THE INDEPENDENCY OF THE JUDICIARY AND SEPARATION OF POWER: EVALUATION OF THE NEW STRUCTURE OF THE HIGH COUNCIL IN THE LIGHT OF THE JURISPRUDENCE OF THE ECTHR AND INTERNATIONAL DOCUMENTS

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ABSTRACT

Courts' independence and impartiality constitutes a precondition that fair trial be the essential basis of rule of law. The judiciary is one branch of the state power. Judiciary is guardian of the rule of law and guarantee against abuse of power by other branches of state. In terms of the separation of power, composition of the High Council for the Judiciary is an important element for guaranteeing the independence of the judiciary. The international trend in this respect is to establish independent body for the governance of the judiciary. There is no unique system of appointment across the Europe. There is immense diversity across the Europe. The most appropriate system for safeguarding the independency of judiciary is setting up a high council holding constitutional guarantees for its structure, authorities and independence and which is responsible for appointment and assignment and disciplinary sanctions of judiciary. This article will analysis the question of to what extent is the separation of power at the apex of Turkish existing and forthcoming system of the HCJP (by efficient separation of judicial powers from executive and legislator pertinent to independency and impartiality of court) compatible with standards of the ECtHR, international documents and practices of the EU Member States?

Key Words: Independency of the judiciary, impartiality of judiciary, separation of power, composition of the high councils, jurisprudence of the ECtHR.

ÖZET

Mahkemelerin bağımsızlığı ve tarafsızlığı hukuk devleti ilkesinin temel bir unsurunu teşkil eden adil yargılama ilkesinin bir ön şartıdır. Yargı devlet erklerinden biridir ve devletin diğer erkleri tarafından kullanılan yetkilere karşı hukuk devleti ilkesinin güvencesi ve koruyucusudur. Erkleri ayrımı bakımından Yüksek Kurulun oluşumu yargı bağımsızlığının güvence altına alınması için önemli bir unsurdur. Bu çerçevede yargının yönetimi için uluslararası trend bağımsız bir yapının kurulmasıdır. Avrupa da Yüksek Kurulun oluşumu bakımından tek model bir sistem yoktur. Bu anlamda Avrupa da çok büyük

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farklılıklar bulunmaktadır. Yargının bağımsızlığını korumak için en uygun sistem oluşumu, yetkileri ve bağımsızlığı açısından anayasal güvencelerin sağlandığı bağımsız ve hâkimlerin atanması, yetkilerinin dağılımı ve disiplin cezalarıyla ilgili yetkileri elinde bulunduran bir Kurulun oluşturulmasıdır. Bu makalede güçler ayrılığı ilkesi bakımından Yüksek Kurulun mevcut ve yeni Kabul edilen sistemi bakımından AİHM içtihatları, uluslararası belgeler ve AB üyesi ülke uygulama standartları ile uygunluk arz etmektedir sorusunun analizi yapılacaktır.

Anahtar Kelimeler: Yargının bağımsızlığı, yargının tarafsızlığı, güçler ayrılığı, yüksek kurulların oluşumu, AİHM içtihatları.

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Introduction

The significance of Art.6 (1) of the European Convention on Human Rights (ECHR) in relation to court's independence and impartiality constitutes a precondition that fair trial be the essential basis of rule of law.[2] An efficient separation of powers may be obligatory in domestic systems in certain conditions and the Court's several judgments suggest an interpretation of Art.6 (1) of the ECHR as necessitating an efficient separation of executive, legislative and judicial power. As regards this issue there are in fact two rival strands in the Court's jurisprudence on Article 6(1): the doctrine of strict separation of powers; and circumstantial approach.[3]

In order to discuss the foregoing this paper will seek to critically analyse the concept of the independency and impartiality of courts in the light of the ECHR jurisprudences. In particular, in relation to how an independent and impartial tribunal can and has been, defined under the strict separation of powers doctrine and circumstantial approach. The paper will review the most important ECHR decisions in this field. The particular question of whether the Turkish existing composition of the High Council of Judges and Prosecutors (the HCJP) and recent Constitutional Amendments concerning the new composition of the HCJP guarantee the independence and impartiality in court proceedings so as to accomplish right to fair trial will be addressed. To what extent is the separation of power at the apex of Turkish existing and forthcoming system of the

2 Opinion 1 of the Consultative Council of European Judges, (2001), at. www.ccje/docs2001/ ccje(2001)opnle (5.6. 2001) at. 4

3 Masterman, R., 'Determinative in the Abstract Article6(1) and the Separation of the Powers',(2005),6 EHRLR, at. 629

HCJP (by efficient separation of judicial powers from executive and legislator pertinent to independency and impartiality of court) compatible with ECHR judgments? How far the EU recommendation that the Minister of Justice be removed from the Supreme Council for the Judges and Prosecutors might ensure greater impartiality and independence for judiciary will also be raised. In line with these discussions, perspective of international documents and comparative analysis of the European countries will be addressed.

I. Definition of Independent and Impartial Tribunal in the context of the European Convention on Human Rights

What requirements should be met for a court to be independent and impartial under Article 6? The conditions of independence and impartiality are interrelated and mostly taken into account together.[4] Judicial independence presumes complete impartiality of the judges. It requires liberty from any connection, tendency and/or prejudice, which might affect or appear to affect judges' fairness at trial. It is necessary for a court not to be biased or not to appear biased against any party to a hearing so that Article 6(1) of the ECHR performs its function as a guarantee of right to fair trial. If a different authority which does not ensure impartiality has power to quash court's judgment, in this case it causes the flaw in independence and impartiality of courts and right to fair trial does not make its actual sense.[5]

The Court has addressed the subjective and objective aspects of independence and impartiality. The subjective aspect comprises of questioning whether the individual opinion of a judge in a specific hearing creates suspicions concerning his or her independence or impartiality. Principally, absence of personal prejudice is assumed, except for the contrary is can be proved. There are rare cases in which individual prejudice has been determined, but proof of such is generally very difficult to adduce.[6] The objective impartiality test is whether the fair minded and informed observer would reasonably suspect the actual possibility of prejudice.[7]

4 Mole, N., and Harby, C., Right to Fair Trial, (2001) CoE publishing, at. 28

5 White, R., The European Convention on Human Rights, (2006), Oxford University Press, 4th edition, chapter 8. See, Van de Hurk v. Netherlands, Judgment of 19 April 1994, Series A, No. 288; (1994) 18 EHRR 481.

6 Ibid.

7 Masterman, R., at. 630. See House of Lord Judgment of Porter v Magill [2002] 2 A.C. 357 at. 105

The objective aspects concern whether defendant's suspicions on the matter of a court's independence and impartiality might be legitimate or not with respect to composition or appearance of a courts.[8]

As much as possible the independence of the judiciary must be assured to the utmost degree by domestic legislation. One of the important underpinnings of independence and impartiality of the judiciary is that appointment of the judges should be based on the objective principles. These should take into account individual quality, reliability; competence and effectiveness not rely on political considerations. Even if separate institutions exist responsible for the appointment and promotion of judges, there is no guarantee that political consideration or the functions of class dominance, favoritism, conservatism, or 'cronyism' have been excluded.[9] Consultative Council of European Judges (CCJE) correctly stated that 'every decision pertaining to appointment and promotion of judges should be based on objective criteria and be either taken by and independent authority or subject to guarantees to ensure that it is not taken other than on the bases of such criteria'.[10]

Doctrine of separation of powers

From the early traditional opinions of Montesquieu it is universally required to accept to bear in mind principle of the separation of powers among the legislative, executive and judicial organs of the state. As a result of recognition of this principle, definite powers and functions of the state are entitled as the powers and functions of the judiciary; mainly the preservation of the fundamental legal principles such as rule of law and protection of fundamental rights, the settlement of conflicts between disputants and citizens and the government or citizens and supranational bodies such as the European Union. To fulfillment of those powers and functions, it is commonly recognised that the judiciary as a whole and every judge has to be independent. This is the relationship between the principle of separation of power and independency of judiciary which are underpinnings of modern state systems. These privileges are granted to

8 Errera., R., 'Art.6(1) ECHR-Right to an Independent and Impartial Tribunal-Impartiality Examined Separately-Composition of Tribunal',(2003), PL, at.352-354

9 Masterman, R., at. 5

10 Ibid.

the judiciary exclusively for maintaining the rule of law and protection of individuals.[11]

The judiciary is one branch of the state power. Judiciary is guardian of the rule of law and guarantee against abuse of power by other branches of state. The judge has to apply the fundamental principles and rules. In addition to this, judge also has to be the conscience of the law and judiciary as a whole has to be guardian of fundamental rights and freedoms against the other branches of power and has to be watchdog of fundamental rights and freedoms against those controlling authority.[12]

In line with the maintenance of judicial independence, the Consultative Council of European Judges (CCJE) at paragraph 42 of its significant view on Councils for the Judiciary, specify a number of requirements which ought to be comply with in an independent approach from the legislative and executive organs. Those requirements can be classified as follows: appointment, promotion, career development; discipline and codes of conduct; training, including the provision of guidance to judges; court administration; protection of the image of justice.[13]

In several judicial systems these assignments are fulfilled by a High Council; in most of the judicial systems some above-mentioned requirements are performed by a High Council and some others are fulfilled by independent organs, nevertheless in a small number of judicial systems, some requirements are still performed by the governmental branch. In various judicial systems none of these requirements are fulfilled by a high council, as there is no this sort of council. These differences are the outcomes of variations in the way in which judicial culture and traditions evolved in historic and political environments in each of state[14]. The Eu-

11 Lord Justice Thomas, 'Some perspectives on Councils for the Judiciary', Frankfurt Symposium: 7/8 November 2008.

12 Eric Alt, 'Judicial independence in Europe Models of self-government and self-responsibility', Frankfort/Main, November 7-8th, 2008,at.http://medel.bugiweb.com/usr/judicial%20independance.pdf)

13 https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2007)OP10&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c33

14 Reports of experts for the CCEJ, Mme Valdes-Buloque and Lord Justice Thomas writen on the situations existed in 2007: https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2007)3&Language=lanEnglish&Ver=original&Site=DGHLJudProfhttps://wcd.coe.int/ViewDoc.jsp?Ref= CCJE(2007)4& Language=lanEnglish&Ver=original&Site=DGHLJudProf

ropean Network of Councils for the Judiciary[15] concurs with the CCJE that it is necessary that the requirements crucial for the appropriate and independent performance of judiciary in the state systems are realized by a branch that has independency against the legislative and executive organs of the state. The European Network of Councils for the Judiciary has the opinion that a High Council as the high representative of the judicial power in the state, be supposed to take part in a vital role in operation of all or some of these requirements of independency itself and in providing that the requirements it does not perform itself are fulfilled in a independent manner.

Choices of the manner in which either High Councils performs requirements of independency by itself or some parts of these requirements are performed by other bodies should be state's preferences which are largely depend on its historical evolution of its customs and social developments and these sorts of issues. It is, though, crucial that every branch fulfilling the judicial requirements must hold independence and that there is an efficient establishment representing the judicial power of the state that guarantees this accordingly. This establishment ought to be a High Council since it is the sole category of branch that can undertake universal task for the administration of the judicial power of the state.[16]

In bearing in mind the nature of branch to carry out each requirement, it is essential to raise several issues: to what extent the judicial control or judicial membership is crucial? How must be the representation of the judiciary to the Council that performs these missions? To what extent of external representation of public is important? How must be hierarchy between judiciary as a whole and the Council? How will the accountability of this Council be ensured as regards the proper performance of these missions? The problem of the accountability is crucial, however unluckily it is an issue that is not raised satisfactory level regularly. This is because the judiciary does not regard them accountable for the performance of their judicial tasks. As the other branch of the state are accountable to the public and the trials are open and public in the process of adjudicating, the reasoning judgments and the judicial review of judgments on appeal. High representative of judiciary is accountable to the public in their

15 http://www.encj.net/encj/GetRecords?Template=web/home

16 Lord Justice Thomas, 'Some perspectives on Councils for the Judiciary', Frankfurt Symposium: 7/8 November 2008.

decision making. In fact the legislative and executive branches of the state are exposed to public scrutiny and public accountability. Likewise, the High Councils must be accountable against the public to carry out all assignments allocated to them. However, this should be in the manner that appropriate for the independence of Councils.[17]

II. The Court's Jurisprudence on independency and impartiality of tribunals

In various judgments, the deficiency of a court has originated not necessarily from the individual character, manners or past connection of one specific member of the court, but from formal worries concerning its institutional composition, authorities and organization. The pertinent issues on this point are the method of selection and terms of offices of the judges[18]; the possession of safeguards against outside pressure[19]; and the court's appearance of being independent.[20]

The ECHR establishes principles in applying article 6 of the Convention. For example, the Court held that a military tribunal whose members are subjected to military hierarchy and inferior level to the convening officer is not an independent court.[21] The Chambers of Maritime Dispute consisting of associate judges assigned and discharged by the Justice Ministry was not considered as an impartial panel.[22] An individual accountable to the Home Office was not regarded as component of an independent court.[23]

In line with these judgments of the Court, it may be inferred that the Court sets up the standards of independency of a court from Government depending on method of appointment of judges, termination of their office, the possibility of dismissal from office and the presence of guarantees in opposition to outside and undue influence.

17 Mme Valdes-Buloque and Lord Justice, Reports of experts for the CCEJ, Thomas writen on the situations existed in 2007:
https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2007)3&Language=lanEnglish&Ver=original&Site=DGHLJudProf
https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2007)4&Language=lanEnglish&Ver=original&Site=DGHLJudProf

18 Le Compte, van Leuven and de Meyere v. Belgium, 1981, para. 55.

19 Piersack v. Belgium, 1982, para. 27.

20 Delcourt v Belgium, 1970.

21 Findlay v. United Kingdom, 1997

22 Brudnika v. Poland, 2005

23 Whitfield and Others v. the United Kingdom, 2005.

1. The Separation of Powers in Respect of Independence and Impartiality

The Court has constantly assured member states that the Convention does not require the concept of the formal separation of pillars of the state. However, the growing significance of concept was pointed out in *Stafford*.[24] In *Benjamin and Wilson*[25] the notion was seen as 'fundamental.' Besides, the separation of institutions of state, which consitute the constitutional independence[26] has been recognized as a 'legitimate aim' of the system.[27]

Art.6 (1) of the ECHR entails not only that a tribunal be independent as between the parties of the case, but also against the executive.[28] Grosz and Duffy point out that to concurrently occupy executive and judicial responsibility would be in breach of Art.6 (1): In reality, the Convention institutions have been hesitant to interpret this so that tribunals under their supervision are considered deficient in independence. [29]

However, it was asserted that jurisprudence of the Court on consistency of occupying both judicial and legislative responsibility with the right to fair trial in Art.6 (1) has two strands of analysis. The first one is that the ability to hold judicial and legislative authority will not of itself constitute a breach of Art.6 (1). This entails that there be a degree of closeness between the functions performed in each pillar so that it can be asserted that a legitimate suspicion as regards the impartiality of a tribunal has been acknowledged. But, the second strand of jurisprudence, appears to indicate that a strict separation of judicial and legislative functions is essential, and seems to allow of no possibility for argument about the connection between the holding of two functions. Masterman maintains, therefore, that simultaneously enjoying judicial and legislative responsibilities

[24] Stafford v United Kingdom(2002) 35 E.H.R.R. 32 at [78].
[25] Benjamin and Wilson v United Kingdom (2003) 36 E.H.R.R. 1 para.36.
[26] Tombe-Grootenhuis, M., Relationship between the Parties,Lawyers and Judges in Civil Contentious Proceedings', at. http://www.bibliojuridica.org/libros/4/1654/20.pdf(5.6.2006), at.340
[27] A v United Kingdom (2003) 36 E.H.R.R. 51 para 77.
[28] Ringeisen v Austria (1979-80) 1 E.H.R.R. 455 para 95.
[29] Grosz, S., Beatson, J., and Duffy, P. Human Rights: The 1998 Act and the European Convention,(2000), (Sweet and Maxwell), at.240-241.

might in itself comprise a violation of Art.6 (1) by causing the reasonable suspicion regarding the impartiality of a court.[30]

2. The circumstantial approach

Verification of circumstantial approach may be traced in McGonnell Case,[31] in Kleyn[32] and Pabla KY[33] where the separation of judiciary, legislator or executive is strict, there may not be the implication of a direct violation of Art.6 but perhaps different conditions of facts of the each individual hearing ought to be taken into account separately before such a doctrine is assumed.[34]

With regard to the question of whether a strict separation of powers is required, the Court held that: '... Neither Article 6 nor any other provision of the Convention requires states to comply with any theoretical constitutional concepts as such. The question is always whether, in a given case, the requirements of the Convention are met.'[35]

The test appears to bases upon the issue of proximity; should the legal review or legislative function exercised be satisfactorily linked to the matter adjudicated upon, in that case the enquiry of objective impartiality might be raised and then there will be violation under Article 6. The exclusive ability to perform the two functions might not be adequate so as to find infringement. In *McGonnell* the Bailiff of Guernsey had delivered a verdict on a planning appeal which related the development plan, the passage of which he had overseen in the legislature. The Court ruled that there was satisfactory proximity between the two functions and activities; judicial and legislative to generate a suspicion in respect of the impartiality of the Court.[36]

Conversely in *Kleyn* the applicant appealed a decision on the direction of railway to which a draft law is pertinent. The applicant asserted that the Council of State' Division was not an independent and impartial court, since that it was advisory body on draft law, but had also resolved the proceedings. The majority of the Court held that the two functions, the

30 Masterman, R., at. 633
31 McGonnell v United Kingdom(2000) 30 E.H.R.R. 289
32 Kleyn v Netherlands(2004) 38 E.H.R.R. 14
33 Pabla KY v Finland (App. No.47221/99), judgment of June 22, 2004, at [27].
34 McGonnell v United Kingdom, para.55
35 Ibid. Para.51
36 Masterman, R., at.634

consultative and the judgment concerning the course of railway were not considered as participation in the same matter and by themselves did not amount violation of Art.6(1).[37]

Possibly the strongest bolster for circumstantial approach may be the case of *Pabla KY.* The applicant claimed that the Finnish Appeal Court hearing and his trial was not independent and impartial, since individual member of it was concurrently a member of the legislature. The applicant maintained that holding these two roles simultaneously amounted to a breach of principle of court's independency and impartiality. The facts of this case may be differentiated from both Procola and McGonnell in that the person did not perform enactment or consultative activity in the passing of the provision at stake: Thus adjudication dealings could not be considered as concerning the same trial or the same judgment in the meaning of breach of Article 6(1) in Procola[38] and McGonnell.[39] The live question of whether simple coexistence of legislative and judicial responsibilities merely would infringe Art.6 (1) was raised in the case. The majority nonetheless adopted that a degree of closeness to the legal subject matter is required for a breach to have taken place[40]:

The Court was not convinced that the sole fact that person was a member of the Parliament while involved in appeal proceedings is adequate to raise suspicions as regards the independence and impartiality of the Court of Appeal. As the applicant based his case on the concept of the separation of powers, this criterion is not determinative in a theoretical way and the ruling indicated that this doctrine is not mandatory.[41]

3. The strict separation approach

The mere performing judicial and legislative power contemporaneously may per se constitute a violation of Art.6 (1). As far as the advocates of this view are concerned, the exact interplay between the two roles, or conditions of that intersection, are unrelated. Hence, this argument appears to require a partition of both occupation and staff; no person may simultaneously undertake function in more than one office of government. This opinion has found its roots, both in the dissenting opinions of

37 Kleyn v Netherlands, at. 200
38 Procola v Luxembourg (1996) 22 E.H.R.R. 193.
39 Masterman, R., at.635
40 Masterman, R., at.635
41 (App. No.47221/99), judgment of June 22, 2004.

in *Kleyn* Case and *Pabla KY* subsequently and as well evidently in *Procola Case*.

In Procola, four members of the Judicial Council performed advisory and judicial duties in the same case. In the framework of Luxembourg Council certain staffs consecutively carried out these two responsibilities casting doubts on the Council' organisational impartiality. In this case, Procola had reasonable justification for concerning the panel of the Judicial Committee which deemed necessary to be bound with former judicial view. Those suspicions in themselves were adequate to render the defect in impartiality of the court under debate suspect, since it refuted its reasoning.[42]

Apparently, this viewpoint implies that the mere ability to carry such responsibilities irrespective of the framework or character of the opinion would comprise a violation of Art.6 (1). Cornes' assessment on Procola Case implies that, in defining that the two different functions of the Council as legislature and judicial institution comprised to an infringement of a 'structural impartiality'. The verdict may mean that Art.6 (1) entails an apparent division of arms of state, notwithstanding the particular facts of each case.[43] On the other hand, the judgment in McGonnell, and the majority opinions in Kleyn and Pabla KY, give the impression of withdrawal from this interpretation of Procola.[44]

The dissenting decisions in Kleyn and Pabla KY nonetheless overtly support the complete separation of powers as a standard construal of Art.6 (1). This implies that overlaps between the pillars of state as an infringement. On a strict reading, the de minimis requisite is met if the fair-minded objective informed person would have sufficiently reasonable or objectively justified doubts about impartiality by the very ability to perform legislative and judicial roles.[45]

Likewise, Judge Borrego analysed the jurisprudence of the Court, revealing that, as the Commission maintained earlier; the notion of independent enshrined in Article 6, refers that the tribunals should be independent

42 Procola v Luxembourg, at. 45

43 Cornes, R., 'McGonnell v United Kingdom, The Lord Chancellor and the Law Lords' (2000), 166 P.L., at.13. See Russell, M., and Cornes, R., 'The Royal Commission on Reform of the House of Lords: A House for the Future?,' (2001), 64 M.L.R. 82 at 93.

44 Masterman, R., at. 636

45 Ibid.

against the executive as well as of the either side in a trial. The equivalent independence should be attained from parliament.[46] Tracing this assertion to Montesquieu, Judge Borrego maintained in conclusion that the independence of judicial bodies from the legislature ought to be permanent and ought not to be judged on the extent of proximity between the two functions in the conflict in question.[47]

4. Establishment of Court and Appointment

In *Sramek* case against Austria ECHR did not find the court as independent. The government was the one of the parties of the trial and the position of representative of the government above the investigative official of the court was not appropriate for independency and impartiality of the court.[48] In terms of the appointment of the members of court panel, the ECHR held that existence of qualified members regarding the quality and legal matters might be considered as an indicator of independence.[49] Appointment of members of the court by the executive merely itself does not mean the infringement of the Article 6 of the Convention.[50] In order to show the appointment by the executive is the breach of Article 6, applicant needs to prove that the composition of the court initiates improper influence of its judgments or lack of legitimacy in the appointment.[51]

Where members of court panel are appointed for certain time period, this may also perceived as a guarantee of independence. In the *Le Compte Case*[52] holding of 6 year definite time period as members of administrative Supreme Court was regarded as the guarantee of independence. In the *Campbell* and *Fell Case*[53] members of prison supervision board were appointed for 3 year time period. Having taken into account that work is not done for payment and difficulties of finding volunteers, it was not ruled to be an infringement of Article 6.

46 Pabla KY v Finland, n.24 above, dissenting opinion of Judge Borrego Borrego.
47 Masterman, R., at. 636
48 Sramek v. Avustria, 22 October 1984.
49 Le Compte v. Belgium, 23June 1981, para 57.
50 Campbell and Fell v. UK, 28 June 1984, at para. 79.
51 Zand v. Avustria, 15 DR para 70, 77.
52 Le Compte.
53 Campbell and Fell, para. 80.

5. Appearance of Court

Doubts concerning appearance of court must be raised on objective basis. In *Belilos Case*[54], a police board member acted as adjudicator over some trivial crimes, he was not subject to review and supervision and he could not be dismissed from his post, (he would eventually return to previous post in police authority). This circumstance could create legitimate doubts about the apparent impartiality of board due to the nature of its particular establishment, and it was held that conditions in Article 6 were not met.

In the *Salaman* case[55] the Court was requested to deliberate on the possible effects of a judge's membership of the Freemasons. The Court did not rule that judge's membership alone might merely give rise to suspicions regarding impartiality even where one side of the case was a participating member of the Freemasons.[56] In the *Pullar* case,[57] one member of the jury was coincidently an employee of the trial witness in a fraud trial. The Court did not hold that this caused a breach of Article 6(1), since an exhaustive assessment of the juror's affiliation with the witness, who had discharged him from his position, did not prove that the juror might be inclined to rely on his statement.[58]

III. European Standards on the Composition of the High Councils

1. Standards of the Council of Europe

The Council of Europe has a Recommendation (94) 12 on the independence, efficiency and role of judges. This has been the very important and initial international initiative in this area. Principle I (2) (c) of the Recommendation (94) 12 primarily focuses on independence of judicial councils and transparency of appointment process. Principle I (2) (c) of the Recommendation (94) 12 states that '*All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be indepen-*

54 Belilos v. Sweden, 29 April 1988, para 66-67.
55 Salaman v. United Kingdom , 15 June 2000.
56 White, R., at. chp. 8
57 Pullar v. United Kingdom,10 June 1996.
58 White, R., at. chp.8

dent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules.

However, where the constitutional or legal provisions and traditions allow judges to be appointed by the government, there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above.'

In addition to this the judges issued the European Charter on the Statute for Judges in 1998.

In 2007, the Venice commission prepared an opinion[59] on appointment method of judiciary: selecting the suitable method for appointments of judges is a key controversy appeared in the newly established democracies. The international trend in this respect is to establish independent body of appointment.

However there is no unique system of appointment across the Europe. The most appropriate system for safeguarding the independency of judiciary is setting up a high council holding constitutional guarantees for its structure, authorities and independence and which is responsible for appointment and assignment and disciplinary sanctions of judiciary.[60]

Parallel to this Report, the Consultative council of European judges (CCJE) released a view on the judicial councils responsible for ensuring independence of judiciary[61]. It emphasizes the vitality of judicial councils for the safeguarding the independence of judiciary: '*It is important to set up a specific body, such as the Council for the Judiciary, entrusted with the protection of the independence of judges, as an essential element in a state governed by the rule of law and thus respecting the principle of the separation of powers ; The Council for the Judiciary is to protect the in-*

59 Report adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007)

60 The opinion contemplates that even in experienced democracies, the executive branch has some instances a critical effects on appointment of judges: this sort of appointment method can operate well in implementation and let an independent judiciary since these authorities are restricted by unseen rules arise from legal culture and customs.

61 Opinion has been adopted by the CCJE at its 8th meeting (Strasbourg, 21-23 November 2007).

dependence of both the judicial system and individual judges and to guarantee at the same time the efficiency and quality of justice as defined in article 6 of the ECHR in order to reinforce public confidence in the justice system ; The Council for the Judiciary should be protected from the risk of seeing its autonomy restricted in favour of the legislative or the executive branch through a mention in a constitutional text or equivalent (...) Part of the work was designed for new eastern democracies, but it is now very helpful for the old ones.' [62]

2. Comparative Analysis of the Composition of the High Council for Judiciary

There is immense diversity across Europe. The United Kingdom reformed the judicial appointment system and established judicial appointment commission which is an independent non Departmental Public Body. It has the responsibility to accept application and advices candidates to the executive as it does not have appointment power. It merely selects candidates for judicial office[63]. The Council for the Judiciary is responsible for fulfilling the administration of judiciary, thus its composition is of vital significance. There are no direct elections to the Council in England and Wales. Every stage of the judiciary has its own Association at which elections are organized and the representatives of those Associations serve on the Council. The Lord Chief Justice is the president of the Council. There is a close cooperation between the Associations and the Council ensuring the mutual understanding and supporting each other, as elections are held via the Associations. The Lord Chief Justice is both President of all the Courts of England and Wales and Chairman of the Council.[64]

The Netherlands set up a High Council in 2002 as a result of an important reorganization of the judicial structure[65]. Likewise, Belgium reshaped appointment system by establishing a Judicial Council in 1999, in order to renovate public confidence to the justice system subsequently the Dutroux case.

62 This view was entirely supported by the Venice commission: see Hanna, Suchocka, Analysis on the Draft View of the Consultative Council of European Judges on Judicial Councils, adopted by the Venice Commission at its 72nd Plenary Session, (Venice 19-20 October 2007).

63 The Constitutional Reform Act of 2005.

64 www.judiciary.gov.uk/docs/judges_council/judicialconduct_update0408.pdf.

65 The Judicial Organisation Act.

Furthermore, the France amended the constitution restructuring the High Council for the judiciary on July 2008. One of the important innovations on the structure of the High Council is the change in the president of the High Council which is formerly President of Republic. The Constitutional Amendments envisages that president of the jurisdictional division of judges will be the President of the Court of Cassation, whereas president of the jurisdictional division of public prosecutors will be the Chief Public Prosecutor of Court of Cassation.

As regards the independency of the judiciary, the methods of selection of members and the representation of different segments of judiciary are the key aspects of a High Council of Judiciary. The CCJE has the opinion that members of the High Judicial Council should be selected either among merely judges or selected among both judges and non professionals. In either case, the perception of self-interest, self protection and cronyism is required to be avoided'. (…) 'When there is a mixed composition (judges and non judges), the CCJE considers that, in order to prevent any manipulation or undue pressure, a substantial majority of the members should be judges elected by their peers'.[66] The phrasing of statement proposes the harshness of the heated discussion.

However, the selection systems of the members of the High Council have to be regarded as vital as the mere subject matter of the majority. For example, the system in Spanish High Council in which judges are represented in majority, was ended sterilized for two years since confirmation of nomination in Parliament is only attainable by qualified majority and thus it was almost unattainable. The French High Council, in which judges and prosecutors had a majority, came to a decision that nominations were alleged by the opponents as impartial or at least very conservative.[67]

As to the conclusion drawn up from the analysis of the Member States practices and principles laid down by the ECHR and the opinions and recommendations of the European Council issued to enhance the rule of

66 Opinion has been adopted by the CCJE at its 8th meeting (Strasbourg, 21-23 November 2007).

67 With the Judicial Reform regarding the structure of the High Council of July 2008, the composition of the Council was reformed and judges and prosecutors are now in a minority.

law and judicial independence, all these semi-binding documents and opinions establish universal standards, norms and principles.[68]

There is no sole system which can be imposed to those controversial democracies. However preferences require to be adopted to build mutual confidence and efficiency against the other judicial systems in order to cooperate more effectively and more importantly to strengthen public confidence in terms of being independent and appear to being independent so that new scales of justice can be reshaped in which a British judge or prosecutor asking his Spanish or French colleagues for various prosecutions and trial can be trusted that the trial is heard according to principles of fair trial. This confidence largely depends on a whole judicial mechanism; however the judicial safeguards of independency of the High Council are far more key part of this organization.[69]

a. Composition of the Judicial Appointment Commission of England

There are three different jurisdictions in the United Kingdom: England and Wales, Scotland and Northern Ireland. Until the Judicial Reform Act 2005, all the judicial tasks were undertaken by the Lord Chancellor who was head of the judiciary, speaker of the upper house of legislature and a member of the cabinet. However, the structure of the governance of the Judiciary was under criticism due to infringement of principle of separation of powers. It should be mentioned however, that for intricate grounds, the structure had operated very well until recent years. Until the judicial reform, it appeared that British system which was depending on the union of powers instead of separation of power had started to create some problems. The United Kingdom reformed the system of governance of judiciary between 2003 and 2008, consequence of which has been transform each requirement related to judicial independence[70].

In the system before the Judicial Reform in England and Wales, the whole administration of justice rested with the Lord Chancellor's performance on the recommendation of the most high-ranking judges. An inde-

68 Eric A., Judicial independence in Europe Models of self-government and self-responsibility, Frankfort/Main, November 7-8th, 2008, at.http://medel.bugiweb.com/ usr/judicial% 20in dependance.pdf (at. 13 June 2010).

69 Ibid.

70 Judicial Reform Act 2005; Yakut, B., Report on Comparative Analysis of Judicial System of United Kingdom, Sweden and Italy, (2008), Unpublished Turkish Prime Ministry; www. judiciary.gov.uk/docs/accountability.pdf

pendent Judicial Appointment Commission was sep up with a wide public participation by conveying the charge of appointment to consisting of 5 judges, 2 lay judges, 2 legal professionals and 6 highly qualified members of the public. All the members of this Commission are selected by a method entirely independent of the executive and by related professional associations. The Commission advices for performing all appointments including the most senior judges: the 42 members of our Court of Appeal, the 12 members of the House of Lords. It has a particular division of 2 judges and 2 lay persons with the senior judge having the casting vote.[71]

Its rationale was to guarantee judicial and public participation into the appointment of judges. The new reform eliminated any risk of political pressure. The subject matter of accountability is addressed by the Appointments Commission revealing an annual report and its president and deputy president being questioned by legislature. The status of the judicial hierarchy is safeguarded by a mechanism of consultation ahead of appointments. This Commission has started to function 4 years ago. The Appointments Commission has no responsibility for assessment of judges. In general in the majority of the states, appraisal vested completely under judicial control. This approach appears a correct one in principle since the appraisal of judicial performance is basically a professional assignment for other judges to which the public can have a slight input.[72]

b. Composition of the Italian CSM

The CSM is composed of 24 elected members, 16 of whom are elected by magistrates and 8 by parliament (Chamber of Deputies and Senate in joint session), and 3 by right of office (President of the Republic, President of the Court of Cassation, Attorney General). The parliamentary appointees, "lay" figures, as opposed to the "robed" members, are elected from among academicians in the area of related legal fields and experienced lawyers. The deputy president of the Council is chosen among the lay members. Before the current application, parliament had preferred the system of associative pluralism by vesting it recognition and promoting the widest participation by way of a proportional 2 method, with opposing listings, planned to select an sufficient number of members: 30 elected, 20 of whom robed and 10 lay, and 3 by right of office. Participa-

71 Ibid.
72 Ibid.

tion and representation of parliamentary opponents had been also intended with this method. Eventually, the selection method was amended, with the intention of building it a reduced amount of proportional with no influencing the fundamental rules of an election, including opposite listings, as regards projects of political character. The CSM is chosen for 4 years period and the members cannot be assigned for the second term. Therefore the CSM is entirely changed every 4 years except for the 3 members by President of Republic, President of the Court of Cassation and Attorney General. But as a result of the 2002 reform[73] magistrates are no longer elected depending on the listings and in accordance with a proportional method, however by way of a single choice for an individual candidate, on a countrywide basis. Anyhow, a change which was planned to decrease the influence of the Magistrate Associations, which in practice enter election with a lists and some projects, has had the outcomes of hindering the search for reconciliation among the members of association. A candidate who has strong support from a definite grouping could rationally anticipate to be chosen. Concurrently with this progress, decline in the figure of representation of lay members, alongside the increase of what is akin to a majority political system have led to outcomes completely opposite to those anticipated. Eventually parliamentary candidates have become performing purely as the delegation of a political majority and not as high scientific and professional figures. This practice provides as a notice of the possible unsuccessful consequences on the occasion that majority logic appear in an independently governed institution, and as a precaution of the significance of the preference of electoral systems. [74]

c. Composition of the Spanish Consejo General del Poder Judicial (CGPJ)

The CGPJ is the organization established in the Spanish Constitution as independent and leading High Council for the judiciary. The CGPJ has the power to take required decisions in regard to carrier, promotion, discipline of judges. Thus the Ministry of Justice has no authority in this respect. It has 20 elected members, plus a chairperson chosen by them

73 Yakut, B., Ibid.; Law 44, 28 March 2002.

74 Salvi Giovanni, 'Self-government and Constitutional Law: The Italian Experience', conference in Frankfurt Main, 7-8th november 2008, at. www.medelnet.org/pages/3_2.html (access date:13 June 2010)

amongst esteemed judges or jurists. Furthermore he chairs the Supreme Court too. The Parliament selects the 20 members of the CGPJ. The 12 judicial members are elected among 36 nominees chosen by judges by means of their associations or nomination of as a minimum 2 per cent of all judges.[75]

IV. Legal Bases of the impartiality and independency of Tribunals in Turkey

1. Overview of the Judicial Independence in Turkey

Several provisions of the Turkish Constitution[76] provide for the independence and impartiality of its courts. Article 9 of the Constitution proclaims that 'judicial power shall be exercised by independent tribunals on behalf of the Turkish Nation.' Under Article 138, any possible pressure may be prevented from affecting the exercise of judicial authority, it is completely prohibited for any authority to give instructions, recommendations, or suggestions to courts. Additionally, no legislative deliberation may be held in relation to the exercise of judicial power in the course of hearing. Both legislative and executive bodies are obliged to obey court judgments without alteration or delay. Article 139 of the Constitution invests the judiciary with a guarantee of tenure, (even though definite legitimate exemptions are provided for). Article 140 provides that judges shall be dismissed from their duties in consistent with the principles of the independence of the courts and the guarantee of tenure of judges. The Article also ensures exhaustive arrangements in regard to the individual position of judges.

These constitutional guarantees of an independence of court are elaborated in different provisions of domestic legislation, in particular; the Law on Judges and Public Prosecutors; the Criminal Procedure Law; the Civil Procedure Code; and the Turkish Penal Code.

Article 2 of the Judges and Public Prosecutors Law provides that 'This law shall apply to ordinary judges, public prosecutors and administrative judges.' While Article 4 of the same Law states that 'Judges shall perform their duties under the principle of independence of courts and be

75 Joaquín Bayo-Delgado, 'Self-government in courts – vertical ('hierarchic' model) versus horizontal ('democratic' model) the Spanish model', Frankfurt/Main, November 8th 2, at. www.medelnet.org/pages/3_2.html. (at.13 June 2010).

76 Turkish Constitution at. www.tbmm.gov.tr/english/constitution.htm (15.6.2010)

entitled to the jurisdictional immunity.' Same Article also guarantees the terms of office and remuneration of judges and establishes that they are not obliged to report on the merit of their cases to anyone outside the judiciary. Various other laws introduce sanctions and preventative measures in order to prevent any restriction, improper influence, inducement, pressure, threat or interference with justice. In the event of disciplinary offences, the Law on Judges and Public Prosecutors stipulates the legal procedure to be followed (Articles 82-97)

2. The Existing Composition of the High Council

The Supreme Council is responsible authority in respect of appointment and promotion of all judges and prosecutors in Turkey. Indeed, the powers of Council are somewhat wider than solely appointing and promoting judiciary. Article 159 of the Constitution sets up the Supreme Council of Judges and Public Prosecutors as an institution of decision-making and for officials responsible for governance of the judiciary. The Supreme Council is in charge for the hiring of judges and prosecutors of ordinary courts and administrative courts. It regulates entry into the profession, appointments and transfers; the entrusting of temporary powers; promoting the first rank; the allocation of judges according to the courts' divisions; the imposition of disciplinary sentences and discharging from post.

The Council is composed of seven members and 5 substitute members. The Minister of Justice is the President of the Supreme Council and his Under-Secretary is an *ex-officio* member. The remaining five original members of the Supreme Council and plus five substitute members are appointed by the President of the Republic. These are chosen from a list selected by the Court of Cassation from and two members from a list selected by the Council of State. All nominations are for four-year periods nevertheless members can be re-elected at the termination of tenure.[77]

3. EU Advisory Visit Recommendations

In the context of the accession partnership between the EU and Turkey, the EU Commission organised three expert missions to scrutinise the Turkish judicial system so as to strengthen it. They delivered four advisory visit reports.[78] A subsequent four Reports contained recommenda-

[77] Turkish Constitution, Art. 159.

[78] The Advisry visit reports on Functitoning of Judicial System in Turkey, at. www.abgm.adalet.gov.tr/(5.6.2006)

tions concerning judicial independence, role of Ministry of Justice[79], and structure of Supreme Council[80].

The recommendations primarily focus on removal of the Minister of Justice and that of his Under-Secretary from the Supreme Council from the Supreme Council.[81]

In the First Advisory Visit Report it was recommended that**, '**in accordance with Principle 1(2)(c) of the Council of Europe Recommendation on the Independence of Judges, Article 159 of the Turkish Constitution be amended so as to remove the Minister of Justice and his Under-Secretary from the High Council of Judges and Public Prosecutors'. In line with this recommendation, it was also recommended that 'in accordance with Principle 1(2)(c) of the Council of Europe Recommendation on the Independence of Judges, the President be absolved of his power to appoint members of the High Council and ***judges and public prosecutors themselves be empowered to elect their representatives on the High Council***. In the alternative, the President could retain his power to formally appoint members of the High Council but any appointment should be made only ***from among candidates brought forward by judges and public prosecutors themselves***'.[82]

In the second and third Advisory Visit Report, they amended the recommendation as was in the new Constitutional Amendments in regards to presence of the Minister in the High Council by saying that 'we consider that provided various other reforms are implemented in line with the recommendations made following the first Advisory Visit, the continued presence of the Minister of Justice on the High Council, without any voting rights, would not undermine the independence of the judiciary in Turkey. We therefore consider that the recommendation could be amended accordingly'. As to the power of president, previous recommendation was repeated by stressing that ***Judges and Public Prosecutors***

79 Ibid., at. 8-11
80 Ibid., at. 12-15
81 Ibid., at. 11
82 The First Advisory Visit Report on Functioning of Judiciary in Turkey: www.abgm.adalet.gov.tr/altmenu/ istisari_ ziyaret.html (at. 15-6-2010)

themselves should be empowered to elect their representatives on the High Council.[83]

In the Fourth Advisory Visit Report requirement of the representation for the courts of first instance emphasized by explicitly that '***the composition of the Council does not adequately represent the judiciary as a whole; its decisions are not published; and there is no effective remedy against its decisions***'.[84]

Except for the representatives of the Ministry, the High Council has five regular members three coming from the Court of Cassation and two from the Council of State. This connotes that although the Council's governance tasks widen to all judiciary, merely the high courts have representative in it. The courts of first instances are entirely excluded, emphasizing the hierarchical organization of the judiciary. Considering suggestion above that the Ministry of Justice should have merely one representative in the Council. Allocation of members could be as follows: representatives of the Court of Cassation, the Council of State, prospective Courts of Appeal, the courts of first instance, the administrative courts of first instance. Moreover, a few members should be allocated to lawyers (members of the Bar).[85]

Following the Third Advisory Report, It was recommended that '***the Council's membership be increased considerably. The new size should make the Council large enough to permit an adequate representation of the lower court judges and public prosecutors and the Bar, while at the same time keeping it small enough not to jeopardize its functionality***'.[86]

Presently, members of the High Council elected by the Court of Cassation and the Council of State are assigned by the President of the Republic from among three candidates elected by the plenary assembly of these courts.[87] The participation of the straightly elected head affords democratic legitimacy to the High Council. The extra representatives could be selected along the same method. The Judicial Reform Strategy specifies,

83 The Second and Third Advisory Visit Reports on Functioning of Judiciary in Turkey: www.abgm.adalet.gov.tr/ altmenu/istisari_ziyaret.html (at. 15-6-2010)

84 Fourth Advisory Visit Report On İndependence, İmpartiality & Administartion of Judiciary www.abgm.adalet.gov.tr/altmenu/istisari_ziyaret.html (at. 15-6-2010)

85 Ibid.

86 Ibid.

87 Art. 159 (2) of the Constitution.

though, that the Ministry of Justice foresees to engage also the parliament in the selection course of action. Provided that every member is chosen among three candidates which are selected by the judiciary, their concrete assignment by the President or the Parliament cannot endanger the High Council to any significant degree.[88]

4. Evaluation of the Current Structure in Turkey

First of all, it is worth to mention the international perspective about existence of the Ministry in the High Council. There is a key difference between the CCJE view and the Venice Commission's opinion concerning the structure of the High Council. The Venice Commission express that "***a substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself***"[89], whereas the CCJE regards that, "***in order to prevent any manipulation or undue pressure, seventy-five per cent of the members should be judges***"[90] This difference does not seem a inconsistency since judges can, obviously also be assigned by another branches than the Judiciary itself. Nevertheless it continues to appear that the Commission can also agree to a considerable number of members from among the judges, i.e. slightly less than half of the members.[91]

On the other hand, an apparent opposition emerges once the Commission regards that "*other members should be elected by Parliament among persons with appropriate legal qualification taking into account possible conflicts of interest*"[92] as opposing view with the CCJE-GT is of the opinion that elections by Parliament however "*commends a system that entrusts appointments to non political authorities*"[93]. The Commission considers that the *involvement of Parliament provides for democratic legitimacy of the Judicial Council*. In case of the election performed by Parliament, the CCJE-GT and the Commission concurs in maintaining on a qualified majority so as to assure equilibrium in representation.[94]

88 Ibid.
89 Venice Commission Report, para. 29.
90 CCJE's opinion, para. 18.
91 Hanna Suchocka, 'Comments on the Draft Opinion of the Consultative Council of European Judges on Judicial Council, adopted by the Venice Commission at its 72nd Plenary Session', (Venice 19-20 October 2007).
92 Venice Commission Report, para. 29.
93 CCJE's opinion, para. 31-32.
94 Hanna Suchocka, at.3.

'*While there is convergence as to a possible role of the Head of State in the Council, the CCJE-GT insists that no minister can be among its members*.[95] However, the Commission might admit presence of the Minister of Justice under definite circumstances, for instance: "*such presence does not seem, in itself, to impair the independence of the Council, according to the opinion of the Venice Commission. However, the Minister of Justice should not participate in all the council's decisions, for example, the ones relating to disciplinary measures*".[96]

In 1961 Constitution, until 1971, a different system was applied. Justice Minister had seat in the Council without a right to vote. However after 1971 amendments in the Constitution the Minister became president of the Council and right to vote was granted to him. Since these two models did not tackle the problems regarding the functioning of the Council, the current model was adopted by the 1982 Constitution.

First argument supporting the presence of the Ministry of the Justice in the Council concerns the accountability of the Council against public. As regards the recommendations advising the removal of the Ministry of Justice and his undersecretary from the High Council, some argues that state branches which exercise powers arising from sovereignty should be accountable to the public. One of the most important responsibilities of the Minister of Justice is to carry out governance of justice in the Council of Ministers and thus he has political accountability. They point out that as a representative of the executive and member of Parliament, Minister of Justice is a political figure and under public and media scrutiny.

In this sense, it was regarded that Justice Minister who bears political responsibility for the administration of justice should have a seat as a representative of executive and legislature in the High Council. It makes important contribution in relation to the governance of the judiciary. According to this view, otherwise, holding Minister responsible for the decision making and implementation process and not giving him seat in the Council would be incompatible with the legitimacy of democracy and pluralism.

On the other hand, according to those who support the presence of the Minister in the High Council did not regard all the functions of judges

95 CCJE's opinion, para. 23.
96 Venice Commission Report.

and prosecutors as judicial function. They believe that principle of separation of powers should not be understood that these powers are entirely disconnected and there must be link and coordination between Justice Minister and Supreme Council in order to carry out justice services more efficiently. Therefore, Undersecretary of the Ministry of Justice who holds the highest administrative position in a justice organization should have a seat in the Council as well.

Second argument supporting the presence of the Ministry in the Council was that in his position, Justice Minister is the only political person and he does not have any competence or influence in practice over the other members of the Council who are elected from high courts. Furthermore, these members elected in respect of professional ability are affiliated to high courts. In accordance with Article 38 of Law on Judges and Prosecutors, even were it assumed that Under-secretary would act in concert with Minister in the Council, there is nothing to prevent the other members from making their own decisions.

Last point they raised is that democracies rely on representation. Six members of the Council are from judiciary and appointed by President. The presence of Justice Minister who has representative power behind him as an elected person is a requirement of representative democracy. Similar views have been mentioned in 44th paragraph of the Opinion number 1 of standards on judicial independence of CCJE. Also, in paragraph number 42 of the same opinion, Turkish system has been presented as a model along with Italian and Hungarian systems.[97]

5. New Structure of the High Council for the Judiciary in Turkey

After the heavy criticism on composition of the High Council of Judges and Prosecutors, the Turkish Government drafted amending the several articles of the Constitution ranging from composition of the HCJP and Constitutional Court to Ombudsman, data protection and right to access information. In particular the composition of the High Council will be changed in line with requirements mentioned in the Advisory Visit Reports and the Venice Commission and views of the CCJE. The Parliament adopted the amendments, but with the quorum of compulsory referenda. The opposition parties applied to the Constitutional Court. If the Constitutional Court and public approve the constitutional amendments,

[97] Opinion the CCEJ, para. 42-44

judicial system of Turkey will transform significantly in particular, the composition of the HCJP.

How will the new composition for the High Council be after the new amendments? At the beginning of the Article 159 of the Constitution, it is emphasised that the HCJP will be established and exercise its functions in conformity with the principles of independence of the courts and the security of tenure of judges.

First important change in the composition of the HCJP is the number of members and selection methods of members. The new HCJP will be composed of twenty two regular members and twelve substitute members and it will carry out its duties and responsibilities as three divisions.

The Minister of Justice will continue to be the President of the Council. However, he will not join the meetings of the divisions. The Undersecretary to the Minister of Justice will be an ex-officio member of the Council. The administration and representation of the Council will be rested on the President of the Council.

As to the selection method of members, four regular members of the Council will be appointed by the President of the Republic from among the academician in the area of law, economics and political sciences and experienced bureaucrats and lawyers. Three regular and three substitute members by the Court of Cassation among its members, two regular and two substitute members by the Council of State among its members, one regular and one substitute members by the Justice Academy, seven regular and four substitute members by first ranking civil judges among them, three regular and two substitute members by the administrative judiciary among them will be selected. The members may be re-elected at the end of their term of office.

The Council will be responsible for admission of judges and prosecutors into the profession, appointments, promotion, and assignment to other courts, the imposition of disciplinary penalties and removal from office.

6. Analysis of the New Structure

In the current structure, judges and prosecutors of courts of first instances are not represented directly. Current structure is consists of members elected from the Court of Cassation and Council of State plus, Minister of Justice and undersecretary. This composition is criticized by the interna-

tional documents. Ensuring representation for judges and prosecutors of the courts of first instances can be considered as positive move forwards in terms of democratic legitimacy. This requirement is emphasized in Venice Commission report on judicial councils. Furthermore, in the EU Advisory Visit Reports on Functioning of the Judiciary and EU Progress Report, it has been consistently stressed that as the composition of the High Council comprising solely members elected from the Court of Cassation and the Council of State does not represent whole judiciary. The selection of certain number of representative from the judges and prosecutors of courts of first instance is necessary. It appears that new structure will met this recommendation and opinion in the Venice Commission and the CCJE.

The Venice Commission states that "a substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself"[98], whereas the CCJE considers that, "in order to prevent any manipulation or undue pressure, seventy-five per cent of the members should be judges"[99]. This divergence need not necessarily be a contradiction because judges could, of course also be appointed by other bodies than the Judiciary itself. It remains however evident that the Commission can also accept a "substantial element" of judges, i.e. slightly less than half of the members.

In the Progress Report 2008, it was stated that even if influence of the executive in the High Council minimised, composition of the High Council that does not represent sufficiently the whole judiciary is one of the problematic aspects of lack of democratic participation to the governance of the judiciary. It is also maintained in this reports that although supervision and governance power of the High Council encompass the judges and prosecutors of the courts of first instances, only the Supreme Courts are represented in the High Council. The judges and prosecutors of the courts of first instance are excluded in the High Council as confirming the hierarchic position of the High Council.

In the European Charter on the Statues of the Judges, it is envisaged that at least half of the members of the Judicial Council which will take the decision on selection, appointment, assignment, rotation, promotion and

98 Venice Commission report, para. 29.
99 CCJE Opinion, para. 18.

discharge from the profession, should be selected by their peers with a system guaranteeing broad participative representation and consisting of judges.

European Judges Consultation Council in its opinion no. 10/2007 the Judicial Council in Service of Society, if it is foreseen that the High Council consists of solely judiciary, it is required to ensure that election of its members should be performed by their peers and as guaranteeing broadest representation of all judicial segments and every judicial branches as possible. In case, the mixed composition preferred, it is stated that majority of its members should be elected by their peers.

UNDP Turkey Delegation carried out a survey among the 1200 judges and prosecutors, %85 of the participants had the opinion that judges and prosecutors of the courts of first instances should be represented in the High Council. Whereas, %25 of the respondent believe that current structure of the High Council represents whole judiciary.

V. Conclusion Remarks

From the evidence collated, it is possible to conclude that, under aegis of the circumstantial approach, the involvement of the Turkish Justice Minister in the current and forthcoming decision making process of the Supreme Council is a 'mere formality.' In this case, the tests of independence and impartiality might not have been fulfilled; the interplay between the two functions is not too satisfactorily proximate. The performances of legislative, executive and judicial responsibilities solely constitute a violation where particular facts of the case show this.

In respect of the strict separation of power approach, apparently, the level of participation of Turkish Ministry of Justice in the decision making process of Supreme Council is a decisive factor, amounting to a sufficiently proximate relationship between the legislative, executive and judicial functions to satisfy the Art.6 tests for independence and impartiality. However, the involvement in the promotion and appointment judges and prosecutors does not go far beyond formality. The involvement is a kind of special measure, which ensures that the separation of powers can not cut interaction between the arms of government, since the separation of power does not mean disconnection among arms of government. In this way, Turkey has ensured better guarantee of the independence and impartiality of judiciary, (as was in the South-eastern sys-

tems of European Countries[100]), where Ministry of Justice functions as a mediator between the judiciary and the Government and structuring reasonable and softened body in which participates as a representative of executive and legislator. He therefore remains a figure accountable to the public as far as justice policy is concerned.

Structure of Supreme Council prescribed in the EU recommendation, one which would not be responsible to the public, risks creating a 'judge state' or 'class dominance', which could create a system, potentially in a sense incompatible with the core of democracy.

Recommendation of EU experts relying on the concept of the strict separation powers is therefore not enough to indict the current judicial system of Turkey under Article 6(1) of the Convention. In favor of the circumstantial approach the system should be judged by individual cases and there should be an adequately strict affiliation between the behavior and the issue being heard by the court to justify a ruling as not impartial. The mere ability to perform legislative, executive and judicial functions should not be considered automatically to lead to violation of the independence and impartiality of the court. Hitherto, the Court did not find violation of Article 6(1) in respect of the composition of the Supreme Council, about Turkey and it would seem that the Turkish judicial system as influenced by Article 6(1) does not entail a strict separation of executive and judicial power regardless of the obvious support for the approach evident in the recommendation of the EU experts.

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