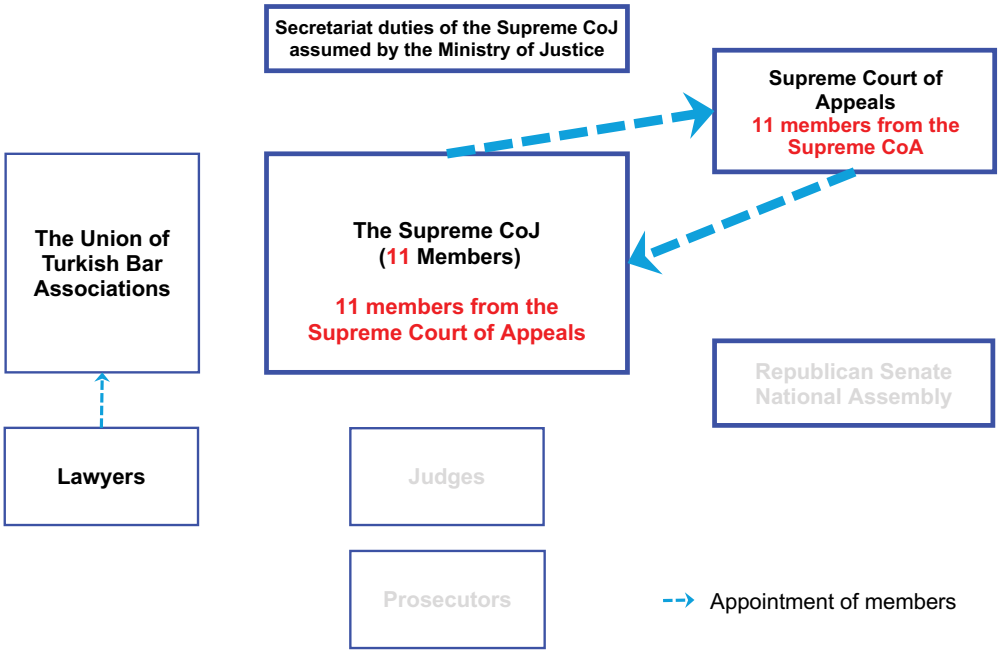
Figure 1: Formation and election of the Supreme Council of Judges according to 1961 Constitution:



By the constitutional amendments adopted in 1971, the number of members of the Supreme CoJ was reduced to 11, and it was decided that all of its members would be elected by the CoA from amongst its own members.

Figure 2: Formation and election of the Supreme Council of Judges after 1971 amendments:

The Supreme Council of Judges elects members of the Supreme Court of Appeals, and the Supreme Court of Appeals elects members of the Supreme Council of Judges!



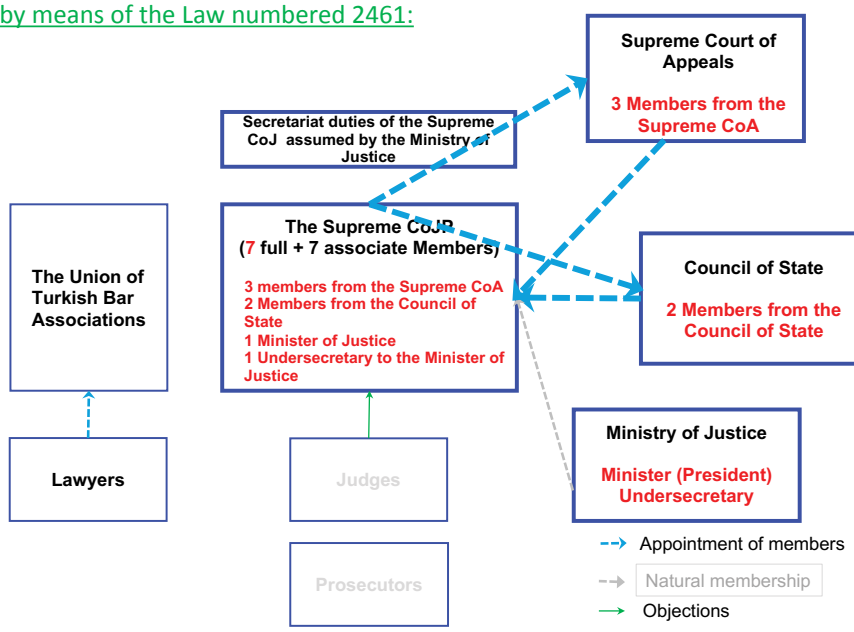
Under the conditions wherein the Supreme CoJ elects members of the CoA and the CoA elects members of the Supreme CoJ, a cooptation status emerged. As of that time the Supreme CoJ has not had its own secretariat, and this service has been performed by personnel of the Ministry of Justice. This picture has been criticized due to the Supreme CoJ falling under the influence of the Ministry of Justice.

Through the amendments made in 1971, a Supreme Council of Prosecutors ("Supreme CoP") was also formed and defined as a Constitutional institution under Article 137. Just as in relation to the personal affairs of judges of courts prior to the 1961 Constitution, certain boards belonging to the Ministry of Justice made decisions about the personal affairs of prosecutors also prior to the 1971 amendments. The Supreme CoP was formed by seven full and two associate members, comprising the minister of justice and his/her undersecretary, the personal affairs general director and chief public prosecutor, as well as three full and two associate members elected by the CoA.

Then, through Law No. 2461 enacted in 1981 during the September coup administration, the Supreme CoP was merged with the Supreme CoJ to form the Supreme Council of Judges and Prosecutors (Supreme CoJP); the minister of justice and his/her undersecretary were made natural members of the Supreme CoJP and its decisions were closed to any appeals or other remedies. Three full and three associate members of the Supreme CoJP were appointed by the president from among candidates nominated by the CoA from among its own members, and two full and two associate members thereof were appointed, again by the President, from among candidates nominated by the Council of State from among its own members. The minister of justice was the chairperson of this council, while its vice-chairperson was elected by the council's members. This structure was then fully reflected in the 1982 Constitution.

Given the absence of separate premises and the fact that it operates in the same offices as the Ministry of Justice, the fact that the secretariat is dependent on the ministry and it was unable even to hold a meeting in the absence of the minister of justice or his/her undersecretary, the Supreme CoJP has become dependent upon the attendance of the minister of justice at its meetings and, thus, upon the heavy tutelage of the executive organ in terms of its functionality. No right of action or remedy is granted against decisions of the Supreme CoJP, but a right of objection to a board of objections formed by both the full and associate members, and rendering its decisions with the participation of at least eight members under the chair of the minister of justice, was available. The decisions made by such board, upon objection, were final.

Figure 3: Formation and election of the Supreme Council of judges after the amendments made in 1981 by means of the Law numbered 2461:

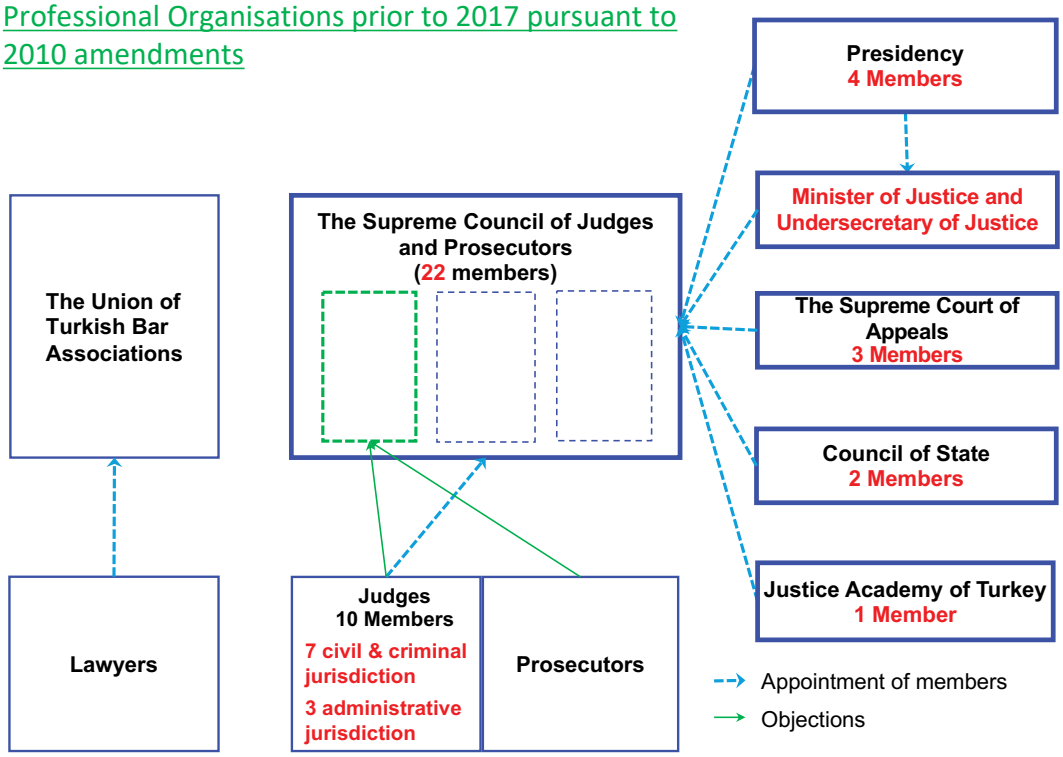


Until 1981, legal resorts and remedies were available against decisions of the Supreme CoJ and the Supreme CoP. An attempt was made to amend the first paragraph of Article 144 of the 1961 Constitution with a view to repealing this right, but this was nullified by the Constitutional Court on the grounds that it was contrary to the Republic and its fundamental principles and human rights and, therefore, it could not even be proposed. In its decision of 27 January 1977, the Constitutional Court states that the Supreme CoJ decisions being closed to judicial review did not accord with republican principles, and was in disharmony with human rights, the state of law and the principle of equality before law. The Constitutional Court further clearly stated that such a rule could not be proposed, nor could it be brought in even by amendment to the Constitution. Accordingly, the 1961 Constitution provisions and principles relied upon in the aforesaid decision of the Constitutional Court were fully transferred to the 1982 Constitution as well, with changes only to article numbers.

However, the provision stating that “Decisions of this council cannot be appealed by any other authority,” which was found by the Constitutional Court in its decision of 27 January 1977, to be contrary to both fundamental republican principles and human rights, the state of law and the principle of equality before law was, unfortunately, added thereafter as a special clause to Law No. 2461 and to the 1982 Constitution; thus, this provision, which is contrary to the fundamental principles of the Constitution, was imposed upon the nation by the coup plotters. Therefore, the decisions of the Supreme CoJP have been closed to any appeals or other resort since 1981.

As per the amendments made in 2010, the number of members of the Supreme CoJP was increased to 22, and in addition to the minister of justice and his/her undersecretary, out of 20 elected members thereof, four were elected by the president, three by the CoA, two by Council of State, one by the Justice Academy of Turkey, seven by civil and criminal jurisdiction judges and prosecutors from among themselves, and three by administrative jurisdiction judges and prosecutors from among themselves. The Council operated in three chambers, and its chairperson and representative was the minister of justice, as in the past.

Figure 4: Structuring and formation of the Judicial Professional Organisations prior to 2017 pursuant to 2010 amendments



Ten out of 22 members of the Supreme CoJP, not being supreme court members, its vice-chairperson and department heads being elected by its elected members, and the remedy of appeal to the Council of State against the Supreme CoJP's decisions as to the penalty of termination of the office of a judge constituted positive developments. However, as the decisions as to judge and prosecutor investigation permissions were made by the minister of justice, as and in the capacity of chairperson of the Supreme CoJP, such decisions were not subject to appeal.

As per Article 159 of the Constitution, amended by the 2017 referendum, CoJP is now composed of 13 members and operates in two chambers. Four members of the Council are elected by the president from among 1st Class judges and prosecutors, three members by the CoA from among its own members, one member by the CoS from among its own members, and three members by the TGNA from among academicians and lawyers. The chairperson of the CoJP is the minister of justice. The undersecretary of the minister of Justice is also a natural member of the council.

Figure 5:Structuring and formation of the judicial professional organizations subsequent to 2017 amendments executed through the 2017 referendum:

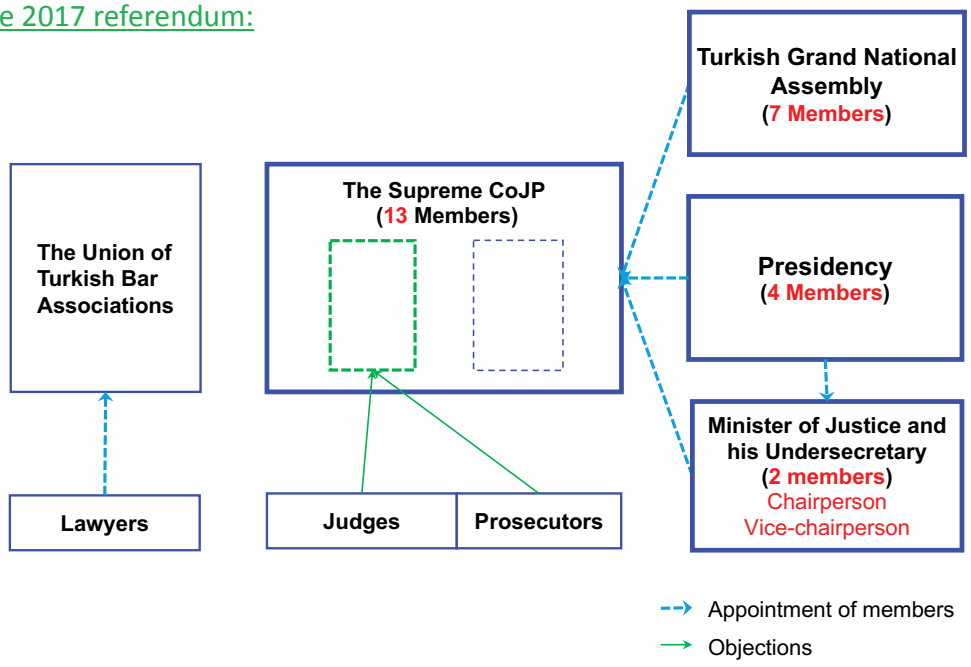
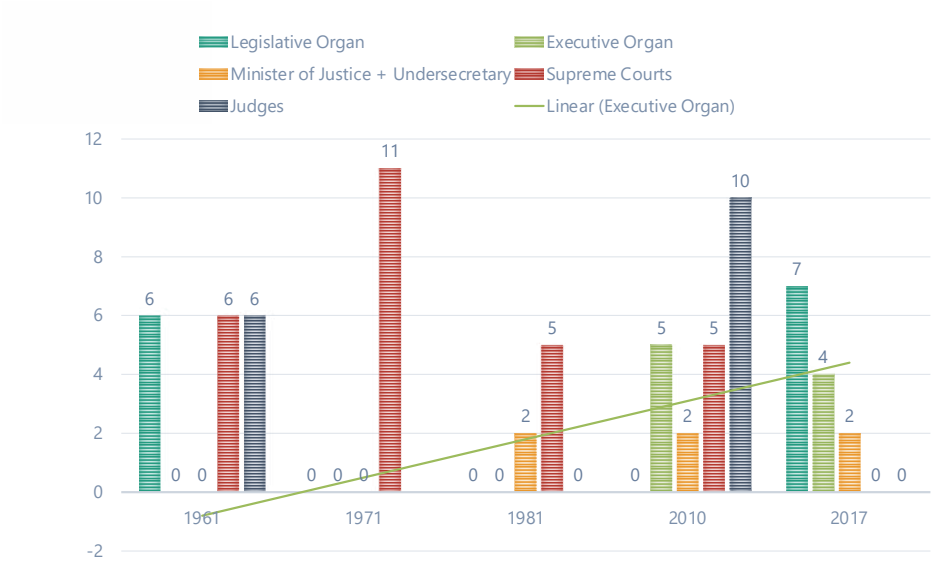


Figure 6 shows that the influence of the executive organ on the judiciary organ has had a tendency to increase since 1981. Thus, while the members of the council were elected from lists drawn up by their own colleagues prior to the referendum, since the referendum the members of the Supreme CoJP appointed by the TGNA have, in fact, been elected by the votes of the AK Party and the MHP and this fact alone indicates that the structure of the judiciary is prone to being captured and invaded by politics.

Figure 6: Distribution of members of the judiciary superstructure



As Figure 6 shows, a comparison of the situations prior to and after the referendum clearly reveals that at present, the superstructure of the judiciary is not appropriate and fit for the production of high-quality services or for the establishment of justice and can easily be taken hostage. In fact, a political party that may elect the president and that is entitled to appoint even one member to the CoJP in the TGNA will have the opportunity to seize control of the CoJP and, thus, to identify, appoint and choose prosecutors and judges who are authorized to accuse, to try and to rule on criminals in the name of the Turkish nation.

Its functioning being dependent upon the approval and participation of the Minister of Justice and his/her Undersecretary, members of the executive organ are vying the second time for domination and control over the CoJP.

The Council of Judges and Prosecutors is Not Accountable and This Fact Constitutes Contravention of the Principles of the Constitution With Respect to the Republic, Equality Before the Law, Rule of Law and Human Rights

The CoJP, constituting the superstructure of the judiciary, has not been subject to any judicial review or any accountability before the courts since 1981.

The judicial review mechanism that existed prior to 1981 was repealed by a law enacted during the coup d'état period in 1981. Throughout the period starting with Law No. 2461, which was passed in 1981 and fully reflected in the 1982 Constitution, the CoJP has not been accountable to the court; this was the situation prior to the referendum, and it has remained the case after the referendum too. For this reason, no judicial review or remedy is available against the great majority of the decisions of the CoJP, other than its exceptional decisions as to the penalty of termination of the office of a judge, not including termination of office due to membership of FETÖ.

As a result, the decisions of the CoJP are devoid of the transparency and justification required in order to demonstrate their correctness to other relevant parties and to the public. For instance, in summer season appointment decrees, only the name and surname of the appointed judge or prosecutor, and the place to which they are appointed, are stated, and no justification is given as to whether the appointment has been made upon demand or upon being deemed necessary or as a requirement of a planned rotation; or as to the compatibility of the competence and experience of the appointed judge or prosecutor with the needs of the place to which he/she is appointed. Likewise, some judges are appointed directly to a court with permanent authorization, while others are appointed only to provinces, whereupon the provincial justice commission is authorized to determine and decide their places of assignment, but this differential treatment is never justified or clarified. As a sanction inflicted as a result of disciplinary investigations, some judges or prosecutors are appointed to other courts attributed with less importance, but as the grounds and rea- sons for this are not clarified, such appointments lead to speculation and gossip. However, neither the parties affected therefrom nor the public are equipped with any judicial remedy against such decisions that deeply affect the members of the judiciary and their professional duties and activities.

This problem, which could easily be prevented entirely through the establishment of a judicial review and remedy mechanism, is one of the most critical causes of erosion of confidence in the judiciary.

As is also stated in the Constitutional Court's Ruling No. 1977/4, in Case File No. 1976/43, dated 27 January 1977, the lack of a judicial remedy against the decisions of the CoJP is in conflict with the "republican" regime of the state, and breaches the principles of the Republic, equality before the law and the state of law, as well as those of human rights in general. Relevant sections of the aforesaid ruling of the Constitutional Court issued in 1977 are quoted in the box below.

Quoted from the decision of the Constitutional Court dated 27.01.1977

The first paragraph of Article 144 of the 1961 Constitution was revised to state that "The Supreme Council of Judges makes the final decisions about the personal affairs of judges of the courts of justice.

No appeal is permitted against these decisions with other juridical authorities. However, the minister of justice, or the judge affected therefrom, may request review of the decisions as to disciplinary matters and termination of office a single time."

[…..]

On the question of whether the sentence "No appeal is permitted against these decisions with other juridical authorities" is in compliance with the fundamental characteristics of the Republic of Turkey or not:

The fundamental characteristics of the Republic of Turkey, forbidden through Article 9 of the Constitution to be changed or revised, are clearly described in Article 2 of the Constitution, and also in the Introduction section referred to in Article 2. For this reason, the prohibition set forth in Article 9 covers and extends not only to the change of the word "Republic", but also to the aspects and characteristics clearly described in Article 2 of the Constitution, as well as in the Introduction section referred to in Article 2.

Article 2 of the Constitution defines the Republic of Turkey as a national, democratic, laic-secular and social state of law that relies upon human rights and the fundamental principles set forth in the Introduction thereof. Therefore, a state alienated from and devoid of these principles can by no means be accepted or classified as a "Republic" as defined in the Constitution.

[……]

That the Supreme Council of Judges is an administrative organ and its decisions are, therefore, administrative decisions has clearly been stated, freely of any doubt, in both the legislative instruments and the statutory documents pertaining to the foundation of the Supreme Council of Judges, in the jurisprudence, in court sentences and judgments, and, particularly, in Ruling No. 1963/113, in Case File No. 1963/169, dated 15 May 1963, of the Constitutional Court. Prior to the revision made to Article 144 of the Constitution, lawsuits brought against decisions of the Supreme Council of Judges were tried and decided by the Council of State. This amendment to the Constitution has not changed the administrative character of the council or its decisions and, in addition, Article 143 of the Constitution amended by Law No. 1488 has made the administrative character of the Council and its decisions even more obvious. Indeed, while the minister of justice was only entitled to participate in the meetings of the Council prior to the revision brought about by Law No. 1488, he/she was authorized by the amendments made to Article 143 of the Constitution to chair and head the council if and when deemed necessary. Given that an executive officer cannot be chair and preside over the Court, it is impossible to accept the Supreme Council of Judges as a judicial board, or to accept its decisions as judicial rulings or verdicts.

As already stated, Article 2 of the Constitution defines the Republic of Turkey as a "national, democratic, laic-secular and social state of law that relies upon human rights and the fundamental principles set forth in the Introduction thereof".

a) In Terms of Human Rights:

[….] Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides that: "In the determination of their civil rights and obligations, or of any criminal charge against them, everyone is entitled to a fair and public hearing within a reasonable time, by an independent and impartial tribunal established by law."

Article 2 of the Constitution clearly declares that the Republic of Turkey has relied upon human rights and has, accordingly, imposed these rules in its Articles 31 and 114.

For these reasons, the rule in dispute preventing the judicial review of decisions of the Supreme Council of Judges is in conflict with the principles of human rights.

b) In Terms of State of Law:

One of the fundamental characteristics of the Turkish Republic is that it is a "state of law". This characteristic is not only explicitly stated in Article 2 of the Constitution but is also transformed from an abstract concept into a solidified rule by provisions of other articles thereof.

As also described in other decisions of the Constitutional Court, a state of law means a state that shows respect to and protects human rights; establishes a legal order fit to and appropriate for justice and equality in social life; deems itself obliged to maintain this order; complies with the general legal rules and the Constitution in all of its acts and attitudes; and opens all of its transactions and actions to judicial review. In fact, judicial review is the fundamental element that stands as an assurance of compliance with all other elements of the state-of-law principle. Because it is the judicial review itself that is considered as the power which dissuades a public administration that does not show respect for human rights, which does not comply with the law and the Constitution in its actions and decisions, from such choices, and which forces the public administration to remain within the limits of legitimacy and legality.

The rule contested in our case abolishes all kinds of reviews and audits and, particularly, judicial review, and deprives judges of any legal assurance. In a state where judges are deprived of the right to resort to judgement, no one can say that individuals have legal assurance.

A judge against whom a complaint is filed, or into whom an investigation is commenced upon an audit, may easily be dismissed through a decision of the Supreme Council of Judges, but he/she cannot resort to any legal remedy against such a decision. This rule is in all aspects unlawful and contra legem. For these reasons, the lack of the right to resort to legal remedies against decisions of the Supreme Council of Judges runs counter to the state-of-law principle of the Republic.

c) In Terms of Equality:

One of the fundamental principles of the state of law is equality.

In its Ruling No. 1/21 dated 19 April 1966, the Constitutional Court states that: "The state of law is based upon the rule (supremacy) of law principle. Equality before the law, i.e. equal protection of the law, is an essential element of this fundamental principle. Such a concept refutes all kinds of privileges." It is unequivocally clear that the rule contested in our case falls contrary to the equality principle.

[…..]

In sum, the sentence " No appeal is permitted against these decisions in other juridical authorities." preventing any legal remedies against the decisions of the Supreme Council of Judges, as contested in our case, acts contrary to human rights and state-of-law principles, which are listed among the fundamental principles of the Republic of Turkey; therefore, it is covered by the prohibition cited in Article 9 of the Constitution, which states that the Constitution "cannot be amended or revised and cannot even be proposed to be amended or revised," and, for these reasons, it is unconstitutional in all respects.

The provision “No appeal is permitted against these decisions by other juridical authorities”, which was previously nullified by the Constitutional Court with its aforesaid ruling of 27 January 1977, on the grounds of being in contradiction with the fundamental principles of the Republic and the Constitution, i.e. against the principles of state of law and equality before the law and against human rights, was, thereafter, imposed upon the nation by the 1982 Constitution in the atmosphere of 12 September.

The formation of a gray zone beyond the reach of judicial review in a state adopting the principle of equality before the law can in no case be accommodated by the state-of-law principle of the country. Furthermore, as also stated by the Constitutional Court, the Supreme Council of Judges, being a judicial organ and all or the majority of its members being lawyers, cannot ever justify the exclusion of its actions and decisions from the scope of the judicial review principle.

The Council of Judges and Prosecutors is Dependent upon the Executive Organ in Practice

During the referendum process, a broad segment of the population cgave voice to very serious concerns as to independence with regard to the dedeamendment made in Article 159 of the Constitution.

In his article published in the magazine Güncel Hukuk under the heading “Judiciary in the Clamp of Politics”, Prof. Dr. Köksal Bayraktar writes: “To adopt a new system to be entirely dominated by the political power by protecting and maintaining the chairpersonship of the minister of justice and the deputization of the Minister by his/her undersecretary in meetings when the minister of justice is absent, which has thus far always been criticized, can, I should say, not ever be described by any words other than entering into a grip.”

Similarly, concerning the amendments made in the aforesaid Article 159, the TBB says in its “Motion on Constitutional Amendments” (Ankara, 2016, page 37) “according to the […] approach put on the agenda by the motion on constitutional amendments, the judiciary is pushed away from being a ‘Power’ operating in accordance with the ‘Separation of Powers’ principle and, particularly, standing as an assurance mechanism for citizens against the overwhelming strength of the executive organ, and is redesigned almost as a subject of the bureaucratic organ, and reporting to the executive organ.”

Likewise, lawyer Berra Besler has also expressed her concerns in “[…] Assessment of Motion on Constitutional Amendments […]”(Ankara, 2016, page 12) as follows: “the council […] whose number of members is reduced to twelve […] is chaired and headed by the minister of justice. The remaining eleven members are contemplated to be selected and appointed by the president and the TGNA. Considering the equation and relationship between the president and the majority in the TGNA, the Supreme CoJP will also enter under the tutelage and custody of the executive organ. Considering the powers vested in the Supreme CoJP, it is unequivocally clear that the whole judiciary system, also including the Supreme Court of Appeals and the Council of State, will enter under the tutelage and custody of the executive organ.”

However, the aforesaid Article 159 about which these serious concerns have been expressed has been fully adopted and put into force in its criticized form and, thus, all of the members of the CoJP are now selected and appointed by the legislative and executive organs.

Given that the CoJP cannot make any decisions without the participation and approval of the minister of justice, or his/her undersecretary, being a natural member and the chairperson of the Council, and that it is stated in the amended form of paragraph 7 of Article 159 of the Constitution that the CoJP is to be managed and represented by its chairperson, i.e. the minister of justice, it is clear that the CoJP is, in fact, dependent upon the executive organ. Pursuant to paragraph 4 of Article 3 of the Law on the Supreme Council of Judges and Prosecutors numbered No. 6087, the deputy chairperson to be elected by its General Assembly is entrusted with the tasks of chairing the meetings not attended by the minister, and using the powers delegated to him/her by the minister. Although the CoJP has a sound grasp of the professions of judge and prosecutor, through its making of decisions regarding their recruitment, appointment, promotion and exchange of offices, and of the establishment and closing of courts, as well as determination of the scope of their duties and supervision of them, its members are still chosen and appointed by the legislative and executive organs; therefore the Council stands with arms folded, and it can by no means make its decisions or take any action without the participation and approval of the executive organ.

Taking into account the fact that the CoJP is clearly dependent upon the minister of justice and his/her undersecretary in performing its functions, it cannot even be argued that the members of the CoJP may, or can, act independently after being elected by the legislative and executive organs, and are not legally an extension of the executive organ. Hence, as also pointed out by Berra Besler, due to the influence of the executive organ on the elections held in the TGNA, it cannot be denied or ignored that the CoJP has become an extension of the executive organ.

Under these circumstances, we have to accept that the formation, composition and functioning of the CoJP do not comply with the standards and criteria that “at least half of its members should be elected by judges,” and that “it should not be dependent upon the legislative and executive organs,” as adopted in the aforementioned documents of the UN and the IBA and as also referred to in the EU Charter.

The Lack of Judicial Review of the Council of Judges and Prosecutors Injures the Independence of Judges:

Included among the factors strengthening the individual independence of the members of the judiciary are the transparency of decisions of the judicial organs and the existence of an effective internal auditing mechanism against these decisions, as well as the possible application of legal remedies against them. However, the provision that "No judicial review or remedy is available against the decisions of the CoJP, other than its decisions as to the penalty of termination of office" contained in Article 159 of the Constitution has closed all decisions of the Council of Judges and Prosecutors, apart from its decisions as to termination of office, to judicial review mechanisms.

Firstly, the restriction of judges' and prosecutors' means to object against decisions made and actions taken concerning them results in the weakening, and even the elimination, of the tenure and employment assurance of judges.

Article 138 of the Constitution provides that "Judges shall be independent in the discharge of their duties; […] No organ, authority, office nor individual may give orders or instructions to the courts or judges relating to the exercise of judicial power, send them circulars, nor make recommendations or suggestions," while Article 140 states that "Judges shall discharge their duties in accordance with the principles of the independence of the courts and the security of the tenure of judges." But these provisions are not adequate to assure the independent and impartial discharge of duties by judges who do not have the right of judicial review and remedy against appointment, career, personal affairs, assignment, and disciplinary decisions that may be made concerning them.

While judges may easily be appointed to another place against their wishes, and the scope of their duties and powers may be changed, or the cases tried by them may be delegated to another judge through the closing of the first judge's court, a provision that no one may give orders or instructions to courts or judges cannot give any assurance of the independence and impartiality of judges. A judge willing to substitute for another and to try and rule on their cases will always be available. Such judges may even not deem it necessary to ask in which direction they are expected to rule and judge. And given that the new judge is in a position to know or estimate how to protect their job position and title by ruling and judging in a particular direction, or in favor of particular interests, they will by no means be able to rule independently and impartially because, in this scenario,

they will perform their duties as a judge not independently and impartially but under political influences and bias, in line with the basis of ruling that will least affect them, or will help them most in progressing in their career. Under such circumstances, it should be admitted that the new judge will also be obliged to surrender to the probable wishes and expectations of the authorities having the power to make decisions about them and their career.

At this point, it should also be taken into consideration that a great majority of our valuable Turkish judges are sons/daughters of Anatolia who are not financially strong enough to resist political intent and pressures directed towards them, and are economically dependent upon their position and wages paid therefor; they dare not lose their position, and are unable to stand against even a small change of place of assignment.

For these reasons, even if it is assumed that it will make the most correct and fairest decisions, the fact that the decisions of the CoJP are immunized against and exempted from judicial review and remedy is alone enough to restrict the independence of judges.

Now, therefore, it is a reality that must be accepted that judges by no means feel themselves to be independent against the fairly broad powers and authorities of the CoJP, which is immunized against and exempted from judicial review and remedy, and even if no one attempts to give orders and instructions to them, the rule set down in Article 138 of the Constitution stating that “Judges shall be independent […] and no organ, authority, office, or individual may give orders or instructions to the courts or judges” will, in any event, remain unfulfilled.

International Treaties and Documents Require Judicial Review of the Council of Judges and Prosecutors:

The “European Charter on the Statute of Judges” dated 8–10 July 1998, which was drafted with the participation of delegates from the European member states and representatives of the Ecole de la Magistrature of France (ENM), European Association of Judges (EAJ) and MEDEL (European Association for Democracy and Freedom) from France and was adopted by the European Council in 1998, sets down and regulates the commonly accepted standards as to the legal status of judges. The minimum standards adopted by this Charter in connection therewith may be briefly summarized as follows:

a) In paragraph 1. 3 of Article 1 regarding “General Principles” it is stipulated that in respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority, independent of the executive and legislative powers, within which at least half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.

As is seen therein, the members to be elected thereto are not only required to be from the profession of the judiciary but are also required to be elected by their peers, following methods guaranteeing the widest representation of the judiciary. Another important criterion is that the authority making these decisions must be totally independent of the executive and legislative powers.

In Turkey, the CoJP perform this function. Prior to the referendum, the majority of the members of the CoJP were elected by their peers, and the system was more compatible with the European Charter on the Statute for Judges but after the referendum, six of the thirteen members of the CoJP were determined by the legislative power and seven by the executive power; thus, the earlier compatibility has been entirely eliminated. This is to say that the method of formation of the CoJP is not in compliance with Article 1.3 of the Charter. On the other hand, given that the roles of the minister of justice and his/her undersecretary, as well as those of various other members of the CoJP, are determined by the executive power, and the roles of certain others by the legislative power, the system is incompatible with the criterion of “being independent of the executive and legislative powers” also set down by the Charter.

b) According to Article 1.4 of the European Charter on the Statute for Judges, the statute gives to every judge who considers that their rights under the statute are threatened or ignored in any way whatsoever or, more generally, their independence, or that of the legal process, the possibility of referring to an independent authority with effective means available to it of remedying or proposing a remedy.

Given that such a threat may emerge through the decisions of the CoJP against judges, in order to respond to or overcome this threat, a juridical authority entrusted with undertaking, and authorized to undertake a judicial review of the actions and decisions of the CoJP is an absolute requirement.

However, the provision “No judicial review or remedy is avail- able against the decisions of the Council of Judges and Prosecutors, other than its decisions as to penalty of termination of office” of Article 159(10) of the Constitution, allows judges to make reference to remedies only against decisions as to their termination of office, and this is clearly contrary to the proviso of Article 1.4 of the Charter.

c) According to Article 5.1 of the European Charter on the Statute for Judges: “The dereliction by a judge of one of the duties expressly defined by the statute may only give rise to a sanction upon a decision, following the proposal, the recommendation or the agreement of a tribunal or authority, composed at least of one-half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation and the decision of an executive authority, of a tribunal or of an authority pronouncing a sanction, as envisaged herein, is open to appeal to a higher judicial authority.” The reference to a “higher judicial authority” towards the end of this extract clearly proves that the authority mentioned earlier in the extract is also a judicial authority.

In the legal cases to be brought against the decisions of the CoJP for termination of the office of a judge, the CoS has jurisdiction in the subject matter as a court of first instance. Decisions of the relevant chamber of the CoS may be appealed in the General Assembly composed of the chambers of the CoS. However, appointment of the members of the CoS by the Council of Judges and Prosecutors may easily pave the way for concerns about independence and

impartiality. Even if they exist only at a level of perception, these concerns must be removed. Furthermore, there is no right to file a petition of appeal to a higher judicial authority against the decisions of the CoS. The General Assembly of chambers, standing as a different grouping inside the CoS itself, performs this function. In order to remove these concerns, a separate judicial authority for appeals against decisions of the CoJP must be created, and another court must be appointed as the appellate court for appeals against decisions of said separate judicial authority.

d) According to Article 5.3 of the European Charter on the Statute for Judges: “Each individual must have the possibility of submitting, without specific formality, a complaint relating to the miscarriage of justice in a given case to an independent body and this body has the power, if a careful and close examination makes dereliction on the part of a judge indisputably appear, to refer the matter to the disciplinary authority, or at the very least to recommend such referral to an authority normally competent in accordance with the statute, to make such a reference.”

The European Council’s Committee of Ministers recommends in Article VI(2 and 3) of its Recommendation No. R(94)12 that a special organ be established, entrusted with the task of giving disciplinary punishments and taking disciplinary measures, with its decisions to be checked by and appealed in a supreme court of last resort, or with itself acting as, and in the capacity of, a supreme judicial authority.

Article 17 of the UN decision titled “Basic Principles on the Independence of the Judiciary” made in 1985 provides that: “A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure, and the judge shall have the right to a fair hearing, and such decisions shall be open to judicial review mechanisms.”

According to these three documents, all complaints against judges must be examined and reviewed by an independent organ; the results thereof must be reported to another authority authorized to impose sanctions; this authority, itself being a judicial organ or its decisions being subject to review and appeal by a judicial organ, must decide to impose such sanctions after a hearing there- on; and the judge must have the right to defend him or herself in this

process. The decisions made by this authority must be open to judicial review mechanisms.

At present, complaints concerning judges are reviewed, examined and decided upon by the CoJP, and judges have the right to seek legal remedies (in the CoS) only against decisions of termination of office. However, according to the documents cited above, the authority examining the complaints and the authority implementing the sanction must be judicial organs independent from the CoJP, and must render their decisions as a result of a hearing.

All of these facts demonstrate the requirement to form a judicial organ to supervise and monitor the decisions of the CoJP.

Pursuant to the provisions of Article 159(10) of the Turkish Constitution, amended by the referendum, and of Article 33(5) of Law No. 6087, no judicial review or remedy is available against the decisions of the CoJP, other than its decisions as to the penalty of termination of office. In the legal cases to be brought against the decisions of the CoJP for termination of the office of a judge, the CoS has jurisdiction in the subject matter as a court of first instance. If it is accepted and viewed as an element of the executive organ, it seems rational for the CoS to be appointed as the authority for appeals against decisions of the CoJP. This is so because, as per Article 155 of the Constitution, the CoS is basically the court of last instance for reviewing decisions and judgments rendered by the administrative courts, is entrusted with the task of expressing its opinions about the general regulatory transactions of the executive organ, i.e. of ensuring the compliance of the executive organ with the law, and is founded for the supervision and auditing of administrative actions and decisions.

However, though the CoJP is described as an administrative board in the 1977 ruling of the Constitutional Court, and it actually performs an administrative duty, it is not a part of the executive organ but indeed is itself an executive organ, specifically working for the judiciary power; to put it in other words, it is an organ that runs the judiciary power, and a component of the judiciary power. For this reason, it is not legally fair to use the CoS, originally founded for the supervision of the compliance of the government with the law, for the reviewing and auditing of decisions of the CoJP as to the penalty of termination of office.

On the other hand, the CoJP selects and appoints three-quarters of the members of the CoS. One quarter of the members of the CoS are appointed by the president and therefore, taking into account that the CoS is a hierarchically supreme board over the CoJP – as it determines and appoints its members – it goes against the grain to use the members of the CoS appointed directly by the CoJP as an authority of supervision and auditing over the decisions of the CoJP. Of course, judges of the CoS will rule and judge independently, and according to their personal convictions, but the natural essence should not conflict with this high ethical duty imposed on the judges, on the contrary, the natural dynamics arising from the natural essence should be to support and strengthen this ethical duty imposed upon them.

This, in turn, requires the formation of a separate judicial organ positioned specifically and independently, and entrusted with the task of ensuring judiciary accountability and supervision of the CoJP, as well as compliance with the law in all of its decisions, particularly its decisions as they relate to termination of office.

Another distortion created by the existing structuring of the judiciary may be seen in the example of legal cases brought forward against the state due to liability of the members of the Supreme Court of Appeals. In the past, liability claims and cases concerning and affecting this court's own members were tried and ruled on by the General Assembly of the Supreme Court of Appeals and, thus, a hierarchy existed between chambers and the General Assembly. Then, this judicial power and task was delegated to the 4th Civil Law Chamber of the Supreme Court of Appeals. As a result, members of the 4th Civil Law Chamber of the Supreme Court of Appeals were equipped with jurisdiction over members of other chambers who are, indeed, their peers in the hierarchy. Even when a legal case is tried by the General Assembly, the concerns arising out of the judges trying the case at the same time as being members of the same authority are felt even more sharply with this new arrangement. Such types of legal cases concerning the members of the Supreme Court of Appeals should not be handled and tried by its other members, but by a special court organized outside

of the Supreme Court of Appeals, with the seniority, competence and adequate qualifications to oversee trials of judges at that level, but being undoubtedly independent and impartial, or specifically structured in such a manner as to not raise any question of impropriety. This requires the formation of a separate court that is specifically assigned to and authorized for these types of cases.

On the other hand, given that criminal cases against members of the Supreme Court of Appeals are tried and ruled upon by the Constitutional Court acting as the Supreme Criminal Tribunal, it is entirely contradictory to accept a different standard of referral of civil claims and cases concerning the same members to a different court. Even this very simple need points to the requirement for the further development of the judiciary superstructure by founding a separate court assigned and authorized to hear these cases.

As mentioned by Canadian judge Justice F. B. William Kelly in his paper “An Independent Judiciary: The Core of the Rule of Law” (International Centre for Criminal Reform and Criminal Justice Policy, 2016), in France judges are tried by the Supreme Court of the Judiciary, composed of seven members who are appointed by the president from among judges and two members who are appointed from among non-judges. As a result of hearings, one of the disciplinary measures, extending from warning to dismissal, is imposed. In Germany, the German Federal Constitutional Court decides whether a judge has breached basic German law or not, and may ultimately decide to terminate their office, to retire them or to appoint them to other duties. Germany also has a disciplinary court authorized to impose disciplinary measures on or terminate the office of judges, in the event of their accepting bribes or delay or failure in the performance of their judicial duties.

These two examples also demonstrate that it is necessary to establish a separate judicial authority for the trial of judges for disciplinary or other matters, and supports our proposal to establish a separate judicial organ for the judicial review of decisions concerning the judiciary itself and its elements within the frame of formation of a Supreme Authority of Justice.

On the other hand, it should be not only the decisions of the CoJP as to termination of office but all of its decisions that are subject to and covered by judicial review, because judicial review of the decisions as to termination of

office will determine only whether the subject can be accepted into the judicial community or not, and therefore this judicial review does not have the capacity or the opportunity to ensure the compliance of existing members of the judicial community with fundamental universal principles. In addition, an uncontrolled authority of supervision over existing members of the judicial community will surely have negative effects, both on their ability to make independent and impartial rulings and judgments and on the effective performance of their duties and even if it does not have any such consequences it will leave them with the lingering fear and pressure of the possibility of such effects and will, therefore, negatively affect their being free to act independently.

Furthermore, to provide an assurance to judges alone, as described above, is not adequate or right either. All professionals employed in the judiciary organ should likewise be covered by this job assurance. Particularly due to the vital role they play, especially in ensuring the compliance of the public administration with the law and, generally, in securing justice in the country, both the lawyers and counsel, accepted as being among the founding elements of the judiciary, and their professional organizations, i.e. bar associations, as well as the TBB, should be relieved of the control, custody and tutelage of executive powers.

Indeed, we are facing a disorganized, patchwork and fragmented picture due to the availability of judicial review in some of the supreme organs of the judiciary and the unavailability thereof in others. Administrative remedies are available and open against decisions of the Union of the Turkish Bar Associations and of the Ministry of Justice. However, this does not conform to the hierarchy of professions and professional organizations. Administrative law judges who are appointed by the Council of Judges and Prosecutors have a say in the decisions of lawyers and their professional organizations that are (required to be) at their equivalent level in the hierarchy. Likewise, administrative court judges are authorized to supervise and audit the administrative decisions made by the minister of justice, standing as the chairperson of the CoJP that appointed them, and by his/her undersecretary, both acting in the name of the Ministry of Justice. As is noted, also when judicial remedies are available against the decisions of the CoJP, various problems and conflicts exist that may affect independence, hierarchically, and may lead to discrepancies among professionals.

Another deep-rooted contradiction is that although lawyers have this right, judges and prosecutors are not allowed to apply for judicial review of decisions of their own superior professional organizations.

In examples from the Supreme Court of Appeals, civil liability claims and cases against members of the courts of appeal are tried by their own peers and colleagues who are at the same hierarchical level, and are in close collaboration with them as a requirement of their job functions, and this also cannot be accepted in light of the principle of impartiality. Such types of legal cases are also required to be referred to, and tried in, a separate court.

In conclusion, all elements of the judiciary must have the right to resort to legal remedies against decisions and actions of their superior organizations, and these legal remedies should be arranged as required, without causing any internal contradictions or conflicts.

The Relationship between the Restriction of the Independence of the Judiciary and Non-Accountability

There is no legislative arrangement (other than for decisions as to termination of office) requiring the CoJP to be accountable to society ex officio, or to a judicial organ or authority upon demand or application of the relevant persons or entities on all matters concerning their rights pertaining thereto.

There are many reasons lying behind the intent of politicians to keep the decision-making organs and elements under their control. However, the reason lying behind the willingness of the public to accept this, and even its almost encouraging politicians towards it rather than objecting to it, is the common belief that the judiciary and, particularly, the supreme judicial organs and their members are not accountable, cannot even be held accountable for personal offences that are not job-related and have become a privileged clan enjoying preferential treatment, even though they fail to perform their duties.

As a matter of fact, the basic reason and rationale underlying the legislative arrangement made in 1981, and upheld in the 1982 Constitution, to directly include the minister of justice and his/her undersecretary in the Supreme Council of Judges was the severe reaction of the public to the system wherein since 1971 members of the Supreme Court of Appeals had elected members of the Supreme CoJ and, vice versa, members of the Supreme CoJ had elected members of the Supreme Court of Appeals, thereby paving the way for the Supreme Court of Appeals to dominate and control the entire system, and for its members to become a privileged and “non-accountable society”.

Behind the support given by the public to the constitutional amendments made in the recent past, i.e. in 2010, in a fairly democratic environment in comparison with that of 1982, lie some important reasons and facts, such as the failure of the judiciary to keep in step with the rapid development of the country, its struggle against change, its failure to offer judicial services to meet the demands or to give clear account, and its push against custody and tutelage in regard to certain important milestones. The public complains of the judiciary in the belief that it does not perform its duties, and cannot accept its members’ making use of the privileges and preferential treatment granted to them solely as a result of their positions. Thus, the people resent the judiciary due to its failure to perform its duties and, therefore, exhibit a reactionary response by giving control to the executive organ – which can, at the very least, be replaced in elections.

Briefly, included among many reasons lying behind the trend for politicians to make efforts to be included in and to take control of the judiciary power through certain elements of the executive organ, as a result of which the weight of the executive organ has gradually increased therein, is one extremely just and right reason, which is the fact that the judiciary and its elements are by no means accountable.

Under these circumstances, the way to make the judiciary accountable is viewed as the surrendering of control by the CoJP, sitting at the peak of the judiciary organization, to the executive organ, which can call the judiciary to account (and may itself be called to account in elections). Historically, the preferred course for the executive has been to make the functioning of the CoJP dependent upon the participation and approval of the minister of jJustice and his/her undersecretary. Thus, in fact, the non-accountability of the judiciary power makes it the subject of efforts to take it under control, and in cases of integration of the legislative and executive organs makes it subject to, and required to surrender to, the executive organ. In other words, this consequence was, in any event, inevitable.

Thus, in turn, demonstrates that the independence of the judiciary power is dependent upon its being accountable. Therefore, the judiciary power can assure respect for and protection of its independence only upon agreeing to be accountable, and providing that it does, indeed, make itself accountable. A judiciary that is not independent, or whose independence is not trusted, can by no means give confidence as to its impartiality, and cannot be expected to provide assurance that it secures, or will secure, justice either in reality or in the perception of its applicants.

The Independence of the Judiciary Can Only Be Ensured by Means of the Formation of a Structure Which Enables the Judiciary to Operate Effectively and Efficiently and Be Accountable:

In fact, in both the public and the private sectors, the healthy functioning and sustainability of institutions and organizations is dependent upon their being accountable. The judiciary should also shore up confidence as to its will to perform its functions in a healthy manner and to secure justice, to fulfill the fair and just requests of the people and to be accountable in all aspects and to this end, it must demonstrate to the public that it is performing its job functions properly or, otherwise, is precluded from performing its job functions due to certain just causes.

The judiciary must become capable of developing cooperation and solidarity among its members, developing and implementing strategies that respond fully to the needs and requirements of society, and establishing trust, both inside and outside the justice system, through functioning in a healthy manner and finally, it must produce the highest-quality services and compete with its contemporaries. For this purpose, the following goals should be achieved in the judicial organization:

(i) Representation of different political views and interest groups;

(ii) Dampening political influence at the stage of determination of policies and priorities, by taking actions and measures assuring the expression of political preferences of different interest groups but, nevertheless, preventing their interference in the operational level of the judiciary;

(iii) Assuring the corporate and individual accountability of the judiciary and its elements – without compromising established principles;

(iv) Ensuring that all actions and decisions of the judicial organs are fully transparent and justified, and are open to legal resorts and remedies;

(v) Ensuring that legal professionals providing services are held liable for, and have a say in, all arrangements and organizations regarding the provision of these services; and

(vi) Ensuring that services are rendered in conformity with the demands,

needs and priorities of service recipients, who are made aware of, and have a say in, all stages of services.

Firstly, it is a commonly accepted rule that in the production of all kinds of goods and services, it is required to establish a consensus between service producer and provider on the one hand, and service recipient on the other hand, with respect to the qualities and standards of services, the modus operandi of the entire production process, and the rights and obligations of the service provider and recipient in the course of the production process. It does not make any difference, and is by no means important, whether the subject service is a public service or not, is chargeable or free of charge, or is given or received voluntarily or non-voluntarily. Speaking of judicial services, in order to satisfy public concern, many mandatory legislative instruments are required to be issued with respect to services, service providers, service processes, and the rights and obligations of service recipients. For example, a fair trial standard determines and puts forth the minimum quality level of judicial services following international and national regulations; the trial procedures and rules describe the service production process to the fullest extent, and intermediate appeal and appeal regulations constitute the quality control stages that provide assurance of the accuracy and fairness of the judgments and rulings resulting therefrom.

Likewise, the exclusion of judicial processes and operations from political influence requires clean and pure services. However, the reflection of the political preferences of society with respect to judicial services is comparable to the fulfillment of requests of service recipients as to how service providers must organize themselves and function. The rules allowing customers to express their requests and demands regarding service providers, but which preclude them from interfering in the activities of the service provider, are exactly the same as for judicial activities. In fact, society must be permitted to express its political preferences regarding judicial issues and choices, but must never be allowed to intervene in judicial operations.

This can be secured by assuring the independence and accountability of the judiciary. To put it in other words, independence and accountability must act in harmony in the Judiciary.

It is already demonstrated through our experiences that the independence of the judiciary should be secured and guaranteed by both the Constitution and a strong constitutional protection organization. To say that judges are independent is in no event, and by no means, adequate to ensure that the judiciary functions independently. The judiciary may function independently

without being subject to or requiring any custody or tutelage only if and to the extent that this is secured and guaranteed by sound constitutional support and protections.

Both the independence and the accountability of the judiciary can be safely assured by a two-phase superstructure and through the separation of service operations from policies. To this end:

(i) Firstly, the stage of formulating policies and preferences with respect to justice and the judiciary, and the organ in charge thereof, should be clearly separated from the stage of providing judicial services and the organ in charge thereof; and the organs and persons determining the policies and preferences should have the right and opportunity to affect and influence the organ determining judicial operations.

(ii) Secondly, in the organ in charge of policies and preferences, a membership composition and an appointment system not affected by any political faction or any politicians should be adopted and applied. Through such methods as providing the mainstream and secondary-level political parties with the right to nominate candidates, and the appointment of a higher number of members by certain organizations (for example, election or appointment by organizations secured by the Constitution and non governmental organizations meeting certain criteria) than by politicians, the elimination and neutralization may be achieved of the determinant weight of the powers of appointment presently vested in politicians in both the legislative and executive organs with regard to the members of the CoJP.

To assure the independence and accountability of the judiciary; to make sure that the judiciary reflects the politics of society regarding justice and the judiciary; to dampen the intention of politicians to influence the judiciary at an early stage, before it can reach judicial activities and elements and, thus, ensure the elimination of just criticisms, complaints, problems and concerns of society in connection therewith; and, at the same time, to make the judiciary capable of producing healthy, effective and productive judicial services at the same level as its contemporaries, will be possible only with the judiciary superstructure outlined and described below. This superstructure can be easily established by the foundation of a superior umbrella organization, which could be named the “Supreme Authority of Justice” by rearranging the relations between the judicial organs, and by allowing legal resorts and remedies against all kinds of decisions and actions of the judicial organs relating to the judiciary.

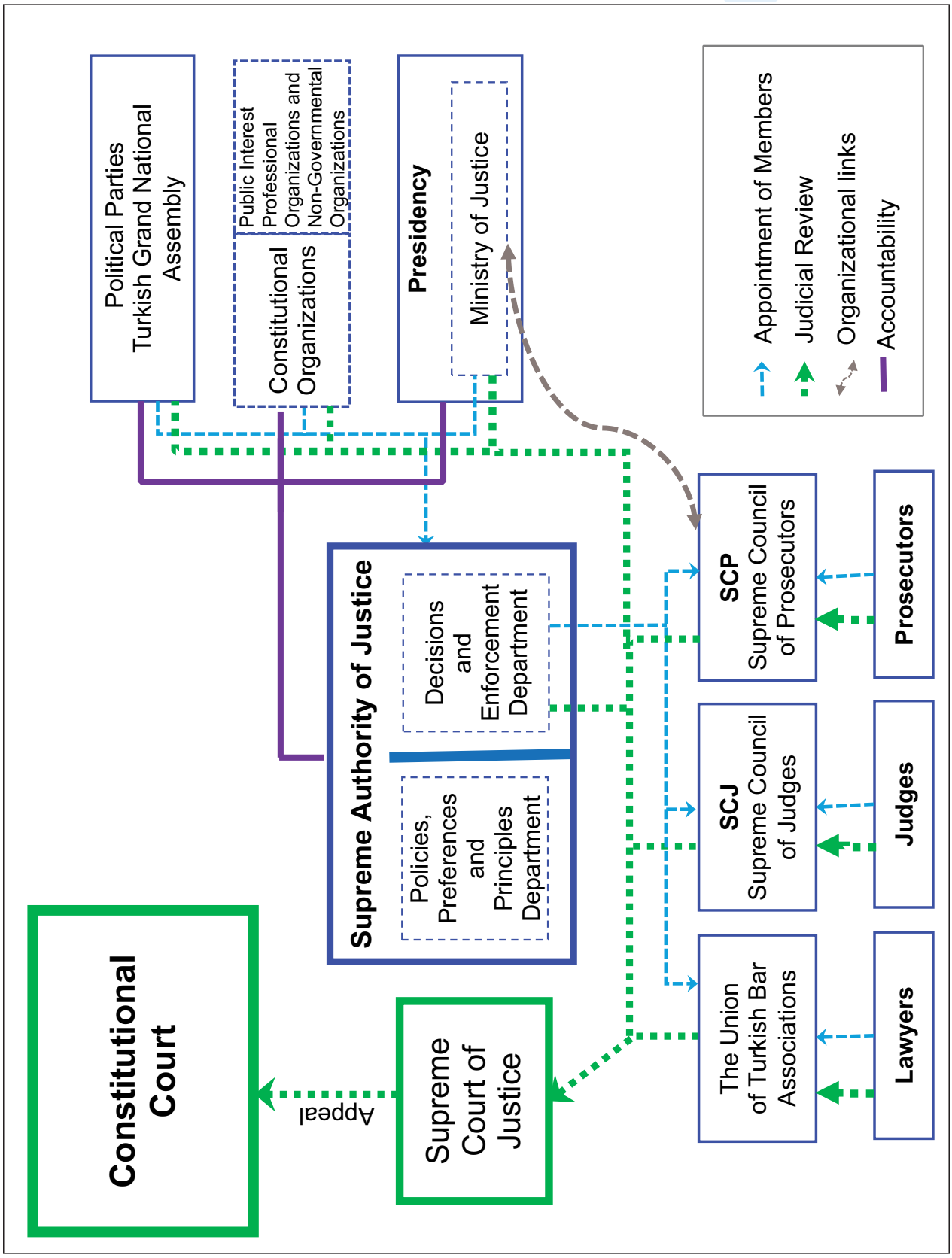


Figure 7: The Supreme Authority of Justice

The Supreme Authority of Justice:

The Supreme Authority of Justice should be entrusted with the task of determining and formulating the justice and judiciary policies of the state in line with the needs of the country and the preferences of society, entirely independent from political powers and governments but, on the contrary, by ensuring the representation and participation of all political viewpoints and even all constitutional organizations and parts of the state and accordingly, all duties and powers vested in the Ministry of Justice in relation thereto should be delegated to the Supreme Authority of Justice. The duties and powers of the Ministry of Justice should be limited to developing policy proposals and presenting the same to the Supreme Authority of Justice, providing the resources that may be required throughout the course of policy formation, and providing certain ancillary services of the judiciary.

The Supreme Authority of Justice should be managed and represented by a board, the members of which may be contemplated to be elected as a result of a process that allows for public debate and for the expression of all opinions in relation thereto from among candidates who meet certain minimum qualifications, as nominated by the organizations regulated by the Constitution, in particular, the TGNA, the Presidency and the bar associations, by the professional organizations with public institution status, and by judges and prosecutors, in such a manner as to reflect the preferences of all segments of society. Such an election procedure will ensure that all segments of society have a say and are represented in the formation of the Supreme Authority of Justice, thereby electing only capable and efficient candidates thereto. So as to further strengthen the impartiality of the Supreme Authority of Justice, the election of candidates to be nominated by certain non-governmental organizations classified according to certain criteria to be determined – such as working in the public interest, having a certain organizational structure and a certain number of members, or being equipped with certain powers – may also be considered.

The Supreme Authority of Justice may further be insulated from political influences by keeping the term of office of its members longer than the term of office of the President and the deputies and, likewise, by electing its members not collectively but separately, at different times. Furthermore, it may also be contemplated that some activities of the board be held under the supervision of the TGNA, or that the board be held responsible by the TGNA in some instances.

The Supreme Authority of Justice must include a “Policies, Preferences and Principles Department” to hold negotiations on justice and judiciary-related issues, and to formulate policies to be pursued thereon and determine principles and priorities in connection therewith, as well as a “Decisions and Enforcement Department” to make and implement decisions for the enforcement of the policies formulated by the former, and to follow up the implementation thereof. The former department should be staffed by representatives of political parties, while the latter should be staffed by experts on the judiciary and its services; thus, the influences of politics on the judiciary should be terminated in the first department, and politics should thereby be detained at that phase.

The basic objectives of the Supreme Authority of Justice should at least be as follows:

(1) Judges, prosecutors, lawyers and counsel, and other paralegal personnel should be required to comply to the maximum extent with universal judicial principles, in particular including, but not limited to, independence, impartiality, transparency and accountability, integrity, honesty, foreseeability, precision and certainty, accessibility, equalitarianism and non-discrimination, capacity, professional capability, prudence, effective and efficient working, and professional attitude;

(2) The Supreme Authority of Justice must determine the policies and priorities of Turkey regarding justice services and resources, as well as required budget therefor, and must give priority to allowing the judiciary budget to be drawn from the state budget;

(3) The Supreme Authority of Justice must ensure both short and long-term planning for lawyers and other human resources and must announce these plans to the public in a transparent manner, and especially to judges and prosecutors ; the planning must show – even if roughly – how the latter may progress in their careers, provide that they maintain their qualifications and competence throughout their full professional life, and must, at the beginning of their career path, indicate at what dates they will be subject to appointments, compulsory eastern service and other similar obligatory assignments;

(4) The Supreme Authority of Justice must ensure that all judiciary professionals (judges, prosecutors, lawyers and counsel, and other paralegal personnel) are subject to the same ethical and disciplinary rules, and to the same prior consent, investigation and prosecution rules in connection with any task-related and personal crimes and misdemeans committed, and that these rules are uniformly implemented over all of them;

(5) The Supreme Authority of Justice must observe the activities of the judiciary elements in pursuit of predetermined goals and the results obtained therefrom, and must ensure accountability for this work in all aspects;

(6) All types of actions and decisions of the Supreme Authority of Justice, other than its policy-related decisions, should be subject to judicial review;

(7) The Supreme Authority of Justice must be accountable directly to the public through the issuing of comprehensive yearly reports indicating to what extent its predetermined objectives for securing justice have been accomplished, and through providing all forms of information to the press, other media and citizens upon demand. It may be contemplated that it should also be accountable to the TGNA. The TGNA should observe and supervise the effective functioning of the accountability of the Supreme Authority of Justice through a special commission designated solely for this purpose.

(8) Cases requiring cancellation of membership or dismissal of members of the Supreme Authority of Justice should be regulated as exceptions, and the Constitutional Court should be authorized in connection therewith. The power to initiate this process may be vested in a limited number of constitutional organizations and the TGNA, and, in addition, it may be considered to give special authorization to entities such as the Constitutional Protection Authority and the Chief Public Prosecutor’s Office which are contemplated to be established.

Policies, Preferences and Principles:

This department which should preferably comprise members appointed or determined by political sources should be entrusted with the task of determining the policies and preferences of the country, as to justice and the judiciary, and should make decisions and recommendations as the basis for the decisions of other departments. As politicians will not be allowed to intervene beyond this point, this department will, on the one hand, identify the political choices and policies of society and, on the other hand, limit and attenuate political influences on the judiciary to this department and its functions – precluding politicians from being involved on the enforcement side. This department may have executive powers only in exceptional cases – for instance, such cases as the exceptional dismissal of members of the Decisions and Enforcement Department – or alternatively may have no executive power in any circumstances.

Decisions and Enforcement Department:

This department may make decisions enforceable by other judicial organs, and may present these decisions to these other judicial organs in line with the policies and preferences that are determined by the Policies, Preferences and Principles Department. For instance, it may make and advise on decisions for the Board of Judges on such issues as in which legal fields the number of judges needs to be increased, and what types of solutions should be prioritized in connection therewith. The effects of this department on other judicial organs may be terminated at the point of presentation of these decisions. This department may also be given certain executive powers, such as over the appointment of certain members of the operational judicial organs, e.g. the CoJP, as well as over their dismissal in exceptional cases. If judicial organizations such as the CoJP are operationally and functionally autonomous from the Supreme Authority of Justice and its Decisions and Enforcement Department, but are accountable in terms of policies and preferences, then this department may also be precluded from exerting any influence on judicial service providers.

Supreme Court of Justice

Through an Objection and Trial Chamber (court) that is a part of the judicial organization but, nevertheless, autonomous from the Supreme Authority of Justice, a full judicial review mechanism can be provided against decisions of both the Supreme Authority of Justice and the Supreme Council of Judges, Supreme Council of Prosecutors and Supreme Council of Lawyers. This chamber (court) may be granted jurisdiction over objections and appeals against decisions of the Supreme Authority of Justice and its departments, and over all of the professional organizations of judges, prosecutors and lawyers, thus, all judicial professionals will have legal recourse and remedies of the same standards, and their conflicts with the system can be resolved by judicial organs in accordance with general trial procedures. Of course, decisions of this chamber (court) should also be subject to appeal.

This judicial authority (chamber/court) required to be formed in order to try objections and legal cases brought against decisions of the Supreme Authority of Justice, CoJP and TBB should be a part of this system, but should function independently from the Supreme Authority of Justice, and if it is included in the organization of the Supreme Authority of Justice, then it should be independent from and impartial in relation to other departments and members of the Supreme Authority of Justice.

To achieve all these objectives requires the establishment of a Supreme Court of Justice with jurisdiction over objections and legal cases against decisions of the aforementioned judicial organs, as detailed in the preceding paragraphs. This chamber should be in the nature of a judicial authority and court. Though this function may also be contemplated to be assigned to the Constitutional Court, for the reason that the decisions of the Supreme Court of Justice are also required to be subject to appeal and it would be more accurate to consider the Constitutional Court as the authority of appeal against the decisions of the Supreme Court of Justice, it will be more accurate to establish this authority as a separate judicial authority. Of course, another judicial authority may also be considered to be established for appeals against the decisions of the Supreme Court of Justice, but as the issues covered by the duties of this court will be closely related to constitutional rights and assurances, it would be more rational to use the Constitutional Court as an authority of appeal.

The Supreme Court of Justice may also be contemplated to be a special and temporary court formed and functioning according to certain procedures with the participation of representatives of other supreme courts; but, in practice, the assignment of such duties to individuals in addition to their normal duties and tasks limits their contribution to both their own institution and their temporary place of assignment, while also narrowing their accountability and their efficiency, and this approach must, therefore, not be preferred.

Such an organization may be preferred as it creates a judicial remedy, authority and methodology, fit and appropriate to the judicial elements and their professions. However, and more importantly, almost all of the decisions and actions in connection therewith, and all of the probable conflicts arising therefrom, are of particular concern to the judicial elements secured and guaranteed by the Constitution and accordingly, each subject of all cases referred to this Supreme Court of Justice will basically contain an element of constitutionality review. Therefore, each subject of any case to be referred to this chamber (court) will directly concern the functions of the Constitutional Court. It would thus be logical to involve the Constitutional Court in the process, at least at the stage of appeal against the decisions of this chamber (court). Such a function would serve to reinforce the function of the Constitutional Court regarding the protection and supervision of the Constitution.

Professional Organizations of Judicial Elements: Council of Judges, Council of Prosecutors, TBB:

The CoJP should be divided into two councils, as the Council of Judges and the Council of Prosecutors, and further, into professional organizations with three judicial elements, i.e. judges, prosecutors and lawyers or counsel. These should be segregated and rearranged, at the same level as each other, as the Council of Judges, Council of Prosecutors and Council of Lawyers , and all of them should be held accountable for rendering their services in harmony, according to choices to be determined by the Supreme Court of Justice. However, these three professional groups should be autonomous from the Supreme Court of Justice and independent per se, and must have a say in their own professional organizations through fair representation. If it is contemplated that the Supreme Court of Justice is to be represented in these councils, such representation should be limited to such an extent as to render it impossible for the Supreme Court of Justice to control and dominate the will of these professionals.

In such an organization, the TBB, Supreme Council of Judges and Supreme Council of Prosecutors can all be independent, and can also perform their functions without compromising their independence, only if they are made to be independent (autonomous) from the Supreme Court of Justice in terms of function. The Supreme Court of Justice, in the interest of the public may, therefore, guarantee their effective accountability and efficient functioning through the monitoring of their activities.

Therefore, the professional organizations of judges, prosecutors and lawyers (Supreme Council of Judges, Supreme Council of Prosecutors and TBB) must be independent and autonomous in their functions, but must also be accountable to the Supreme Court of Justice. The Supreme Court of Prosecutors must be independent and autonomous in its functions, and accountable to the Supreme Court of Justice in its activities, but must also be affiliated with the Ministry of Justice in terms of resources.

In Conclusion:

In conclusion, the structuring of the supreme organs of the judiciary as proposed above will, on the one hand, attenuate and dampen the influence of the executive organ and politicians over the judiciary at the level of the Supreme Authority of Justice while, on the other hand, making it possible to formulate judicial policies in line with the preferences of society and to guarantee the accountability of the judiciary without compromising its independence and impartiality, in addition to creating positive platform for cooperation and solidarity among the professionals. This, in turn, will rapidly enhance the quality of judicial services.

On the other hand, autonomous professional organizations will further develop vocational efforts and competition and, through the professional management support provided, professionals will be able to use their own power more effectively.

In addition, the Supreme Court of Justice will be able to reflect in judiciary and judicial policies the preferences and wishes of the institutions representing a broad cross-section of society with regard to society, the judiciary and social justice, without precluding the judiciary from functioning independently and impartially, through the members to be appointed by them thereto.

daha iyi yargı