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THE HIGH COUNCIL OF JUDGES AND PROSECUTORS IN TURKEY:

ROUNDTABLE DISCUSSION ON ITS NEW STRUCTURE AND OPERATIONS

MODERATOR:
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Turkish Economic and Social Studies Foundation

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TESEV's Preface

Koray Özdil, *TESEV Democratization Program*

One of the most critical areas of reform in Turkey's recent history involves the judiciary, which has served to corroborate the tutelary regime. With a discourse emphasizing that the judiciary itself must also be bound by the "rule of law", the Justice and Development Party (JDP) took a number of steps toward reforming the administration of supreme judiciary bodies, as well as the judiciary in general. The constitutional amendments brought to the ballot in the referendum of 12 September 2012 essentially represented an initiative to transform the judiciary. The amendments package was intended to equip the Constitutional Court and the High Council of Judges and Prosecutors (HSYK) with a more pluralist structure.

Expectations were particularly high that amendments concerning the HSYK would provide the judiciary with a more democratic administrative structure, given that HSYK has a substantial role within the centralist hierarchical composition of the judiciary in Turkey. In addition, transforming the HSYK, otherwise a bureaucratic center of power, into a more participatory, pluralist body subject to civilian supervision would insinuate other bureaucratic government entities could also undergo a similar mutation. The public support extended to the referendum had its origins in these hopeful expectations and perceptions. Political groups opposing constitutional amendments, however, were critical that the amendments would translate into the government gaining more influence upon the judiciary.

Following the referendum, even circles supportive of amending the constitution were intensely critical of the decision the Constitutional Court made in regards to the HSYK elections, as well as of the subsequent election process. The HSYK instituted after the election received positive feedback thanks to the decisions it issued on the reinstatement of Ferhat Sarıkaya, the prosecutor removed from office for having authored the Şemdinli indictment in 2005; and Sacit Kayasu, the prosecutor who was stripped of his professional credentials in 2003 for having drawn up an indictment against the perpetrators of the 1980 coup. It has, however, ushered in a serious crisis of confidence among the public with respect to the independence of the judiciary as a result of the ways in which prosecutors in the Deniz Feneri, Hrant Dink and Ergenekon cases were removed from office. International reports drafted about the judiciary reform in Turkey raised concerns along the same lines.[1] The reports had a positive approach toward HSYK's new structure in terms of the representation of various levels of the judiciary. However, they critiqued that the HSYK remained excessively control-prone and centralist in comparison with similar councils in democratic regimes based on the rule of law.

In light of all these developments, we decided to put together this study to assess the structure, operations and practices of the new HSYK. As a matter of fact, we previously published an academic and normative evaluation of the HSYK in a 2010 report edited by Serap Yazıcı titled "Judicial Conundrum: Opinions and

1 **Hammarberg, Thomas, "Administration of Justice and Protection of Human Rights in Turkey", 2012.Venice Commission, " Interim Opinion on the Draft Law On the High Council for Judges and Prosecutors of Turkey" (CDL-AD (2010) 42) and "Opinion on the Draft Law on Judges and Prosecutors of Turkey" (CDL-AD(2011) 004).**

Recommendations on Constitutional Reform in Turkey".

This report titled "the High Council of Judges and Prosecutors in Turkey: Roundtable Discussion on its New Structure and Operations" is based on discussions of the roundtable meeting attended by representatives from judges and prosecutors professional associations such as YARSAV (The Association of Judges and Prosecutors) and Demokrat Yargı (Democratic Judiciary Association), which adopted divergent positions over the course of the referendum; one representative from HSYK, the direct addressee in the debate; and experts with diverse opinions.[2] With the roundtable, we intended to generate direct discussion by experts and practitioners of the field in a small group affording sufficient time for speakers. As a result, we treated the current situation and practice through an insider's perspective and in detail. This also provided a shared platform where parties coming from varying political positions exchanged opinions regarding both the HSYK and several contested aspects of the judiciary reform. The roundtable ensured that critiques were communicated to and discussed with the directly relevant parties through face-to-face conversations.

Main discussion points for roundtable held in Ankara on 21 May 2012, and the report were drawn up in consultation with Ali Bayramoğlu, who has advised on this study. The minutes of the meeting were compiled and turned into a report by this study's editor, Ferda Balancar. We made an effort to convey the content of the discussion as smoothly as possible into the report, keeping in mind the stylistic requirements of the report format. A substantial part of the discussions in the roundtable has been carried over into the report. However, sections where not-yet public information was shared about ongoing trials regarding individuals not attending the meeting were not included in the report, considering among other things the suggestions made to the effect by those in attendance. An exception to that concerned the sections relating to the Deniz Feneri case. Roundtable exchanges about this particular case largely included publicly available statements, and we thought it is important that different parties in attendance could speak to the allegations regarding the case; therefore, we decided not to exclude those exchanges.

While there were sharp disparities in the roundtable based on organizational and political positions, certain common points have emerged in regards to the problems and recommended solutions concerning the current status of the HSYK and the administration of the judiciary. These common problem areas and recommended solutions are discussed under a separate heading titled "Common Points and Recommendations". We hope that this report and the emerging recommendations contribute to the information and discussion platform necessary for the democratic running of Turkey's legal system.

2 **In addition to these, we invited a representative from the board of directors of the Union of Turkish Bar Associations, the organization that represents the defense litigator community in Turkey. Citing scheduling reasons, any representative was able to attend.**

Remarks and Recommendations on the New Structure of the High Council of Judges and Prosecutors (HSYK)

21 May 2012

Moderator:

Ali Bayramoğlu, Yeni Şafak Daily Newspaper

Discussants:

Ahmet İnsel (Galatasaray University, Professor of Political Science)
İbrahim Okur (HSYK, Head of the First Circuit)
Leyla Köksal Tarhan (YARSAV, Board Member)
Mithat Sancar (Ankara University, Professor of Law)
Uğur Yiğit (Democratic Judiciary, Co-president)

Ali Bayramoğlu:

This meeting will be divided into three sessions. HSYK's new structure is only a year and a half old experience. The topics we want to discuss are: Did the individuals who suggested and supported the new structure get what they expected? To what extent have the expectations been realized? Did we witness any shortcomings? Are there additional emerging concerns for those who strongly criticize the new structure? What were some of the practical shortcomings? What kind of picture are we looking at?

1. Post-Referendum Structure and Practices of the High Council of Judges and Prosecutors

1.1. HSYK'S STRUCTURAL TRANSFORMATION

Ali Bayramoğlu

Ali Bayramoğlu:

I would like to give the floor to İbrahim Okur first. Mr. Okur, if you might summarize for us the road we have traveled so far with respect to the HSYK, where we have ended up now. After that, we will each expand on the topic by raising critiques and asking questions.

İbrahim Okur:

Before looking at today, I think we need to consider where we started, how things were. Let us consider later what the new structure brought about.

As you know, under the 1982 Constitution the HSYK had a seven-person membership, including the Minister of Justice as its chair, the Ministry undersecretary, three principal and three alternate members from the Supreme Court of Appeals, and two principal and two alternate members from the Council of State. Five members from supreme judiciary bodies and two other members, the minister and the undersecretary formed the seven-person membership. This seven-member council made the decisions, [and later] it also made the re-examination decisions, followed by a final decision issued by the Appeals Review Committee, a 12-member body, whose decision would be the ultimate ruling.

Ever since it was established in 1982, HSYK has been a subject of contention. The participation of the Minister of Justice and the undersecretary in there has been contested since day one. However, up until 2008, there was no serious public discussion raised tothe fact that those subject to the Council decisions had no representation in the body.

Until then, the debate was about the participation of the minister and the undersecretary in the council. The idea was that their participation cast a shadow upon the independence of the judiciary, and once they removed, the problem would cease to exist.

The ministry offered the following line of argument at that time: "The participation of the minister and the undersecretary provided for a system of checks and balances. If the council included only members from supreme judiciary bodies, it would become a different political body in itself. A council composed only of members from the Supreme Court of Appeals and the Council of State would be one directed by people only from these two supreme judiciary bodies."

The main reason decrees became controversial with problems beginning in 2007 was that the secretariat, budget, inspection reports of the YSK *(Supreme Elections Board)* were drafted within the Ministry of

Justice. It was the Ministry that set the agenda items to be discussed by the board. Controversies surrounding the extent to which the Council would change the items –or whether or not it would so-, the problem of pseudo-decrees turned the HSYK into a publicly questionable entity as of 2007-2008.

Also, the negotiations that were underway with the EU on judiciary reform, EU advisory visit reports and progress reports clearly demonstrated that the composition of the HSYK was not in harmony with EU norms. Several entities and organizations openly began arguing that the structure of the HSYK needed to change.

When it was 2010, the dominant view came to be that the composition of the Council, whose secretariat, budget and Inspection Committee were subject to the authority of the Ministry of Justice, had to transform. It was established that the Council, which comprised only of members of supreme judiciary bodies and representatives from the ministry, would now include judges, who were the ones subject to Council decisions., participating in it. I think this was the most noteworthy aspect of the HSYK reform. It paved the way for the representation of ten judges, seven of them from judicial courts and three from administrative courts, who are subject to Law No. 2802. The incorporation of three members from the Supreme Court of Appeals and two from the Council of State secured the spots of those coming from the supreme judiciary bodies. It also allowed for the appointment, by the President, of four members who practice law or are legal scholars and are not judges. A representative elected by the 30-person plenary session of Turkish Justice Academy would now be able to join the HSYK. This representative was elected by the plenary session of the Justice Academy composed of 30 participants. The minister and the undersecretary held on to their seats in the Council, as well. As a result, a broad-based representation was ensured in the Council. The President's appointment of members to the Council prevents the HSYK from being a body composed only of judges. Currently the

İbrahim Okur

Council has four non-judge members, two of them are lawyers and the other two are university professors. The participation of non-judge members in this Council relieved the concern that the HSYK would turn into a body comprised of judges only.

As HSYK stood previously, the Objections Committee, formed by the addition of five alternate members to the seven-member committee, did not have the ability to amend decisions. As the new structure stands now, 21 members of the 22-person Council (we'll talk about the Minister of Justice later) were distributed in groups of seven to three circuits evenly and on the basis of affiliation. With that, the intention was to have a fair and balanced representation. That is, people coming from the same source were not placed in the same circuit, there was no such practice as grouping members appointed by the President in one circuit, and then grouping those coming from the Supreme Court of Appeals in another. If there was any objection against a decision made by a circuit, that is by the seven members, the 22-person General Assembly, in other words three circuits and the minister, convenes and evaluates the objection. This has provided for an effective objection mechanism. It was a major step. There was also a stipulation that "the Minister of Justice may not participate in the objection resolutions concerning disciplinary matters". Each circuit's duties were established by law. Legal recourse was made available in the event of

"Looking at the national average, that makes 1,500 documents per prosecutor, and 1,200 per judge. Without reducing that workload, you cannot ensure trust in the judiciary. As a member of the judiciary myself, I would not have trust in such a judiciary under these conditions."
(İbrahim Okur)

dismissal decisions. To ensure objectivity, impartiality and independence, the resolutions were rendered accessible to the public. At this time, the texts of the resolutions are available on our website. It was ensured that those who are not members of the judiciary could contribute actively to the resolutions. An independent secretariat and an independent Inspection Committee were established. The Inspection Committee and the secretariat, previously within the auspices of the Ministry, were now placed under HSYK. We have an independent budget that we can use. The HSYK has a budget that is one and half times larger than that of the Constitutional Court. In addition, the position of the Minister of Justice has been weakened. He may not attend the circuit meetings where the actual resolutions are made. The Minister may chair the General Assembly; however, he may not attend the Assembly meeting when files concerning disciplinary matters are being ruled. While the Minister previously had the authority to set the agenda, now it is the acting chairwho has that authority. Each circuit's agenda is set by that circuit's chair. The road has been paved for the members to set the agenda. As a result, an amendment package has been drafted which ensures that troubles previously blocking the system could be taken care of.

Now, how did the judiciary in Turkey look like before? Any diagnosis that does not consider this question would be a wrong one. In January of last year, that is when we took office as the new HSYK, one million 260 thousand court files at the Supreme Court of Appeals, six million investigation documents at prosecutors' offices, and six million court files in the courts were waiting to be heard. About five thousand judges and four thousand prosecutors were tasked with the entireity of cases. In other words, looking at the national average, that makes 1,500 documents per prosecutor, and 1,200 per judge. And then there is this injustice: While in small districts a judge would preside over some 40-50 files, in İstanbul you have a judge who is in charge of 17,000 files. Under these conditions, you expect that the judiciary to function and citizens to trust the judiciary. How is that going to be possible under these conditions? Without reducing that workload, you cannot ensure trust in the judiciary. In a poll Bilgi University made a few years ago, the judiciary's approval rating was down to around 42%. As a member of the judiciary myself, I would not have trust in such a judiciary under these conditions. Without reducing this workload, you will have trouble reaching justice. To that effect, the Council of State and the Supreme Court of Appeals now have more staff members. New circuits were added to each. It was ensured that the Supreme Court of Appeals is able to speed the process up.

Uğur Yiğit:

To be able to analyze the HSYK and its practices, one first needs to consider carefully the mission entrusted to it by the 12 September military regime. If this mission is accurately identified, we can then understand the current structure of HSYK and create a democratic structure in the future.

As you know, after the 12 September military coup, the military council restructured the state system in a manner that would allow them to keep it under control and surveillance. If you wonder what structures these are, you can look at the bodies in the Constitution that are referred to with the word "supreme" or "high". Higher Education Council, Supreme Elections Board, supreme courts, Supreme Military Court etc. Councils and boards including these words in their names were built as ideological control mechanisms. That's how HSYK was for 30 years. And for some reason, the publicbegan debating them after 2007. That reason is the democratization process, which is among the topics studied by TESEV The post-Second World War

Uğur Yiğit

order came to a close with the fall of the Berlin Wall in 1991. We all witnessed the ramifications of that on Eastern Europe. The composition of the nation-state and the economic structure underwent a change. In Turkey, first of all the economy began transforming in 2000s, and along with it the social and political structures. Although essential laws were replaced, the structure of the judiciary remained intact. In 2007, debate began on the structures that have been functioning the same way for 30 years. This anti-democratic structure needed to change. And we supported that as Demokrat Yargı. Of course, what we wanted was not a structure that represented an extension of the old one, but a democratic HSYK structure.

The 2010 referendum granted judges and prosecutors a more advanced and historically significant entitlement than was accorded under the 1961 Constitution: judges and prosecutors were given the right to vote, and be voted as, members to the HSYK. With this right, judges and prosecutors for the first time acquired subject status vis-à-vis matters of the judiciary. They began to be consulted with respect to judiciary issues. They now turned into solvers of problems in the judiciary. This allowed for the emergence of a new set of power relations. However, we as Demokrat Yargı have argued and continue to argue that the 2010 HSYK election was subjet to a political occupation. The bureaucracy of the Ministry

"2010 HSYK election was subjet to a political occupation. The bureaucracy of the Ministry of Justice intervened in the elections and directed the process. Our formal rights were encroached upon and seized. Following a 30-year old habit, judges and prosecutors succumbed to the authority." (Uğur Yiğit)

of Justice intervened in the elections and directed the process. Our formal rights were encroached upon and seized. Following a 30-year old habit, judges and prosecutors succumbed to the authority. Now, you may say that 6,500 votes were cast. If that's how you would look at the issue, well, 92% of the electorate affirmed the 1982 Constitution. Many leaders in the Middle East enjoy huge numbers of affirmative votes. Actually, you can explain elections in two different ways. From a top-down perspective, they are manifestations of power relations. From a bottom-up perspective, they are a matter of democracy and diversity. We explain the HSYK elections in a power relations framework. We think this body has a serious issue of legitimacy because of the elections. Also, what actually came about as a result of the vote? Have the points we critiqued the previous council cease to exist? Why were we critical of the previous one? Because it did not have room for multiple voices and plurality. Does the current council have those? No. We critiqued the old one for tutelary role. Is that role gone? No.

It all continues as before in the judiciary. The first sign that it does so came with the knock on the office door of the Undersecretary of National Intelligence Organization in January 2012; this made it undeniably clear that the tutelage was there. The judiciary is clinging to the habits of the previous era. To be consistent in terms of principles, we direct the same remarks to the new body as we did to the old one. Let me give you an example. The Supreme Court of Appeals still appoints a member to the Public Procurement Authority. And the Council of State does so to the Competition Authority. That means the

ordinary judiciary and the administration are still intertwined. No changes to that. Did the hierarchical structure in the judiciary go away? No. The certificate of conduct was renamed as performance evaluation form, and that was the change. Unfortunately, no organization except Demokrat Yargı directed the criticism they made to the previous structure to the new body. No one bothered to check whether the new version actually represented a change. So, nothing has changed. Right now we need to talk about HSYK itself. We think that this body has a serious crisis of legitimacy because of the elections. Its democratic legitimacy is a question in dispute.

Ahmet İnsel:

We need to first of all discuss if HSYK needs to exist at all. It would be better to have two separate bodies, one representing judges and the other prosecutors to protect employee rights without a a top-down structure, and entailing more pluralist governance mechanism.

There arefour or five organizational problems that are at the source of the issues that have emerged after 2010. And then there are problems about the mentalityof the judiciary world, that is, about how members of the judiciary position themselves between the state and the society. These are not the kind of issues that may be taken care of simply by amending the law, but of course legal amendments will prevent them from becoming more grave and acute.

Ahmet İnsel

Mithat Sancar

"The judiciary has for a long time been dominated and supervised by a tutelary bureaucracy and the mentality it represented. The bureaucracies of a number of ministries in Turkey are utilized as the sanctioned space of the tutelary powers. The bureaucracy of the Ministry of Justice is one of those." (Mithat Sancar)

Mithat Sancar:

For the independence of the judiciary, the status of supreme bodies like HSYK is very important. HSYK came into existence with the 1982 Constitution. At the time the 1982 Constitution was being discussed, concerns were raised that there would be serious problems regarding judiciary independence were the Constitution adopted as it stood. Afterwards, there were multiple discussions about the oligarchic character of this structure.

HSYK is a body that controls and guides all activity within the judiciary, and it has very extensive powers. The presence of such a body will of course have impact upon the behavior of judges and prosecutors. The way the structure of this body looks will reflect on the entire judiciary in one way or the other. Therefore, when you talk about the oligarchic structure, it matters who and which mentality control that

structure. The judiciary has for a long time been dominated and supervised by a tutelary bureaucracy and the mentality it represented. The bureaucracy of the Ministry of Justice played a special role in this set up. The bureaucracies of a number of ministries in Turkey are utilized as the sanctioned space of the tutelary powers. The bureaucracy of the Ministry of Justice is one of those. If you look at the Turgut Özal era, which witnessed the first experiment in liberalization after 12 September, you will see that ministers of justice have always been representatives of that general structure. In the initial Justice and Development Party governments, actually until the last couple of years, ministers of justice have been individuals who are considered to know "the state" well and are aware of and protect the "interests of the state".

At the outset, members of supreme judiciary who took part in HSYK did not have any complaints about the minister and the undersecretary participating in that body. That was because they shared a mentality. Even when the military segment of the tutelary system was shaken, the crises did not come to the fore because this partnership was largely intact as far as the judiciary was concerned. However, when the partnership began going downhill, the essence of the system became more visible. There were such interesting developments that the participation of the minister and the undersecretary, who would otherwise be expected to represent the tutelage, disrupted the calculations of the judiciary oligarchy. The fact that debates about HSYK have for long been concerned with the participation of the minister and the undersecretary in this body has significantly interrupted the search for a model for Turkey. This also put an obstacle before the positioning of the amendments that came about as a result of the 12 September 2010 referendum on a sufficiently solid ground.

Although all of the actors are responsible for the particular way in which the discussion was carried out and for the lack of a solid ground in favor of the amendments, I think the government has the lion's share of the responsibility. There were some preliminary efforts before the amendments. When the proposed amendment was taking its final form, either the bureaucracy of the ministry of justice did not sufficiently inform the government of these efforts or it did not work hard enough to convince the government. The proposed recommendations were quite good, however they did not find their way into the processes at the Turkish Grand National Assembly as they were supposed to. There were some particular bottlenecks over the course of the Constitutional amendment process. The notion that the oligarchic structure must be dissolved and replaced with a pluralist one cast a shadow upon the other aspects of the issue. Of course, the concern to dissolve the oligarchic structure as much as possible was a fair one and appropriate, however it was also necessary to see that this particular amendment would not automatically mean the solution of the problems of the judiciary.

Yücel Sayman:

First of all I'd like to say this, we are not going to find a way out if we treat the HSYK as independent from the organization of state authorities and as disentangled from the system. For instance, HSYK appears to be the most important body in terms of the operation of the judiciary. But that is only the case with respect to the judges and prosecutors. That is not the case with respect to the defense. In our country, the defense has been institutionally cast outside the system of judiciary. We think it is there but actually it is not. Why aren't we talking about the defense when we discuss HSYK? Because the defense has no representation in that entity. Discussing the judiciary within the framework of HSYK means that we are talking about the judiciary within the framework stipulated by the current Constitution. That is, the judiciary means the judges and the prosecutors. This is a particular design. And it is not a democratic design, but a despotic one. The judiciary has been given a role to play within this despotic design. In the preamble of the Constitution, the judiciary was tasked with the duty to protect the

"In our country, the defense has been institutionally cast outside the system of judiciary. We think it is there but actually it is not. That is, the judiciary means the judges and the prosecutors. This is a particular design. And it is not a democratic design, but a despotic one." (Yücel Sayman)

Yücel Sayman

state. When I was the president of the Bar Association, I saw that very clearly. They were saying that they were going to protect the state. I was horrified. I would object, just how would a judge protect the state? Over the course of the bar elections I had a line that I used: "We won't leave the judiciary to the judges".

The judiciary has been given the function to protect the state. Both judges and prosecutors have been serving this function to a large extent up until now. And HSYK is the body that organizes and monitors this service. Granted, it is good that the amendment took place. Before the amendments, it was the supreme judiciary, that is the Supreme Court of Appeals and the Council of State, that held control over the HSYK, that has now changed. The framework created by the 1982 Constitution needed to be discarded, and it was discarded indeed. But then other problems surfaced there. The tutelage is not just the control that the military or the bureaucracy established over the government. The real tutelage is the one exercised over the public. And that is yet to be taken care of. So, the main structure has not changed. No matter how many amendments you introduce, the structure itself needs to be the subject of debate and it must be transformed. Issues such as bar association and the judicial law-enforcement must be considered as a whole.

To wrap it up, I don't think it is right to discuss HSYK separately from the system. If we are talking about the problem of the judiciary, we need to consider and critique the entire system of which HSYK is a part. In fact, if that is not done, the amendments to HSYK will not mean much by themselves. And we actually see that they don't.

Leyla Köksal Tarhan:

I would like to start by saying that the main reason for the Constitutional amendments in the 12 September referendum is to change the structure of the judiciary. I guess no one can argue otherwise, given that of all the Constitutional amendments only those pertaining to the judiciary have been put into effect promptly. The other items had only a nominal effect. The purpose of course is obvious; keeping the judiciary under control, having central control over the principal of the separation of powers. As Ahmet İnsel always emphasizes in his writings, this was democratic oligarchy marching forward. Inside the HSYK, this oligarchy manifests itself more blatantly than it did in the previous system, and with more excruciating consequences. We as YARSAV opposed the amendment. And we were not categorically opposed to any kind of amendment, but to this particular kind of amendment. In fact, the bylaws of YARSAV emphasize the rule law and the independence of the judiciary... What we meant by the independence of the judiciary is that we were objecting to five supreme judges and one minister and one undersecretary determining the system of the judiciary. We did not disagree with judges and prosecutors having voting rights. The participation of the minister and the undersecretary in this body could provide for an element of balance, but because democratic culture is not established in Turkey, this participation is a threatening factor; the power and authority they represent prevent the members of the council from

Leyla Köksal Tarhan

exercising their free will. After all judges and prosecutors are human beings, too. We want a council that is composed of judges and prosecutors. As YARSAV, we supported certain candidates in the election. But the results demonstrate that we are faced with quite an engineering effort. For the first time ever, the Constitutional Court exceeded its powers and effected an adjustment: if they find something was wrong, they should revoke it. But that is not what the Constitutional Court did. The Court made an adjustment and then affirmed it. This does not have anything to do with YARSAV or CHP *(Republican People's Party)*. This is totally an amendment made to create the HSYK that exists today.

With the first decree after HSYK elections and in appointments to the Supreme Court of Appeals, candidates from YARSAV were all exiled to various places. They were appointed to places they did not request. Candidates from YARSAV, founders and directors of YARSAV were all given appointments that looked like punishments. And of course they found the necessary pretexts for all of that. Things like professional requirements, their disciplinary records, and their scores etc. We were faced with these kinds of practices. In the meantime, no attention was paid to the unity of families. Several of our colleagues went by themselves, with their families remaining in Ankara. When it was time to elect members to the Supreme Court of Appeals, 160 members were elected. I do not blame those who were elected, but what was the fault of those who were not elected? Where were the women?

İ. O.:

They had no blame. Because of the election rules the system worked as follows: the list of all the candidates was published, and those who did not want to be elected notified us. As such, 70 of our colleagues withdrew their candidacy. Later, we distributed the emergent lists to members of the HSYK in November. All of the information about candidates including their performance evaluations was compiled in a file. The candidate files were delivered to HSYK members who would vote. From among a total of 5,000 candidates, the voters cast as many votes as the number of vacant memberships. That is, for 160 vacant seats each voter cast 160 votes. According to the previously designated procedure, we held a final round. There were 320 candidates in that final round. Of these 320 people, votes were cast for 160 and the 160 candidates who got the highest number of votes were elected.

L. K. T.:

Okay, why could only two or three women get elected?

İ. O.:

That means there were that many votes for them. Some of our colleagues did not get any votes at all. There were those who couldn't get elected because they were one vote short.

L. K. T.:

Well, let's assume that this voting system is very accurate and fair. How is it then that there formed a group that acts together after they were elected to the Supreme Court of Appeals and the Council of State?

İ. O.:

How can you know how votes were cast in the secret ballots in the Supreme Court of Appeals? Did you place a hidden camera there?

L. K. T.:

But there is an organized transformation. You can't deny that, everyone is aware of that.

Ahmet İnsel: Going back to the ration of women, what is the proportion of women in the judiciary? That is, what is the percentage of women voters?
Leyla Köksal Tarhan: According to the official website of the Ministry, it is 24.3%. In terms of the rate of representation, it was previously 30 to 33%, right now it is about 1 to 2%. That's the case for the entire supreme judiciary. 160 individuals were elected to the Supreme Court of Appeals. Only five of them are women. And all of those women are spouses of bureaucrats.

İ. O.:

So there's a voting box and it is a secret ballot, but you're saying there's block voting. Previously, the President of the Supreme Court of Appeals, Nazım Kaynak, was elected with 230 votes from 250 members. This year he got 190 votes from 387 members. And you are saying that there was block voting for Nazım Kaynak. How is that possible?

A. İ.:

Going back to the ration of women, what is the proportion of women in the judiciary? That is, what is the percentage of women voters?

L. K. T.:

According to the official website of the Ministry, it is 24.3%. In terms of the rate of representation, it was previously 30 to 33%, right now it is about 1 to 2%. That's the case for the entire supreme judiciary. 160 individuals were elected to the Supreme Court of Appeals. Only five of them are women. And all of those women are spouses of bureaucrats. That is, they were elected because they supported this system. They came saying that they would end the oligarchy in the judiciary. And now there are fewer women judges.

İ. O.:

It is actually not fewer. Right now there are more women judges. I can say that since we took office more women have been appointed as presiding judges.

A. B.:

Ms. Tarhan, I think we also need to ask, what are the effects of the change in HSYK on the sphere of inspection and investigation?

L. K. T.:

In the case of decisions regarding promotion, it is a serious threat for judges and prosecutors that one cannot have recourse to the law against decisions concerning disciplinary offenses. Criteria for transparency must be established here as soon as possible. All of HSYK decisions need to be open to judicial review. Previously there was at least the remedy to object to the decisions made by the minister. Right now you cannot have recourse to the law against any HSYK decisions, except those concerning dismissal.

Furthermore, there is a body within the Supreme Court of Appeals called the Committee of Presidents. This committee changes the places, circuits of the members, and assigns investigating judges to different places. Most recently, four investigating judges from the Assembly of Civil Chambers were assigned to other places. They were all highly successful. One of them was a colleague of mine. I know very closely that that person was highly interested in research and very diligent. So were the other three. Actually they usually assigned successful judges to the Assembly of Civil Chambers. Once the new president was elected these four individuals were removed. It is said that they were removed because they are Alevis.

In addition, the Committee of Presidents previously imposed the condition of having served for four years in the Supreme Court of Appeals. This condition was annuled. Right now it's all filled with people who had no tenure in the Supreme Court of Appeals. So these are the people who are now changing the places of the members. This is eventually a result of the practices of those members newly chosen to HSYK.

A. B.:

What is the role and influence of the Ministry of Justice with respect to the recruitment of judges and prosecutors?

İ. O.:

Currently, a committee composed mostly of Ministry of Justice representatives handles the recruitment of candidate judges. Although this committee evaluates the candidates, and it is the 3rd Circuit that eventually has the final say, it is rather difficult to say "No, we don't want this particular candidate" after completion of two years of internship. I think there must be a role for HSYK in the determination of candidate judges. In fact, candidate judges must entirely be designated by HSYK. If that won't be possible, then a committee composed of representatives from the Ministry of Justice and HSYK should designate the candidate judges. HSYK needs to have a definitive role in determining the budgets of the courts. Currently, it is the Ministry of Justice that sets the budget of HSYK. Under existing conditions, chief public prosecutors manage the budgets of courts. However, courts and prosecutors' offices need to have their own separate budgets. And HSYK needs to have a say in setting these budgets. And for this to happen, it is necessary for judges and prosecutors to be in separate committees. I also think that HSYK needs to have a voice in relation to the employee rights of judges and prosecutors.

1.2. HSYK ELECTION PROCESS

İ. O.:

To understand the HSYK election process, one needs to consider the most recent HSYK elections. The reaction against HSYK's former structure had an important share in our electoral success. There was also reaction against YARSAV and the judiciary crises Turkey had recently. I believe we are in agreement so far. The referendum was held to transform this structure. YARSAV was very confident before the election. They were thinking that the supreme judiciary was for their taking. They had about 1,500 – 2,000 votes to come from courts of first instance. Demokrat Yargı also tried to create a platform of its own. They had limited representative capacity. To be honest, we, as the "ayes" in the referendum, came together. YARSAV represented the front that said "nay". And Demokrat Yargı participated in the vote with a six-person list. It was being said that "people would go on the stump, knock on every door and ask for votes", "this would create trouble for the judiciary". So, they imposed a ban on stumping. The YSK interpreted the ban broadly and imposed prohibitions even on our CVs. There was a line in my CV indicating that I served as project leader of the court administration project. The Supreme Elections Board removed even that line. They left the line 'National Security Academy' in my CV. And the press reported on it. They said, "Unashamed he put it in there". That's nothing to be ashamed of. Every year, some 40-50 bureaucrats attend academic training at the National Security Academy for six-month semesters. I put it in my CV because it was an academic experience. How many judges are you going to influence under these conditions?

Also, one needs consider, what were the faults of YARSAV that caused it to get so few votes? Its critical outbursts, its position next to a political party, did all these have a negative effect? It's interesting, of 10 thousand people, the winners got a 58% vote. Remember, that was also the percentage of "ayes" in the referendum. So, it was a response well deserved by those who said "why would a shepherd's vote be the equivalent of the vote of an educated person". That's all behind us now. One day after we won the vote, we said "We need to defend the rights of all our colleagues, no matter if they are from YARSAV or Demokrat Yargı", "This body is not the prerogative of only those who voted for it". The Ministry did not exercise any systematic, organizational pressure over the election. And the most important thing to say is this: The referendum took place on 12 September, and at the instruction of the Minister on 13 September, inspections that were in progress in 99 places were cancelled. Inspectors were withdrawn. The Ministry did not have any obligation to do this. It could have very well done this; it could have instructed the inspectors as follows: "Keep influencing the judges and prosecutors until the elections in October". But that's not what the Ministry did. It is unfair to blame a

Ministry that acted with such sensitivity. Of course, as candidates we spent our individual efforts. We held meetings. But arguing that the Ministry directed this process is unfair to both us and the judges and prosecutors who voted for us.

A. B.:

Mr. Okur, let us focus on the issue of elections for a while. I invite participants to offer their remarks in response to what you have said. Mr. Yiğit, what do you think about the elections and the election system?

U. Y.:

A widespread misperception among members of the judiciary is that HSYK is a professional organization, and therefore it must be composed of judges and prosecutors. However, we noted that HSYK is not a professional organization. Under the Constitution, the Union of Bar Associations, other professional chambers are examples of professional organizations. Demokrat Yargı and YARSAV are non-governmental and professional organizations. HSYK is not a professional organization. It is a permanent body that is regulated in the judiciary section of the Constitution and administers the judiciary. It is a council concerning the administration of the judicial branch which, like the legislative branch and the executive branch, exercises powers on behalf of the people; therefore, some kind of connection must be established with public on behalf of whom it exercises authority. In order for this connection to be established, HSYK members must be elected directly by the public or the Grand National Assembly. As Demokrat Yargı, we asked that at least two-thirds of HSYK be elected by the Grand National Assembly. We want political parties' groups to elect them on a qualified majority basis. The remaining one-third must be elected by the judges and prosecutors.

A. İ.:

What criteria are you suggesting with respect to the candidates?

U. Y.:

The Grand National Assembly can appoint members of any profession. We do not propose a requirement that appointees must be judges or prosecutors. One other issue is that HSYK has a very rigid governance structure that needs to be decentralized. Whoever takes control of HSYK can do whatever they want. So, in a place where anything can be done, where one body of power can do anything, you cannot perform the duties of a judge and prosecutor. You can do anything other than those. Where one power does it all, controls everything and governs everything, you can never perform the duties of a judge and prosecutor. Being a judge and prosecutor has to do with independence, individual character, identity; you can't perform the duties of these offices when there is such a powerful and influential body. In fact, one of the reasons 6,500 people gathered around the same place in the HSYK election is actually that power. There is nothing a judge and prosecutor can do against such an entity.

Therefore, we need to disperse the powers of this body. Our recommendation is this: We propose two committees, the Judiciary Executive Committee and the Judiciary Ethics Committee, and we argue for localization.

A. B.:

How is the Judiciary Ethics Committee supposed to work? What's its function going to be?

U. Y.:

The Judiciary Executive Committee will be in charge of promotion and appointments. And the Ethics Committee will handle disciplinary matters. So, we won't centralize the powers. We are in favor of localizing them. To say it more clearly, we want committee chairs and chief prosecutors to assume office via an election. We actually laid the preparatory groundwork for this model, as well. These are our ideas regarding the elections and the election system.

A. B.:

What are your ideas about the politicization of the election system and about what happened in the most recent election?

U. Y.:

The bureaucracy of the Ministry intervened in the election process considerably. They did so through chief prosecutors and committee chairs. The bureaucracy is not the only culprit here, actually. YARSAV is to be blamed, too. YARSAV acted in a manner which would multiply and instigate the fear. So, both the bureaucracy of the Ministry and YARSAV itself pumped an imaginary fear of YARSAV. It was in fact known that YARSAV was not that influential. The result of the election showed that. Even when the YARSAV mentality was most dominant among the supreme courts, HSYK, committee chairs and presiding judges and chief prosecutors, YARSAV had a membership of about 500 in the provinces.

A. B.:

So, you are saying something different from Mr. Okur's.

İ. O.:

But in the end YARSAV garnered some 2,500-3,000 votes.

U. Y.:

That's what I am saying. 2,500 is about the maximum they could get after the alliances they built, that is, the connections with secular nationalists. Take the secular nationalist vote out of the picture, and YARSAV has about a 10% voter base among judges and prosecutors. YARSAV is nowhere to be found among the base. They rubbed this particular fear in deliberately. And the government was told that the Ministry's list is the only solution against YARSAV. They were limited to that choice. According to the information our association received, Ministry bureaucrats who were not candidates traveled to courthouses all over the country and worked in favor of the Ministry's list. They visited various courthouses and held meetings. In other words, judges and prosecutors, concerned as they were about their own futures, voted for this list under the influence of the bureaucracy and the Ministry. Furthermore, although the Constitution prohibited only the candidates from stumping, YSK expanded the prohibition to cover everyone and pulled the ban date15 back before it was supposed to take effect, before candidacies were even announced. It was a very anti-democratic election that took place. We were granted some formal rights, but we were prevented from exercising them in a substantive sense.

İ. O.:

The election system that was envisaged is based on each judge casting one vote for one person. But after the Constitutional Court's cancellation, each judge was allowed to cast as many votes as the number of vacant seats. This resulted in the emergence of different lists. I think at this point it is absolutely necessary to go back to the single vote system. The Constitutional Court's cancellation forestalled the representation of all groups in the council. We have said ever since that even a single vote matters. In the current system, there's the risk that the wills of 10 thousand people may not find any representation.

The judges and prosecutors are in the same body, which is yet another problem. The duties of a judge and those of a prosecutor are different. We need to distinguish between the status of judges and that of prosecutors, and place them in separate bodies. The defense is weakened by the fact that judges and prosecutors are on an equal footing. The defense and prosecutors must have equal positions, while the judges must have a separate position.

The Turkish Grand National Assembly should be designating members to the council. Instead of President of the Republic of Turkey appointing members, I believe it is more appropriate if the Grand National Assembly elected the members, since

"The defense is weakened by the fact that judges and prosecutors are on an equal footing. The defense and prosecutors must have equal positions, while the judges must have a separate position." (İbrahim Okur)

different segments in the society must find representation there and have an idea of what is happening there. If I am not represented there, I may misinterpret what is going on inside. So, members could be elected by the Grand National Assembly instead of by the President, or both may elect members, that is, both the members elected by the President and those elected by the Grand National Assembly may participate in the council.

The rulings by the 3rd Circuit are still subject to the approval of the president of that circuit, that is, to the approval of the Minister of Justice. The decision to investigate a prosecutor requires the approval of the minister. I don't think that is necessary. The 3rd Circuit's resolution must be enforced straightly. We definitely need change that.

A. İ.:

I believe about 10 thousand votes are cast. The candidates are first-grade judges and prosecutors. In fact, the HSYK administration asked that each voter cast one vote for each vacant seat, but the Constitutional Court rejected that. the Constitutional Court blocked this change to maintain the system in effect at the Supreme Court of Appeals and the Council of State.. Otherwise, safeguarding democracy was not really Constitutional Court's aim in doing that. Constitutional Court prevented that because it feared that this method could later be implemented in the elections at the Supreme Court of Appeals and the Council of State and that the co-optation method there could disappear. But the method that came into being was the worst possible that could ever be. That's the method of "both there's a list and there isn't any list". In fact, there could have been another method: an open roll of candidates. However, this is discussed by neither the Ministry nor HSYK. There could have been proportional representation on the basis of that roll. The advantage of that system is that promises need to be laid out clearly. So, when there is a representative list, there could have been three or four them, ensuring broadest possible representation. The method suggested by İbrahim Okur is based on individuals, however in that method you can't win a majority. And that requires a serious engineering effort. In that method, voters elect specific individuals. We know about the issues that arise when the electoral environment is a smaller one. I guess the reason the third method is not chosen is that if there are open rolls, very rigid groupings will come into being within HSYK. There was fear that there'd be an A party, a B Party or an A Group or B Group. This may indeed create issues, but in the case of a closed roll of candidates, which is the current and also worst method, same issues are there, except that they are not recognized explicitly and they create far more doubts. If this system is going to be left behind in the future, I think we need to consider the system of open roll of candidates with proportional representation instead of reverting to the previous method. In addition, HSYK needs to be evaluating judges' and prosecutors' employee rights and their promotions. That's actually HSYK's main job. All the others are secondary matters.

"Constitutional Court prevented that because it feared that this method could later be implemented in the elections at the Supreme Court of Appeals and the Council of State and that the co-optation method there could disappear. But the method that came into being was the worst possible that could ever be." (Ahmet İnsel)

M. S.:

The section relating to the election in the article on amendment which the Constitutional Court revoked actually did mean that the government was imposing a restriction upon its own authority. I am hoping that we'll go beyond diplomatic language here and talk about the issues openly. It was voiced in many places, including those where I was in attendance, that YARSAV had an influence on supreme judiciary bodies. Apparently there was a level of confidence that YARSAV would win the majority in the election, given the number of vacant memberships and the nature of the voting system. I believe this perspective or this

"This is a structure that remained in existence for years, even though its oligarchic character is quite obvious. This structure has now changed, but no serious shift has taken place with respect to the de jure and de facto conditions which inspire oligarchic tendencies. Oligarchy's iron fist works its magic one way or the other, which results in the oligarchy reproducing itself by adjusting to the new conditions." (Mithat Sancar)

confidence had a major role in CHP filing a revocation application. If you get to analyze the Constitutional Court's decision, you will see that what that represents is an incredible work in engineering. So far, I read and analyzed countless revocations. Never did I see one in which there was so fine an engineering strategy. It was not a matter of revoking one paragraph or one sentence of an article; they actually canceled out one word. It is apparently an extremely carefully calculated intervention.

Right now, it doesn't make much sense debating why this decision was made. What matters is to lay out the kind of changes that need to be made. In my opinion, the core of the HSYK reform was jeopardized due to this revocation. Colleagues from Demokrat Yargı who previously attended meetings like this one, and today Mr. Yiğit here, have raised their objections regarding the election. However, in the appointment of members to HSYK, is Demokrat Yargı opposing entirely a system where all judges and prosecutors vote or does it think there is no need for such a body? My feeling is that their attitude toward that is not clear. There are indeed countries where there are no such bodies such as HSYK and the judiciary is administered entirely within a Ministry of Justice, and the system in these countries is not automatically called anti-democratic. There are also radical democrats who think that high councils such as HSYK prevent holding the political authority accountable directly, and that for the purpose of holding politics accountable, it is preferable to have a Ministry of Justice that administers the system. There are other systems, as well. Each has its own pros and cons. But let me tell this: In no EU-member country is the respective system as much a matter of contention as it is in ours.

Turkey decided to have the high-level entity that is HSYK. This is a structure that remained in existence for years, even though its oligarchic character is quite obvious. This structure has now changed, but no serious shift has taken place with respect to the de jure and de facto conditions which inspire oligarchic tendencies. Oligarchy's iron fist works its magic one way or the other, which results in the oligarchy reproducing itself by adjusting to the new conditions.

A. B.:

Can you discuss the structure we have?

M. S.:

After the Constitutional Court's revocation decision, a new composition came into being which would breathe life into all of the dark areas created by the historically-rooted tendencies.

A. B.:

Did this happen as a result of the revocation of the article concerning the election?

M. S.:

Yes, but we would nevertheless have these issues even if this was not the election system we had. Given the political culture in Turkey, governments don't change attitudes, whether they are voted into office or brought to office by the power of arms. Entities such as HSYK are mouthwatering for a government's appetite. The 1982 Constitution reinforced all that, but there's also prior history to it. When rolls are being created at the time of the election, both the Ministry of Justice bureaucracy and the world of judges and prosecutors proceeded toward the elections with that state of mind. That is, the question was who is going to be in charge of this entity? That's why there were battles over rolls. Who would control this body was the real issue. All that happened at the time of the election resulted in a new HSYK that came into being

in a controversial and even dubious manner, and a heavy shadow was cast upon it. Actually HSYK could have done a few things to get out of that shadow or to reduce its impact, but it did not and could not. I say did not and could not, because both apply. There are efforts it did not take, and there are those it was not able to take. I am not going to focus on individual cases, but as the TESEV study we conducted on judiciary culture indicates, the impartiality and therefore its legitimacy is closely related with the perception in the society. If a certain segment of the society does not trust the decisions made by the judiciary, then the judiciary has a problem of legitimacy. We know that many cases today have quite a number of controversial aspects and the public feel upset about that. When I reviewed some indictments and court decisions, I was greatly disappointed, or more accurately, I felt angry. I'll repeat here something I've said quite often recently: At no time during my career as a professor of law did I have the kind of troubles I had in the past year. Up until a year ago, whenever there were problems in cases, you would know their sources and the individuals responsible, the situation was quite clear and offering an explanation was easy, but in the past year, that is, after the new HSYK, there's confusion about responsibility and the individuals who bear that responsibility. Who is doing what and why? It is now quite a challenge to find satisfactory answers to these questions. The question of "who is doing what and why within this body and within the judiciary?" is very crucial in terms of identifying, in a political and ethical sense, responsibility and the people who carry it. The Minister of Justice can actually himself imply that some sources of power within the judiciary block them. Just who are those sources of power, what it is that they block, how do they block and what exactly do they do? Before I came here, I looked at some indictments. There were times I studied indictments in the past. I can tell you this, there were poor quality indictments in the past as well, but right now I see that there are so many poorly written ones. My question to HSYK is this: To what extent do you consider yourself responsible for this outcome? What is your responsibility in the atmosphere in which this situation emerges and for your role as an organization? What are your plans to solve these problems? How exactly are you coming to terms to with your responsibility in this regard? The judiciary climate that Turkey is heading toward can create wounds that are very difficult to heal and ailments very challenging to cure. That is a major concern I have. These issues and shortcomings regarding HSYK are being expressed in EU progress reports, advisory visit reports, and Venice commission reports. The question I want to ask is, what is HSYK doing or planning to do about all this?

U. Y.:

The ambiguity you have mentioned about HSYK elections does not stem from us. Before the Constitutional amendment package was presented to the Grand National Assembly, we announced our own amendment package in April 2010. If you can take a look at that package of ours, you'll see the kind of system we want. Later, when the Constitutional amendment package was ratified by the Grand National Assembly, we argued in its favor, actually we argued for an even more progressive version of it. In our writings and talks, we consistently emphasized that.

M. S.:

Fair enough. Actually that's not what I'm objecting to. There's this perception that you have only critiqued is this particular intervention. I came to have the impression that your objection is to HSYK members being designated by way of an election. Perhaps that's not what your objection is about, but the impression I got is nevertheless that you're opposing HSYK members being designated through an election.

U. Y.:

If the Constitutional Court did not revoke it, then a different strategy would be in place. The country would be divided to into different regions, and the judges and prosecutors in a given region would be

voting for specific candidates. This would have resulted in an even more acute problem in terms of the judiciary.

L. K. T.:

I agree with what Uğur Yiğit said about the election. İbrahim Okur himself is here. We debated this countless times before. Even if the amendment did not go through, the country would still be divided into provinces, regions and the desired result would nevertheless be obtained. The problem is that the Ministry of Justice exercised undue power and influence. There is actually a very noteworthy fact: None of the smaller courthouses voted in favor of YARSAV candidates. This shows the extent to which how free will was exercised in the ballot.

İ. O.:

Tell us the provinces in which the Ministry of Justice actually conducted meetings during the election process, let's have all that on the record.

L. K. T.:

In İstanbul, Mersin, Adana…

İ. O.:

It is one thing for the candidates to have a meeting, it's another thing for the Ministry to hold a meeting.

L. K. T .:

These meetings were held relying on the means and authority of the Ministry. The meetings were organized by chief prosecutors. Judges and prosecutors who are Alevis were not invited to the meetings. Only certain people who held a particular viewpoint were selected and invited. We also held meetings, but ours were open to all. Some attended, some did not. While some of our meetings were not attended by anyone, the meetings were open to members of the press. It was a major problem to have a ban on stumping during the election. If stumping was allowed, there could have been more transparency and participation. Even the candidates' CVs were published abbreviated, on the grounds that they could have been used for propaganda purposes. The CVs that were out there were laughable, all they included was information on academic history, completion of military duty, marital information etc.

A. B.:

Really? I had no idea that was the case.

L. K. T.:

We are all responsible for this result. HSYK put a ban on stumping. The Constitutional Court awarded a revocation. And in the end, I'm sorry to say this, it's a bomb that exploded right by us.

A. İ.:

If I remember correctly, Ministry's inspectors were also among the candidates.

L. K. T.:

Yes. We had them as candidates, too. We were opposed to that, but they were saying that "as members of the inspection committee, inspectors cannot be counted among Ministry staff". That's why we nominated them as candidates. That's how it happened in that electoral climate.

A. İ.:

There were criticisms that the inspectors symbolically represented the Ministry.

L. K. T.:

Indeed. They were fair criticisms. Let me offer you a specific example. We were on our way back from Prosecutor Hakan Kılıç's funeral. We were to stop by Aksaray Courthouse. The group included the undersecretary and HSYK members. All judges and prosecutors were lined up in front of the building. It was 5:30 p.m., business hours were over, but they were all lined up, waiting for the group. I was shocked by the sight of that. I can't help mentioning that. That's what I saw.

İ. O.:

But that's not what HSYK wanted.

L. K. T.:

It doesn't have to. Once they give the word that they would be coming, that's what happens.

A. B.:

So, Ms. Tarhan, you're saying that the Ministry had a significant influence over the election?

L. K. T.:

Yes, absolutely.

A. B.:

Alright, what kind of a structure is the one that emerged after this election?

U. Y.:

First of all, I want to congratulate these colleagues, for it takes quite some courage to undergo such a judiciary in rubbles. You're talking about an 80-year, even a century old wreck. But when they underwent all that, they did not do anything to transform it. Just like the way today's Specially Authorized Courts function like a Special Warfare Division, if yesteryear's powerholders are behind bars today, tomorrow we'll see the reverse of that. This structure must be democratized as soon as possible. The old HSYK was at work for 30 years. It made decisions on tens of thousands of judges and prosecutors. At the end of this 30-year period, we say that this body aggrieved only three people in three decades.

M. S.:

It's not three people. Tens of others we know but whose names did not become public were also aggrieved.

U. Y.:

Indeed, I am not the one who says that. With the draft law they put together, it is the current HSYK and Ministry of Justice bureaucracy that say that. According to them, only a couple of people who were awarded dismissal decisions were aggrieved. This HSYK whitewashes, acquits a 30-year HSYK which had a history of countless grievances it caused. This is not only an act of whitewashing, it is also assuming and taking over the grievances caused by the previous body. This is very dangerous. There's no rationality and conscience in taking over the unfairness, cruelty and grievances exacted before the new HSYK came into being. If it were seriously a novel entity, it would have drawn a thick line separating itself from the old one and ascertained the damage. As things stand now, the demolition of the old HSYK laid a legitimate groundwork for the installation of the new one. Because it didn't do as such, it gave credibility to the allegations that its main aim was to take control of the judiciary power, and not to take care of judges and prosecutors and deal with their grievances.

Actually, we have before us a particular good practice that demonstrateshow the old structure did injustice and caused grievances. See, all of the individuals who were stripped of their rights due to Supreme Military Court decisions had all their problems resolved in all senses, not just with respect to their dismissal. If this council claims that this is a new body, aggrieved individuals must have been located and ways to redress their grievances must have been found and quickly realized.

When you look at the run of events in the world and the Middle East in 2012, you see localization and democratization. But unfortunately we ended up with a system of judiciary that is very centralist, highly authoritarian and univocal. And even though the 2010 referendum demolished the previous authoritarian, centralist, univocal structure, we came to have a replacement that is even more authoritarian, more centralist, and more univocal. How are we then supposed to explain that while we set out to harmonize with the world and the region, we went in the opposite direction? My opinion is that today's HSYK is a transitional, interim HSYK. Its mission is to clean up the rubble that is the former HSYK and to create consensus regarding its move toward the new era. While the path inclines toward localization and democratization in other areas of the society and the state thanks to Constitutional amendments, while there is talk of democratic autonomy with respect to the Kurdish question, it is understood that this council cannot be permanent and it is a transitory one. You need to replace this entity.

1.3. "PERFORMANCE EVALUATION" AS A SCORING SYSTEM

A. İ.:

I have before me the HSYK resolution made on 30 September 2011 in relation to the grade promotion of judges and prosecutors. In theory, there are qualitative evaluation criteria such as judges' and prosecutors' professional behavior and progress, loyalty to duty and so on. There are the performance evaluation forms filed by the inspectors. But when we look at it in the end, there is a scoring system in promotional evaluations. When there is a scoring system, we know that quantitative assessment will prevail over the qualitative. So, if there's a scoring system, there will be no more of 'that judge is good, bad, hard-working, not hard-working etc.' and the score, just like in the case of the university entrance examination, will be only criterion. In the scoring system, the judge needs to make more than one decision a day. The civil courts of first instance and the family courts are expected to make one thousand decisions in a year. When we look at those numbers, the logic we encounter is, and I know it very well from Soviet planning, that you say, "this is the maximum number of cars you need to manufacture in one year". But whether there's customer satisfaction, is the car solid, are the wheels alright, is it going to leave you stranded, you don't really consider any of that. Now, with this kind of performance evaluation system, I think this phenomenon of sloppy law, something most of us complain about, will inevitably be the result. Under such a heavy workload, the only way for this many judges and prosecutors to fulfill their duty will be to compromise the quality of the work they're doing. This method is being adopted because the Ministry for its part aims to reduce the number of files and cut back on the long duration of trials. But if things proceed as such, performance evaluation will become a problem and it will lead to other troubles. Will the judges and prosecutors ensure that justice is done or will they focus on the requirements of the career; that is the dilemma they will face.

It is of course inevitable that one body needs to evaluate the performance of the judges and prosecutors, given that they provide service to the public. Here, there is a need for a system of evaluation with a pre- established and transparent framework to the extent possible. And this body that will do the evaluation must largely be elected from within the members of the judiciary. Just as in the case of universities. Members of the faculty having their performance evaluated by, well, members of the faculty. This is the core of academic freedom. For the independence of the judiciary, it is absolutely crucial that this evaluation be performed by members of the judiciary themselves. So, it is important that elected bodies take care of the performance evaluation. The group in question needs to elect the individuals who will evaluate members of the group. In other words, a HSYK that will evaluate the performance of judges and prosecutors needs to be brought into office with the votes of judges and prosecutors, since this is very important for an independent judiciary.

Generally speaking, the new notion of governance that now dominates all public administration prefers quantitative assessment criteria over qualitative ones. The EU has a share in that. That's the idea of "completing a particular amount of work". In the academic world, there is the criterion asking you to publish this many articles in certain journals. Same in medical practice; the physicians need to attend a certain number of patients in one hour. As I see that, there is that kind of tendency in the judiciary, as well. It has especially been prevalent in the past couple of years. I looked at the list of scores for 2009, they are the same as today's scores.

İ. O.:

Actually they have been the same since 1983, there's only more flexibility now.

A. İ.:

Well, if the scores remained the same and population, as well as the number of cases, increased, then that means the judiciary in the 1980s did not have as much pressure.

İ. O.:

But the number of judges and prosecutors also increased from those times. There were about 6,000 judges and prosecutors in the 1980s. Right now there are some 12,000. The number doubled.

A. İ.:

Alright, but I have this concern here. There are two types of performance analysis. What is the number of files completed, and in what period of time? If there's a scoring system, why does that not cover the number of files that are under appeal? If we know the number of files under appeal, we would also be conducting a qualitative assessment. Let us also score the assessment itself. Let us give points on the basis of whether a judge's decisions are brought to the European Court of Human Rights, and cases of Turkey being tried there.

Y. S.:

Then members of the Supreme Court of Appeals need to be scored at that point. It is them who render the final decision.

A. İ.:

Let us score them, too, then. Are they not subject to performance analysis?

İ. O.:

No, they are above that…

A. İ.:

I think it is a mistake to score only on the basis of the number of files, or "completing a specific amount of work". In any case… In addition, when it comes to scoring prosecutors, I saw no reference to failure rates in court files. Scoring is based on the number of cases prosecutors file and the speed with which they close the cases. This is a terrifying criterion. You're telling the prosecutor, "the higher the number of cases you open and the faster you conclude those cases, the more successful you are". That's another way of saying "the higher number of people you bring to court, the faster you will advance in your career". In Turkey, prosecution is an office with not a very clearly defined range of authority, and having such a performance criterion is highly alarming. Such a performance analysis transforms everyone into an object that will help the prosecutor meet performance criteria. Each citizen becomes a performance object for the prosecutor. And that's very dangerous. Failure needs to be given consideration. If this type of evaluation is not supported by qualitative criteria in the next period, the entire society might turn into an object of trial as a result of the enhancement of prosecutors' powers.

U. Y.:

In the former system, as regards performance, there was only the certificate of conduct issued by the inspectors of the Ministry of Justice. With the new council, there are now the inspectors of the council whose activities are regulated by law. At the time the law was forwarded to the Grand National Assembly, the draft onlymentioned certificate of conduct. But after the visit of the members of the Venice Commission, the provision concerning the certificate of conduct was removed from the draft. Because the law was enacted without any reference to something like the certificate of conduct, the Ministry of Justice put together a draft and included an articleso that Law No. 2802 could be amended to allow for the issuing of the document that we now call the performance certificate. But that draft did not go through. Even though it did not, it is still in practice. The article in question lacks legal ground, and it was included in the Inspection Committee Regulations and now there is a performance evaluation form as a result.

"In Turkey, prosecution is an office with not a very clearly defined range of authority, and having such a performance criterion is highly alarming. Such a performance analysis transforms everyone into an object that will help the prosecutor meet performance criteria. Each citizen becomes a performance object for the prosecutor." (Ahmet İnsel)

So, when we look at it today, the performance evaluation form does not a have legal basis. Secondly, in supervising officer-junior officer relations in the past, there was the practice of issuing a certificate of disciplinary record. On the grounds that this practice became irrelevant in modern staff management, it was lifted after an amendment to Law No. 657. But they nevertheless continue to issue that record when it comes to prosecutors. While the chief prosecutor or prosecutors cannot issue that in relation to their own clerks, someone else can issue that in regards to the chief prosecutor. In fact, the relationship between a chief prosecutor and a prosecutor is not hierarchical. A chief prosecutor is not a `supervisor` of prosecutors in the sense we commonly understand that term. A supervising officer would be one who conducts or allows investigations et cetera. A chief prosecutor does not have such powers. That's an authority retained by the HSYK. But the practice nevertheless continues as such. That needs to be changed.

Our proposal regarding performance is to pay attention to appropriateness of decisions. This must be a criterion applied not just to final decisions but also interim ones. In other words, one needs to consider the number of persons the prosecutor orders into custody. Let's say there are 20 people, and the prosecutor sends all of them to the court with a request for their arrest. In that case, the judge will have to deal with 20 people. There must be a notion of appropriateness rate of a decision. That's what performance needs be evaluated on.

Y. S.:

On the issue of performance, I'll give a specific example. There's this judge I know who makes decisions incredibly fast. You can't decide that fast, even if you were an *Ottoman qadi*. I think this performance system will multiply such examples. And then you look at the conclusion of the case, there's no way to understand why the case was lost. The public asks why it was lost, you can't say anything in response. You appeal it, they have a heavy workload also, and they also decide in a lightning fast manner. And then it is said, "people don't trust the judiciary any longer". How can they? This performance issue must be given very serious attention.

L. K. T.:

About the issue of performance, quantity is really given preference over quality. No one seems to care about the appropriateness of decisions. The Performance Evaluation Committee should not be full of bureaucrats from the Ministry. That body must be composed of people from the world of judiciary. Representatives from bar associations should be able to take part. In other words, there needs to be a performance committee that makes decisions independently. Once the scoring system at the Supreme Court of Appeals is discontinued, I think such an independent system could be put in place.

İ. O.:

When he was talking about performance criteria, Uğur Yiğit said, "the certificate of conduct is still issued". Actually it is not. The performance evaluation form does not include anything about personal conduct. Performance assessment uses measurable criteria. In former certificates of conduct, there really were factors that were not applicable to measurement. We changed all that. Uğur Yiğit said performance assessment has no legal ground, but in fact the legal ground provided by Law No. 2802 is in effect. The amendment concerning 2802 has not yet been forwarded to the Grand National Assembly.

It was asked, "Do you assess performance only by considering the numbers?" We are not looking at the number of decisions only, we also consider their outcomes. How many were acquittals, how many were convictions, we also look at that. At UYAP *(National Judiciary Informatics System)* we are conducting a study on that. We are also evaluating the prosecutor's deliberation, but maybe the prosecutor drew up the opinion at the last second. That needs to be taken into consideration as well. All these factors must be considered collectively.

Numbers are only one type of data when it comes to performance assessment. The process considers the

notion of appropriateness, as well. If the judge had 100 cases to hear, we don't expect him to complete all of that. But let me add this also: If a judge has 17,000 files, we don't tell him, "Complete all those and make sure they are all done appropriately". We tell him, "It'll suffice if you can complete one or two thousand of them". And that's actually the maximum number of cases a judge can hear in one year.

It was asked, "Why don't you also consider the fact a given decision was not appealed?" Well, that was the reason we got rid of that point. It was as if we were punishing a judge whose file was not appealed. Perhaps no one appealed because everyone was content with the ruling made by that judge. To that judge, we used to tell, "You did not have 40 decisions appealed with the Supreme Court of Appeals in two years, so you cannot be promoted". We will consider the decisions of the European Court of Human Rights. If there are reasons that are not attributable to the judge, we won't pay attention to that. But for instance if the judge exceeded the reasonable period of time, then we will consider that in the evaluation.

L. K. T.:

It is called the performance evaluation form, but the certificates of conduct are still there. In fact, even if you received an 'average' score in the past, that would not hinder your promotion. But now it does. The council did not use to take the evaluations that seriously in the past. Once I had a certificate of conduct in which my score was average, but I was promoted in any case. There are so many subjective evaluation criteria. It talks about family situation, for instance. Decisions are based on rumors heard. The certificate of conduct of a judge is completed on the basis of what the courthouse driver tells. A person's worldview, tendencies have much more of an impact now. And then there is the serious problem of workload. For instance, I'm here, that's only because I agreed to work late for two days. Because there are files I need to complete. Promotions are yet another source of stress. The difference between the two grades is 3,000 TL.

İ. O.:

The difference between two grades is not 3000 TL. The difference between someone who could go to the first grade and who could not is about 1000 TL. If we say 3000, that'll be misleading.

L. K. T.:

I am talking about the gross difference. In other words, the gap reaches up to 3000TL once you come to certain point in your career. That translates into a continued urgency to complete files. When that's the case, the quality of decisions that are made are adversely affected. The grading system is discontinued. Decisions no longer include reasons. I read files at the Supreme Court of Appeals, don't bother looking for justifications in decisions. I was against scoring, too, but it should have been replaced with something else.

A. B.:

So, you're saying decisions without justification are on the rise now.

L. K. T.:

Yes. There is no statistics on that. I say that on the basis of the thousand files I read in one year, but that is not a small number. Seriously, justificationss are put on the back burner. There are still judges who offer neatly written justifications, but we longer have any way of appreciating them. That is, we cannot support them by giving them good scores. Perhaps we could consider the grading system of the Supreme Court of Appeals again. The control mechanism could be re-established, in a different way.

The Supreme Court of Appeals is now having trainees. There are judges who have not completed five years of professional service. They read criminal files. People who haven't served as criminal judges are reading criminal files. For my part, I find that really scary. This is all I have to say about the troubles for now.

A. B.:

These people who are coming to your office, are they in connection with HSYK?

L. K. T.:

Yes. They are coming upon assignment. It is really very terrifying to discontinue the five-year rule, because they are reading criminal casefiles.

İ. O.:

The five-year rule was lifted by way of a law, but even though the law does not impose a term, we look for an actual two years practice. This is something we've done to reduce the backlog. The criminal files are not the only documents at the Supreme Court of Appeals.

L. K. T.:

Correct, but because criminal cases number the highest, the newcomers are given criminal files. They are indeed given slim files. It is the senior judges who are given the chunky files, but they are already weighed down with the workload. Look, we are really working under dramatic conditions.

A. B.:

The Minister of Justice repeatedly mentions that the backlog of files will be reduced. Is there any attempt toward that?

L. K. T.:

All investigating judges work like slaves.

A. B.:

You're saying they do so by compromising on quality.

L. K. T.:

Yes, exactly.

1.4. TRAINING PROSPECTIVE JUDGES AND PROSECUTORS AND THE JUSTICE ACADEMY

A. B.:

Let us now move on the topic of training judges and prosecutors. We will start with Ahmet İnsel again.

A. İ.:

HSYK faces the problem of training judges. I analyzed the HSYK conference report titled "Analyzing the Situation in the Judiciary". It discusses the problems one by one. My feeling is that they don't seem to have any serious projects regarding HSYK's training problem. As İbrahim Okur indicated, there is the problem of elections. But there is a second problem. Let's say the political authority acted impartially and wanted to carry out an election that's based on data. We are aware of the situation in law schools. When we factor in the law schools launched recently, there's the issue of drop in average quality which stems from the increase in the number of schools. That's how it works anywhere in the world. As the numbers go up, the average quality will drop. When we take this into consideration, a law school graduate who received only undergraduate education will need to do more than undergoing internship training to begin practicing. There should be an additional educational process including coursework and grading, and no such process is available now. In judges' decisions, in prosecutors' indictments we've seen recently, there are legal disasters, as we notice in the case of the disproportionality between the evidence and the sentencing requests. We think that it is purposefully so when it is senior level judges who are in charge, but if it is mid-level judges, then we think it stems from a lack of knowledge. After looking at HSYK's annual reports, I didn't come across any such concern and preparatory work. If they are there, I didn't see them.

The selection of judges is through a multiple choice test of the kind administered by the board for university placement exams. It is not through a process that selects individuals who have the intellectual capacity to conduct an analysis and the skill to write down the justification on which the decisions they make is based. Memorized knowledge is being tested through a question-answer format. And then there is an effort to compensate for that with additional training. As far as I can see, it appears the training offered at the Justice Academy is not the kind that can fill the gap. That training is also based on the memorization of articles of law and practical matters relating to the judging profession. They offer information about the practical aspects of having the status of a judge. The test that comes at the end is also a very undemanding one. As far

as I'm aware, the length of internship has been reduced to one year, as well.

İ. O.:

Although the law stipulates that, the earliest draw we did was in 23 months. In other words, we did not apply the one-year rule. The law does provide for that option, but we did not implement that option.

Y. S.:

Is there a second test?

İ. O.:

There is a test at the end of the semester at the academy. Half of the trainees will need to take the make-up test. There is a graduate thesis requirement and a degree examination. Only one person was not able to graduate last year.

A. B.:

Is that so? Then that means in terms of the seriousness involved, attending the training is no guarantee that you will be able to complete it. So I gather that you're putting an emphasis on the training. If I may wrap up, I think that the training offeredmust cover the knowledge and approach, or courses such as philosophy of law, not provided at law schools. Also, in order for that to be possible, the Justice Academy must have its own dedicated faculty members.

Y. S.:

Yes, emphasis needs to be put on the training of judges, but there's also this problem: The judges perceive themselves as authority figures. They have authority over the prosecutor, the clerk, and the defense. If you equip a person with that type of authority, then a superior source of authority will manipulate his powers. That judge is looking at the Supreme Court of Appeals for "not reversing his decision", for that's important in terms of his promotion.

U. Y.:

When it comes to training, those currently in charge of the judiciary approach the exercise of jurisdiction almost as if it is assembly line work. Judges and prosecutors are perceived as justice workers, and that's how they are educated. Judges and prosecutors are actually craftsmen. They are like tailors. They create a work. In countries that did not experience colonization and military coups, judges and prosecutors are appointed after they practice law. In countries that were colonized and had military coups, there are justice academies where they receive ideological training. The academy method is good for training members of the army or the police force. There are 60 law schools in Turkey today. Instead of promoting diversity out of them, we mold the students there into a standard type of judge. We shape them by telling things like "This is the way to sit, this is the way to dine, this is the way to talk, and this is the way to decide". First of all we need to discard this notion of academy. If judges and prosecutors are to have graduate level education, they need to be dispersed to different universities, and that will be the source of diverse ideas. This is what will enrich the judiciary with differing opinions and give it breathing space. If there will be some kind of change in the new system, practice of law should be introduced as a prerequisite.My personal opinion is that in parallel with the localization of courts, the recruitment of judges and prosecutors can also be localized.

L. K. T.:

I would like to talk about admission into the profession. There's a test administered by the university placement board. It tests one's technical knowledge. Afterward, there's an oral test on etiquette, experience, and conduct. The oral test is graded by a committee where bureaucrats from the Ministry are preponderant. It is not known what criteria they base their grades on. It is uncertain what answers to what questions earn which grade. There is a rumor; apparently one question asked the name of the mufti who led the funeral prayer of Atatürk. We don't know whether people are making a caricature of the situation, but the saying goes that they ask questions like that to those whom they don't wish to pass the test.

Candidates who are successful through this committee are then pushed into the system known as Justice Academy. I taught there for four semesters. They basically offer repeat versions of the courses taught in

law schools. There are no debates on sample cases. There are no courses dealing with specific decisions. The teaching covers topics such as rules of protocol, dining and drinking etiquette. During class breaks, I used to tell students that they need to get to know the people they were going to make decisions about, sometimes I offered practical information, but the curriculum is not a suitable one. These are things you could talk about only during breaks. At the Justice Academy, education relies on a specific template and is offered through certain molds.

I think very serious mistakes are being made in the education system. Prospective judges must be selected by an independent committee composed of a broad membership including representatives from bar associations and other professional organizations. They need to be recruited into the profession after taking a test that could really be monitored. I think that the Justice Academy must have a role only in terms of vocational training. And only certain kinds of individuals are being sent abroad for vocational training. A certain type of judges and prosecutors are always being ignored when it comes to vocational training.

İ. O.:

Our troubles with education have their roots in law schools. When the Justice Academy had the role of a training center, all it did was to repeat the curriculum. After it was transformed into an academy this changed to a certain extent. But that's not enough. I agree with that critique. We need to teach the essential concepts in law, legal methodology, and along with them a judge's conduct. Whether that teaching could be accomplished outside of the Justice Academy could be debated, but I don't think the Academy is exactly fit for the purpose.

It was said, "The relationship between a chief prosecutor and prosecutor is not like the one between a supervising officer and a junior officer". Indeed, I agree, however, provisions of Law No. 5235 and those of Law No. 2802 stipulate that prosecution is an integral whole, and prosecutors act in the name of the chief prosecutor, and that chief public prosecutor's office carries out the division of labor.

U. Y.:

Mr. President, prosecutors do not act in the name of the chief prosecutor.

İ. O.:

The law stipulates that chief prosecutor's office may undertake the division of labor.

U. Y.:

Mr. President, I even authored an article on this topic. It's not "in the name of the chief prosecutor". When you say "in the name of" in law, the prosecutor should be signing on behalf of the chief prosecutor. That implies there's a relationship of representation.

İ. O.:

Let's fix that then. Let's not use the phrase "in the name of". As a matter of fact, we will soon be holding a workshop on resolving this problem and regulating the chief prosecutor-prosecutor relationship. We will address this problem there. Chief prosecutors, acting chief prosecutors and prosecutors will attend the workshop. We are going to clarify the chief prosecutor-prosecutor relationship in the law.

Judges need to be able to think broadly and multidimensionally. Thanks to our budget, we are able to send judges abroad for training. We grant leaves for graduate study. When we do so, we do not send only a certain group of people. We send the judges whose language proficiency is above a certain score. The criteria are established. We give priority to candidates who did not apply for training before. Sometimes we provide the training even if the judge did not apply for it. The most obvious example is that in relation to the process of expropriation, we conducted training for judges in jurisdictions in Turkey where there is intense expropriation. We offered training to 85 judges. Some of them did not request that training. We looked at their cases. The judge has some 400-500 expropriation cases, but the judge did not request training. So, we incorporated them into the training even if they did not specifically request it.

L. K. T.:

The investigating judges at the Supreme Court of Appeals are not offered these trainings. The reasons

given for that is that the Supreme Court of Appeals does not allow that because of the workload of its members. How could this be facilitated?

İ. O.:

We started doing that as well. But the Council of State declined. We then said we will initiate the training on our own initiative, and we did so. We have the same idea in regards to the Supreme Court of Appeals. And we also plan to hold regional meetings under the banner of professional consultation conferences. We are creating the infrastructure for that. We requested support from the Supreme Court of Appeals and the Council of State. For example, we would like the family court judges to get together and discuss among themselves the decisions and practices in the area of family law. We would like them to be joined by Supreme Court of Appeals judges who review the files arriving from family courts. We divided Turkey into 16 regions. These meetings are to be held twice a year. We allocated funds toward this purpose. We created the conference format. We studied the examples from Europe while designing professional conferences. The difference we have with Europe is this: In Europe, there is a body known as the office of the chief judge. This office assigns labor cases to one judge, commercial cases to another, and family cases to yet another. They do not have the division we have, which is labor courts, commercial courts and so on. The chief judges have some extensive powers. Because we do not have such an office, 10 different courts might be awarding 10 different decisions on a case. Of course, there may be differences in legal interpretation, but grave mistakes should be avoided. To reduce those differences, we will be holding regional conferences. Judges serving in the country's southeast will get together and discuss the cases specific to that region. This will ensure a unity in practice, and unnecessary trips to and from the Supreme Court of Appeals will be avoided.

Also, in relation to tests, I think that it is a mistake to have only judges and prosecutors in testing committees. Sociologists, psychologist must also definitely be included. A given person's behavioral orientation must be laid out. In their hiring practices, private companies administer tests to prospective employees. But we rely on a couple of minutes-long interview to decide whether or not the individuals we entrust the nation's judiciary with can serve as judges. Instead, we need a serious test that can measure the candidate's psychological profile. A person may have the requisite legal knowledge, but could the same person also serve as a judge? We need to be able to assess that. I agree with Uğur Yiğit. The person must either have practiced law or worked as a prosecutor for a certain period. I think that the practice of recruiting judges right off the bat and without prior experience as such must be changed.

2. HSYK's Operations and Impact on Ongoing Cases

2.1. THE OPERATION OF THE NEW HSYK

A. B.:

What is the extent to which HSYK can impact or influence the process in the case of major political cases? How influential is HSYK on the structure and operations of Specially Authorized Courts? Again, in political cases, we see that the relationship between the police and the prosecutor is an inside-out relationship. We notice that police reports directly end up becoming prosecutor's indictments. Aren't there steps that HSYK can take in that regard at the level of prosecutors? And I'd like to ask a question relating to İstanbul. All of the critical cases are being tried in İstanbul. There are about 40 specially authorized prosecutors, 38 judges. It is said that one particular group of people, members of the Gülen community, are dominant among these 78 people. What are your observations in that regard? Do you have anything to say about that? If we were to rely on what I was told by a group of judges and prosecutors who visited me at the newspaper, it is a bad situation out there. Word has it that they hold a highly critical position at the Specially Authorized Courts. There are claims that they have been focusing on the High Criminal Courts in case critical files would go to those courts if specially authorized courts were to be disbanded. I am wondering what Mr. Okur has to say about these allegations.

İ. O.:

Now, let's start by discussing what HSYK did correctly and where it failed. So, first of all, what's HSYK's mandate? What is its impact on the judiciary? Let us speak to that. Can HSYK take decisions about the judicial process, or is it an administrative entity that deals with the appointment and promotion of members of the judiciary? The system we have defines HSYK as an administrative body. No judicial task has been assigned to HSYK. The system that was created is meant to give the judiciary the means to monitor judicial operations internally. HSYK, however, has been assigned an administrative task. We need to underscore that first of all. Starting in 2008-2009, the former HSYK got the notion that it would fix all the issues with the judiciary. And that's the cause of many problems that arose. In the previous era, the acting chair of the HSYK used to say, "even my doorman asks me why we were not intervening in the case in Istanbul. Of course we will intervene". So, they sought to intervene in cases on trial. That's why problems emerged. HSYK is not authorized to intervene in the judicial process. Mr. Bayramoğlu, I will turn to your question later, I mean I will later address your question, "why, as HSYK, did you intervene in some cases at the present time?"Let us now consider the issue of trust in the judiciary.

A. B.:

Don't you have the means to conduct monitoring?

İ. O.:

We are authorized to monitor whether prosecutors do their job properly and honestly. But we don't have the right to ask, "Why did you make this decision this way?" We monitor whether the prosecutor or the judge took a particular decision in return for a benefit. We don't specifically have the right to ask, "why did you make this decision this way?" That's a process that concerns the Supreme Court of Appeals.

M. S.:

The high councils may not have that kind of authority in any case. The debate is about HSYK's intervention

"In the KCK (Koma Ciwaken Kürdistan – Union of Kurdistan Communities) case, lawyers' offices were searched. Of course, a lawyer's office may be searched in relation to an offense the lawyer committed, but no such search can be conducted in relation to that lawyer's clients. The prosecutors nevertheless went in there, took all the documents and left. The judge who made that decision is at fault in my opinion. You could have done something to intervene in that." (Yücel Sayman)

in the decision-making process through appointments and changing the place of duty.

İ. O.:

HSYK's job is to check whether or not judges and prosecutors perform their duties in accordance with the law, bylaws, executive orders and regulations. Otherwise, HSYK is not authorized to ask, "why did you make this decision?", "how come can you make such a decision?" Let's establish that first.

L. K. T.:

But in the event of rights violations, you have the capacity to dispatch inspectors. You make that obvious on your website.

İ. O.:

Correct, but here's what we do in that context: We don't ask, "why did you make this decision in this way?" We dispatch an inspector based on whether or not the decision-maker was under any influence. Most recently in the case of Ayşe İnce[1], you know, the case where the husband committed a murder after being released, as soon as we became aware of that, we assigned an inspector to assess whether there was negligence in the prosecutor's decision to release.

Y. S.:

In the KCK *(Koma Ciwaken Kürdistan – Union of Kurdistan Communities)* case, lawyers' offices were searched. Of course, a lawyer's office may be searched in relation to an offense the lawyer committed, but no such search can be conducted in relation to that lawyer's clients. The prosecutors nevertheless went in there, took all the documents and left. The judge who made that decision is at fault in my opinion. You could have done something to intervene in that.

L. K. T.:

I'll add this. Prosecutor Abbas Özden was given a reprimand for having launched an investigation about the police on charges of conducting an unlawful search. In other words, he did what you as HSYK should have done and he was penalized for that. So, a prosecutor going after unlawfulness was punished. I'm saying this as you might not have heard about it.

İ. O.:

As far as I'm aware, the lawyers whose offices were searched in relation to the KCK case were later arrested on charges of having committed offenses. HSYK cannot act in that regard, because those lawyers were detained and arrested on grounds of having offended.

Y. S.:

But the lawyers had all of their documents seized.

2.2. THE PRACTICES OF THE NEW HSYK AND CONTROVERSIAL CASES

A. B.:

In reference to the former HSYK, Mr. Okur said that was far more dependent on the political authority. In your opinion, has the current HSYK distanced itself from political authority? What is your take on that?

1 **After being assaulted and threatened by his husband, Ayşe İnce filed a complaint against him, but the prosecutor's office released the husband, Mehmet İnce. Upon his release, Mehmet İnce murdered Ayşe İnce by stabbing her 17 times. Following the incident, HSYK held a session on whether or not the judge entered the restraining order timely, judicial authorities took the necessary steps against the death threat, and the decision to release Mehmet İnce and what measures were taken in the aftermath of the release decision. HSYK resolved to allow an inquiry with respect to the prosecutors. http://www.hurriyet.com.tr/gundem/20456975.asp, last accessed : 03 September 2012**

U. Y.:

The new HSYK proceeded in parallel with the government for a while. But there came a divergence with the case involving rigged soccer matches. The tension that emerged due to Specially Authorized Courts and the Deniz Feneri case peaked with the call issued to the National Intelligence Organization Chief to testify. The tension reached a stage where it can no longer be kept secret.

A. B.:

If I understood that correctly, you're saying the new HSYK sometimes moves in parallel with the political authority and sometimes it distances itself. Is that right?

U. Y.:

Correct. We believe there's a collision at this time, as well.

A. B.:

I also wrote about it from time to time. Several others noted that the contention between the government and the Gülen community is manifested through the judiciary. There are claims that that community has a slightly heavier presence in that council. Does the divergence take place through the judiciary?

M. S.:

Did you take any steps with respect to highly controversial cases such as the one that involves rigged soccer matches, in other words, in cases where the government and that community came up against each other?

"Several others noted that the contention between the government and the Gülen community is manifested through the judiciary. There are claims that that community has a slightly heavier presence in that council. Does the divergence take place through the judiciary?" (Ali Bayramoğlu)

A. B.:

Let me turn the floor over to Ms. Tarhan also. After that Mr. Okur can respond. By the way, the topics have begun to get intertwined. We will of course talk about the Gülen community or major political cases, but let us not skip any other topics while we're doing that.

L. K. T.:

Mr. Okur responded to my criticisms that elections were held under pressure from the Ministry. Apparently it is YARSAV that transformed the judiciary. I guess that means the judiciary would not transform if there was no YARSAV. Look at that fear we've spread. With some 1,500-1,600 people…In 1999 or 2000s, we got together to claim our rights, because we used to convene on Wednesdays, we called ourselves "the Wednesday judges". We were excited when the right to association was granted. Our colleagues from the Supreme Court of Appeals and the Council of State were in the majority. We strived to have colleagues from local courts join us. Because the colleagues from local courts came from several different places, it was more difficult for them to orgnaize as compared to members of the judiciary who were together in main bodies like the Supreme Court of Appeals and the Council of State. Therefore, YARSAV had a composition where colleagues from the supreme judiciary bodies formed the majority. Members of supreme judiciary bodies and HSYK members became members to encourage other judges and prosecutors. Also, the results of the election show us that we didn't get votes from members of our organization who work at smaller courthouses. Of course, their opposition to our discourse must have had a role in that. So, we have colleagues who are both YARSAV members and oppose YARSAV's ideas.

İ. O.:

Is it likely that they reacted to the alliances you built? I'm offering that only as an observation.

L. K. T.:

Perhaps, but I cannot make sense of this fear of YARSAV. We are after all a professional association

that argues for the independence of the judiciary. Let me tell you this: At no time was YARSAV ever supported by any government.

U. Y.:

In the past year and a half, we forgot about the former council. No one is talking about the former entity. We're talking about the new one.

L. K. T.:

There is actually no point in talking about the former one. They want to put so heavy a burden on YARSAV. In fact, no matter how powerful you might be in the system, if you are at odds with the political authority, how much longer will you survive…

A. B.:

Ms. Tarhan, the important issue here is, how do you explain the mechanism, that is, the ongoing operations, of the new entity? Let's hear remarks on that for a while. From an outsider's perspective, how does it all look?

L. K. T.:

Alright. A new entity was established, one way or the other. They said they concerned themselves with the future. But as we saw, nothing changed. One year and a half passed. The mechanism remains the same. When you look at it as an outsider, HSYK is that huge building by the side of the road. Considering what emerges from there, you see the practices of the 1st Circuit. Judges and prosecutors who are YARSAV members are being slashed. Our candidates for positions in HSYK are under strain. They have trouble with the new body. You're legislating a new constitution, but there is no point in doing so where you don't have a separation of powers. The power that establishes separation of powers in democracy is the judiciary. It is an independent judiciary that ensures the separation of powers. If HSYK really defends the rule of law and the independence of the judiciary, it can have a contributory role, but just like the citizens out there, I don't believe that to be the situation. That's my opinion of HSYK.

A. B.:

Please go ahead Mr. Okur. Let's finish this discussion first. We'll then move on to other topics.

İ. O.:

First of all, it was noted that we did not redress the grievances of anybody except three individuals. Let's start from there. Now, there's a Constitutional framework at hand. Since 1982, it has remained intact, no one found it necessary to replace it, or no one was able to accomplish that. And the 12 September referendum did not ignore the council altogether by way of the constitutional amendment, it only altered its structure. With the temporary Article 3, the files of individuals who were stripped of their professional credentials were brought back to the council for reconsideration. If that's the Constitutional framework in which HSYK operates, and in fact HSYK is obligated to do so, there's no chance for it to redress the grievances you mentioned. In addition, Demokrat Yargı says, "leave all practices of the former HSYK behind". I am unable to do that, I don't have that authority. Only the parliament can do that. The constitutional amendment that took place did not ignore what went on before. It only contemplated a new HSYK here onwards. The new regulation contemplated the reconsideration of the files of those who were stripped of their professional credentials. We received 51 such files. Seven of them were reinstated. Of those seven, two or three went back to the profession. The rest did not want to go back to the profession. Some of them could not, as they were beyond the 65-year age limit. We cannot exercise a right that is not granted under the Constitution. That's not possible at all. The operations of the former HSYK remain valid. You need to recognize that. The legislative branch did not tell us, "get rid of all the previous operations". On the contrary, on the day we took office, we received a decree we took over from the former council. It concerned those whose spouses were teachers, and we put it into force. You can't simply get rid of the old habits and traditions. You can of course reconsider them, leave some of them behind, but beyond that, we could not act as if we were

equipped with powers that were not granted to us and proceed as such, and in fact we did not do so. We took out 34 circular letters and re-wrote them. We could not say this either: "We've just come to office. We'll wait for a few months. And then we'll start taking action." That wouldn't be possible, either. There were judges awaiting their assignments. There were prosecutors who were awaiting their appointments. The system needed to move forward without interruptions. There were judges who were excused. They were waiting for a solution that we would offer. It is impossible to completely disregard the former YSK. Continuity is a state's essential feature.

Let me move on to topic of "What should be HSYK's mandate?" On the one hand, we say, "HSYK should not intervene in the judiciary, it should not interfere with the cases on trial". And you gave some examples: Why did you intervene in the Deniz Feneri case? Why did you intervene in the Dink case? You're waiting for an explanation from us, just like the rest of the people in country. But then on the other hand, you're saying, "Why didn't you intervene in the crisis involving the National Intelligence Organization?"

U. Y.:

Before we move on to Deniz Feneri, I'd like to say one last thing about the proposals of Demokrat Yargı. İbrahim Okur said, "there's nothing that can be done about past decisions". But you're an administrative body. You can actually reconsider the decisions issued in the previous term.

İ. O.:

Alright, but where does that stop? There are so many past decisions. The law states, "HSYK's decisions become final after the appeal process is completed". That applies to both the previous body and the current body. How are you then going to implement the principle of continuity in the state's affairs?

Y. S.:

As the bar association, we did that often. Whatever the Minister of Justice said in regards to stripping one's professional credentials, the bar association had an obligation to comply. We either annuled those decisions or declared them null. We reinstated those who were dismissed. The Minister of Justice sued us. In response, we said, "as the board of directors, we resolved to have them back into the profession. We did not cancel the previous resolutions." The judge granted our claim. We were acquitted. You can try that path. Of course it requires a serious amount of work.

İ. O.:

But in the example you gave, that particular power of the Minister of Justice was revoked after an amendment to the law, as far as I'm aware.

Y. S.:

No, it was not revoked. We made a new resolution on having the person back into the profession. In other words, the resolution was completely lawful.

M. S.:

Let us go back to the question on what HSYK's mandate must be. We need to shed more light on the question itself. This is what we want to ask: Approval is being granted to decisions whose legality is controversial, without regard to the parties involved and whom those decisions are for or against. That's the issue. For instance, in the Dink case, decisions were made against the claims of the Dink family, while in a different case decisions are made differently. So, the public has a perception that decisions are being made wrongly.

İ. O.:

Did HSYK intervene in cases, or did it not? We've offered remarks on that ever since the beginning. We provided explanations regarding the Deniz Feneri investigation from the outset. As HSYK, we did not intervene in that case. The chief prosecutor's office advanced certain requests. There are the documentsprosecutors requested with their own signatures from the Penal Court of Peace. They demanded the seizure of land, maritime and aerial transportation vehicles owned by the people in question, their partnership interests incompanies

where they are partners; and also of the assets of companies owned or partnered by the people in question…So, they made requests about the individuals, and also about the seizure of the companies. In its decision, the court granted the request to have partnership interests seized, but denied the request to have the companies seized. The court found that the latter request was unlawful. So up to this point, it's all normal. The prosecutor then does this: He crosses out the second paragraph that the court denied the request, and serves a letter to the registry of deeds. He requests the seizure of the assets of companies where these individuals are partners. In response, the registry asks: "Let's not take a wrong step. Are we going to seize it all?" The prosecutor says, "Yes, you will seize everything". And it does not end there. The lawyers then tell the prosecutor, "Mr. Prosecutor, there are missing elements in this decision. Please amend the decision". After that, three prosecutors sign a letter where they say, "in fact our aim is to have all assets of the companies seized, that's why we issued that letter". Now, as result, there's now a claim of document fraud. HSYK was asked to allow an investigation about the prosecutors in question, and HSYK did. The trial will result in a decision, but that's the allegation nevertheless. And it is said, "HSYK engages in the same practice". For instance, a decision is made about the three of us, participants sitting on the right side of the table, and the section of that decision which concerns Ms. Tarhan is crossed out and the decision is forwarded like that, so that they wouldn't know what the decision had to say about her. But the allegation here is not like that. If we're saying, "HSYK should not interfere with that", then that's another matter. The chief prosecutor's office withdrew these prosecutors from this investigation. There was a request for an injunction. HSYK denied the injunction request. The injunction request was by the inspector said, "Move these prosecutors away from this place, and assign them to another place". But HSYK said, "no, I don't need to do that". As for the other cases…

A. B.:

Before we come to that, there's a question here.

Levent Pişkin (TESEV)

This particular practice, the practice of blacking out sections of the decision to ensure confidentiality, is a very common one. Questions were of course raised in the public opinion regarding this blacking out practice in the case of prosecutors of the Deniz Feneri case.

İ. O.:

Definitely. When a decision is made about more than one individual in the same file, it's alright to cross out that section of the decision that pertains to, say, Ms. Tarhan. That's perfectly alright. But in this case, they show one paragraph of the decision and obtain the result they seek by crossing out the other. That's the difference. The claim is that they obtained the result they sought by crossing out the matter about which the Court said, "no, you can't do that". So, for example, let's say I have 10% share in that company. Instead of seizing my shares, they seize all assets of the company. And contrary to the court decision. That's the problem.

L. P.:

With respect to wiretapping, they exceed the relevant periods and then they make decisions again and again. There's unlawfulness there, is an investigation allowed in that case?

İ. O.:

We allow investigation in that event already. With respect to Deniz Feneri, an investigation was allowed because there was an allegation of document fraud.

A. B.:

Ms. Tarhan wants to add to the discussion.

L. K. T.:

With respect to the Deniz Feneri case, I'd like to give examples based on the files I read. I read several files regarding the adjustment of title deed registry records. In cases involving major banks, for instance, when Egebank was seized, the registry will proceed as it sees fit no matter what letter you serve them. There might be a similarity in names; the registry will then

issue an injunction. You ask that only the shares of the partners of the bank be seized, and the registry seizes the entire company. When you read the justification for the decision, it reads, "seizing the shares of the partners will mean the seizure of their assets, so there's no need to take an additional decision on that". We need to read that properly.

A. İ.:

When you talk about the shares, what is their percentage?

L. K. T.:

In fact, when you seize their shares, the company cannot dispose of the remaining shares.

A. İ.:

What I'm wondering is, what percent of the company do the seized shares represent? Is it 5%? Or is it 95%?

L. K. T.:

The percentages all vary, but if my share is seized, the company may not dispose of that asset.

A. İ.:

Let's say I own 5% of Turkcell. If my shares are seized, what happens to the remaining 95%?

L. K. T.:

Here the issue concerns the seizure of immovable property. Not the shares in the company. When the company's immovable property is seized, the entire property will be seized, not just the part which represents my share. That's what injunction is all about. In sum, I think it doesn't matter much that one part of the decision was crossed out. Here's what I want to ask: Whether or not the investigation on prosecutors would be allowed is voted three times, with one week between each vote. The law stipulates, "permission will be considered to granted or denied with a simple majority of votes". So, when it was a three-to-three tie, the matter was put to vote three times, with one week between each vote, until the tie was broken. Is there a gap in the law in that regard?

İ. O.:

As I noted a while ago, with respect to Deniz Feneri, article two of the decision states that the assets cannot be seized in entirety as the law does not provide for that. So, there's practice that has no place in the law, an unlawful practice. There might have been mistakes at the registry of deeds. That cannot be taken as the criterion. At the request of the lawyers, three prosecutors issue a reply to the lawyers and stand by the decision saying "our aim was to have all immovables seized". I'm not saying whether that was right or wrong, but that's what happened. It is only normal to request permission from us to initiate an investigation after that.

On to the issue of investigation being denied because of the three-to-three tie: If there is a tie, the issue automatically becomes the first item on the agenda of the next meeting. Because one member was on leave, there was a three-to-three tie. When that member attends the following meeting, then the tie is broken. That's something that stems from the regulations. The council's internal regulations include a provision stipulating that it is the procedure to be followed in the event of a tie. That's not something that contradicts the law.

A. B.:

Before we move on to the other cases…I'm leaving the legal dimension aside. I'm looking at its political dimension. We live in a country that became polarized. Deniz Feneri connects to Kanal 7, and therefore to the political authority. What I'm wondering is that, when a decision is being taken in such a case, do you feel an indirect, if not direct, pressure from the political authority? That is, can decisions really be taken independently?

İ. O.:

Let me say this: I never worked in the disciplinary circuit, but there's no one there who represents the government there. Neither the minister nor the undersecretary is in the circuit. The government has no direct representative in the circuit that makes this

decision. I do not know how the colleagues discussed that among themselves.

L.K. T.:

As a matter of fact, we sort of sentenced the prosecutors here. This section should rather be off the record.

A.B.:

What causes the concern here?

L.K. T.:

We talked about an ongoing investigation. Because a decision won't be made before the transcript of our discussion is published, we will have influenced the trial. It'll be better if the discussion on Deniz Feneri prosecutors is not included in the report.

A. B.:

Alright, we can now turn a bit to the issue of Gülen community.

İ. O.:

When you come to the issue of Gülen community... First off, membership in the council has increased. It is completely untrue that council membership only includes judges subscribing to one particular viewpoint. For instance, Ziya Özcan, who came from the Supreme Court of Appeals, is a YARSAV member. There are others who follow the YARSAV standpoint. Colleagues, who were elected with us, as I said a while ago, formed the "aye" front. It is, as the name implies, a front. There are colleagues who subscribe to diverse points of view. There's a notion that Specially Authorized Courts proceed as they see fit, one particular group dominates the Specially Authorized Courts. This is especially the talk regarding Specially Authorized Courts of İstanbul. In the Specially Authorized Courts of İstanbul, three presiding judges were transferred. Once we took office, injunctions were requested in regards to three presiding judges. We denied one of them and granted the other two. These two presiding judges were stripped of their professional credentials. We did not appoint other presiding judges externally in their stead. We appointed the most senior judges of those courts as their presiding judges. This was also the practice at the time of the previous council. Later, members were added to these courts. New courts were established. The presiding judges of the new courts were also authorized in keeping with the same established practice. It is impossible to talk about a specific power in all of this.

We attribute to the Gülen community a power they don't have. I guess they must be enjoying that. They are probably thinking, "If we are that great, if we are that powerful, everyone will be scared of us". You will find a diversity of opinions among 12000 judges and prosecutors. Whatever perspective they subscribed to before the 12 September referendum, they still retain that. People's perspectives won't simply change in a referendum. Whatever orientations there were in the judiciary in the past, they are there today, too. There are also people close to Gülen community. The Specially Authorized Courts are no exception. My opinion is that this situation stemmed not from the influence of theGülen community but from the problems in the relationships between prosecutors and the police force. In fields such as drugs, terror, organized crime, the police have capabilities the prosecutors do not. The police are really strong in those areas. Prosecutors don't have those capabilities, and they don't have the means to take advantage of those, either.

So, the security forces initiate the process, they kick things off. What is even more critical is that, with respect to definition of an organization, there are

"Supreme Court of Appeals for the 9th Criminal Circuit applies the definition of organization in relation to much simpler offenses. If the new judiciary is to be a liberal one, we need to fight this approach and develop a democratic and liberal judiciary that differs from precedents and has a distinct character." (İbrahim Okur)

decisions, even precedents established upon a reflex to safeguard the state. When defining what an organization is, we kept the scope too broad. We did so based on a reflex to safeguard the state. Right now, Specially Authorized Courts follow these old precedents. This is an approach that needs to change. In the past, the Supreme Court of Appeals had a very broad definition of this term in the cases involving the PKK and Hizbullah. A lot has been included in the definition of an organization. In this hotel, we had week-long discussions attended by 250 judges and prosecutors. This is what we were told: Supreme Court of Appeals for the 9th Criminal Circuit applies the definition of organization in relation to much simpler offenses. If the new judiciary is to be a liberal one, we need to fight this approach and develop a democratic and liberal judiciary that differs from precedents and has a distinct character. Given that we can't find another 12000 judges and prosecutors to replace the existent12000, we need to create the Supreme Court of Appeals precedents that these 12000 are guided by.

If the perspective changes at the Supreme Court of Appeals, the approach at the Specially Authorized Courts will follow suit. According to the current definition of an organization, where you have three people, where you have an action, and where you have arms, there you have an organization. We need discard that approach. I believe that's something we can achieve with education first and foremost.

A. İ.:

And with legal amendments, to a certain extent ...

Y. S.:

The system needs to change.

L. K. T.:

Agreed, the system needs to change.

İ. O.:

The judge needs to act independently of the state, the judiciary, and even of his own person.

3. Judiciary's Problems Beyond the High Council of Judges and Prosecutors

3.1. SPECIALLY AUTHORIZED COURTS

A. B.:

Mr. Okur, what is your opinion of the Specially Authorized Courts? That is, when the government or the Ministry requests your opinion on these, what do you tell them about the Specially Authorized Courts? Do you want them to be abolished? Do you think they should be reformed? On the basis of an example such as the case that involves the National Intelligence Organization, I'd like to know what you think about this issue. Are there other cases that can serve as examples?

L. K. T.:

I think the İlhan Cihaner case is also critical.

A. B.:

Alright, let's talk about that one, too. Please go ahead Mr. Okur.

İ. O.:

The powers granted to the Specially Authorized Courts under Articles 250, 251 and 252 of the Code of Criminal Procedure are very broad. These articles grant the prosecutors the authority to launch an investigation on any person, without regard to that person's job or title. This authority must definitely be revised and restricted. In the Cihaner case, the interpretation based on this perspective was that even if he was a chief prosecutor, he could be the subject of an investigation. This is a problem we will face often in the upcoming process. If the prosecutor is to investigate any person without regard to that person's job or title, shall we put no limit to that, as the situation stands now? My view is that this authority must be curtailed. With respect to the issue involving the Undersecretary of the National Intelligence Organization, the claim was that Hakan Fidan committed an offense by performing his duty in a situation that is directly related to his job description. We don't know whether he committed an offense. But there's a document seized during the search. Before any evidence was collected or any inquiry conducted in relation to that, the prosecutor called the Undersecretary of the National Intelligence Organization to testify. Does the law grant that authority to the prosecutor? In my view, when you look at Article 250/3, the law grants the prosecutor that authority. When you look at it from the perspective of the prosecutor, you can't say the prosecutor committed an offense. Then, did the prosecutor exercise that authority appropriately? No. My personal opinion is that he called him to testify without collecting an adequate amount of evidence. There are also claims that the prosecutor transgressed the limits of his position. How are we to determine the limits of his position? Why did the undersecretary go to Oslo, and on what authority? Who authorized him? Calling the undersecretary to testify without asking these questions is in my opinion a transgression of the limits of duty. But if you ask whether he had the legal authority to issue the call, the law did grant him that authority.

A. B.:

You think the law needs to be revised. What is your opinion about the Specially Authorized Courts?

İ. O.:

The law foresees Specially Authorized Courts are specialized courts. They were established when the

State Security Courts wereabolished. The military member was removed. These courts are composed of judges all of whom were appointed by HSYK, and they are vested with very broad powers. Their geographic scope is also broad. They were created to hear cases in 7, 8 or sometimes even 10 provinces. When you look at it, each of these courts is a specialized court normally. I think there is a need for them today. Considering the KCK or previously the PKK cases, it is now the Specially Authorized Court of Diyarbakır that hears them. If you abolish that court, then the High Criminal Court in the province of Bingöl or Şırnak or other provinces in the region will be hearing those. And as a result, there will be diverging methods of evidence collection and different decisions. So I think there is a need for these courts. But the list of offenses that these courts try needs to be revised and be limited to offenses against solely state security. These issues need to be discussed and the powers of these courts must be reconsidered.

A. B.:

Then let me ask everyone their opinion of the Specially Authorized Courts. Mithat, let's start with you.

M. S.:

I'd like to make some remarks not just on that, but also on the discussion about the Gülen community. That is an important discussion because: In my opinion, it is and it should be nobody's business who at the judiciary or HSYK follows what kind of belief. There shouldn't be any intellectual policing. But if a group of people adhering to a certain belief or worldview are systematically, and to a certain end, taking specific decisions and seeking to obtain political results through institutions, then there's a problem no matter what belief they adhere to. This is a more serious problem if it is the judiciary that's in question. In fact, in the judiciary, impartiality greatly precedes independence. If the situation we just described is actually the case, it will be naïve to expect that the judiciary will act impartially. Actually the doubts and arguments about the judiciary among the public stem from this.

"The question of impartiality or the politicization of the judiciary is not just a matter of political authority exerting pressure upon the judiciary. A particular group or powerhouse influencing the judiciary or organizing within the judiciary and exerting pressure on certain segments of the society and even on the political authority is at least equally serious, and sometimes even more serious and critical." (Mithat Sancar)

The public's perception is that a specific group is eliminating others it considers to be opposing groups by way of Specially Authorized Courts. This sets a typical example of the politicization of the judiciary. The perception that judicial means are being utilized for purposes of political interest and elimination is a very serious issue. This is an issue with a history. The question of impartiality or the politicization of the judiciary is not just a matter of political authority exerting pressure upon the judiciary. A particular group or powerhouse influencing the judiciary or organizing within the judiciary and exerting pressure on certain segments of the society and even on the political authority is at least equally serious, and sometimes even more serious and critical.

We said there is a strong perception that this is the case at HSYK. Based on that, let's pose the question this way: Does HSYK have the tools, power and most importantly the willingness to dismantle that structure? Perhaps there are people at HSYK who also find this perception disturbing and want the situation to change. But events up until now show that the groups that seek to instrumentalize the judiciary for their own political calculations have largely accomplished their goals. If that's correct, the entity that came into being as a result of the Constitutional amendment will not differ much from the previous version. That means the judiciary problem is becoming more and more impenetrable. That's why I asked the question about transparency. For instance, is it not possible to publish minutes of all important discussions in the councilas is, after crossing out sections that concern individuals' private lives and

their names? What about publishing them on the website or somewhere else? I emphasized the issue of transparency during the Constitutional amendment process. If that could be done, I think it won't be easy for any community, group or the political authority proper to exercise domination over the judiciary.

İ. O.:

It all gets tangled at the point of whether there is such a perception. Colleagues at HSYK as well as at the bench, think that Turkish judiciary does not have such a perception problem. We have colleagues who think like that. Also, Kristos Makridis, a member of the advisory committee that recently visited Turkeyreported that both some HSYK members and some judges and prosecutors at the Ankara courthouse told him, "There's no such perception problem at the judiciary. Where on earth did you come up with that?", and asked me what I thought about the matter. I told him in response, "This is exactly the problem. If you think there's no such perception problem, then you won't take any steps to deal with it". You must first recognize the existence of the problem and then take a step to solve it. We're saying that the judiciary has a perception problem. There are problems in the judiciary; there are things that are going in the wrong direction. If you recognize them for what they are, then you'll strive to correct them.

Mithat Sancar's proposal is important. There's no legal barrier before the publication of minutes in the name of transparency. This is something we must discuss among ourselves at HSYK. Let me talk to you about something more serious. We realized that one particular habit that became established over in the former HSYK actually remained in effect over the past year. Withthe former HSYK, a decision did not include information on whether the decision was made unanimously or based on a majority of votes. The letter that was delivered only said, "this is the decision about you". Later, whether the decision was made unanimously or by majority came to be included in the text, but there was no disclosure on who cast what vote and on the dissenting opinion. The office of the general secretary drafted and delivered the decisions, so we did not see the text that was sent out. I heard that in a few decisions, the dissenting opinions I submitted were not delivered. I checked it with colleagues. They said they did not have such a practice. This is now over. If I have a dissenting opinion in a decision, I want the addressee to know about that. Perhaps he will rely on my dissenting opinion when he objects to the decision. We have some practical mistakes like these. The transparency issue raised by Mithat Sancar is something we could consider in this context.

M. S.:

As you know, in Turkish law, the justification occupies a central position. The justification for any decision must be provided. That's a Constitutional obligation.

İ. O.:

Yes, you're right. Therefore, the dissenting opinions in a ruling with justificationss now reach their addressees. Of course there are further steps to be taken.

Y. S.:

I also think Specially Authorized Courts must be abolished. But of course not by way of granting their powers to High Criminal Courts. The İlhan Cihaner case was a political one at any rate, but there were efforts to exploit it towards a different purpose. Chief Prosecutor Cihaner must be tried at the Supreme Court of Appeals. That case was forwarded to Istanbul. If the court that hears the Ergenekon case in İstanbul merges the cases, this case will later go to the Supreme Court of Appeals. And the Supreme Court of Appeals will forward it to the Military Court of Appeals and that will be the end of the case. This was the intent. Whether the Cihaner case was fair or unfair was left aside. And the court in İstanbul forwarded the case to some other place. This is actually a scandal. Some things are being used toward political ends. This happens often in structures like that.

A. B.:

Alright, what is your perspective on the Specially Authorized Courts as Demokrat Yargı?

U. Y.:

We consider the Specially Authorized Courts the latest form extraordinary legal preceedings assumed. The Independence Courts, State Security Courts and now the Specially Authorized Courts. There's no way you can expect justice to come out of those. When you look at similar courts historically, you can't explain their decisions with reference to the law. You can offer an explanation not in terms of criminal law, but of political intent. Courts like those are courts established to eliminate the opposing party which you perceive to be your enemy. Our opinion is that the Specially Authorized Courts must be abolished completely.

L. K. T.:

Specially Authorized Courts must definitely be abolished. We think that these are courts political authorities or certain powerhouses instrumentalize toward their respective objectives. These courts restrict the right of defense and make classified decisions. Lawyers are not admitted to the hearings. The accused are prevented from attending hearings. One of the most recent judiciary packages stated decisions could be made without the presence of the accused or lawyers in the courtroom. Indeed, in a trial, the defense will have something to say until the last hearing. Keeping lawyers away from the final hearing is highly alarming. Specially authorized prosecutors only collect evidence that is against the accused or use such evidence collected by the police. A prosecutor has an obligation to collect evidence in the accused's favor, as well. They only find the evidence they want. In addition, they cripple the defense. Look at the trial of Turgut Kazan on charges of tampering with a fair trial. He's being tried because he disclosed the defense he advanced in the room. The lawyers are being intimidated. In the Cihaner case, we saw how a chief prosecutor was dragged out of his room by a specially authorized prosecutor. The purpose was to intimidate the judiciary. The Specially Authorized Courts transgress their powers and conduct highly dangerous activities. As a judge myself, I'm talking about a trial that involves a colleague. One could give other examples, as well. That's why the Specially Authorized Courts must be abolished. A strong judiciary is one that is independent and impartial. I guess no one here will argue that Specially Authorized Courts are a sign of a strong judiciary. The Specially Authorized Courts represent a politicized judiciary. In sum, there are qualified judges and prosecutors who can undertake the work that these courts do.

3.2. JUDICIAL LAW-ENFORCEMENT VS. ADMINISTRATIVE LAW-ENFORCEMENT

A. B.:

New technologies bring forth some ethical problems. A wiretapping system is set up on the basis of a piece of evidence, and anyone who is tapped is treated as a criminal. Is this simply a problem of the police? Or is that a problem within the judiciary, as well? Is this something you discuss in your trainings? Or is this not your problem, but that of the police?

İ. O.:

It is also our problem. When law-enforcement brings evidence on a charge through its own means, it offers a justification for its request. For instance, they offer details on a wiretapping request. They indicate the crime with which that request is connected. And the judge awards the technical surveillance decision on the basis of that.

A. B.:

Mr. Okur, let me give you an example: For example, some information arrives from Germany. The information notice says, "Ali Bayramoğlu is connected to such and such dubious organization". The intelligence division of the General Directorate of Security takes the claim seriously and starts wiretapping. Through the tap, other connections and offenses begin to surface. Now, first of all there is the problem that the prosecutor takes the information notice from Germany seriously.

İ. O.:

Yes, there's a problem there. There's a problem both in terms of the prosecutor's office and in terms of the police.

L. K. T.:

The problem is that there is no judicial law-enforcement. With judicial law-enforcement, no such problems would exist. But for that you need serious infrastructural preparation.

İ. O.:

The main problem is that because there is no judicial law-enforcement, prosecutors do not have the sufficient means to launch investigations. They don't have necessary tools. Because prosecutors cannot carry out adequate preparatory work, the court ends up having to collect evidence. And the judge strives to gather evidence by way of the questions he directs. In fact, that's why a case drags on for three or five years. That's why people complain about drawn-out trials. Since 2008, the Ministry has been working on a system known as expert judicial service or judge's assistant. The models in Europe were studied. The main goal is this: As Yücel Sayman noted we are working toward a system in which the judge will only make the decision on the merits. The file will come before the judge after it becomes complete with the finalizations of intermediary stages such as the compilation of interim decisions and collection of evidence. Anything to the contrary is not in accord with the dialectics of a trial. The prosecutor and the judge have an equal position, there's no defense. Unless we change this system, we won't have solved the problems of the judiciary.

The right way to go is for the prosecutor to launch the investigation and then request actions from law-enforcement. But our practice is sometimes the opposite. Prosecutors' offices do not have adequate number of staff, which plays a role in this. The prosecutor has no assistant or clerk. A few prosecutors might be sharing the same office. That's how things are in İstanbul, as you know. For every two prosecutors, there's one clerk in İstanbul. More important than all else is the fact that we don't have judicial law-enforcement officers. Because there's no judicial law-enforcement officers, law-enforcement delivers the result of their search to the prosecutor. And then the prosecutor launches the investigation. The prosecutor does not have technical support or an office. The prosecutor conducts the investigation, participates in a post-mortem, and has to deal with many other things at the same time. Unfortunately, that's that's the situation at hand.

"The main problem is that because there is no judicial law-enforcement, prosecutors do not have the sufficient means to launch investigations. They don't have necessary tools. Because prosecutors cannot carry out adequate preparatory work, the court ends up having to collect evidence." (İbrahim Okur)

When it comes to the courts of inquiry, they bring 10 people whose detention periods have expired to the judge, who has a heavy workload, in the evening. They are sent to being interrogated. The judge has two choices: He will either release or arrest them. Instead of taking a risk by releasing them, he chooses to arrest them. He says, "let the judge who tries the objection handle this". He heard some 40-50 cases in the Criminal Court of First Instance. He thinks, "Let me not take the risk, the relevant court will decide". In major centers, there must be separate courts that will render injunction decisions. In fact, the injunction decisions of Specially Authorized Courts must also be evaluated by these courts.

A. B.:

Are these among your recommendations to the Ministry of Justice?

İ. O.:

Yes, they are. Either by way of informative letters or orally.

Y. S.:

Unless judicial law-enforcement is established and its operation is scientifically determined, the problems with the judiciary won't be solved. At a minimum, the judiciary's design must be altered. Defense has no

place in the design of the judiciary. You can't democratize the judiciary unless you change that design. The result will be the same no matter who is appointed judge in this system. As soon as you say there's a threat against the state, you are assigning the judiciary to safeguard the state against that threat. Before it was the National Security Council that said that, now it is the government. Previously the National Security Policy Document listed the threats, right now the government notifies them, saying things like KCK for instance…I would make the decision for arrest if I were judge in this system, and I wouldn't cancel that decision. Unless you change the system, it won't matter even if HSYK appears to function well, it will eventually become part of the system.

Without establishing judicial law-enforcement, the prosecutors will have to yield to the police, as they do in the current system today. Some law offices use the prosecutor and the police as their assistant. One complaint goes the prosecutor. The prosecutor forwards it to the police. The same thing happens not only in criminal cases but also in intellectual rights. A police officer, accompanied by an expert, arrives and says, "we're here with instructions from the prosecutor's office, you're stealing works that are under protection". When you respond, "how are you able to know that we're stealing works under protection?", he then points to the expert and says "that's why we're here". A prosecutor should first launch the investigation and then this process should follow, but the prosecutor doesn't care.

3.3. STRENGTHENING THE DEFENSE

Y. S.:

The organization of the judiciary does not have room for the defense. There's no board that includes the defense in the attorneys' act or the Constitution. Particularly in criminal cases the defense has no presence as an institution. It exists only as a right. In other words, there's no institutional defense mechanism against the prosecution. Rather than the dialectics of the judiciary, the judge voices his own interpretation and what he considers to be right. Such a system of judiciary is inherently flawed. No matter how you reform this system internally, you won't be able to democratize the judiciary.

"The organization of the judiciary does not have room for the defense. There's no board that includes the defense in the attorneys' act or the Constitution. Particularly in criminal cases the defense has no presence as an institution. It exists only as a right. In other words, there's no institutional defense mechanism against the prosecution. Rather than the dialectics of the judiciary, the judge voices his own interpretation and what he considers to be right." (Yücel Sayman)

Once a case is filed, a judge is to make all the decisions regarding that case. Whether witnesses will be heard, injunction will be imposed; everything is decided by the judge. And as he does, he already has an inclination when the file appears before him. So his opinion has begun to form already. If we're talking about the dialectics of the judiciary, all issues that need to be discussed in relation to that file must have been handled by other bodies before the file appears before the judge. In other words, if a given piece of evidence does not qualify as evidence that should be established before the file comes to the judge, and then it won't be left to the judge to decide on that. Otherwise, the judge won't be able to duly administer the process. Another example: will a witness be heard or not? The judge can't decide on that. This is something to be established before the issue reaches the judge, but this requires institutionalization.

In order for all these procedures to take place before the trial, there needs to be a judicial law-enforcement institution that is accordingly qualified, that puts together the evidence and carries out this process with input from the defense. As the defense, I must be able to argue there, and if I can't reach a settlement, the decision must be made at another court. In other

words, whether or not the evidence is admissible must be decided upon not by the court that will judge the merits, but by another court before that one. Forensic medicine could be included in the trial process. Judicial law-enforcement, forensic medicine could be elements of a common institutional structure. If the judicial law-enforcement is organized autonomously, many problems will be solved. You don't need to go anywhere else. The secretariat, or what we call the clerk's office, should also be autonomous so that the lawyer, the plaintiff and the defendant can solve their problems there. Whatever we claim as part of the file, let's bring it over there. If we are to initiate other suits, let's do it there. In sum, the judge who will decide on the merits should not have to deal with the auxiliary issues. And as the defense, I must be able to argue the parameters in the file that will arrive before the judge. But that's not how things work with us. In a case that lasts five years, it will be impossible for you to speak authoritatively to the parameters that constitute the judge's thinking if there's a different discussion in each hearing. Procedural law is an art. It is the art of influencing. It is the art of determining the parameters that the individuals who will make the decision will employ. Accordingly, the judge who is to decide on the merits should not be discussing auxiliary matters. If he does, then he is the one setting his own parameters. And the decision he will make will only be his. The judge will become a major power. And if he is a major power, the way he will exercise his power will be dictated by an authority that has even greater powers. That's not how you have an independent judiciary. So, we need to have the institutionalization I mentioned. Indeed, we have the High Council of Judges and Prosecutors. We also have the Bar Association. They could all get together, form a consultative body and look for solutions for the problems of the judiciary. And most importantly, the judiciary must be open to public review. We have an article that concerns the attempt to influence a fair trial. That's actually an article meant to protect the accused, but it has quite unbelievably been turned into an article utilized by the Supreme Court of Appeals to silence anyone who will talk about the case, starting with the accused. Eliminating the factors that might affect a judge's freedom to decide is what matters here. So, a commanding officer of the army won't be able to say, "I know him, he's a good guy" about an accused. Once an indictment is made, I will of course talk about it. The judge will listen to me and form an opinion. There's nothing more natural. When we consider all that as a whole, we realize that what needs to be accomplished is a complete transformation of the system. But when you say that, the response is, "we don't have the money". But then they do have the money for other stuff. If you want to create a democratic system, what could be more important than the judiciary? During the meetings about the new Constitution, two people; one from the Aegean region and the other from the East, complained about the same issue. They say, "We had a land-related case against the Treasury, but we lost it. No one can explain to us why we lost. All cases filed against the Treasury are lost." In order for people to be convinced by the rulings, the decision-making process must be subject to independent checks. Which is what we call independent scrutiny. The judiciary must be open to public scrutiny. Whether you will establish a jury system or come up with something else, but decisions should definitely be open to checks by the public. When you react, "what kind of decision is this!" they actually sue you for that. This needs to change. Judicial law-enforcement and forensic medicine should be considered together. The lawyers do not have an impact on the trial. Cross-examination is the only practice that has been introduced, but actually what goes on is not at all like cross-examination. It's just that the lawyer can ask questions directly to the accused. Cross-examination is an exercise of influence. With your questions, you show the judge the parameters on which he will base his decision. In our system, the judge questions the witness. The fact that the judge does so means that he has his own right answers in his mind. I as the defense can ask questions, because I do have my parameters. What does the judge consider to be the right answer?

If a judge is questioning a witness or an accused, that means parameters have already been set in his mind. Then there's no point in cross-examining. All that means is that I have a right to direct questions while as the judge asks questions. They say, "we got this system from the United States". Have you ever come across any judge who questions an accused in a case involving a capital offense? That doesn't happen. We need to see things through this perspective. As someone who has been practicing for 40 years in Turkey, I know that they always offered lack of money as the reason Appellate Courts were not created. There's talk about reducing the number of files, if you move excessively fast to reduce the number, then you will be trashing the cases of a whole lot of people. So, to wrap it up, we need to have a holistic view and change the system entirely. Otherwise, the decisions HSYK takes will always be the subject of controversy.

Koray Özdil (TESEV):

Do you plan to have professional meetings with the lawyers as well? There's contention between judges and prosecutors on one side and lawyers on the other, it is almost as if they can't come at the same place together. It's high time this was done away with. Meetings like that could help mitigate the tension.

İ. O.:

My colleagues who are in the practice of law might be offended a bit when they hear this but here's the concern we've had: If lawyers bring their specific cases to these meetings and discuss them there…

L. K. T.:

So be it, why would that be a problem?

İ. O.:

But when judges talk about their cases there, a lawyer comes around and perhaps brings a file that I'm hearing. We put that aside for the time being. We decided to evaluatethe transcripts of the discussion once they are out, and reconsider in the future. Last year, we held 16 regional meetings under the banner "Analyzing the Situation in the Judiciary". We invited colleagues from bar associations to these meetings. They attended and there were very productive exchanges. But right now we don't plan to do that about professional consultation meetings.

L. K. T.:

But it could be considered in principle.

İ. O.:

Yes, of course it could be considered in principle. We'll think about that.

M. S.:

Judges are always taught that they need to keep a distance between themselves and the lawyers, since lawyers could otherwise take advantage of them.

İ.O

That's why we thought that we would have a low attendance of judges if we also invited lawyers to attend to those meetings.

L. K. T.:

If the lawyer wished to get in touch with the judge and have an exchange with him, he'll do it one way or the other. So, I don't think there's any problem in discussing institutions and problems together.

3.4. APPELLATE COURTS[2]

A. B.:

Yücel Sayman has just raised the topic of Appellate Courts, so let's move on to that. Mr. Yiğit, do you as Demokrat Yargı have any proposals about Appellate Courts?

2 **Appellate is the process in which final decisions rendered by courts of first instance are, through a legal remedy, reviewed in terms of both material facts and legality. In other words, the decisions rendered by the courts will be reviewed one more time by a superior court, a new hearing will be given, evidence will be collected and witnesses will be heard if necessary. Law Concerning the Establishment, Duties and Powers of the Courts of Original Jurisdiction and the Regional Courts of Justice, http://www.mevzuat.adalet.gov.tr/html/1412.html, accessed on: 03 September 2012**

U. Y.:

Yes, we have a proposal regarding Appellate Courts: After courts of first instance make a decision, the citizen who files an appeal with the Supreme Court of Appeals and the Council of State assumes that some four or five supreme judges will read and analyze his file and decide on the basis of that. But that's not what happens. The file arrives, and you leave it at the hands of a judge who has two years of experience. Whatever he tells in relation to that file before the panel, the members of the panel decide without actually looking at the file at all and only on the basis of what was conveyed to themt. There's no such practice in any country around the world. This needs to be done away with. 20% of the judges and prosecutors in Turkey are administrative staff. There are judges in charge of lodging among other things, and judges are employed in several other areas. The council employs judges as well. You don't have this many supreme courts anywhere in the world. Localization is the global trend in all fields, and we need to localize the judiciary. So, in the new Constitution, a 30-person court of appeal should be created to replace the Supreme Court of Appeals and the Council of State, and current members of the Supreme Court of Appeals and the investigating judges there, as well as the judges who are members of administrative staff, should be dispatched to Appellate Courts. That means we're talking about some two or three thousand judges and prosecutors as a result. There should be no problem establishing Appellate Courts with those judges. That's our proposal.

L. K. T.:

The Appellate Courts must be established. I call judges and prosecutors who are assigned administrative duties "judges and prosecutors whose talents are wasted". You don't need presiding judges for protocol duties or camp administration,. There is sufficient number of individuals who are qualified in other fields and can handle these administrative matters. For Appellate Courts, too, there are qualified individuals, and the state has the resources in its budget to establish those courts. All that is needed is the willingness to create a strong judiciary.

Y. S.:

Appellate Courts are a major issue when it comes to the judiciary. Why would a judiciary not have Appellate Courts? That's where you have a tutelary relationship. The Supreme Court of Appeals exercises tutelage over the judges. You can't get rid of that tutelage by simply replacingindividuals. To do so, you need to put Appellate Courts into service. You can't do away with tutelage by replacing the individuals at the Supreme Court of Appeals. With replacement, you would only have brought in a different set of individuals who would be exercising tutelage. And that's not a democratic practice at all. The law concerning Appellate Courts was passed in 2005, but the courts haven't been created for the past seven years. It appears they don't want a systemic change; they don't want the tutelage exercised by the Supreme Court of Appeals to be done away with.

İ. O.:

With the 2013 summer decree, we plan to have appointments in relation to Appellate Courts. Thanks to some of the measures that were taken, the workload at the Supreme Court of Appeals has been reduced significantly. Once smaller courthouses are closed, we will be able to meet the staff needs of Appellate Courts to a certain extent. It won't of course all be perfect. Our goal right now is to create the Appellate Courts with the 2013 summer decree.

There was a comment, "why would you need so many judges at the Supreme Court of Appeals". Indeed, there's no need for that many judges and investigating judges at the Supreme Court of Appeals. The Supreme Court of Appeals has some 2000 employees right now. Because the workload will have been reduced until the decree is issued in the summer of next year, we can appoint interested colleagues to the Appellate Courts. That was the reason we increased the number of investigating judges at the Supreme Court of

Appeals. Once these colleagues gain experience as investigating judges, they may be assigned to Appellate Courts.

It is not correct that 20% of judges and prosecutors are employed as members of administrative staff. You will get that rate if you include those who are working at the Supreme Court of Appeals. Only 500 of those are employed at HSYK and the Ministry. If 500 people out of 12000 are employed there, that's not too many. 160 of those are employed at HSYK, and that's normal when it comes to a body such as HSYK. In the Ministry, though, there are over 300 judges, which I also think is a high number. 20% as a whole is also a high rate. I agree with that, too.

When the topic of Appellate Courts was brought up in the HSYK General Assembly, we discussed it and resolved that unless existing conditions change, Appellate Courts won't fix the problem at the judiciary, on the contrary, they would add to the burden. It is necessary first of all to reduce the workload at the Supreme Court of Appeals and to close down smaller courthouses. As I said a while ago, while a judge in İstanbul has 17000 files to deal with, a judge in a smaller courthouse has some 40-50 files to handle. In those places, you're wasting the capacity of two judges and two prosecutors. We decided to open Appellate Courts in 15 locations and requested that they not be created unless their buildings are constructed, so we're now trying to take care of issues of building and infrastructure. These are the reasons why Appellate Courts could not be instated right away.

Common Points and Recommendations[3]

1- Judges and prosecutors need to have separate councils.

2- In the recruitment of judges, a committee dominated by the Ministry of Justice plays a determining role. This needs to change.

3- The Justice Academy, as it stands now, falls short of meeting the need for professional training. The Academy must be reformed.

4- The election system in effect at HSYK must be changed. The method of election must be decided upon after broad-based discussion.

5- The reflex to safeguard the state is very powerful at the judiciary, and existing precedents reinforce it. Novel interpretations are necessary especially in regards to organized crimes and terrorist crimes.

6- Judges need to act and decide independent of the state.

7- Judicial law-enforcement force must be established as soon as possible.

8- Appellate Courts must be established.

9- Court budgets and courtrooms must become autonomous.

3 **The recommendations listed in this section were compiled by the report's consultant Ali Bayramoğlu, editor Ferda Balancar, and Koray Özdil and Levent Pişkin of the TESEV Democratization Program based on key common points raised at the roundtable.**

Conclusion: Analysis of the New HSYK and Roundtable Discussion

Ali Bayramoğlu

With the Justice and Development Party coming to power, Turkey has gradually moved away from the polarized atmosphere centered around the issue of lifestyles and from the military tutelage characteristic of the 1990s. While the transformation went forward on a course based on reforms in the legal structure in the frame of the Copenhagen criteria, it also entailed crises and tensions tied to power relations that enveloped these reforms. The tensions intensified when it came to putting legal amendments into practice. The efforts to reorganize inside the state and break free from any association with the military pitted the new governing elite against the old one, leading to a serious internal "strife" in the country particularly since 2005.

This process continued in full swing until the Constitutional referendum in 2010, with elite groups striving to eliminate one another. The demonstrations held in support of the Republic, the Presidential election campaign, the army's 27 April memorandum, the 367 crisis, July 2007 elections and the lawsuit to ban JDP, formal and informal outbursts from the army all represented one side of the coin, while political and legal cleansing steps targeting the old actors and the elimination of the tutelary regime represented the other.

2008 was a critical year in terms of political developments and controversies. In January of that year, the judicial process known as the Ergenekon investigation started. This would be followed by the investigations and prosecutions on Poyrazköy, Kafes *(Cage)*, and Balyoz *(Sledgehammer)*. And all these judicial steps meant a cleansing act against the military and civilian figures of the tutelary regime as part of a significant power struggle.

Yet another and important implication of this development is that it demonstrates that Turkey's transformation proceeded through a "continued state of contention" with no "political rupture" and without the emergence of a new "constitutive power". Several political and administrative actors were both objects and subjects in the transformation process, and the transformation itself proceeded in interaction with with the figures, structure and mentality whose mutation was sought. This resulted in serious instances of politicization, polarization and ideological tension within the state.

Universities, military bureaucracy and the judiciary were among the leading actors that were "both objects and subjects". There is no doubt that the judiciary needs to be discussed separately in this context. That is the because the judiciary not only provided a powerful center of resistance in a "transformation model" that rests upon the "continuity-contention equation", but also had to play the role of freighting the transformation through as part of the judicial cleansing acts that had a political character.

It is under these conditions that Turkey will be witnessing the turning of a new page in the "transformation-judiciary-politics relationship". In terms of the judiciary, one can refer to a dual situation or function. On the one hand, the judiciary has become a politically-characterized arbiter of political problems in a waythat exceeds its scope and framework. On the other hand, through the extraordinary powers granted

by way of the regulation of Specially Authorized Courts and specially authorized prosecutors so that the lawsuits in question could move forward, the judiciary and its actors became a powerhouse in themselves. The condition of polarization and politicization underscored above both reinforced and fed off the formation of this powerhouse.

The meaning of becoming a powerhouse is obvious: Depending on the specific place, court and time, the judiciary-politics relationship moved at a pace that sometimes facilitated and other times hindered the transformation, pushing the limits of the law and legislation. At the very least, there has been a strong public perception that the relationship turned and twisted as such.

In this context, the "identity" of judges and prosecutors, "the nature of the operations" of Specially Authorized Courts and prosecutors' offices, whether or not they exceeded their limits under the law have all become contentious matters.

Especially in the first period that ran up to 2010, the political authority defined the composition of the supreme judiciary and HSYK, made up of former political elites, as the most formidable obstacle before the process of transformation. Several initiatives of HSYK toward judicial processes and actors, and the decrees it issued in regards to appointments and assignments caused serious and nation-wide strains between this body and the political authority in period prior to 2010.

In fact, for the government, the Constitutional amendments in 2010 were meant to alter the structure of HSYK and the supreme judiciary and to break the resistance that formed there. With an ambition to overcome the judiciary challenge before the transformation and "to eliminate the tutelage" over the supreme judiciary, the JDP government, on the basis of a text drafted in a framework concieved around that ambition, proceeded with the Constitutional amendment and then took the amendment to the referendum. The Constitutional amendment and the ensuing harmonization laws significant changes in the make-up of HSYK, and a new rule was adopted which provided that HSYK membership would be determined by way of an election in which judges and prosecutors would be the voters, as was the case in other high courts.

In parallel with the balance of powers and polarizations in the country, the referendum and council elections were experienced in an atmosphere in which diverse tendencies within the judiciary organized politically either through associations or an informal network. The determination of HSYK's composition directly through the vote of judges and prosecutors brought three groups to the fore known as YARSAV, Demokrat Yargı and the government. The competition was among the rolls of candidates put together by those groups, and eventually the roll created by the Ministry of Justice was the one that prevailed.

While some circles considered the result a democratic one and an example of ordinary normalization and transition, other groups, including primarily YARSAV and Demokrat Yargı, interpreted it as the government seizing HSYK by influencing the elections and particularly the Fethullah Gülen community taking charge of the supreme judiciary bodies including mainly HSYK. Following the elections, any initiative of HSYK regarding judicial processes with a political dimension, and any appointment decree it issued only deepened the controversy. In other words, the debate around politicization remained intact, it was just that the participants in the debate swapped places.

TESEV thought it important and meaningful to conduct a study around these concerns.

This study aimed to determine evolution of HSYK, the problems or shortcomings it has and how they could beaddressed. To that end, a roundtable was organized where parties' expressed and compared their views, existent and emerging criticisms about this issue. A goal of this study is to effectively identify the problems through face-to-face conversation; to

determine common points and divergent ideas; and to create a cluster of recommendations toward broadening and improving the current reform.

OBSERVATIONS ON THE ROUNDTABLE

It is telling and noteworthy that shortly after the roundtable started, the parties mainly raised common points with respect to the functions, ideal composition and structural deficiencies of HSYK, and referred to similar problem areas. Participants started by offering critiques of the former structure of HSYK in which the minister and the undersecretary had a leading role, the secretariat, budget and supervision were the prerogative of the ministry, and members essentially originated from the Supreme Court of Appeals and the Council of State.

Participants also drew attention to the main features of HSYK's new composition, the election of judges by judges and prosecutors, and the availability of a bureaucratic and financial structure that will allow the council to maintain its independence from the political authority.

The new recommendations that were advanced also point to the need for new regulations towards this end. Associations, actors and tendencies representing the Turkish judiciary could be said to have such common concerns such as the separation of judges' and prosecutors' respective councils; the appointment of members to the council by the Turkish Grand National Assembly; restriction or abolishing of some of the ministry's and the minister's powers regarding ongoing reviews and investigations; the incorporation of the defense into the system; broadening scope of the training provided for judges and prosecutors; and the creation of a judicial law-enforcement system.

The roundtable also demonstrated that there is a shared opinion that regulations concerning the functions of the judiciary and the role of the judge need to be effected independent of political inclinations, and that there was a fundamental pursuit of having a judiciary that operates on an impartial and independent legal background that is free from any political influences

The problems, questions and criticisms mainly focused on the practices of the new HSYK, on its operations rather than its composition, the election process, and the regulations concerning that process.

The representative from the Demokrat Yargı Association noted that the council could not be given a pluralist structure and the former mentality remained intact because of the dominance of the Ministry of Justice in the elections. He added that certain practices of HSYK, for instance the stance it took toward the crisis involving the National Intelligence Organization, was a sign of that continuity and their association was now even more critical of the situation. YARSAV representative, underscoring the same issues, said that the new structure suffers from exclusive recruitment practices that favor the government and politicization. The two dissenting associations emphasized, sometimes implicitly and sometimes explicitly, the impact and presence of the Gülen community in relation to the resultant situation at HSYK and in the elections. HSYK's stance and role in the replacement of judges and prosecutors in the Deniz Feneri, Ergenekon or Hrant Dink cases received criticism. Despite the powerful objection and defense put up the HSYK representative, it became quite clear that there is a strong conviction with respect to that issue.

There is no doubt that this opinion to an extent stems from political oppositions, but at the same time it feeds into those oppositions. Consequently, following issues deserve emphasis in this regard:

In the present state of affairs, the stakeholders have overwhelminging common views, and their divergences present a situational, political and even informal character. This is a sign that as long as the political burden on the judiciary prevails, and the transformation process moves through a framework in which there is a policy of cleansing and restructuring by way of the judiciary, it is not going to be easy to

reduce the degree of politicization and bring to the fore "a functional consensus that is *sine qua non*" in regards to the judiciary.

Additionally, new regulations need to be put in place in line with common points raised in the previous section as soon as possible, and the preliminary steps toward these regulations must be taken through a participatory mechanism. Furthermore, new pluralist regulations are needed to limit the impact of political divisions and political attitudes, especially as regards the election system and process.

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