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Peer Review Mission on the High Council of Judges and Prosecutors (6 – 8 May 2014)

Report on the
Reform of the High Council of Judges and Public Prosecutors by Law No. 6524 of February 2014

Disclaimer

This peer review was conducted from 6 to 8 May 2014 by an independent expert in agreement between the European Commission and the Turkish authorities with the support of TAIEX, and followed by a series of exchange of comments and additional information, including during a meeting held in Brussels on 7 November 2014.

The views expressed in this report are entirely those of the independent expert and do not represent the views neither of the European Commission nor of the Turkish government.

Professor Dr. iur. Thomas Giegerich,
LL.M. (Univ. of Virginia)
Director, Europa-Institut
Jean Monnet Chair for EU Law and European Integration
Professor of EU Law, Public International Law and Public Law
at Saarland University
Campus B 2.1
D-66123 Saarbrücken
Germany
Phone: +49-(0)681-302-3695 (-3280)
Fax: +49-(0)681-302-4879
e-mail: t.giegerich@mx.uni-saarland.de

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Executive Summary

The process of judicial reform in Turkey has progressed far towards ensuring the implementation of common European standards of effectiveness, independence and impartiality. The most important element was the reform of the High Council of Judges and Public Prosecutors (HSYK) which was accomplished in 2010 but in certain respects did not go far enough. Before that reform could firmly take root the new legislation of February 2014 increased governmental influence on the HSYK and the Justice Academy. The Constitutional Court struck down most of the new provisions which had given the Minister of Justice in his capacity as the *ex officio* President of the HSYK a high degree of control over the HSYK. The legislature has meanwhile dutifully executed the Constitutional Court decision. Some provisions, however, which have survived that Court's scrutiny, still raise concerns from a European point of view. These provisions add several new items to the unfinished reform agenda of 2010. More importantly, further steps are needed to restore the credibility of the governing majority as regards their adherence to the principles of judicial independence and impartiality in all cases, including high-profile cases (that is to say cases which are considered as politically important).

1. The Purpose of the Current Mission

The purpose of the current mission was to study the effects of the Law No. 6524 on the Amendment of Certain Laws which was adopted by the Turkish Grand National Assembly on 15 February after heated debates, signed by the President of the Republic on 26 February and entered into force on 27 February 2014. The Law No. 6524 amends various laws, but my focus is the extent in which it has changed the Law No. 6087 on the High Council of Judges and Public Prosecutors (HSYK). The Law No. 6087 was enacted as part of the judicial reform of 2010 together with pertinent amendments to the Constitution. There were no constitutional

amendments accompanying the new Law No. 6524. That Law also changed the Law No. 4954 on the Justice Academy.

The Law No. 6524 increases the influence of the executive on both institutions. The HSYK is the keystone of the Turkish judicial architecture because it plays a crucial role in the promotion and transfer to other locations of, and disciplinary proceedings against judges and public prosecutors, including their removal from office.[1] When the independence and impartiality of the HSYK is jeopardized, so is the independence and impartiality of the Turkish judiciary as a whole. The Justice Academy on the other hand is entrusted with the pre-service and in-service training of all the judges and public prosecutors. It shapes the current and future members of the judiciary. Independence and impartiality must be firmly rooted in their conscience if those values are to become an every-day reality. Whoever controls the Justice Academy exercises considerable influence on those who are to function as independent and impartial guardians of the law. The reform of the Justice Academy, which the Constitutional Court upheld,[2] was not the subject of my mission. I therefore only note in passing that it increased the executive influence on the Academy This is important due to the fact that the General Assembly of the Justice Academy (in which senior staff of the Ministry of Justice and appointees of the Minister constitute a majority) elects one HSYK member.

I will not only consider the immediate impact which Law No. 6524 has had on the independence and impartiality of the judiciary, as represented by the HSYK, but also the long-term effects in this regard. This will require an assessment of the climate in which Turkish judges and public prosecutors currently have to work.

In making my assessments, I am using the common European standards of independence and impartiality of the judiciary that are laid down in the documents listed in the annex to this Report.

2. The Constitutional Court Decision of 10 April 2014 and the Reaction by the Legislature

The Turkish Constitutional Court in its meeting of 10th April 2014 found the most problematic parts of Law No. 6524 to be unconstitutional. The reasoned judgment was published in the Official Gazette only on 14 May 2014, after the end of my current mission. It placed the ball in the legislature's court which had to bring the Law No. 6524 in line with the Constitution.

The Constitutional Court decision in this case (as in all other cases) did not have retroactive effect where it struck down provisions of the Law. Thus, the consequences which those provisions had caused in the meantime remained unaffected. However, the Minister of Justice in his capacity as the *ex officio* President of the HSYK had exercised only some of the additional powers which the Law No. 6524 had granted to him in violation of the Constitution. With regard to certain unconstitutional provisions, the Constitutional Court decision gave the legislature three months' time from the date of publication of the reasoned opinion (14 May 2014) to repair the defects before the annulment became effective. This was in order to prevent the emergence of a legal void because the annulment of a provision amending an existing law does not restore the previous legal situation because of the lack of retroactive effect of the annulment decision. Finally, with regard to some provisions, the Constitutional Court ordered a stay of execution, thus preventing accomplished facts.

[1] See my Report of 4 February 2013, para. 1.1. (available at http://jean-monnet-saar.eu/wp-content/uploads/2013/12/Report04022013_edited.pdf).
[2] See below para. 2. on the decision of the Constitutional Court.

On 28 June 2014, the Law No. 6545 entered into force. It amended the Law No. 6087 on the HSYK in order to repair the violations of the Constitution as had been established by the Constitutional Court in the aforementioned decision. The Law No. 6545 restored the legal situation before the entry into force of the Law No. 6524 to the extent in which the Constitutional Court had found that law to be unconstitutional.

3. The Preparation of the Current Report

The current mission took place at a time of legal uncertainty after the Constitutional Court decision of 10 April 2014 but before the reasoned judgment had been published on 14 May 2014. In accordance with the usual procedure, the first version of my report was submitted to the European Commission on 3 June 2014 and by them transferred to the Turkish authorities for their comments. Taking into account, but not always following those comments which I had received on 19 July 2014, I produced a revised version of my report on 30 July 2014. As an exception to the usual practice of peer reviews, the Turkish authorities thereupon suggested a meeting in Brussels to discuss my report and their comments, in particular those which I had not accepted. That meeting took place on 7 November 2011. Two days earlier, I had received a new set of comments from the Turkish authorities which constituted the basis for our discussions in Brussels. Only on 6 November 2014 did I receive an English translation of the relevant provisions of the Law No. 6545. In the Brussels meeting, some misunderstandings could be cleared up. On some other issues, differences of opinion remained.

4. Sequence of Events from December 2013 until the Enactment of Law No. 6524 in February 2014

Before outlining the sequence of events between December 2013 and the adoption of the Law No. 6524 in February 2014, I underline that for me, the decisive question is this: What impression was that course of action by the government likely to make on external observers of the rule of law in Turkey and, more importantly, on the judges and public prosecutors and on the general public in Turkey concerning the effective guarantee of the independence and impartiality of the judiciary? The effects of such profound legislative changes on the independence and impartiality of the judiciary cannot be properly evaluated without considering the circumstances under which they were adopted. These circumstances include public statements from the political branches that they were determined to combat an alleged anti-government conspiracy ("coup attempt") within the judiciary.[3]

As far as the impression made on external observers is concerned, suffice it to quote the European Commission: "… the government's response to allegations of corruption targeting high-level personalities, including members of the government and their families, raised serious concerns over the independence of judiciary and the rule of law. This response consisted in particular in amendments to the Law on the High Council of Judges and Prosecutors and subsequent numerous reassignments and dismissals of judges and prosecutors, as well as reassignments, dismissals, or even detention, of a large number of police officers. This raised serious concerns with regard to the operational capabilities of the judiciary and the police and cast serious doubts on their ability to conduct the investigations into corruption allegations in a non-discriminatory, transparent and impartial manner."[4]

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[3] See below para. 4.1. and 5.1.

[4] Summary of findings of the 2014 Progress Report on Turkey, Annex to COM(2014)700 final of 8 October 2014 (available at http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-turkey-progress-report_en.pdf [last accessed on 29 November 2014]), p. 3.

4.1. The December Events and the Government's Response

In December 2013, prosecutors initiated proceedings against cabinet members and/or their close relatives for suspicion of corruption. Under Turkish law, prosecutors are obliged to investigate in a neutral manner, collecting evidence for and against potential suspects, whenever they consider that there are sufficient indications that a crime was committed.

The European Commission's Turkey Progress Report summarized this sequence of events:

> "For most of the year, attention was drawn to the 17 and 25 December 2013 corruption allegations targeting the Prime Minister, four ministers, their relatives, the head of the biggest public bank, public officials and businessmen. Ten out of twenty-five ministers were replaced in a Cabinet reshuffle on 25 December. There was a significant delay in submitting requests to parliament to lift the immunity of four former ministers implicated in corruption allegations.
>
> In response to the allegations of corruption, the government alleged that there had been an attempted judicial coup by a 'parallel structure' within the state, controlled by the Gülen Movement. Prosecutors and police officers in charge of the original investigations of 17 and 25 December were removed from their posts. A significant number of reassignments and dismissals in the police, civil service and the judiciary followed, accompanied by legal measures in the judiciary. …
>
> As part of that response, key legislation, including on the High Council of Judges and Prosecutors and on the internet, was drafted and adopted in haste and without consultations. …
>
> On 19 December, the government amended the regulation on judicial police to require law enforcement officers, when acting upon instructions of prosecutors, to notify their police hierarchy about any criminal notices or complaints. On 25 December, police did not follow instructions from prosecutors to detain suspects as part of two investigations into alleged corruption. The HSYK issued a statement on 26 December criticising this amendment as being contrary to judicial independence. On 27 December, the Council of State suspended implementation of the amendment considering it to be contrary to the Code on Criminal Procedures. The Minister of Justice, in his capacity as President of the HSYK, decided on 30 December that any HSYK public statement should receive his prior approval."[5]

In the aforementioned Cabinet overhaul of 25 December 2013, the Minister of Justice was also replaced. I was explained that he resigned in order to be able to run as a candidate in the mayoral election in his home town (which he eventually did without success). It needs to be underlined that he was not at all affected by the investigations into alleged corruption and not suspected of any wrongdoing.

4.2. Transfer of Location of Public Prosecutors

The newly-appointed Minister of Justice automatically became the *ex officio* President of the HSYK.[6] He selected a new Undersecretary who thereby automatically became an *ex officio* Member of the First Chamber of the HSYK.[7] In the first session of the Plenary of the HSYK

[5] Turkey 2014 Progress Report of 8 October 2014, SWD(2014)307 final, p. 9, 45 (see above note 4).

[6] It was him who decided on 30 December that any HSYK public statement should receive his prior approval.

[7] I note that by 8 May 2014, more than sixty judges and prosecutors who had previously worked in the Ministry of Justice had been transferred to the courts and replaced by new personnel.

on 15 January 2014 which he presided, the Minister proposed (and the majority agreed to) an addition to the agenda concerning changes to the composition of the three Chambers.[8] The reason given by the Minister was that the work of the Chambers should be made more efficient. The Plenary thereupon re-evaluated each member one by one and decided whether to leave him or her in the current position or transfer him or her to another Chamber. As a result, two members of the First Chamber[9] were exchanged, one with a member of the Second Chamber and the other one with a member of the Third Chamber. On the following day, the newly-composed First Chamber issued a decree by a majority of six (including the three new members) to one. By that decree which was effective immediately the First Chamber transferred to other locations prosecutors who were considered responsible for the investigations against the cabinet members and/or their family members. The reason given was that there had been irregularities in those investigations and that the timing indicated a coordinated attack on the Government by "foreign circles" or a "parallel structure."[10] The President of the First Chamber explained to me in the official meeting I had with that Chamber in which all the members of the First Chamber were present that the prosecutors involved in the investigations were not transferred, out of respect for their independence. Rather, their superiors – the Chief Public Prosecutors – were transferred because they had not properly controlled their subordinates. The new Chief Public Prosecutors then decided to give other assignments to the prosecutors involved. This course of events prompts me first of all to repeat a recommendation I made in my Report of 4 February 2013,[11] always in view of its likely influence on the public perception as to the effective implementation of the independence of the judiciary and the rule of law.

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

These events occurred before the entry into force of the Law No. 6524. Pursuant to the Law No. 6087 on the HSYK in the version which was then applicable, the disciplinary power over judges and prosecutors was actually vested in the Second and Third Chambers. The Third Chamber was responsible for investigations with the help of the Inspection Board, subject to the approval of the Minister in his capacity as the *ex officio* President of the HSYK,[12] and the Second Chamber was responsible for deciding on whether the results of those investigations warranted disciplinary action or even prosecution. But the majority of the First Chamber (which is responsible for routine transfer decisions) believed that there was no time to follow that regular procedure and that the transfers had to be made immediately to avoid "irreparable damage" – to the judiciary. Some members of the HSYK believed that this was interference by the First Chamber in the responsibility of the other Chambers.

The course of action taken by the First Chamber risks being perceived by judges and public prosecutors in Turkey as an indication that, if they are involved in high-profile cases, they are

[8] The dissenters argued that such a change of composition of the Chambers was illegal, while the majority considered it to be covered by the general power of the Plenary under Art. 8 (2) of Law No. 6087 in the interest of ensuring the smooth functioning of the HSYK.
[9] The First Chamber is considered as the most important Chamber since it exercises the appointment and transfer power affecting the vast majority of judges and public prosecutors and their families.
[10] See below para. 5.1.
[11] See para. 2.5.3.4. of that Report (available at http://jean-monnet-saar.eu/wp-content/uploads/2013/12/Report04022013_edited.pdf).
[12] See below para. 5.5.1.

subject to immediate transfer of location, whenever the majority of the First Chamber is dissatisfied with their performance, irrespective of the reason for such dissatisfaction and irrespective of whether they committed any disciplinary offence. This raises concerns because it is likely to destroy much of the progress which had been made in creating a mentality of independence in the members of the judiciary. The independence of the judiciary is not adequately guaranteed and the rule of law not adequately enforced, unless the same standards are adhered to in both routine and high-profile cases.

The events described confirm that the routine transfer power of the First Chamber must be more strictly regulated. While that power is in the large majority of cases undoubtedly used properly and in accordance with the requests of the judges and public prosecutors concerned, it can be abused as an instrument of intimidation striking at the heart of prosecutorial and judicial independence and impartiality. The power of routine transfer of location must not become the 'Achilles heel' of the independence and impartiality of the judiciary, and this must be put beyond doubt for all the immediate stakeholders (*i.e.* judges and public prosecutors) as well as the general public.

Moreover, it has become obvious that the independence and impartiality of the chief public prosecutors is the cornerstone of an independent and impartial judiciary. Additional safeguards are required to prevent interferences in the judicial process via the chief public prosecutors. The events also confirm that transfer decisions must be made subject to judicial review. This requires a constitutional amendment, but the aforementioned events have proven that these steps are indispensable to safeguard the independence and impartiality of the judiciary in Turkey both in fact and in appearance. It has become necessary to demonstrate to all the immediate stakeholders in the judiciary as well as the general public that the chief public prosecutors cannot be easily removed for reasons which are incompatible with the fundamental values of the independence and impartiality of the judiciary. I therefore underline and extend the recommendations I made in my previous report.[13]

I recommend that for the sake of safeguarding their independence in law and practice both judges and public prosecutors (including chief public prosecutors) be guaranteed security of tenure *and location* after a period of time not exceeding ten years. It must be ensured that the High Council can only remove or relocate those tenured judges or public prosecutors against their will for disciplinary reasons on a clearly formulated statutory basis and subject to judicial review. The separation of powers between the Chambers of the HSYK according to which routine transfer decisions are made by the First Chamber and the disciplinary power is shared by the Second and Third Chambers must be strictly observed.

That guarantee of security of location does not extend to the judges and public prosecutors who work in the Ministry of Justice at the discretion of the Minister. Neither does it extend to the rapporteur judges of the high courts, the Constitutional Court and the HSYK whose work at their respective institution should be subject to the continuous confidence of that institution's General Assembly. But since the speedy and effective exercise of the judicial functions by the high courts, the Constitutional Court and the HSYK depends on the support of the rapporteur judges, it must be ensured that no authority outside the respective judicial body with which they are affiliated interferes with their work, unless permission is given by the General Assembly of the respective judicial body.

[13] See my Report of 4 February 2013, para. 2.5.1. and para. 3 (available at http://jean-monnet-saar.eu/wp-content/uploads/2013/12/Report04022013_edited.pdf).

I further recommend that all HSYK decisions imposing a burden on chief public prosecutors, such as their transfer to another location against their will or other burdensome decisions taken against them, be made subject to the most exacting substantive and procedural standards. They should be entrusted to the Plenary of the HSYK and require a qualified majority.

I further recommend that the judicial review should be extended to all the High Council decisions which potentially interfere with the independence or impartiality or individual rights of judges and public prosecutors. This concerns in particular the transfer decisions of the First Chamber.[14] I recommend that the necessary constitutional amendment be enacted to enable such judicial review.

At the additional meeting I had with representatives of the Turkish authorities in Brussels on 7 November 2014, we intensively discussed the above recommendations. I realize the difficulties which a guarantee of location would cause to the current Turkish system of regular transfers of location from less attractive to more attractive work places and vice versa. But I continue to believe that reform is both necessary and possible. I also continue to believe that in Turkey, the chief public prosecutors have great influence on the administration of justice at their courthouses so that whoever controls them controls the administration of justice to a considerable extent. This is why the transfer of location of chief public prosecutors against their will and other burdensome decisions (such as disciplinary measures) pose a particular problem.

At that 7 November meeting, we also intensively discussed the issue of judicial review of all HSYK decisions. I explained my opinion in detail in my Reports of 2011 and 2013. I there particularly argued that the existing internal review mechanism is good, but not good enough. After it has been unsuccessfully exhausted, an external review by the courts must be made available.[15] The problematic transfer of location decisions of the First Chamber have reinforced my conviction. My interlocutors pointed out that the persons transferred had made no use of the internal objection procedure. I cannot tell why they did not, but they might well have found a judicial remedy more promising.

In view of discussions at that Brussels meeting, I add a clarification concerning judges and public prosecutors who work in the Ministry of Justice or as rapporteur judges for the high courts, the Constitutional Court and the HSYK. While those who have voluntarily opted for a transfer to the Ministry have become part of the executive branch of government, the rapporteur judges remain part of the independent and impartial judiciary. They perform important judicial functions in support of their respective court or the HSYK that all depend on such support in order to function effectively. The independence and impartiality of the respective judicial body must therefore also cover the rapporteur judges.

4.3. The *Ex Officio* Chairmanship of the Minister of Justice and Membership of the Undersecretary in the HSYK

The events described moreover indicate that vesting the presidency of the HSYK in the Minister of Justice and making the Undersecretary an *ex officio* member of the First Chamber is not conducive to preserving the independence and impartiality of the Turkish judiciary,

[14] See below para. 5.5.6.

[15] See my Report of 1 August 2011, para. 3.2.6. (available at http://jean-monnet-saar.eu/wp-content/uploads/2013/12/Report01082011_edited.pdf) and my Report of 4 February 2013, para. 3 (available at http://jean-monnet-saar.eu/wp-content/uploads/2013/12/Report04022013_edited.pdf).

both in fact and in appearance to the immediate stakeholders in the judiciary and the general public. The specific environment in which the Turkish judiciary operates does apparently not permit arrangements which can indeed be found in some other European countries. Contrary to my previous assumption it has now become clear that the membership of the two leading representatives of the Ministry of Justice in the High Council is not only symbolic. Rather, the two can exercise decisive influence on the operations of the HSYK and will do so if they consider it as necessary. In my 2011 Report I agreed with the Venice Commission that proposed to make the actual functioning of the HSYK the real test in respect of the governmental presence.[16] The Venice Commission referred to the danger that the Minister and the Undersecretary might abuse their position for the purpose of exerting undue pressure and influence on the functioning of the High Council.

In view of the events in January 2014 which clearly demonstrated the influence which the Minister of Justice in his capacity as the *ex officio* President of the HSYK has on the High Council,[17] I partly repeat and partly revise my previous recommendations. From my present standpoint, both the Minister of Justice and the Undersecretary should ultimately be removed from the HSYK. This would send a strong signal to the judiciary and the general public that the political branches are making serious efforts at strengthening the independence of the judiciary and restoring credibility. It would also counteract the erroneous conception that because the HSYK is presided over by the Minister who is politically responsible to the TGNA, the Minister should control the High Council so as to make that political responsibility effective.[18] This would mean no less than subjecting the HSYK to the control of the respective parliamentary majority which is incompatible with European standards of judicial independence.

The Undersecretary should be immediately removed from the HSYK. His *ex officio* full voting membership in the First Chamber is problematic because that Chamber is considered as the most important one since it exercises the appointment and transfer power affecting the vast majority of judges and public prosecutors and their families. Whatever flow of information may be necessary between the First Chamber and the Ministry can be guaranteed in other ways. For instance, one could admit an observer from the Ministry to attend the meetings with the right to speak but not to vote.

It would be most conducive to the independence of the judiciary both in fact and in appearance if the *ex officio* HSYK membership of both the Minister and the Undersecretary were terminated. As a first step in that direction, one could imagine the removal of the Undersecretary and the reduction of the Minister's position to a purely symbolic presidency. All the substantive functions of the Minister would henceforth be exercised by the Deputy President and the Minister would simply chair the meetings of the Plenary (except those on disciplinary matters) without any influence on the agenda and without the right to vote. Ultimately, the symbolic Presidency of the HSYK could be transferred for instance to a high-ranking personality that credibly embodies judicial independence. I realize that the implementation of these recommendations requires constitutional amendment.

I recommend that the current form of the *ex officio* chairmanship of the Minister of Justice and the *ex officio* membership of the Undersecretary in the HSYK be terminated in the medium term. As a first step, the Undersecretary should be removed from the HSYK and the Minister's position be reduced to a purely symbolic presidency, all his

[16] See my Report of 1 August 2011, para. 2.3.3. (available at http://jean-monnet-saar.eu/wp-content/uploads/2013/12/Report01082011_edited.pdf).
[17] See above para. 4.2.
[18] This erroneous conception was presented to me during my visit as one argument in support of the Law No. 6524 (see para. 5.1.).

substantive functions being exercised by the Deputy President. Ultimately, the symbolic Presidency of the HSYK could be transferred for instance to a high-ranking personality that credibly embodies judicial independence.

4.4. Ensuring the Public Accountability of the HSYK

On the other hand, I reconfirm what I wrote in my Report of 14 April 2009: "[A] constitutional system cannot function properly unless all the three branches of government loyally cooperate with each other. Irrespective of the great importance of preserving the independence of the judiciary, the third branch of government must not forget that after all it is a branch of government and cannot claim total independence from the other branches of that same democratically accountable government."[19] Rather, there should be a well-balanced system of checks and balances between all the branches of government that are all ultimately accountable to the people. However, that system must be designed in a way which maintains the independence and impartiality of the judiciary both in fact and in appearance. Thus, the HSYK should not be, nor be perceived as, the representation of the professional interests of the judges and public prosecutors. Rather, it must credibly function as a body of professional self-administration serving the public interest in an independent, impartial and effective judiciary. Its operations must also take place under the watchful eyes of the other branches of government, the media and the public to whom the HSYK is ultimately accountable.

The presence of four members from outside the judiciary who are appointed by the President of the Republic already contributes to ensuring that the HSYK is functioning in the public interest and not only in the self-interest of the members of the judiciary. Apart from that, the HSYK must work hard for the confidence of the public by adhering to objective decisions-making standards which are pre-published, transparent decision-making processes, well-reasoned decisions which are subject to judicial review, the publication of anonymized versions of all important decisions as well as an active information policy. I realize that since the reform of 2010, the HSYK has made considerable progress in these regards. But the events since January 2014 have unfortunately demonstrated that in high-profile cases (that is cases which are considered as politically important) the HSYK is ready to use special standards that are not compatible with the principles of independence and impartiality of the judiciary.

Concerning an improved active information policy of the HSYK, this could comprise regular (for instance bi-annual) reports which are sent to both the Ministry of Justice and the TGNA and published on the HSYK's website. The Deputy President of the HSYK should participate in a public question and answer session of the Justice Committee of the TGNA to explain those reports. Representatives of the Ministry of Justice should also attend that session and be permitted to raise questions. This reporting procedure should be regulated by law.

Moreover, as I wrote in my Report of 4 February 2013,[20] the High Council needs to appoint one of its members as the official spokesperson and liaison with the media. This should be done as soon as possible. The spokesperson should be responsible for issuing press releases on all important decisions made by the High Council, in particular those pertaining to high-profile cases; those press releases should also be published on the website of the High Council. The spokesperson should also be available for interviews. He or she should be given professional assistance by someone with media experience, such as a journalist to be employed by the High Council. This media expert would also be responsible for constantly

[19] Para. 1.4.3. (available at http://jean-monnet-saar.eu/wp-content/uploads/2013/12/Report14042009_edited.pdf).
[20] Para. 2.1.

monitoring the media coverage of the judiciary and alert the High Council to instances calling for an official reaction to counteract negative publicity.

As a matter of course, the information policy of judicial institutions, including the HSYK, is subject to confidentiality requirements as far as ongoing investigations etc. are concerned. On the other hand, the judicial branch of government needs to open up to public (media) scrutiny more than before. Otherwise, it will be difficult for it to create and maintain public confidence.

I recommend that the HSYK create public confidence in their function as a body of professional self-administration that serves the public interest in an independent, impartial and effective judiciary. For that purpose it should adhere to objective decisions-making standards which are pre-published, use transparent decision-making processes, issue well-reasoned decisions which are subject to judicial review, publish anonymized versions of all important decisions as well as engage in an active information policy *vis-à-vis* the other branches of government (by making and defending regular reports) and the general public (via the media). Most importantly, the HSYK should use the ordinary decision-making standards also in high-profile cases, that is to say cases which are considered as politically important.

4.5. The Importance of the Judicial Police for Effective, Independent and Impartial Prosecutions

The aforementioned investigations into alleged corruption induced the Government to impose reporting requirements on members of the judicial police, which the HSYK characterized as interference in the independence of the prosecution.[21] The Government have also transferred hundreds of police officers who are subordinates of the Ministry of the Interior. However, the prosecutors depend on the assistance of the police for their investigations. The judicial independence of the prosecutors can be undermined, if their indispensable instruments – the judicial police – are subject to governmental interference (either in the form of direct orders or in the form of reprisals) to the effect that certain investigations are not conducted independently and solely in the interests of justice or not conducted at all. The events since December 2013 raise concerns that the independence of the judicial police is not sufficiently guaranteed in practice.

I recommend that the judicial police be brought under the cover of the independence of the judiciary in the same way as the public prosecutors in order to make the independence of the prosecution effective. The independence of the judicial police must be guaranteed both in law and in practice. Where police officers exercise judicial as well as other functions, it must be ensured that their integration in the police hierarchy with regard to those other functions does not jeopardize their independence with regard to their judicial functions.

5. The Enactment of Law No. 6524

5.1. Background of the Enactment

According to the explanation I was given in the Ministry of Justice, the original legislative proposal was prepared in the Turkish Grand National Assembly (TGNA). It was not introduced by the Government but by AKP deputies. The Ministry became involved only

[21] See above para. 4.1.

when the legislative proposal was debated in the Justice Committee of the TGNA. There it recommended amendments. However, there is no trace of a thorough review regarding the compatibility of the legislative proposal with European standards either in the TGNA or in the Ministry. The legislative process which produced Law No. 6524 obviously had no built-in safety valve to prevent the adoption of legislation contradicting Turkey's long-term commitments to European standards. While draft laws prepared by the Government for the purpose of harmonising Turkish law with EU law are routinely screened for their compatibility with EU law,[22] that screening does not occur more generally beyond the bills specifically geared towards the EU *acquis,* and there is no such procedure for legislative proposals originating in the TGNA.

I recommend that a routine procedure be established to thoroughly screen all draft laws and legislative proposals, irrespective of where they originate, including draft constitutional amendments, as to their compatibility with European (EU and European Convention on Human Rights) standards, in particular in the area of judicial independence and impartiality as well as human rights. Such a screening procedure should be performed under the joint responsibility of the Ministry of Justice and the Turkish Grand National Assembly and concluded by a report that is made public before the final vote in the Assembly. This would prevent overhasty legislation and help Turkey to ensure that it always faithfully adheres to its legal and political commitments as a candidate country for EU membership and party to the European Convention on Human Rights.

The Law No. 6524 was adopted by the TGNA within little more than a month. The primary stakeholders – the HSYK and the Justice Academy – were not officially involved. However, some HSYK members were contacted unofficially. As a matter of fact, the plenary of the HSYK had published an opinion on the Draft Constitution in 2013[23] where it proposed additional reform steps with regard to the judiciary. Those proposals went in the opposite direction from the legislative proposal which became Law No. 6524.

When I asked why the new Law was considered not only as necessary but seemingly even as extremely urgent, I was given the following reasons by several of my interlocutors during the official meetings that had been organized together with the Ministry of Justice. I was not given any other explanation for the enactment of the Law No. 6524, even though I specifically asked for it in each and every session I had during my visit. I repeat those reasons here without taking any position as to whether or not they are factually correct: the HSYK had had (unspecified) "operational problems"; it had not sufficiently explained its decisions; it had elected too many young judges as members of the High Courts, thus blocking the career perspectives of others for too long; it had packed the High Courts with members of "foreign circles"; the majority of the HSYK themselves belonged to those "foreign circles"; the HSYK should have intervened to stop abusive investigations against the Government; the HSYK had not properly controlled the Inspection Board; since the Minister of Justice was responsible to the TGNA also with regard to his position as President of the HSYK, he had to be given power over the HSYK to match his political responsibility.

In my eyes, none of those reasons convincingly justifies the unusually quick adoption of the far-reaching Law No. 6524. Specific "operational problems" of the HSYK should have been

[22] The new Prime Minister Davutoğlu issued a Circular 2014/16 (published in the Official Gazette No. 29130 of 25 September 2014) to this effect.
[23] Work on the new Constitution has become stalled because of disagreements between the Government and the opposition.

addressed by specific amendments to the law, such as a requirement to give sufficient reasons for decisions, to lay down and publish specific objective criteria for its decisions or to better explain the Council's policies to the public. To the extent in which the reasons I was given imply the allegation of possible illegal behaviour by members of the HSYK, disciplinary proceedings could have been initiated against them in accordance with the law. This was not done.

In a written comment to the above paragraph of my Report of 30 July 2014, the Turkish Ministry of Justice stated that they did not understand what the term "foreign circles" referred to. I took that issue up at the meeting in Brussels on 7 November 2014 and explained that the term was used interchangeably with "parallel structure" in numerous public statements by high-level officials to justify their course of action since December 2013 and that it referred to the Gülen Movement. My Turkish counterparts immediately stated that they could not talk about the Gülen Movement. During my visit to Turkey in May, several of my interlocutors had told me that it was not illegal in Turkey to belong to that movement. Also the identification of Gülenists was usually not based on objective evidence but on the subjective beliefs of others concerning a person's affiliation.

5.2. Mitigation of the Original Legislative Proposal during the Legislative Process

The original legislative proposal which would have given the Minister in his capacity as the *ex officio* President of the HSYK a high degree of control over the HSYK was mitigated during the legislative process in the TGNA.[24] The President of the Republic, whose signature was needed for the entry into force of the law, made pertinent recommendations, and the version adopted by the Judicial Committee of the TGNA was improved. Further changes were made by the Plenary. Accordingly, the Law No. 6524 as enacted interferes less deeply with the independence of the judiciary than had originally been planned. However, the Law No. 6524, instead of completing the reform of the HSYK in those areas where issues of judicial independence and impartiality have remained,[25] dismantles previous accomplishments which were just about to take root.

5.3. The Main Changes to the HSYK by the Law No. 6524 as Enacted[26]

One of the most important changes brought about by the reform of 2010 was to transfer the responsibility for the Inspection Board from the Ministry of Justice to the HSYK. The Plenary of the HSYK was then put in charge of the appointment of the President and Vice Presidents of the Inspection Board. Law No. 6524 re-transferred that power to the Minister of Justice in his capacity as the *ex officio* President of the HSYK. Moreover, the new Law provided that the Inspection Board perform their duties on behalf of the Council, but under the supervision of the Minister in his capacity as the *ex officio* President of the HSYK. It was also stated that the President of the Inspection Board was responsible to the Minister in his capacity as the *ex officio* President of the HSYK. The Minister in his capacity as the *ex officio* President of the HSYK was furthermore given the power to impose duties on the President of the Inspection Board[27] (a power previously held by the relevant President of Chamber) and on the Inspection Board (a power previously held by the Plenary).[28] The appointment of the inspectors

[24] Examples are given below in the footnotes of para. 5.3.
[25] See my previous Reports of 1 August 2011 and 4 February 2013.
[26] See para. 5.4. on the parts of the Law No. 6524 which were struck down by the Constitutional Court.
[27] Art. 16 (1) lit. e of the Law No. 6087, as amended by the Law No. 6524.
[28] Art. 14 (4) lit. c of the Law No. 6087, as amended by the Law No. 6524.

remained vested in the Plenary, but their choice was limited to two candidates for each vacant position proposed by the First Chamber.[29]

The influence of the Minister in his capacity as the *ex officio* President of the HSYK was increased in another respect, namely the conduct of inspections, examinations and investigations against judges and prosecutors. Previously, Ministerial approval for those measures was needed in the sense that examinations and investigations could not be undertaken by the Third Chamber alone. Now, the Third Chamber needs the approval of the Minister even if it decides not to launch an examination or investigation. In other words, the Minister can now both prevent the Third Chamber from and compel it to ordering such an examination or investigation.

The Minister in his capacity as the *ex officio* President of the HSYK was also given the authority to determine in what Chamber the members would serve – an authority previously vested in the Plenary.[30] The power of the Plenary to elect the Chamber Presidents was restricted to the selection of one of two candidates to be proposed by each Chamber.[31] The composition of the Chambers was, however, left unchanged.[32] The power of appointing the Secretary-General of the HSYK has remained with the Minister in his capacity as the *ex officio* President of the HSYK and his choice continues to be limited to three candidates elected by the Plenary (in his absence[33]). But the election system was changed to the "one man, one vote" system in the first round,[34] whereas in the second round (which takes place if the quorum of twelve votes[35] is not reached in the first round) the three candidates with the highest vote will become the candidates.

While under the previous law, the Plenary appointed the Deputy Secretaries-General that power was given to the Minister in his capacity as the *ex officio* President of the HSYK by Law No. 6524. He also obtained the power to intervene in the division of labour among the Deputies by the Secretary-General which was made subject to Ministerial approval. The Minister can now determine the meeting days of the Plenary (which had previously been determined by the Plenary) and can also set the agenda of the Plenary without asking for the opinion of the Secretary-General.[36]

The HSYK depend on rapporteur judges for the timely execution of their tasks. Previously, those rapporteur judges were appointed by the Plenary. Under the Law No. 6524, the choice of the Plenary was limited to two candidates for each vacant position proposed by the First Chamber.[37] Whereas the other HSYK personnel were previously appointed by the Deputy Council President[38] upon the motion of the Secretary-General, all the appointments are now

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[29] Under the original legislative proposal, the two candidates were to be proposed by the Minister in his capacity as the *ex officio* President of the HSYK.
[30] This power had not been exercised before the Constitutional Court declared it to be unconstitutional.
[31] Under the original legislative proposal, the two candidates were to be proposed by the Minister. Also, the Undersecretary could be elected as President of the First Chamber.
[32] According to the original legislative proposal, the First and Second Chambers should have only five members each, and the Third Chamber eleven.
[33] The rule that the Minister cannot participate in the meeting nominating and electing the candidates for Secretary-General was added by Law No. 6524.
[34] Previously, each member had had three votes.
[35] Under the previous law, the quorum had been fifteen.
[36] Under the original legislative proposal, only the Minister could allow discussion of issues outside the agenda items. Law No. 6524 has reinstated the right of each HSYK member to request agenda changes, but only in written form and one day before the meeting day at the latest. Such a request is decided by the Plenary (as before).
[37] Under the original legislative proposal, the two candidates were to be proposed by the Minister.
[38] The Deputy Council President is elected by the Plenary from among the Presidents of Chambers.

made by the Minister in his capacity as the *ex officio* President of the HSYK. This revokes the autonomy regarding personnel which the HSYK only obtained in 2010.

With regard to the election of HSYK members, the new law reintroduced the "one man, one vote system" with regard to those who are elected by the Court of Cassation, the Council of State and the Justice Academy. Each member of the general assemblies of those institutions now has only one vote (instead of as many votes as members are to be elected by the respective institution). With regard to the election of HSYK members by the judges and prosecutors and the administrative judges and prosecutors, Law No. 6524 retained the previous system which gives each voter as many votes as members and substitute members are to be elected by their group.

The Law No. 6524 also increased the powers of the Minister in his capacity as the *ex officio* President of the HSYK at the expense of the HSYK Plenary with regard to disciplinary investigations against HSYK members.[39]

As a matter of particular concern, the Law No. 6524 added the Provisional Art. 4 to the Law No. 6087. According to this provision, the entire personnel of the HSYK (including the Secretary-General, Deputy Secretaries-General, President and Deputy Presidents of the Inspection Board, all the inspectors, rapporteur judges and administrative staff) was automatically dismissed with the entry into force of the Law.[40] New personnel were to be appointed or elected within ten days. The dismissed staff members were to be reassigned to new posts, taking their acquired rights into consideration. With the entry into force of the Law, also all the circulars of the HSYK were automatically revoked. All my interlocutors agreed that the dismissal of hundreds of judicial and administrative personnel by an act of the legislature without consideration of the individual cases was highly unusual. Provisional Art. 4 amounts to an annihilation of the entire record of the post-2010 HSYK. It can only be perceived as a warning to the HSYK – both the members and their staff – as well as to the entire judiciary, represented by the HSYK, that any action considered as a judicial interference by the authorities is unwelcome and will have consequences, including dismissal from the current position.

The new appointment powers of the Minister and/or the Plenary of the HSYK were immediately used[41] before the Constitutional Court could order the stay of execution. The previous President of the Inspection Board was reappointed and two new Deputy Presidents appointed. 57 of the previous chief inspectors and inspectors were reappointed, while 80 previous members of the Inspection Board were transferred.[42] Of the previous 47 rapporteur judges, 18 were retained and 29 transferred. Of the previous 270 administrative staff members, 228 were retained, 195 of them on a temporary basis.[43] As a matter of fact, none of those staff members was removed from the judiciary or public service, but 80 of 137 inspectors and 29 of 47 rapporteur judges were removed from the HSYK. Only with regard to the administrative staff, the majority of the previous staff members was rehired. The question whether the decision-making process on which members of the previous personnel to rehire was transparent and objective criteria were used was not clearly answered. Some of the previous staff members are currently using various legal remedies against their dismissal.

[39] Under the original legislative proposal, the Minister would have participated in the meetings of the Plenary on disciplinary matters.
[40] Under the original legislative proposal, the duties of the Deputy President of the HYSK and the Presidents of Chambers would also have been terminated.
[41] The Law entered into force on 27 February and the first appointments were made on 28 February.
[42] The appointment of the new inspectors was done by the Plenary of the HSYK even before the reasons for the Constitutional Court decision were published.
[43] These figures were mentioned to me on 7 May 2014.

In their written comments, the Ministry of Justice downplays the seriousness of the legislative interference in the operation of the HSYK by Provisional Art. 4 because ultimately so many staff members were reappointed. However, the dismissal of the entire personnel of the HSYK effectively shut down this judicial body for a certain – albeit short – period of time. More importantly, the fact that the personnel of the HSYK – the keystone of the Turkish judicial architecture – is dismissed by legislative *fiat* and then compelled to apply for reappointment in a process under the control of the Minister of Justice in his capacity as the *ex officio* President of the HSYK sends a clear message to the entire judiciary who is really in charge.

In their written comments, the Ministry of Justice also states that there was no reason to claim that the transfer of the appointment power with regard to the administrative personnel of the HSYK from the Deputy Council President to the Minister in his capacity as the *ex officio* President of the HSYK derogated from the High Council's autonomy regarding personnel. Of course it does: The Deputy Council President is elected by the Plenary from among the Presidents of Chambers. He thus is a member of the HSYK with no executive affiliation because the Undersecretary cannot be elected President of the First Chamber. The Minister of course is and remains a cabinet member even after he enters the door of the HSYK building and assumes his function as the *ex officio* President of the HSYK.

5.4. Evaluation of the Law No. 6524 by the Constitutional Court

The Constitutional Court decided on 10 April that many parts of the Law No. 6524 violated the Constitution. The reasoned decision was published in the Official Gazette on 14 May 2014, after my mission.

The Constitutional Court struck down the following provisions pertaining to:

- the power of the Minister in his capacity as the *ex officio* President of the HSYK to appoint the President and Deputy Presidents of the Inspection Board (subject to the proviso that the annulment should enter into force only three months after the publication of the reasoned decision[44]);
- the power of the Minister in his capacity as the *ex officio* President of the HSYK to determine in which Chamber the members and substitute members of the HSYK are to serve (with immediate effect and accompanied by a stay of execution);
- the requirement that when electing the Chamber Presidents, the Plenary is limited to two candidates proposed by the respective Chamber as well as the fall-back rule for cases of lack of quorum of the Plenary session in which the election was originally scheduled to take place[45] (subject to the proviso that the annulment should enter into force only three months after the publication of the reasoned decision);
- the fall-back rule for cases of lack of quorum of the Plenary session in which the election of the Secretary-General was originally scheduled to take place (subject to the proviso that the annulment should enter into force only three months after the publication of the reasoned decision);

[44] According to the explanation I received that proviso was added to avoid a gap in the law. Decisions of the Constitutional Court which declare a law unconstitutional have no retroactive effect and thus do not revive the previous law that was superseded by the unconstitutional law. Since the dismissal of the entire personnel of the HSYK by virtue of unconstitutional Provisional Art. 4 remains effective, there must be a legal possibility to replace the staff. Otherwise the HSYK could not operate until the TGNA had passed a new law which is in accordance with the constitution. While in such cases the TGNA is usually given six months, the time period was shortened to three months in the particular case because of the urgency of the matter.

[45] That fall-back rule was struck down by the Constitutional Court because it did not clearly state what quorum was required in the next plenary session in which the election is actually conducted.

- the requirement that when appointing rapporteur judges the Plenary is limited to two candidates proposed by the First Chamber as well as the fall-back rule for cases of lack of quorum of the Plenary session in which the election was originally scheduled to take place (with immediate effect and accompanied by a stay of execution);
- the responsibility of the President of the Inspection Board to the Minister in his capacity as the *ex officio* President of the HSYK[46] (subject to the proviso that the annulment should enter into force only three months after the publication of the reasoned decision);
- the appointment of the President and Deputy Presidents of the Inspection Board by the Minister in his capacity as the *ex officio* President of the HSYK (subject to the proviso that the annulment should enter into force only three months after the publication of the reasoned decision);
- the requirement that when appointing inspectors the Plenary is limited to two candidates proposed by the First Chamber as well as the fall-back rule for cases of lack of quorum of the Plenary session in which the election was originally scheduled to take place (with immediate effect and accompanied by a stay of execution);
- the power of the Minister in his capacity as the *ex officio* President of the HSYK to give duties to the President of the Inspection Board (subject to the proviso that the annulment should enter into force only three months after the publication of the reasoned decision);
- the election of HSYK members by the civil and administrative judges and prosecutors according to a voting system different from that introduced for the election of HSYK members by the Court of Cassation, the Council of State and the Justice Academy, a differentiation which the Constitutional Court held to be incompatible with the principle of equality[47] (subject to the proviso that the annulment should enter into force only three months after the publication of the reasoned decision);
- the purely discretionary power of the Minister in his capacity as the *ex officio* President of the HSYK to summon an extraordinary meeting of the Plenary, even if the majority of the HSYK members request such a meeting (subject to the proviso that the annulment should enter into force only three months after the publication of the reasoned decision);
- the power of the Minister in his capacity as the *ex officio* President of the HSYK to launch investigations against elected HSYK members for disciplinary or criminal offences committed during their membership and disciplinary or criminal offences committed prior to their election to the HSYK as well as the power of the Minister to establish an investigation board of three members (subject to the proviso that the annulment should enter into force only three months after the publication of the reasoned decision);
- the legislative dismissal of the entire personnel of the HSYK, their transfer to other positions and the appointment of new personnel;
- the suspension for five years of the requirement of twenty years of service as judge or prosecutor before being eligible for membership in the HSYK (subject to the proviso that the annulment should enter into force only three months after the publication of the reasoned decision).

The Constitutional Court accordingly eliminated most of the provisions of the Law No. 6524 that had increased the powers of the Minister in his capacity as the *ex officio* President of the

[46] The Constitutional Court did not find fault with another provision according to which the Inspection Board performs its duties on behalf of the Council and under the supervision of the Council President (*i.e.* the Minister *ex officio*).
[47] See further below para. 5.5.5.

HSYK. This is certainly a positive aspect which demonstrates the resilience of the Turkish constitutional system. But the Court was indeed the last bulwark to stop the rollback of the reform of 2010 – the legislature had better never have gone that far, thus calling their adherence to the principle of judicial independence into question. More importantly, the Court did not (and could not) undo the accomplished facts caused by the entry into force of the Law (such as the dismissal of the entire HSYK staff) and even less the damaging long-term effects of the message which the legislative procedure sent to the HSYK and the judiciary as a whole. Also, several provisions have survived scrutiny by the Constitutional Court and therefore remain in force even though they are incompatible with European standards. These provisions add items to the unfinished reform agenda of 2010.

5.5. The Remaining Parts of the Law No. 6524 which Survived Scrutiny by the Constitutional Court

5.5.1. Approval Power of Minister in his Capacity as the *ex officio* President of the HSYK with regard to Examinations and Investigations against Judges and Prosecutors

The provision which extended the approval power of the Minister in his capacity as the *ex officio* President of the HSYK concerning decisions of the Third Chamber on examinations and investigations against judges and prosecutors to negative decisions (*i.e.* decisions not to examine or investigate) is incompatible with the independence of the judiciary. I have continuously recommended the removal of the original provision which limited the Ministerial influence to a veto over positive decisions of the Third Chamber to launch examinations or investigations.[48] I repeat my previous recommendations and extend them to the new Ministerial power. I do this irrespective of my recommendation above that the *ex officio* chairmanship of the Minister of Justice in the HSYK should be terminated[49] because the approval power of the Minister does not necessarily depend on his chairmanship of the High Council. To the extent that the removal of the Ministerial influence on the initiation of examinations and investigations requires constitutional amendment, the constitution should be amended accordingly.

Some of my interlocutors claimed that the negative and positive Ministerial control over the examinations and investigations introduced a beneficial or even necessary element of separation of powers into the system: The procedural decision was given to the Minister in his capacity as the *ex officio* President of the HSYK and the substantive decision on the conclusions to be drawn from the results of that procedure was entrusted to the HSYK. That claim is unconvincing because the Ministerial control jeopardizes the independence of the judiciary. There already is a separation of powers element in the system because it is the Third Chamber of the HSYK that controls the procedure while the Second Chamber takes the substantive decisions. Moreover, in view of my recommendation to extend the judicial review to all the High Council decisions which potentially interfere with the independence or impartiality or individual rights of judges and public prosecutors,[50] the power of the HSYK is limited sufficiently.

I could not get any official information on the practical use of the Ministerial veto power either by the previous Minister or by the new Minister in their capacity as the *ex officio* Presidents of the HSYK. This was quite striking in view of the otherwise very detailed information I was given.

[48] See my Reports of 1 August 2011 (para. 3.2.3.) and of 4 February 2013 (para. 2.5.3.3.).
[49] See above para. 4.3.
[50] See below para. 5.5.6.

I recommend that the requirement of approval by the Minister of Justice in his capacity as the *ex officio* President of the HSYK of the annual routine inspection schemes be abolished.

I further recommend that the Ministerial veto on the initiation as well as non-initiation of disciplinary examinations and investigations concerning judges and public prosecutors be eliminated.

Art. 159 (9) of the Constitution which can be interpreted as covering both the negative and the positive aspect of the Ministerial control should be changed accordingly.

5.5.2. Power of Minister in his Capacity as the *ex officio* President of the HSYK to Appoint the Deputy Secretaries-General

Under the previous law, the Deputy Secretaries-General were appointed by the Plenary. The Law No. 6524 transferred that power to the Minister in his capacity as the *ex officio* President of the HSYK and the Constitutional Court found that provision to be constitutional. One of the main goals of the 2010 reform was to make the HSYK independent of the Ministry with regard to its personnel. This has been partly rescinded by returning the power to appoint the Deputy Secretaries-General to the Minister. I can see no reason why the Minister should have such an influence on the selection of the HSYK personnel. It is certainly enough to let him select the Secretary-General from a group of three candidates nominated by the Plenary. Moreover, the division of labour between the Deputies which was previously determined by the Secretary-General alone is now subject to the approval by the Minister. There is no plausible reason for this reform which would be compatible with the principle of judicial independence.

I recommend that the power to appoint the Deputy Secretaries-General be returned to the Plenary of the HSYK. I further recommend that the division of labour between the Deputy Secretaries-General be entirely left to the Secretary-General and that the Ministerial approval power be abolished.

In their written comments, the Ministry of Justice argue that the paragraph above is contradictory because I have no objection against the power of the Minister in his capacity as the *ex officio* President of the HSYK to appoint the Secretary-General but criticize his power to appoint the Deputy Secretaries-General. I disagree with this argument for three reasons: First, the appointment power of the Minister in his capacity as the *ex officio* President of the HSYK is strictly limited by the proposal power of the Plenary. Secondly, if this kind of limited executive influence on the High Council's personnel is extended further to other personnel, it becomes more difficult to ensure the independent operation of the HSYK. Thirdly, one of the main goals of the 2010 reform was to establish the High Council's autonomy with regard to its personnel, including the Deputy Secretaries-General, in order to safeguard the independence of the HSYK from the executive both in law and in appearance. Undoing that reform step sends the wrong signal: that the executive, in the person of the Minister in his capacity as the *ex officio* President of the HSYK, intends to resume control of the High Council's personnel.

5.5.3. Power of Minister in his Capacity as the *ex officio* President of the HSYK to Appoint HSYK Personnel

The independence of the HSYK in regard of personnel which had been introduced by the 2010 reform was guaranteed by giving the appointment power to the Deputy Council President who decided upon the proposal by the Secretary-General. The Law No. 6524 transferred the appointment power to the Minister in his capacity as the *ex officio* President of the HSYK. Here as well, there is no plausible reason for the reform which would be compatible with the principle of judicial independence.

I recommend that the power to appoint HSYK personnel be returned to the Deputy President and Secretary-General of the HSYK.

5.5.4. Supervision of Minister in his Capacity as the *ex officio* President of the HSYK over Inspection Board

While the Constitutional Court struck down the provision according to which the President of the Inspection Board was responsible to the Minister, it found constitutional a further provision setting forth that the Inspection Board performs its duties on behalf of the Council and under the supervision of the Minister in his capacity as the *ex officio* President of the HSYK (whereas before the supervisory power had been accorded to the President of the Third Chamber). The latter provision raises doubts as to who ultimately controls the Board – the HSYK or the Minister. Ministerial control of the inspection system was abolished in 2010 because it was considered to be incompatible with the independence of the judiciary. It should be placed beyond doubt that the Minister in his capacity as the *ex officio* President of the HSYK exercises no control over the Inspection Board and that only the HSYK has supervisory powers. Any other arrangement would give rise to wrong appearances and damage the credibility of the system.

I recommend that the power to supervise the work of the Inspection Board be returned to the President of the Third Chamber of the HSYK.

5.5.5. Election of HSYK Members

The reintroduction of the "one man, one vote" system for the election of HSYK members from the Court of Cassation, the Council of State and the Justice Academy by Law No. 6524 (but not for the election of HSYK members by the civil and administrative judges and prosecutors) is a commendable step in the right direction. As I wrote in my previous reports, such a system increases the likelihood that minority candidates are also elected, and thus of a more pluralistic composition of the High Council which better represents the Turkish judiciary as a whole.[51] However, the Constitutional Court had on 7 July 2010 declared that system to be unconstitutional even though it had been introduced by constitutional amendment. This is why the legislature had then established a plural voting system (each elector having as many votes as vacant seats are to be filled).

In its decision of 10 April 2014, the Constitutional Court reconsidered this issue and the Judges changed their mind, referring also to the Venice Commission of the Council of Europe. Accordingly, they now upheld the reintroduction of the "one man, one vote" system for the election of HSYK members from the Court of Cassation, the Council of State and the Justice Academy. But the Constitutional Court understandably would not tolerate different

[51] See my Report of 1 August 2011 (para. 3.2.2.1.) and my Report of 4 February 2013 (para. 2.3.1.).

voting systems for different electoral groups in the same elections which it qualified as a violation of the principle of equality. Since the Court underlined the discretion of the legislature in determining the voting system, it is now up to the TGNA either to extend the "one man, one vote" system also to the civil and administrative judges and prosecutors (which in my view is the preferable solution), or to maintain the previous plural voting system for all the electoral groups, or to come up with yet another system and apply it equally to all the electoral groups.

I recommend that the "one man, one vote" be extended to the election of HSYK members by the civil and administrative judges and prosecutors.

5.5.6. Remedies against HSYK Decisions

The Law No. 6524 as enacted does not change the previous legal situation with regard to remedies against HSYK decisions.[52] I criticized that situation in my Report of 4 February 2013 both with respect to the absence of judicial remedies (except concerning dismissals from the profession) and the internal complaint procedure where the members of the Chamber that made the original decision participate in the Plenary when it decides on the complaint. This does not fully meet the impartiality standard of Art. 13 ECHR.[53] Although the introduction of that internal complaint procedure was a step in the right direction, it does not go far enough. I repeat my recommendation realizing that it requires an amendment to Art. 159 (10) of the Constitution.

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

5.5.7. Revocation of all HSYK Circulars

Provisional Art. 4 revoked all the circulars issued by the HSYK, including an important one of 30 September 2011 that the result of an eventual review of judicial and prosecutorial decisions by the European Court of Human Rights would be taken into consideration when decisions on promotion are made. The Undersecretary of the Ministry of Justice told me that a similar circular has meanwhile been issued.[54] This induces me to repeat recommendations which I made in this context in my Report of 4 February 2013.[55]

I recommend that the promotion criterion of how decisions made by a certain judge or public prosecutor fared on appeal or in the European Court of Human Rights be implemented cautiously in a way which safeguards judicial and prosecutorial

[52] The original legislative proposal had abolished the power of the Plenary to decide on complaints against Chamber decisions and introduced a system in which another Chamber was given that power.
[53] See European Court of Human Rights, judgment of 13 November 2008 in the case of Kayasu v. Turkey (Nos. 64119/00 and 76292/01).
[54] As a matter of fact, in March 2014, an 'Action Plan for the Prevention of Violations of the European Convention on Human Rights' was adopted.
[55] Para. 2.5.2.1.

independence. The mere fact of a reversal on appeal or a conviction in Strasbourg should not automatically be qualified as a negative factor with regard to promotion. Rather, the courage to question the case law of the high courts or the Strasbourg Court in a thoroughly reasoned opinion for the sake of initiating the progressive development of the law should be rated as a positive factor. If, however, the reversal on appeal or the conviction in Strasbourg occurred because the judicial or prosecutorial decision was based on the inexcusable ignorance or reckless disregard or arbitrary application of the duly published relevant case law, this can be qualified as bad performance for promotion purposes.

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

5.5.8. Outstanding Recommendations Concerning further Reform of the HSYK

In my Reports of 1 August 2011 and of 4 February 2013 I made a number of further recommendations concerning future reform of the HSYK for the sake of improving the independence and impartiality of the Turkish judiciary. As those recommendations have not yet been taken up, I repeat them here in a partly revised version without going into any detail. I refer to the reasons I gave in my two previous reports.

I recommend that

- **the Turkish Grand National Assembly be given an important role in the election of the non-judicial members of the HSYK, acting by a reinforced majority so as to ensure the election of impartial members;**
- **part of the responsibility for recruiting the candidates for the position of judges and public prosecutors be transferred to the HSYK and the influence of the Ministry of Justice on the boards of interview be reduced;**
- **with regard to disciplinary sanctions (including removal from office) all members of the judiciary should as far as possible be subject to the same rules. These rules should be implemented by the High Council, except for members of the Constitutional Court with regard to whom implementation should be entrusted to the Constitutional Court;**
- **with regard to the election of members of the Court of Cassation and the Council of State, the eligibility criteria should be clearly defined and published, a system be devised to reduce the number of candidates to a manageable level before any vote is taken in the HSYK Plenary and an interview of the shortlisted candidates be introduced before that vote;**
- **the election period of HSYK members be extended and the possibility of re-election abolished for the sake of better safeguarding the independence and impartiality of the HSYK. The election periods of members should be staggered in a way that ensures that no more than half of the membership is replaced at the same time;**
- **at least two of the four members of the High Council who are now appointed by the President of the Republic should rather be elected by the Grand National Assembly in a way that promotes the representation of different cultural and political orientations of the Turkish society.**

In their written comments on my Report of 30 July 2014, the Ministry of Justice took exception to the first of the preceding recommendations. They argue that the President of the Republic who is currently empowered to select the four non-judicial members of the HSYK on his own makes that selection impartially and thus ensures the cultural and political diversity of the HSYK. It is true that the President of the Republic is now directly elected by the people so that his democratic legitimacy equals that of the Grand National Assembly. It is also true that the President of the Republic cannot be a member of any political party and that he is obliged to exercise his functions in an impartial manner. On the other hand, dividing the appointment power between the President of the Republic and the Grand National Assembly would even better ensure the cultural and political diversity of the HSYK.

6. The Enactment of Remedial Law No. 6545 in June 2014

On 28 June 2014, the Law No. 6545 entered into force. It amended the Law No. 6087 on the HSYK in order to repair the violations of the Constitution as had been established by the Constitutional Court. While the legislature had been given three months' time by the Constitutional Court it acted much more quickly. This is certainly positive. On the other hand, the Law No. 6545 restored the legal situation before the entry into force of the Law No. 6524 only to the extent in which the Constitutional Court had found it to be unconstitutional. The legislature did not repair those parts of the Law No. 6524 which the Constitutional Court upheld under the standards of the Turkish Constitution but which nonetheless are incompatible with European standards.[56] There was no attempt on the legislature's part to make any further progress with regard to the independence and impartiality of judiciary.

For example, the Constitutional Court objected to the different voting systems which the Law No. 6524 had introduced for the election of HSYK members by the Court of Cassation, the Council of State and the Justice Academy (one man, one vote system) on the one hand and the civil and administrative judges and prosecutors (plural vote system in which each voter can cast as many votes as vacancies are to be filled) on the other hand.[57] As the "one man, one vote" system is better suited to ensure plurality in the composition of the HSYK and thus increase public confidence in the Council's impartial decision-making, I recommended the extension of that system also to the civil and administrative judges and prosecutors. The legislature, however, unfortunately returned to the old plural vote system for all electoral groups.

Apart from that, the dutiful execution of the Constitutional Court decision by the legislature alone could not undo the self-inflicted damage to the credibility of the political majority as regards their adherence to the independence and impartiality of the judiciary. There was no admission that the enactment of the Law No. 6524 had been a mistake.

7. The Elections to the HSYK of September and October 2014

On 12 October, the elections of the ten HSYK members from the civil and criminal courts (7 members) and the administrative courts (3 members) were held. Eight of the successful candidates belong to the Unity in the Judiciary Platform (YBP) which included candidates with different political backgrounds. None of the candidates nominated by YARSAV or the Judges' Union were elected.

[56] See above para. 5.5.
[57] See above para. 5.4.

At the Brussels meeting of 7 November 2014 I posed the question whether the Government had tried to influence the outcome of the elections by supporting certain candidates or groups because I had heard reports that the YNB had been supported by the authorities. I was assured that no governmental interference in the elections had taken place. My interlocutors were also unaware of any official statement by the President of the Republic that he had a "Plan B" which could be activated if the results of the HSYK elections were unsatisfactory. In any event, the Government apparently did consider those elections as crucial in their struggle to prevent what they depict as an attempt by the Gülen Movement to assume control of the judiciary.[58]

In the elections by the High Courts which had already been held in September, none of the YBP candidates was successful, but two candidates supported by YARSAV were elected. Meanwhile, the Justice Academy has also elected one HSYK member and the President of the Republic has appointed four lawyers in private practice as non-judicial members.

8. The Way Ahead toward Implementing European Standards of Judicial Independence, Impartiality and the Rule of Law

My present peer review mission took place under difficult conditions because of the events I described earlier. While I experienced the same warm hospitality as always, I felt that some of my interlocutors were less ready to speak their mind than on previous missions. My impression is confirmed by the speech which the President of the Constitutional Court Haşim Kılıç gave at the ceremony marking the 52nd anniversary of the founding of the Court on 25 April 2014. In the presence of both the President of the Republic, the Prime Minister and several Ministers, President Kılıç found it necessary to reject interferences by the Government in the judiciary and underlined that a judiciary under Governmental tutelage which was used as a weapon against political opponents could never function as an independent protector of legal rights. The President of the Constitutional Court was thereupon criticised by Cabinet Ministers as being a partisan of an anti-government alliance. This raises the question whether there is consensus on fundamental constitutional and European values in Turkey today.

The Government has publicly questioned the integrity of the Turkish judiciary as a whole and thereby undermined the credibility of the third branch of government as faithful guardians of the law in the eyes of the Turkish public. A general suspicion of conspiracy has been voiced in the sense that judges and public prosecutors who proceeded against the Government in high-profile cases followed orders by organisations outside the formal judicial structure.[59] However, European standards provide only one way to counteract alleged violations of their official duties by individual members of the judiciary – the ordinary disciplinary and criminal procedures in accordance with the law and in compliance with due process requirements. Apart from that, it is the core function of an independent and impartial judiciary in a system founded on the rule of law[60] to say what the law is and to enforce the law with equal determination against everyone subject to the law– private individuals, enterprises, intelligence service chiefs, cabinet members or the Government as such, including in high-profile cases.

[58] See the exclusive interview given by the Minister of Justice in Daily Sabah, 25 November 2014 (available at http://www.dailysabah.com/politics/2014/11/09/gulen-movement-did-not-manage-to-seize-judiciary-in-hsyk-elections [last accessed on 29 November 2014]).

[59] This refers to the Gülen Movement. See above para. 5.1.

[60] See Art. 2 and Art. 49 (1) sentence 1 of the Treaty on European Union, Art. 3 of the Statute of the Council of Europe and the last preambular paragraph of the European Convention on Human Rights.

I recommend that alleged violations of their official duties by individual members of the judiciary be sanctioned exclusively through the ordinary disciplinary and criminal procedures in accordance with the law and in compliance with due process requirements. It is against European standards for the political branches of government publicly to undermine the credibility of the judiciary as a whole by putting its members under a general suspicion of conspiracy ("coup attempt").

The course toward implementing European standards of judicial independence and impartiality was most clearly documented in the judicial reform of 2010. Less than four years later, the Law No. 6524 tried to undo important parts of that reform by bringing the HSYK as well as the Justice Academy under the control of the executive. The most problematic parts of that law were declared unconstitutional by the Constitutional Court and the Law No. 6545 was quickly enacted in order to repair those violations of the Constitution, in dutiful execution of the Constitutional Court decision. But no further steps have so far been taken to repair the credibility of the governing majority as regards their adherence to the principles of judicial independence and impartiality in all cases, including high-profile cases. Such steps would be very important and necessary, since judicial independence and impartiality are the indispensable conditions of effectively securing the rule of law. These are fundamental European values upheld by both the Council of Europe, to which Turkey acceded in 1950, and the European Union, to which Turkey plans to accede. Art. 49 (1) of the Treaty on European Union requires candidate countries not only to respect the rule of law and its foundations, the independence and impartiality of the judiciary, but also to be committed to promoting them.

Annex: Documents on Common European Standards of Independence and Impartiality of the Judiciary

Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities

Venice Commission Report on the independence of the judicial system (2010) - Part I: the independence of judges, Part II: the prosecution service

European Guidelines on Ethics and conduct for public prosecutors (the Budapest guidelines) adopted by the Conference of Prosecutors General of Europe on 31 May 2005

Consultative Council of European Judges Opinion No 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges

Council of Europe recommendation Rec(2000)19 on the Role of Public Prosecution in the Criminal System

Council of Europe recommendation CM/Rec(2012)11 of the Committee of Ministers to member States on the role of public prosecutors outside the criminal justice system

European Charter on the statute for judges, 1998

Committee of Ministers Recommendation R(94) 12 on the independence, efficiency and role of judge, 1994

Recommendation No R (86) of the Council of Europe on Measures to Prevent and Reduce the Excessive Workload in Courts

Bangalore Principles of Judicial Conduct ("Bangalore Principles"), adopted by the UN Human Rights Commission on 23 April 2003

Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 113 December 1985