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Report on my ten day visit to the State Council of Turkey (Danıştay in Turkish) in September 2014

1. Introduction

There is a natural tendency to interact more with courts that resemble our own. But, in my view, we can learn much from those who deal with the exact same issues in completely different ways. All judicial systems ultimately face the same challenge: how to dispense justice in the most fair, accessible, expeditious, and least expensive way.

That is why I chose to apply for this exchange with the Turkish Council of State (the Council). This was my first participation in this type of judicial exchange. It was also my first real contact with a system in which judicial control of the administration is effected by a totally separate judicial branch – the administrative courts.

Therefore, what was of interest to me may not be as interesting to a European judge already working in a similar environment, such as a Council of State modelled on the French Council of State.

The significant differences in the Turkish and Canadian systems made this experience particularly enriching for me, and I wish to thank the Association Internationale des Hautes Juridictions Administratives (AIHJA) for giving me this opportunity. I hope that others, who like me work in adversarial rather than inquisitorial systems, will participate in similar exchanges.

2. The visit

I will begin my report with a brief description of my time in Turkey, during which I was continuously impressed by the kindness and dedication of the judges, judge-rapporteurs, and staff with whom I had the pleasure of interacting.

Upon my arrival at the Ankara Airport on Sunday, September 13, 2014, I was met by Ömer Faruk Ates, a senior judge-rapporteur currently assigned to the General Secretariat of the Council. Mr. Ates was my main contact during my visit.

I stayed at a Turkish Hotel located near the Council on the wise suggestion of those who had organised my visit, in order to avoid the half hour drive from busy downtown Ankara.

When I was driven to the Council facilities the next morning, I was surprised by the scale and quality of those facilities. They were huge, modern and very secure. Every member of the Council and each judge-rapporteur have private chambers. The complex includes two restaurants and a multitude of services to ensure that the members of the Council (about 150), judge-rapporteurs (about 350), public prosecutors (about 30) and staff of more than six hundred (600) people can focus completely on the work, while easily interacting with their colleagues.

I was assigned an office with my name on the door, so that anyone wishing to visit me could easily locate me. This is where I went every morning around 9:00 a.m. It is from there that I was picked up at the end of each day to return to my hotel.

My days were spent meeting with many judges to discuss, in French or in English, not only their work, but also their aspirations and their views on the particular events or news that I would choose from the newspaper every morning.

I spent hours with Mr. Ates learning more about the wide and complex jurisdiction of the Council, its organisational structure (discussed below), and reading relevant statutes, papers and some case law translated into English that I obtained from their library.

I met with the President, the Deputy Secretary General and the senior judge-rapporteur tasked with the distribution of the files to the judge-rapporteurs in Division 9. I also attended the deliberations of a committee (made up of 4 judges and the president of the Division) in that Division.

Because the dates of my visit were finalized in May 2014, they may not have been ideal, for there were no hearings or meetings of a Plenary Session of the Administrative Law Divisions or of the Tax Law Divisions to attend. The President who is currently the President of the AIHJA and her staff were also extremely busy as the AIHJA was meeting in Poland.

I visited the Academy of Justice, where the training given to all new judges was explained to me. Contrary to the situation in Canada, an administrative judge does not require a degree in law. He or she may have a degree in, for example, economy, so long as that programme also included a sufficient legal component. The additional legal training required is provided at the Academy.

During the weekend, I went to Cappadocia to view this unique and spectacular region. During my stay, I also visited Ankara and its museums with Mr. Ates. I was impressed by the

culture and history of the country and discussed the social challenges presently faced by Turkey at length with Mr. Ates, including how to deal with the 1.5 million refugees from Syria it so generously shelters until a more permanent solution is found.

In other words, it was clearly important to my host that I get to know the Turkish people, not only their legal system. This is also why I often went to lunch at one of the restaurants on the premises of the Council, so that I could experience not only the excellent Turkish cuisine, but better appreciate the spirit of fellowship that the facilities so clearly foster. Judges - be they members of the Council or judge-rapporteurs – could share their knowledge and experiences.

What I witnessed was that all judges worked hard, for long hours and had a very demanding case load (which will be discussed later on). However, they do so in a serene and friendly atmosphere. They make good use of technology[1]. They are proud of what they do, proud of their institution, and dedicated.

Even the staff, including security, was diligent, smiling and helpful.

3. Issues of particular interest

I familiarized myself with the Turkish judicial system as a whole, the details of the jurisdiction of the Council of State and its rules of procedure, as well as its place in the administrative courts system. This system deals exclusively with disputes involving

[1] Including, among other things, the UYAP Informatics System. This is an integrated data operating system that enables the transmission of data and documents not only within an organization but also between judicial bodies. The Council and the administrative courts have recently been integrated into the system.

administrative acts and decisions, including tax disputes. Even if this clear cut division in the jurisdiction of the administrative courts is quite different from the Canadian system, I do not believe that it would be particularly useful to describe all this in detail in my report, especially considering that it has already been done in the context of other exchange reports (see, for example, the report of Olga Papadopoulos, which was provided to me in the documents that I was given to examine during my time in Turkey).

Instead, I will briefly address three topics. First, I will describe how recent amendments to the three main statutes dealing with the organization, jurisdiction and procedure of the Council, the district administrative courts, administrative courts, and tax courts (Laws Nr. 2575, 2576 and 2577) have had and should continue to have an impact on the efficiency of the Council.

Second, I will make a few observations about some notable differences between my system and the Turkish system that I would have liked to explore further in order to determine their potential impact on the efficiency of courts in both countries.

Third, I will say a few words about judicial independence.

a) Recent amendments

The administrative court system is composed of administrative and tax courts (first instance courts), district administrative courts (these have only very recently become real appellate level courts) and the Council. The Council is the court of last resort that reviews as an appellate court the decisions of all the other administrative courts. It also acts as a first instance

court (as well as final instance) to review what are considered the most important administrative decisions or acts of government, for example decrees of the Council of Ministers. Finally, the Council can give opinions on draft legislation and regulations submitted to it by the Prime Minister or the Council of Ministers. It can also review the conditions of certain contracts concerning the grant of concessions relating to public services.

Since at least 2008, Turkey has taken steps to improve its judicial system as a whole. I will review some important amendments intended to reduce the workload and increase the efficiency of the administrative court system.

In order to reduce the workload of committees of the administrative and tax courts, which consist of three judges, the monetary limit in respect of cases that could be heard by a single administrative judge was increased to 25,000 Turkish Liras (TL). Then to allow district administrative courts to operate with more than one committee, additional administrative judges were appointed to those courts. In addition, it became possible to challenge regulatory instruments that do not apply nationwide before the administrative courts.

The organization of the Council was changed by increasing the number of divisions from 13 to 15. It now includes 4 tax law divisions, 10 administrative law divisions and 1 administrative division providing, among other things, the advisory opinions discussed earlier. The authority to determine the jurisdiction of each division has also been transferred to the Council, giving it more flexibility to deal with its workload.

By 2012, these and other measures had already had a beneficial impact on the number of cases resolved by the Council. According to data reported to the Ministry of Justice in 2008, 91,961 cases were disposed of. This amount increased by 51.5% to 139,385 in 2012.

I was advised that the Council resolved 160,000 cases in 2013. Despite the fact that it was able to resolve this enormous number of cases, about 190,000 cases remained pending. Thus, in 2014, the government adopted Law Nr. 6535 (OG 28.06.2014). Among other things, this statute includes other significant changes in respect of the procedure and remedies available through the administrative courts system.

Before the 2014 amendments, parties could challenge first instance judgments of administrative and tax courts by filing an objection with the district administrative courts or an appeal before the Council. Under the new regime (new version of article 45 of Law Nr. 2577), objections are no longer available. All final judgments of the administrative and tax courts can be appealed to the district administrative courts subject to new monetary limits, which I will address shortly. On such appeals, the district administrative courts have wider powers than they had on objections: upon finding errors of fact or law, they can set aside the initial judgment and decide the merits of the case on the basis of any evidence or arguments they may find relevant. Although judgments of the district administrative courts provided for in section 46 of Law Nr. 2577 can still be appealed to the Council, in theory the additional appeal now available before the district administrative courts should reduce the number of appeals to the Council.

The new monetary limits for appeals are as follows. In respect of claims where the amount in dispute is less than 5,000 TL, judgments of the administrative and tax courts will be

final. Only judgments in respect of actions dealing with the annulment of administrative acts, full remedy actions, and tax disputes where the amount claimed is between 5,000 TL and 100,000 TL will be appealable to the district administrative courts.

New restrictions dealing with the right to appeal to the Council were included in article 46 of the Law Nr. 2577. The new monetary limit applicable to tax disputes, full remedy actions, and actions concerning the annulment of administrative acts is particularly noteworthy. Only parties to cases in which the amount in dispute is greater than 100,000 TL will now have the right to file such an appeal.

Another substantial amendment is the introduction of a fast track trial procedure. Article 18 of Law Nr. 6545, adding article 20/A to Law Nr. 2577, stipulates that this procedure shall be applied to disputes regarding:

- acts concerning tenders other than prohibition from tenders,
- acts regarding urgent expropriation,
- decisions of the Privatization High Council,
- sales and leasing contracts and acts of appropriation based on Law Nr. 2634 regarding Encouragement of Tourism dated 12/3/1982,
- decisions rendered upon environmental impact assessment other than administrative sanctions based on Law Nr. 2872 regarding Environment dated 9/8/1983,

- decisions of Council of Ministers based on Law Nr. 6306 regarding Reconstructing of Areas Under the Risk of Disaster.

A new article 20/B was also added in September 2014 to provide for another fast track procedure with slightly different delays applicable to disputes concerning, among other things, examinations by the Ministry of Education and ÖSYM.

These fast track procedures, as the expression implies, provides for shorter delays in which to file and process an action or a claim. Importantly, judgments must be issued within a month after the defence is filed (or the time to do so has expired).

Fast track procedures are not appealable to the district administrative courts. Although the parties may file an appeal before the Council, they must be instituted within 15 days of the notification of the first instance judgment. Again, shorter time limits will apply in processing such appeals, and the procedure requires judgments to be issued within two months of the filing of the rebuttal.

According to the senior judge-rapporteur in charge of distributing the files to the judge-rapporteurs in Division 9 (Tax Division), the new monetary limits alone should cut in half the number of cases filed before his Division. It should significantly reduce the amount of time required to finally dispose of a case. In his estimation, in due course, new case should take about eight months from start to finish.

I am quite impressed by these efforts to improve the efficiency of the Council and the administrative courts system in general. From my own perspective, it is difficult to imagine how the judges (members of the Council and the judge-rapporteurs) could sustain the extremely high

level of productivity currently required of them for anything but a short term. I will comment further on this when discussing the notable differences with my system.

b) Notable differences

As mentioned earlier, the judicial system in Canada is very different from the Turkish system. Although like Turkey, civil law remains the basic law applicable in the Province of Québec, the organisation of justice is based on the British common law tradition.

That said, I noted from my review of English translations of some Council decisions that the Council nevertheless appears to apply many similar principles of administrative law when reviewing administrative decisions. Also, as is the case for our Courts, the decisions of the Council must all include the legal reasoning on which they are based[2]. Precedents are normally followed and there is a process (albeit one that appears somewhat complicated) to ensure uniformity among the decisions of various divisions of the Council.

What surprised me the most is probably the number of cases pending before the highest court in Turkey in respect of disputes involving administrative actions, the number of members of the Council that can get involved in a case depending on the circumstances and the absence of a public hearing in the vast majority of cases.

[2] Unfortunately, members of the FCA do not have the precious assistance of judge-rapporteurs to draft their reasons.

Even considering the differences in our system, the number of cases begun each year cannot be explained solely by the differing sizes of our populations (Turkey 76.5 million and Canada 35.5 million).

As was explained to me by the senior judge-rapporteur in Division 9, many of the cases in his division raise the same or similar issues and are thus directed to the same judge-rapporteur. The judge-rapporteur will then be able to deal simultaneously with many files (perhaps even 50 or 100) when he appears before the committee in his division (the President and four judges) who ultimately decides them.

Although the Federal Court of Appeal has procedural rules for consolidating appeals, this appears to be done on a much wider scale in Turkey. This begs the question of whether it would be appropriate to consider requiring leave to appeal to the Council in certain types of cases.

This process (requiring leave to appeal) is used in Canada in respect of appeals to the Federal Court of Appeal from major administrative tribunals such as the Canadian Transportation Agency. It applies to the majority of cases filed and heard by the Supreme Court of Canada, which is the ultimate court dealing with all civil, criminal and administrative matters in my country.

This process is even used when a party wishes to seek judicial review before the Federal Court of one of the thousands of decisions made under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 each year. Even after such triage, decisions of the Federal Court in cases that it actually judicially reviews can only be appealed to the Federal Court of Appeal if the

judge of the Federal Court certifies that the case involves a serious question of general importance.

Unlike Turkey's judicial system, in which the Court of last resort varies depending on the nature of the case, in Canada all appeals can ultimately flow to the Supreme Court of Canada. The Court is composed of eight judges and a chief justice, who is the Chief Justice of Canada. With the exception of certain categories of cases which are allowed appeals as of right, the Court selects the cases that it will hear based on whether those cases involve a question of national interest that the Court, in its discretion, wishes to settle. On average, the Supreme Court of Canada decides only about 65 to 70 appeals on the merits each year.

In fact, this is why the Federal Court of Appeal was designated by the Chief Justice of Canada as the court that should become a member of the AIHJA. It is in the vast majority of cases, the court of last resort in respect of federal administrative actions and decisions.

The Federal Court of Appeal is composed of 11 judges and a chief justice. It sits in panels of three and exceptionally five judges, while the Supreme Court of Canada can hear cases with a panel of five, seven or nine judges at the discretion of the Chief Justice. This leads me to the next point, the number of judges - members of the Council - that can be involved in a given case.

Every case before the Council will have to be decided by at least five members of a law division of the Council (a committee), whether the Council is the court of first instance or acts in its appellate capacity. Committee decisions from either an administrative law division or a tax law division acting as the first instance court are appealable to a Plenary Session of the Administrative Law Divisions or a Plenary Session of the Tax Law Divisions, respectively.

These plenary sessions consist of four members (the President of the division plus three members) of each administrative law divisions or tax law divisions (as the case may be) other than the division from which the decision that is the subject of the appeal originates. This means that for a Plenary Session of the Administrative Law Divisions, 36 members of the Council could be involved. For a Plenary Session of the Administrative Law Divisions, 12 members may be involved.

This same number of judges will be involved in appeals to the Council, when the Court whose judgment was found deficient by a committee of a law division of the Council acting in its appellate capacity insists that it is right (Section 49 of Law Nr. 2577).Indeed in such cases, plenary sessions must get involved.

Finally, the body charged with ensuring that there is no serious conflict in the decisions of the law divisions or the plenary sessions is the Assembly on the Unification of Conflicting Judgments. This body is constituted of all the members of the divisions of the Council plus the President of the Council, the Chief Advocate General and the Vice-Presidents of the Council. The quorum is 31 judges.

Even though I do not have any statistics as to how often all these procedures are used, it certainly raises a question as to how this could be the most efficient way to dispense justice at the highest level. This is especially so when one considers that the Constitutional Court of Turkey (another High Court in the country) is composed of only 17 members.

This brings me to my final point – the use of public hearings. Although in theory, parties (in most cases, see Section 17 of Law Nr. 2577) and the Court can request a hearing, I

understand that this is not done in the majority of cases before the Council. It would be interesting to determine why this is so. I note that pursuant to Section 19 of Law Nr. 2577, when there is a hearing, a decision must be issued within 15 days of the hearing. This is hardly an incentive to hold such hearings. This is especially so considering that hearings are particularly useful in complex cases or to clarify difficult points raised by the parties.

I note however, that in cases involving self-represented litigants, hearings are not generally as useful. In those cases, there is much to be learned from the procedure used at the Council and its inquisitorial approach.

c) Judicial independence

I would be remiss if I did not mention a topic of much discussion during my visit: the election of new members of the High Council of Judges and Prosecutors (HCJP), which was scheduled to take place on October 12, 2014. The HCJP is an independent organization by virtue of article 159 of the Constitution, as amended September 12, 2010. Two of its regular twenty-two members and two of its twelve substitute members are appointed from among the members of the Council.

The HCJP is particularly important as it controls, among other things, the admission of judges and public prosecutors in civil and administrative courts, their appointment and transfer to other positions, their promotions and disciplinary actions taken against them, including removals from office. In February 2014, several amendments were adopted which increased the role and

power of the Minister of Justice over the HCJP. There were concerns about the resulting impact of these amendments on the independence and impartiality of the judiciary.

In April 2014, the Constitutional Court struck down many of the most controversial amendments, giving the legislature 3 months to adopt new provisions in line with the 2010 Constitution. This was done. Still, given that the decision striking down legislation has no retroactive effect, it remains to be seen how the Council will deal with any claims filed by former employees or members of the HCJP who were replaced or disciplined before the amendments were held to be unconstitutional.

Much was written in the newspapers about the fact that the government was trying to control the HCJP by having its "approved candidates" elected. This was said to be part of the government's arm wrestling with the judiciary, which it allegedly viewed as taking an activist anti-government role.

This is obviously a delicate subject, but not one that is exclusive to Turkey. In fact, if one were to read the Canadian newspapers in 2014 or even this month, one would find similar articles suggesting profound disagreement and arm wrestling between the federal government and the Supreme Court of Canada, as well as with the Federal Courts, as a result of several decisions quashing administrative decisions and legislation on the basis that they were unconstitutional. This occurs even though, it is the Prime Minister that appoints judges to the Supreme Court of Canada and the Minister of Justice that appoints all federal judges from a list of approved candidates prepared by 17 independent judicial advisory committees (each

consisting of 8 members representing the judiciary, the Bar, the law enforcement community and the general public).

That is not to say that the issue raised in the Turkish press was not serious. In its October 2014 progress report on Turkey, the European Commission mentions the amendments to the law on the HCJP and the subsequent dismissal of HCJP's staff as well as the reassignment of numerous judges and prosecutors, which raised concerns over the independence of judges and the separation of power. However, it also states that the decision of the Constitutional Court highlights the resilience of the Turkish constitutional system.

There is no doubt that those involved in the Turkish judicial system will require time to adapt to all the recent changes. The judges at the Council may face more challenges than we presently face in Canada. But being a judge requires one to be able to find the courage to defend judicial independence in accordance with one's Constitution. The principle of judicial independence is mentioned at the very beginning of the Turkish Constitution at article 2, as is the principle that the Republic of Turkey is a democratic state governed by the rule of law. .

Despite the brevity of my visit, I have the distinct impression that the judges at the Council are up to the challenges they face. I wish them well.

4. Conclusion

I was generally impressed by what I saw and by what I learned about the Council. I congratulate the AIHJA for putting this exchange programme into place. I hope that my Court

will be able to participate as a host in the near future. This interesting experience has made me realise how important it is for my Court to participate in the activities of the AIHJA.

Again, I wish to thank my Turkish hosts for their warm hospitality and for all the time Mr. Ates devoted to make my visit as enjoyable as possible.