Policy Note
19 March 2014
This policy note has been prepared by the Checks and Balances Network.
The policy note evaluates Law no. 6524 Concerning Amendments to Certain Laws adopted by the Plenum of the Grand National Assembly of Turkey (GNAT) and its possible effects from the point of checks and balances.

THE JUDICIARY, WHICH MUST BE INDEPENDENT, HAS COME UNDER THE CONTROL OF THE EXECUTIVE

The Supreme Council of Judges and Public Prosecutors (SCJP) is the supreme judicial body that carries out the procedures of recruiting, appointing and transferring judges and public prosecutors in the general and administrative judiciary of the Republic of Turkey, giving them temporary powers, promoting them, placing them in the first class, distributing positions, deciding on those who are not considered appropriate to remain in the profession, imposing disciplinary penalties and removing from office.

The structure of the SCJP was changed by the constitutional referendum held on 12 September 2010, and Law no. 6087 on the SCJP, which specifies the structure of the Council and its working procedures and principles, came into effect in December 2010.

The "Bill Concerning Amendments to Certain Laws" envisaging changes to the structure of the Council was adopted by the Plenum of the Grand National Assembly of Turkey and became law on 15 February 2014. The President of the Republic ratified the Law on 26 February 2014.

The most controversial aspect of the Law is the fact that it gives the executive and the Minister of Justice, who has political responsibility, a wide-ranging authority over the Council by introducing radical changes to its structure and working procedures and principles.

We think that the SCJP, which is the highest judicial body, should not be under the control of any power including the Ministry of Justice. The indispensable principles of modern pluralistic democracies based on checks and balances, are separation of powers and the rule of law. The "independence and impartiality of the judiciary" is the most fundamental element to put these principles into effect. An independent and impartial judiciary ensures that a state governed by the rule of law on the basis of checks and balances effectively operates and that human rights and freedoms are guaranteed.

The SCJP has been created to uphold the principle of "judicial independence", one of the most important elements of a state governed by the rule of law. In its Report on the Independence of Judges, the Venice Commission states that "it is an appropriate method to safeguard judicial independence for an independent judicial body to play a decisive role on decisions concerning the appointment and careers of judges".

Article 138 of the Constitution states: "Judges shall be independent in the discharge of their duties; they shall pass judgement in accordance with the Constitution, law and justice and their personal convictions. No organ, office, agency or individual may give orders or instructions to courts or judges in connection with the exercise of the judicial power, send them circulars or make recommendations or suggestions." Article 139 of the Constitution states: "Judges and public prosecutors shall not be dismissed, or retired before the age prescribed by the Constitution unless they request it themselves; nor shall they be deprived of their salaries, allowances or other personnel rights even as a result of the abolition of a court or a post."

For judges to be able to give full effect to their independence, "for them to be able to carry out their profession peacefully and free from material or moral pressure, they must above all not be in fear of

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dismissal, unemployment, lack of money, or relocation.” A judge who is afraid that he may be dismissed and become unemployed or may be deprived of a salary or may be appointed to a remote and difficult place for punishment cannot feel independent. That is why the SCJP, the highest judicial body, must not be under the control of any power including the Ministry of Justice.

Judicial bodies under the influence of the executive cannot ensure the independence of the judiciary and they turn into an instrument enabling the executive to control the judiciary. Governments and their ministers of justice can use their powers to punish judges who make decisions contrary to their preferences, and can put pressure on judges and public prosecutors. It is possible to see examples of this in many countries throughout history. Public prosecutors under pressure can render decisions that turn those in the right into the guilty and the guilty into the victim, in breach of justice and law, disregarding the supremacy of the law. In this uncertain picture that will arise, it will not be possible to distinguish the guilty from the innocent and the right from the wrong. There will be doubt concerning whether decisions are “fair” and citizens will feel cheated. In a state governed by the rule of law, the administration has no right to put citizens into such an uncertain situation. In a state where checks and balances effectively work, on the other hand, the individual feels secure and has the necessary faith to seek his rights through legal means. For this reason, law must be kept above political preferences no matter what.

The Referendum of 2010 is Suspended

The structure of the SCJP was changed by the constitutional referendum held on 12 September 2010, where 57.8% of the voters said “yes”. Our preference may have been different from the outcome of the referendum but democracy is a culture of consensus. Regardless of our individual vote, the referendum is a vote to determine the direct will of the population. The Bill on the SCJP, which was one of the most important elements of the 2010 referendum, where the people directly exercised its sovereignty, has passed through the Plenum of the GNAT and become law in a step backward in terms of democracy. We think that suspending the arrangement created by the referendum and quickly adopting the new Bill without consulting civil society, all political parties and different experts from every section and without operating a process of negotiation will lead to controversies from the point of transparent and participatory democracy.

While reforming the SCJP through the constitutional referendum, it was argued that the objective was to ensure democratic legitimacy and a broad-based representation.

- **Before the referendum**, inspections and investigations at the SCJP were carried out with the permission of the Minister. The Inspection Board was affiliated to the Minister of Justice. The President and Deputy Presidents of the Inspection Board were appointed by the Minister.

- **After the referendum**, inspections and investigations took place upon a proposal by the Third Department and “approval” by the Minister. The Inspection Board was affiliated to the SCJP itself. The President and Deputy Presidents of the Inspection Board began to be appointed by the SCJP General Assembly.

- **With the latest change of law**, the powers given to the SCJP have been transferred to the Minister of Justice. The SCJP personnel have been removed and the new personnel appointed by the Minister of Justice. The power to decide inspections and investigations has been transferred to the Minister. The President and Deputy Presidents of the Inspection Board will also be appointed by the Minister of Justice. With arrangement, which involves many breaches of the Constitution, there has been a return to the one-man period in the judiciary.

As the Checks and Balances Network, We Propose the Following Solutions

- Before the end of 2014, a comprehensive judicial reform should be created which does not belong to any faction and which is based on the universal criteria of the rule of law, on the principle of legal decisionmaking.  

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3 “Judge’s Tenure”, Part 21: The Judiciary, Turkish Constitutional Law, Website of Turkish Constitutional Law, Kemal Gözler, http://www.anayasa.gen.tr/yargiorgani.htm

4 Ibid.
security, on the independence of judges and the judge’s tenure, and on the independence of the judiciary from the legislative and the executive.5

- As soon as possible, the process of making a new Constitution should be launched taking the mechanisms of checks and balances as a basis.

- The 23rd chapter of the EU Acquis on the “Judiciary and Fundamental Rights”6 should be opened in line with our final goal of EU membership.7

- Judges and public prosecutors should be separated from each other both institutionally and in terms of physical space.8 This proposal should be consolidated by giving the Ministry of Justice no place on the council of judges in particular and it should be ensured that judges are not linked to the executive.

- There should be a constitutional guarantee for the geographical tenure of judges.9

- To widen the base of the Council and ensure pluralism, some of the SCJP members should be elected by qualified majority in Parliament.10 A committee to be established in Parliament for candidate members should carry out a comprehensive inquiry regarding their professional competence and their commitment to the principles of law. The remaining members should be elected by judges and public prosecutors from among themselves.

- To ensure accountability and legal responsibility, judicial review should be made available against all decisions of the SCJP.

- To ensure and guarantee the rule of law, an Ethics Board should be created for the accountability of judges.

- The SCJP should be independent in the election of its members and in its working procedures. It should have administrative and financial autonomy.

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5 For detailed information about a comprehensive judicial reform as set forth in our report titled “Strengthening Turkey’s System of Checks and Balances through Constitutional Reform”, see http://ipc.sabanciuniv.edu/wp-content/uploads/2012/07/Anayasa-Raporu-denge-denetleme.pdf

6 For detailed information, see http://www.abgs.gov.tr/index.php?p=88&l=1

7 The 23rd chapter on “The Judiciary and Fundamental Rights” attaches particular importance to the establishment of an independent judiciary. The chapter puts emphasis on eliminating external influences on the judiciary, legal guarantees for court trial procedures, the impartiality of court decisions and monitoring the effectiveness and efficiency of the judicial system. For detailed information, see our policy document “We Call for Consensus on a Wide-ranging Judicial Reform” available at http://ipc.sabanciuniv.edu/wp-content/uploads/2012/05/41.pdf

8 Ibid.

9 Gözler, Geographical Tenure: “For the judge to be able to perform his duty in peace of mind, he must have no worries that his place of duty can be changed. Especially in a country such as Turkey where geographical disparities are acute, the possibility that a judge working in a fine city may be appointed by transfer to a bad city can lead to pressure on him. For this reason, the judge’s place of duty should not be changed without his consent so that he may be free from all influence. Just as it is possible for a judge whose political tendency is disliked by the Supreme Council of Judges and Public Prosecutors to be appointed elsewhere by the Council and removed from a particular case, it is also possible to appoint him to a worse place after he passes a judgment in order to put pressure on him or intimidate other judges.”

10 Ibid.
### Change Made by the Law

The scope of the SCJP authority to issue circulars has been narrowed down.

Authority is granted to issue circulars only about recruitment, appointment, transfer, authorization, promotion, disciplinary affairs, inspections, examinations, inquiries and investigations.

The powers of the Minister of Justice as the President of the SCJP have been considerably increased.

The inspectors and the Inspection Board, who have considerable influence on the careers of judges and public prosecutors, are subject to the Minister of Justice, the representative of the executive on the Council.

The Minister of Justice as the President of the SCJP will be able to appoint directly the President and Deputy Presidents of the Inspection Board and the Deputy Secretaries-General, even if not the Secretary-General.

### Evaluations

The authority available under the law to issue circulars relating to the judicial duties of public prosecutors and the administrative duties of judges (art. 4/1-c of Law no. 6087) is terminated. It appears that such authority is reserved for use by the Ministry of Justice in the future.

Following the change, circulars relating to effective investigation, judicial police, corruption, arrest and forcible summons, autopsy, investigation procedures and similar matters will be issued by the Ministry of Justice.

Accordingly, in breach of EU reports, the way is cleared for the power of the Minister of Justice to give orders and instructions to public prosecutors by issuing circulars on judicial matters.

In the Accession Partnership document of 2008, emphasis was put on democracy and the rule of law and it was stated that the SCJP and the inspection system were important from the point of ensuring the independence of the judiciary from other institutions.

In consultative visit reports, it was recommended that the Inspection Board should be affiliated directly to the SCJP rather than the Ministry of Justice. In almost every EU report, the experts stated the criticism that the inspectors, who were in fact judges and public prosecutors, functioned as officers of the Ministry of Justice under the roof of the Ministry.

### Breaches of the Constitution

This arrangement is contrary to the Constitution. In accordance with Articles 140 and 144 of the Constitution, public prosecutors are affiliated to the Ministry of Justice only in administrative terms.

According to Article 159 of the Constitution, the inspectors of the Council have the authority of inspection concerning the judicial duties of public prosecutors and the administrative duties of judges and therefore it is also the inspectors of the Council who inspect whether action is taken in compliance with circulars in this respect.

If the inspection authority belongs to the inspectors of the Council, the authority to issue circulars in these matters must also belong to the Council.

The power to appoint the President and Deputy Presidents of the Inspection Board and the Deputy Secretaries-General, who have an important position in the functioning of the Council, is removed from the General Assembly and transferred to the Minister of Justice, who is the President of the SCJP and the representative of the executive on the Council, and therefore to the government.

The said provision is clearly against the principles of separation of powers, the independence of courts and the judge’s tenure. The powers belonging to the General Assembly are transferred to the executive.
The Minister of Justice as the President of the SCJP is granted the powers:
- To perform the duties given in this Law in relation to criminal investigations and disciplinary investigations and prosecutions involving members of the Council;
- Upon a proposal by the relevant department, to approve inspections, inquiries, examinations and investigations involving judges and public prosecutors and to approve decisions that there is no need to conduct such examinations and investigations.
- To determine the days of meeting of the General Assembly; and
- To demand changes to the agenda in line with the conditions specified in the Law.

As a matter of fact, in response to those criticisms, the Inspection Board was subjected to the Council and the rule was introduced that the inspectors on the Board should be elected by the Council.

However, the latest provisions made concerning the Secretariat and the Inspection Board are a regression from the gains obtained in the process of alignment with the EU acquis.

While there is already criticism of the power of the Minister of Justice to grant approval concerning examinations and investigations or, in other words, of his power of veto, the Third Department is almost deprived of any function as a result of giving him also the power of approval concerning decisions that there is no need to start examinations and investigations.

These provisions are also clearly against international documents (Venice Criteria, EU Progress Reports etc.).

These powers of the Minister of Justice concerning disciplinary and criminal investigations against members of the Council represent a clear intervention in the independence of the Council, which the Constitution requires to function in accordance with the principles of the independence of courts and the judge's tenure.

This power is a significant obstacle to the ability of Council members to work and make decisions freely and independently of the executive.

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<th>The powers of the SCJP General Assembly have been narrowed down on account of the powers granted to the Minister of Justice as the president of the Council.</th>
<th>Since certain matters which are stated above and included within the competence of the General Assembly are now left to the Minister of Justice, the sphere of the General Assembly is restricted.</th>
<th>These provisions are clearly in conflict with the principles of separation of powers, the independence of courts and the judge's tenure.</th>
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<td>The power of the Minister of Justice as the President of the SCJP is increased concerning the composition of the departments, the election of the heads of department and their duties and authorities.</td>
<td>In this way, the executive is enabled to appoint any member it wishes in any manner it wishes to departments it considers important, in such a way as to obtain the absolute majority.</td>
<td>This is against the requirement set forth in Article 159 of the Constitution that the Council should work in accordance with the principles of the independence of courts and the judge's tenure.</td>
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The power to determine in which department the members will serve as principal and complementary members according to the principles indicated in the Law is removed from the General Assembly and left to the executive.

The power given to Parliament in the framework of these principles in the Constitution is a limited power. Giving the Minister of Justice such an extensive power in a manner that will set these principles aside enables the formation of a structure where the Minister can direct the composition of the departments and the election of
<table>
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<th><strong>Minister of Justice.</strong></th>
<th><strong>The rule is introduced that the division of work prepared by the Secretary-General will be approved by the Minister of Justice as the president of the SCJP.</strong></th>
<th><strong>their presidents as he wishes.</strong></th>
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<td>This situation exposes the authority of the Secretariat-General, which is a service unit of the Council and performs the secretarial work of the departments and of the General Assembly, to intervention and direction by the executive and represents an indirect intervention in the independent functioning of the Council.</td>
<td>The direct intervention by the President in the division of work is against the principles of the independence of courts and the judge's tenure, which form the essence of Article 159 of the Constitution to govern the operation of the Council.</td>
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<td><strong>The power to appoint the Deputy Secretaries-General is removed from the General Assembly and left to the Minister of Justice.</strong></td>
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<td>The power to appoint the Deputy Secretaries-General, who have an important position in the functioning of the Council, is removed from the General Assembly and given over to the Minister of Justice, who is the representative of the executive on the Council and who is the president of the SCJP, and therefore to the government.</td>
<td>The said provision is clearly against the principles of separation of powers, the independence of courts and the judge's tenure. A power belonging to the General Assembly is transferred to the executive.</td>
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<td>This situation has the character of an indirect intervention by the executive in the duties of the Council, which is required by the Constitution to function in accordance with the principles of the independence of courts and the judge's tenure.</td>
<td>Article 159 of the Constitution shows that the Council has the authority to appoint the judges and public prosecutors to be temporarily or permanently employed on the Council after receiving their consent. Since the Deputy Secretaries-General must also be judges and public prosecutors, the authority to appoint them also belongs to the Council. Therefore, it is against the Constitution for the Minister of Justice in his capacity as President to directly appoint the Deputy Secretaries-General to be employed on the Council.</td>
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<td>The procedure for the appointment of investigation judges and inspectors is changed and the appointment procedure, which is included directly within the authority of the General Assembly according to the Constitution without any restriction, is restricted in a manner against the Constitution. The power is introduced for appointment by the General Assembly to each vacant position needed from among twice as many candidates proposed by the First Department.</td>
<td>This power, granted by Article 159 of the Constitution to the Council without any condition or limitation, is restricted by the Law.</td>
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<td>In this way, a restriction is imposed by the Law, in breach of the Constitution, on the scope of choice available to the General Assembly, which is required to make an election from among candidates nominated by the First Department, which in turn is created by the Minister of Justice, who is influential in the formation of the Departments and in the determination of their members.</td>
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<td>The Minister of Justice as the President of the SCJP is placed in an influential position concerning the appointment of personnel.</td>
<td>The power to appoint the personnel of the Council is removed from the Deputy President and the Secretariat-General and given over to the President. Considering the importance and position of the personnel in the functioning of the Council, the possibility is created for a personnel structure open to political direction and to the influence of the executive. For the Council to be able to work in accordance with the principles of the independence of courts and the judge’s tenure as stated in the first paragraph of Article 159 of the Constitution, its organization chart should be formed accordingly. Leaving the power to appoint personnel, which was previously within the competence of a structure formed under the Council’s own democratic functioning, directly to the Minister of Justice in his capacity as President is against the constitutional principle that the Council must operate independently.</td>
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<td>An important part of the authorities and duties of the Inspection Board is left to the Minister of Justice as the President of the SCJP.</td>
<td>The inspectors and the Inspection Board, who have an important influence on the careers of judges and public prosecutors, are directly subjected to the Minister of Justice as the President of the SCJP, who is the representative of the executive on the Council. It is provided that the Inspection Board, who until now functioned under the supervision of the Head of the Third Department, shall now function under the supervision of the President of the Council, that is, the Minister of Justice and that the President of the Inspection Board shall be accountable to the President in the discharge of his duties. It is also provided that the President and Deputy Presidents of the Inspection Board shall be appointed by the Minister of Justice in his capacity as the President of the Council from among first-class judges and public prosecutors after receiving their consent. Because the inspectors on the Board are accountable to the President of the Inspection Board, the Inspection Board functions under the supervision of the Minister in the capacity of the President of Justice. Giving the power to appoint the President and Deputy Presidents of the Inspection Board, which until now belonged to the General Assembly, to the Minister, who is a political figure, is clearly against the principles of separation of powers, the independence of the judiciary and the judge’s tenure, considering the sensitive duty performed by this Board on members of the judiciary. The fact that the President, who is a political actor, rather than the General Assembly will play an active role in the election of the Inspection Board President and Deputy Presidents and that the Inspection Board will operate under the control and supervision of the Minister in his capacity as President creates the possibility for an unacceptable political intervention by the executive in the judiciary and damages the judge’s tenure. In this regard, it will lead to the undoing of the current structure, which was created in line with criticisms expressed in EU progress reports and consultative visit reports. At the same time, it marks a regression from the gains achieved in the process of alignment with the EU acquis.</td>
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While maintaining the rule that votes are cast for as many candidates as the total number of principal and substitute members for judges and public prosecutors in the general and administrative courts of the first instance, it is required in the elections of Council membership to be held for the next 5 years (only the next two election terms) that candidates have worked for at least 20 years.

For Council membership, the Constitution requires the condition of "being first-class and not having ceased to be eligible for placement in the first class". Law no. 2802 specifies what this condition means. Under normal conditions, a person who has entered the profession of judge and public prosecutor can satisfy that requirement after 13 years. However, another 7 years are now added to this period and it is extended to 20 years. As a result, thousands of judges and public prosecutors who are currently eligible for SCJP membership are deprived of their right to be elected.

Introducing the requirement of having worked as a judge or public prosecutor for 20 years as a minimum, a criterion not included in the Constitution, is a breach of Articles 6/3 and 159 of the Constitution.

Article 67 of the Constitution states in its final paragraph that "changes made to the laws of election shall not be applied in elections to be held within one year from the effective date of such changes." While this change must therefore not be applied for the SCJP elections to be held in the course of this year, the 5-year period is stipulated to ensure that the change in question can be applied in the SCJP elections to be held in 2014. This is clearly against Article 67 of the Constitution.
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<th>Changes are made in the procedure of disciplinary investigations and prosecutions involving members of the Council, and the Minister of Justice is given more influence concerning disciplinary investigations.</th>
<th>The Minister of Justice in his capacity as President almost takes on the role of public prosecutor in disciplinary investigations. The General Assembly will conduct the investigation procedures on the file submitted to it by the Minister of Justice in his capacity as President. In other words, it takes on the role of a court. With this provision, the members of the Council will not be able to act independently of the executive and will become vulnerable to all types of pressure and intervention that may originate from the executive.</th>
<th>This is clearly against the rule of law, the principle of separation of powers, and Article 159 of the Constitution, which provides that the members of the SCJP shall function in conformity with the independence of courts and the judge’s tenure.</th>
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<td>Changes are made in the procedure of investigations and prosecutions for judicial offences committed by members of the Council, and the Minister of Justice as the President of the SCJP is given more influence regarding permission for such investigations.</td>
<td>The Minister of Justice in his capacity as President almost takes on the role of public prosecutor in criminal investigations. The General Assembly will conduct the investigation procedures on the file submitted to it by the Minister of Justice in his capacity as President. In other words, it takes on the role of a court. With the provision, the members of the Council will not be able to act independently of the executive and will become vulnerable to all types of pressure and intervention that may originate from the executive.</td>
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<td>The appointments of all personnel serving on the Council except the members of the Council have been terminated.</td>
<td>The Minister is a political figure. In a situation where all appointments are made by the Minister, the principles of separation of powers, the independence of courts and the judge’s tenure, which are indispensable elements of the rule of law, cannot be effective. Therefore, removing the personnel with the judge’s tenure and then making the new appointments subject to the will of the Minister, who is a political figure, means a very clear intervention by the executive in the</td>
<td>A law terminating the appointments of these employees on the Council, which is created under Article 159 of the Constitution as the institutional guarantee for the independence of the judiciary and which must be established and function according to the independence of courts and the judge’s tenure, is clearly against the principles of separation of powers, judicial independence and the judge’s tenure. In addition, since the persons whose appointments are terminated by a</td>
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<td>The rule is introduced for the training and other assignments abroad to be made by the Ministry, and the authority of the Supreme Council of Judges and Public Prosecutors in this respect is abolished.</td>
<td>The SCJP is excluded from such training and other assignments of judges and public prosecutors, thereby allowing political influence and intervention by the executive in this respect.</td>
<td>Legislative act do not have the right to bring a lawsuit against such act, freedom to seek redress is eliminated and judicial review prevented. In this respect, too, there is a breach of the Constitution.</td>
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<td>In-service training must be organized considering the principles of the independence of courts and the judge’s tenure.</td>
<td>In-service training is both a right and a duty for judges and public prosecutors. It is directly related to the performance of judicial functions. The Council is the institutional guarantee for judicial independence as required by the Constitution.</td>
<td>Given the change made to the Law on the Academy, which has ended its autonomy and placed the executive in an influential position, the fact that the Academy becomes the main authority with respect to in-service training is in conflict with and a breach of the said constitutional principles.</td>
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<td>It is provided that the in-service training of judges and public prosecutors will be arranged by the Justice Academy of Turkey rather than the Supreme Council of Judges and Public Prosecutors and that the power to issue regulations on such training will be given to the Justice Academy of Turkey rather than the Supreme Council of Judges and Public Prosecutors.</td>
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