

25 July 2021

Att. Mehmet Gün  
President of the Board of Directors  
Better Justice Association

My dear friend Mehmet Gün,

First of all, I wholeheartedly support your consistent efforts to improve the legal system in our country as part of the Better Justice Association, and I congratulate you and your teammates.

I would also like to thank you for your request for my opinion on your work titled *Turkish Judicial Reform A to Z*. The quality of life increases in societies whose institutions can be relied upon. On the other hand, a well-functioning legal system and good governance institutions are indispensable for a society and a sustainable future. Therefore, it was exciting for me to be able to contribute to this valuable work of yours.

To summarize briefly, I would like to present my proposals under a few headings to add solidity to your valuable work: (i) ensuring that the people who will operate the system are competent people who understand and internalize the spirit of the proposed system, are independent, impartial, and know and apply their responsibilities well; (ii) ensuring that the principles that will build trust are complementary and adopted by the elements of the legal system; and (iii) constructing the knowledge production and education system that will ensure the continuous development of the system.

The Supreme Authority of Justice, included in your proposal, is critical to your system. Although I find your proposal very correct that the candidates to be elected to this Authority should consist of independent and impartial competent legal experts and represent different segments, I am concerned that this may not be sufficient. The reason for this is basically the expected independence and impartiality of thought. Choosing from different institutions may be insufficient to meet this purpose. For example, as has been observed recently in our country, allegiance to another power (such as FETO) in the background has resulted in the castration of the legal system in order to control the state instead of validating the rule of law in prosecutors, judges, law enforcement agencies and even in parliament. Therefore, my first proposal would be to add a written statement from the candidates that they are not and will not be bound by any power other than the rule of law, and to run a public inquiry and interview process during the selection process, to ensure that the candidates and their previous professional performance and decisions are scrutinized by different segments. In case of detection of situations contrary to the written declarations, it should be stipulated that the candidacy and even the term of office, if elected, will come to an end.

In your work, principles such as accountability, transparency, participation and fairness come to the fore. However, I would like to express the view that for a society whose institutions can be relied upon, it is important to consider all seven principles of good governance: **consistency, responsibility, accountability, fairness, transparency, effectiveness and deployment of inclusive participation in decision making.**<sup>1</sup> In this context, I think it would be useful to explain the importance of the principles of responsibility, effectiveness and consistency for the independence of the judiciary and the rule of law for the newly proposed system.

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<sup>1</sup> CRAFTED principles: **C**onsistency, **R**esponsibility, **A**ccountability, **F**airness, **T**ransparency, **E**ffectiveness, and **D**eployment of inclusive participation in decision making.

One of the most important features of a well-functioning justice system is the belief in the rule of law and the confidence that the rules will be applied equally to everyone. For this reason, **consistency** in the decisions of the legal system is critical to the formation and management of expectations. On the other hand, the OECD's "Open State" approach reveals that the understanding that improves the sense of trust in society will become widespread by improving the consistency and increasing transparency not only in election processes but at every stage of decision-making.

It is important for the system to work better that the approaches and decisions of those who take charge in the legal system are also open to questioning, and that developments in career and performance evaluations are linked to the responsibilities they undertake.

In terms of both the principle of **responsibility** and the principle of **effectiveness**, it should be regularly examined how the decisions and the system produce results, and participation in training on necessary corrections and practices should be made mandatory.

Therefore, evaluation processes that are open to improvements should be established not only on a decision basis, but also on a system basis. For example, (i) draft writing processes should be established to ensure that laws and decrees to be adopted by the Turkish Grand National Assembly are compatible with both previously accepted laws and international agreements (adopting a "whole of government" approach); (ii) it should be ensured that the written language is written in a way that will ensure that the law enforcement and legal units that will implement the decisions understand it in the same way (in this way, it should be prevented that rules which are open to interpretation increase the corruption tendency of those who undertake the task of supervising the implementation); (iii) the evaluations regarding the main purposes written in the justifications should be made before the decision (*ex-ante impact analyses*), and the decision should be made after discussion with the participation of the stakeholders; (iv) continuous improvement should be ensured by evaluating the developments over time with impact analyses (*ex-post impact analyses*) and making the necessary corrections a part of the process (such as "sunset" rules); (v) it should be ensured that an assessment of the social costs of compliance is stipulated before decisions are made (*enforcement and compliance costs, impact analyses, "one-in-one-out"*); and (vi) approaches (such as frequent amnesty) that give advantage to those who do not comply with the rules over those who do comply with the rules should be abandoned.

In conclusion, I would like to state that Ms. Ece Güner Toprak's book *Başarabiliriz* (We Can Succeed) contains proposals in line with your valuable work and it would be beneficial to get her contributions to this important work by contacting her.

In summary, by adopting the understanding summarized above, an approach focused on continuous learning and development can be put into practice, the efficiency of the justice system can be improved, and a society that trusts its institutions can be built instead of one based on the understanding that "What I say goes".

Again, I would like to thank all of your colleagues who contributed to this important work, especially yourself, and I further add: let's keep working for a better Turkey ...

With kind regards,

*R. Yılmaz Argüden*

Dr. Yılmaz ARGÜDEN

## **Our evaluation and opinions of *Turkish Judicial Reform A to Z***

- The proposal aims to create an inclusive, specialized and independent regulatory body. This institution is defined as the Supreme Authority of Justice.
- The aim is that the Supreme Authority of Justice will have a structure that represents all segments of society, and that its membership will be formed using an inclusive approach, with members as participants. This approach creates a positive picture in terms of strengthening participatory democracy and the principle of impartiality. Designing the representation, nomination and selection structure of the institution in a way that prevents it from being controlled by a group can be effective, especially in terms of carrying out its activities in line with principles of governance such as independence, fairness, transparency and accountability.
- As an inclusive structure, the Supreme Authority of Justice can determine and prepare its law and justice policies with the agreement of all parties, thus contributing to the formation of a social consensus, reassuring society as to its impartiality and fairness, and increasing confidence in the sense of justice in society. The main purpose of good governance is to ensure the trust of all stakeholders in institutions and the system. The establishment of the Supreme Authority of Justice carries importance for the implementation of the good governance approach in judicial services.
- That Supreme Authority of Justice will incorporate tasks such as structuring and establishing courts, appointing judges and prosecutors in a transparent manner within the framework of the rules, and realizing admission to the profession contributes to the integrity and quality assurance of the legal service. In such appointments, it helps career and merit come to the fore by reducing the influence of the legislature and the executive. A good governance approach is implemented by qualified practitioners who have internalized these principles with the aim of establishing the right decision-making processes and increasing the quality of the decisions.
- The structuring of the courts in line with needs of the prosecution and advocacy institution in such a way as to enable quick decision-making in the courts creates a sense of confidence in the rapid access to justice in society. It helps to control efforts to seek solutions through illegal mechanisms.
- The supervision and submission to the judiciary of institutions, courts and mediation decisions are important in terms of transparency and accountability principles. This approach is compatible with the OECD's Open State approach in terms of jurisdiction. On the other hand, it can support the widening of the sense of justice in society. It complies with good governance practices by enabling consistency and effectiveness in decisions.
- Ensuring the independence of judicial professional organizations and the administration of these institutions by professional members is compatible with the good governance approach because it increases the quality and impartiality of decisions.
- The Permanent Law Council, by learning from experience, evaluating the legal processes in new fields revealed by new trends and contributing to the integration of international practice into the Turkish legal system, will support the improvement of the quality of judicial services. This approach is also in line with the understanding of learning from experience and continuous improvement of good governance.

- The establishment of the Supreme Court of Justice before the Supreme Authority of Justice and implementation of special judicial procedures to ensure the effectiveness of this court's supervisory activities, and its hearing of cases against the judicial organization, its functioning and its members, comply with good governance principles such as fairness, transparency and accountability. The existence of the Constitutional Court as an appellate authority is important in showing that all decisions are open to questioning. The aim is to ensure the rule of law and impartiality by ensuring that the judiciary is held accountable.
- Your proposal for legal immunity and supervisor approval in conducting investigations regarding public duties contributes to increasing transparency and accountability, especially in public institutions. This also helps in the fight against corruption. The trial of public officials by the Supreme Court of Justice would be beneficial in this respect.
- For judges, prosecutors, attorneys and notaries who are components of the legal profession:
  - Uniform career plans will be created;
  - Performance evaluation systems will be established;
  - After entrance to the profession and the internship phase, admission to the profession is carried out through an exam and interview; exam and interview records are open to the public and shared transparently.
  - Providing the opportunity to transfer between professions thanks to the uniform career plan contributes to the formation of professional, competent, experienced and knowledgeable people. It can contribute to the strengthening of the prestige of the members of the judiciary in the eyes of society, and to the sense of justice;
  - Developing human resources enables the adoption and strengthening of continuous development and learning, which are part of good governance culture, and increases the quality of decisions.
- The new systems proposed in the election methods of the Constitutional Court, Court of Cassation and Council of State increase transparency and, at the same time, play a role in reducing political influence by bringing merit to the forefront. The three-part structure proposed for the Constitutional Court, the fact that new members will start working with individual applications and the proposed rotation practices between departments also provide the opportunity for independence and impartiality by rejecting political pressures and influences.
- The Court of Cassation acts as the highest authority that examines and decides on all criminal and civil court decisions. The Court of Cassation has an important role especially in establishing jurisprudence and ensuring consistency of decision-making and jurisprudence. The selection of the members of the Court of Cassation, by giving importance to merit, helps to achieve this goal and allows the quality of decision-making to increase.
- The Council of State acts as the appeal authority for the decisions of administrative courts, tax courts and regional administrative courts, and as the court of first instance for administrative cases not heard by other courts. The Council of State has an important role in establishing jurisprudence for tax cases, especially in administrative cases, and also in ensuring consistency in decision-making and jurisprudence. The selection of the members of the Council of State, by giving importance to merit, helps to achieve this goal and allows the quality of decision-making to increase.

## Our suggestions

- Principles such as accountability, transparency, participation and fairness come to the fore in the set of proposals. Good governance is shaped around seven principles. These can be listed as: **consistency, responsibility, accountability, fairness, transparency, deployment of inclusive participation and effectiveness**. The independence of the judiciary and the rule of law can be achieved through the implementation of these seven principles. In this context, we think it would be useful to explain the importance to the newly proposed system of the principles of consistency, responsibility and effectiveness.
- We believe that **consistency** is important in terms of ensuring that the decisions taken are compatible with basic principles and fundamental values, and of preventing different and arbitrary decisions within the scope of the same legal regulation. In this regard, the Court of Cassation and Council of State play an important role. This is because the decisions of the institutions in question shape the formation of jurisprudence and future decision-making. The prepared set of proposals does not contain proposals for the control of the operation and decisions of these institutions. It is important to explain the mechanism in question if it already exists, and if not, to offer suggestions on how to build a fair working and decision-making mechanism, in terms of the healthy functioning of the system and ensuring social trust (the OECD Open State approach lays out the transparency proposition for each phase). The current proposals merely suggest a mechanism for member selection. Therefore, they may not be enough.
- **Efficiency** is important in terms of the correct functioning of the system. In this context, the main objective should be to ensure an effective working system, both in creating the Supreme Authority of Justice's own structure and in the preparation of laws. In this context:
  - Conducting an impact analysis study with a participatory approach (ex-ante) in order to understand the possible effects from the beginning during the preparation of laws and regulations will reveal important effects, and the results will help the drafts to be prepared in the most accurate way in the light of the available data. Likewise, in order to understand the effects that occur after the implementation of laws and regulations, to understand whether the targets are achieved and to understand the extent to which the regulations are enforced and how they affect the system cost (enforcement and compliance costs), it would be useful to conduct an ex-post effect analysis after the implementation. The main purpose of these studies is to maximize the benefit to be obtained by performing cost–benefit analysis. In this process, it is important for the Supreme Authority of Justice to work as the most important stakeholder in the correct execution of the work.
  - From the same point of view, it would be useful to evaluate the structures established by the Supreme Authority of Justice. We think it would be beneficial to include proposals on these issues in the study.
- We think that it would be beneficial to develop proposals for law-making processes for the effective implementation of the principle of effectiveness. Although the Supreme Authority of Justice determines the policies and principles, it is important for the rule of law and the independence of the judiciary that the laws enacted comply with policy, principles, international norms, basic human rights and the principle of equality.

- As the legislative power is vested in the legislature, the judiciary makes decisions within the scope of laws enacted by the legislature and regulations prepared by the executive. In this context, we think it is useful to include mechanisms and proposals for:
  - Ensuring their enactment and enforcement of draft laws and legislations prepared by the relevant ministries or deputies, after technical examination of them within the scope of the above by the Supreme Authority of Justice and after giving opinions and making corrections after these opinions;
  - Preventing the executive from making legal arrangements by disabling the legislature or, if this authority exists, examining and regulating it within the scope of the above;
  - Putting in place mechanisms that will ensure that regulations are harmonized with different legislation by examining all relevant parties from the perspective of the whole of the government (OECD Whole of Government);
  - Preparing and presenting proposals to amend the legislation that allow regulations such as bag laws and decree laws; the correct establishment of the system and its functioning; strengthening the independence and impartiality of the judiciary; and the preparation of the regulations by the political authority in the context of law, equality and human rights;
  - Ensuring the compliance of the prepared regulations with international agreements and regulations.
- **Responsibility** is important both for the correct establishment of the system and for its functioning. In particular, decisions need to be taken by considering the impact and outcome of the elections to be made. In this context, we think it is important to refer to the principle of responsibility in the proposal.
- We find it positive that the connection between the proposed proposal and **Sustainable Development Goal (SDG) 16** has been established. Nonetheless, we believe that ensuring that these concepts are explained to all employees in the system through a continuous training system will contribute to a better understanding of the work both in our country and on a global scale. There are parallels between the SDG 16 goals and the goals of the proposal. Among the sub-goals of SDG 16 are to:
  - 16.1 Significantly reduce all forms of violence and death rates from violence, everywhere;
  - 16.2 Put an end to abuse, abuse, smuggling and all forms of violence and torture of children;
  - 16.3 Promote the rule of law at national and international levels and ensure equal access to justice for all;
  - 16.5 Substantially reduce all forms of corruption and bribery;
  - 16.6 Develop effective, accountable and transparent institutions at all levels;
  - 16.7 Ensure responsive, inclusive and participatory decision-making at all levels;

- 16.10 Provide public access to information in accordance with national law and international agreements and protect fundamental freedoms;
  - 16.a Strengthen relevant national institutions, including through international cooperation, with the aim of building capacity at all levels, particularly in developing countries, to combat terrorism and crime and prevent violence;
  - 16.b Promote and implement non-discriminatory laws and policies for sustainable development.
- **Diversity and inclusiveness** are important when constructing systems. However, institutional diversity does not always allow diversity to be achieved correctly. We think that it would be useful to put forward a detailed proposal for the following issues in the studies, aimed at ensuring diversity and independence in a real sense.
    - Groups with the same mindset can take control of the structures and committees be formed by taking part in different institutions and entering elections through these institutions. We think it is necessary to add work on the following: particularly in the nomination process, the mechanisms that enable the Supreme Authority of Justice to neutralize the attempts of such organizations should be designed in detail and their functioning ensured.
    - Public, transparent interviews should be conducted with those who will be elected and appointed (this is proposed for certain institutions, but interviews should be done from the lowest appointment upwards, at local or national level depending on the type of appointment).
    - A commitment should be obtained with the declaration of independence that the person to be elected will not serve any other power and will act only in accordance with the rules and regulations; and the legal regulations to be applied in the case of non-compliance with the commitment and the implementation of these regulations should be specified.