



CCJE-BU(2016)3

Strasbourg, 5 July 2016

**BUREAU  
OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES  
(CCJE-BU)**

Comments by the CCJE Bureau

following the request of the Association of European Administrative Judges (AEAJ) to provide opinion about certain aspects of the legislation in Turkey concerning judges and prosecutors

## **I. The request**

By letter of 25 March 2016, the Association of European Administrative Judges (AEAJ) informed the CCJE about certain aspects of the practice of the Turkish High Council of Judges and Prosecutors as regards the transfer of judges and prosecutors. The AEAJ requested the opinion of the CCJE with regard to Article 47 of the Law No. 2802 on Judges and Public Prosecutors. In particular, the AEAJ requested the opinion of the CCJE on whether Article 47 of the law and the application of this provision, as seen in the practice of the Turkish High Council of Judges and Prosecutors, are in line with European standards.

AEAJ reported that several claims regarding the transfer of judges against their will had been put forward to AEAJ, and reminded that also the CCJE in its Situation Report on the judiciary and judges in Council of Europe member states CCJE 2015 (document CCJE(2015)3) had mentioned similar incidents. Several claims had indicated that such transfers had been reactions to certain judicial decisions made by the judges concerned. A number of administrative judges had been transferred to tax courts. Fifty-five judges or prosecutors claimed that they had been transferred more than once.

AEAJ referred to a survey among judges and prosecutors, which was carried out from July till November 2015, on the numbers of involuntary transfers of judges and prosecutors in 2014 and 2015 in Turkey. Attached to the letter was a summary of the results of this survey. Out of the 1750 judges and prosecutors who participated in the survey, 886 had been transferred during January 2014 and June 2015 at least once. Of these, 32% were happy with the transfer, while 68% were not.

AEAJ stated that between January 2014 and October 2015, 6075 civil and criminal judges and 709 administrative judges had been transferred by decrees of the High Council of Judges and Prosecutors. AEAJ claims that 47% of these transfers were without the consent of the judges and prosecutors concerned, without any previous disciplinary procedure and without taking into account that the judge or prosecutor had not finished the stipulated time of a posting to the respective region.

AEAJ underlined that the decrees (especially the decree dated 12.6.2015) were not reasoned in a comprehensible or an individual manner, that they were adopted only a few days before the transfer should take place, and that they provided a short term for remedies.

As a concrete example, the AEAJ referred to the case of prosecutor Menderes Arican, who by a decree of the High Council of Judges and Prosecutors of 19 February 2016 was transferred to Malatya province for a period of four months, which is 1300 km from his former working place in Canakkale. AEAJ considers that the decree was adopted by a chamber which had no jurisdiction, that it is not sufficiently reasoned and that it is not in line with Article 47 of the law on Judges and Public Prosecutors. The original decree was sent to the CCJE, and the AEAJ provided an internet link to an article by Cihan News Agency, in which a connection is alleged between recent critical comments by prosecutor Menderes Arican in respect of the Minister of Justice and others and his transfer.

## **II. The procedure of the assessment**

According to its terms of reference, one of the tasks of the CCJE is to provide targeted cooperation, inter alia, at the request of CCJE members, judicial bodies or relevant associations of judges, to enable States to comply with Council of Europe standards concerning judges. The aforementioned request of the AEAJ falls within the terms of

reference of the CCJE as the AEAJ is one of the associations of judges in Europe, and the CCJE is entitled to answer the questions raised by the association.

Following its general policy, the Bureau of the CCJE has invited the CCJE member from the member states concerned by a communication, in this case Turkey, to provide the Bureau with his views and with any additional information which may be deemed to be helpful to consider the issue raised. For this purpose, the Bureau has communicated the letter of the AEAJ and its attachments to the Turkish member of the CCJE.

### **III. The response**

The CCJE received a response of the Turkish member of the CCJE, also expressing the view of the Turkish High Council of Judges and Prosecutors. The full text of the response can be found in the Annex to this paper.

In the response, it is asserted that the results of the survey, which is the basis of the argumentation of AEAJ, are not trustworthy, that the conclusions are wrong and without any scientific value, that the survey was carried out in the framework of an organisation composed of judges, prosecutors, lawyers, academicians and other persons, and that nobody knows if the answers really were given by judges or prosecutors.

The Turkish member of the CCJE and the High Council of Judges and Prosecutors strongly oppose the accusation forwarded by AEAJ that transfers are misused to punish judges and prosecutors for their decisions. From January 2014 to June 2015, only 15.51% of the transferred judges and prosecutors within the civil judiciary were transferred without their consent. With regard to administrative judges, 28.61% of those who were transferred by the decrees were transferred without their consent. Regarding the civil judiciary, 3.87% of those transferred were transferred due to their status of registry (performance), while 3.14% of the administrative judges transferred were transferred for the same reason. With respect to the civil judiciary, 12.38% of those transferred were transferred due to completion of their duty in the area, while 7.56% of the administrative judges transferred were transferred for the same reason. These transfers were made in consideration of the needs of the organisation, and similar ratios of judges transferred are observed in the decrees of the previous High Councils of Judges and Prosecutors.

The Turkish member of the CCJE and the High Council of Judges and Prosecutors reported that 79 administrative judges were transferred from regional administrative courts or administrative courts to tax courts. Of these, 44 were transferred without their consent, but only three of them sought to challenge the decision. Among the judges and prosecutors transferred by the decrees after December 2013, only 2.3% of them were transferred to a place that was not included in their letter of appointment. The equivalent ratio for administrative judges and prosecutors transferred, was 2.8%. All these transfers were made when the needs of the judiciary made it obligatory. This information was substantiated by statistical material that complemented the material submitted to the CCJE in response to the CCJE/CCPE Report of 2016 entitled "Challenges for judicial independence and impartiality in the member states of the Council of Europe" (document SG/Inf(2016)3rev).

The Turkish member of the CCJE and the High Council of Judges and Prosecutors did not agree that its decrees had no justification. In the decrees issued by the previous Councils, the announcement of the grounds as to why judges and prosecutors who were subject to disciplinary sanctions were transferred had tarnished their reputation among their colleagues. Therefore this exercise had been abandoned by the new High Council of Judges and Prosecutors. However, grounds for the transfer were immediately provided to the person concerned privately upon request.

The transfer of prosecutor Menderes Arican was made due to the status of work and personnel pursuant to the provisions of Article 47 of the Law 2802 on Judges and Public Prosecutors, and had nothing to do with a post he shared on social media.

#### **IV. The assessed facts**

The Bureau of the CCJE is in no position to examine the factual basis neither of the survey referred to by the AEAJ, nor of the statistics referred to by the Turkish High Council of Judges and Prosecutors. However, both sources makes it evident that Turkish judges have been transferred to another judicial office without consenting to it in situations where the transfer is neither a result of disciplinary proceedings, nor due to the judges' performance of their duties. The transfers have been implemented prior to expiry of the statutory term of office in the respective region. It is also evident that some judges were transferred more than once in the period between January 2014 and June 2015.

The Bureau of the CCJE was provided with the decrees regarding the transfer of civil and criminal judges and prosecutors, and of administrative judges, of 12 June 2015, and with an announcement to the Chief Public Prosecutor of the Province of Canakkale regarding the decree concerning the transfer of prosecutor Menderes Arican of 19 February 2016.

The decree of 12 June 2015 announced that the High Council of Judges and Prosecutors had decided that on 22 June 2015 the judges listed would be transferred to the new posts indicated in the list, and that objections had to be raised at latest by 19 June 2015. Attached to the decree was a list of names indicating the individuals' current and future court or office. The decree is not motivated.

The announcement of the transfer of prosecutor Mendires Arican of 19 February 2016 refers to Article 47 of the Law 2802 on Judges and Public Prosecutors, to the current workload and personnel of the courthouse in Canakkale, without specifying them, and orders the transfer of prosecutor Mendires Arican to the province of Malatya for a period of four months, referring to the possibility of appealing the decision within ten days. No further reasoning is given.

#### **V. The legal framework**

It is for the national authorities of Turkey to judge the correctness, the legality and the constitutionality of the decisions in question made by the Turkish High Council of Judges and Prosecutors. The Bureau of the CCJE is not able or authorised to assess these aspects of the decisions, nor is it able to assess the constitutionality of the legal framework in question. The assessment of the Bureau of the CCJE concentrates on whether the decisions and the legal regulations are in conformity with international and European standards for judicial independence. In this respect, it is necessary to examine the legal framework regarding the transfer of judges in Turkey.

##### **A) The Constitution:**

Article 138 of the Constitution guarantees the independence of the courts and judges.

Article 139 dealing with security of tenure of judges and public prosecutors states:

*“Article 139: Judges and public prosecutors shall not be dismissed, or unless they request, shall not be retired before the age prescribed by the Constitution; nor shall they be deprived of their salaries, allowances or other rights relating to their status, even as a result of the abolition of a court or a post.*

*Exceptions indicated in law relating to those convicted for an offence requiring dismissal from the profession, those who are definitely established as unable to perform their duties because of ill-health, or those determined as unsuitable to remain in the profession, are reserved.”*

Article 140, which deals with judges and prosecutors, delegates in its paragraph 4 among other aspects “*their promotion, temporary or permanent change in their posts or place of duties, the initiation of disciplinary proceedings against them and the imposition of disciplinary penalties...*” to the ordinary laws, which should regulate these issues “*in accordance with the independence of the courts and the security of tenure of judges*”.

Article 159, which regulates the High Council of Judges and Prosecutors, enumerates the jurisdiction of this body in its paragraphs 6 and 7. Among other tasks these are “*transfer to other posts, the delegation of temporary powers, promotion and promotion to the first category, decisions concerning those whose continuation in the profession is found to be unsuitable and the imposition of disciplinary penalties and removal from office*”

B) The Law on Judges and Prosecutors:

Following Article 140 of the Constitution, the parliament adopted the Law on Judges and Prosecutors (Law No 2802). Some of the relevant provisions are:

***Appointment through displacement:***

*Article 35: Judges and prosecutors shall be appointed by transfer to equal or higher positions in the same or other locations in accordance with the Regulation on Appointments and Transfers issued by the High Council of Judges and Prosecutors and they shall retain their acquired salary entitlements and cadre degrees.*

*Locations with civil and administrative judiciary organisation shall be divided into zones in respect of geographical and economic conditions; social, healthcare and cultural development level, level of deprivation and transportation and other means, and the term of duty in each zone shall be determined.*

*(Amended third paragraph: 22/12/2005 - 5435/Art. 17) In the civil judiciary, any location with a regional court of appeals shall be deemed superior to other locations in the same zone in respect of the service location; any location with a heavy criminal court shall be deemed superior to other locations with civil courts of first instance in the same zone in respect of the service location.*

*In the administrative judiciary, a regional administrative court shall be deemed superior to the administrative and tax courts in the same zone in respect of service location.*

*Judges and prosecutors who have been found by documentary proof to fail their duties and act contrary to the requirements of the profession in a specific zone may be transferred to another zone or a location equal to the current zone regardless of seniority or whether the service term in the current zone has been completed.*

*The requests of displacement by judges and prosecutors for due to personal, family, health and other substantiated reasons as indicated in the Regulation on Appointments and Transfers may be granted.*

***Assignment by temporary authorisation:***

Article 47 *The High Council of Judges and Prosecutors has the power to assign judges and prosecutors by temporary authorisation in a different jurisdiction other than their permanent place of duty or in the same place as may be required by the service. No distinction between judges and prosecutors shall be observed in the case of assignment by temporary authorisation in a location other the permanent place of duty.*

*Judges and prosecutors assigned by temporary authorisation in places other than their permanent jurisdiction may not be made to work there for more than four months. However, this period may be extended for two months upon their request or as may be required by the service.*

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**Displacement as a disciplinary penalty:**

Article 68 *Displacement means changing the place of duty of a judge or prosecutor by assigning to a place in a lower zone where s/he will have to serve the minimal length of service in that place.*

*The penalty of displacement shall be imposed when a judge or prosecutor:*

- a) impairs the honour and respectability of the profession or loses personal dignity and reputation due to inappropriate and improper acts and relations,*
- b) creates the impression, by way of acts or conduct, that s/he fails to perform duties properly and impartially,*
- c) creates the impression that their work is influenced by others or personal emotions,*
- d) disrupts work by quarrelling with and acting cantankerously towards colleagues because of his/her own faults,*
- e) creates the impression of involvement in bribery and corruption even if it is not established by substantive facts and evidence,*
- f) requests gifts directly or through intermediaries, receive gifts for obtaining a benefit or borrow from clients even if not in the course of duty.*

**Imposing a disciplinary penalty of a lower or higher degree:**

Article 70 *A higher degree of disciplinary penalty shall be imposed if an act or conduct resulting in a disciplinary penalty that may be removed from the credentials of the concerned was repeated within the periods set out in Article 75 on removal of penalties from the credentials or if several acts or conducts calling for the disciplinary penalty were committed.*

*A disciplinary penalty of a lower degree may be imposed on a judge or prosecutor who has committed a disciplinary offense for the first time- with the exception of an offense which requires dismissal, who had a positive track record or excellent credentials and been granted with a privileged or preferential promotion.*

**Right of defence:**

Article 71 *No disciplinary penalty may be imposed on judges and prosecutors without first taking their defence.*

*A judge or prosecutor who fails to present defence within the period of at least three days as established by the investigator or High Council of Judges and Prosecutors shall be deemed to have waived the right of defence.*

## C) The bylaws

On the basis of Article 35 of Law 2802 on Judges and Prosecutors, the High Council of Judges and Prosecutors adopted a Bylaw on the Appointment and Transfer of Administrative Judges and Prosecutors and a Bylaw on the Appointment and Transfer of Judges and Prosecutors, which include the following relevant provisions:

### C1) Bylaw on the Appointment and Transfer of Administrative Judges and Prosecutors:

#### Regions: Article 2

*As indicated in the attached list, the locations of District Administrative Courts have been divided into three regions in consideration of the following: economic and geographic conditions, medical, social and cultural conditions; degree of deprivation, development and transportation; the distance from the important centres; and other conditions*

#### Term of Office in Each Region: Article 3

*Apart from the exceptional provisions in these regulations, the minimum term of office in each region is as follows: Five years in the third region; seven years in the second region; ten years in the first region.*

#### The Principles of Appointment: Article 4/2

*...Apart from the exceptions in these regulations, judges and prosecutors who have not completed their minimum terms of office may neither demand to be appointed nor be appointed as ex officio.*

*Upon their consent, those who have completed two years in office in any region may be appointed to a location of an equal region or a lower region, or may be appointed to a superior position in a location of equal region, as ex officio*

### C2) Bylaw on Appointment and Transfer of Judges and Prosecutors:

Corresponding provisions are included in the Bylaw on Appointment and Transfer of Judges and Prosecutors:

*Article 2 of the Bylaw: Locations with civil and administrative judiciary organisation are divided into five zones in respect of geographical and economic conditions, social, healthcare and cultural development level, level of deprivation and transportation and other means.*

- a. First Zones (As an example Ankara, İstanbul, İzmir, Antalya, which are the largest and best cities)*
- b. Second Zones (As an example Erzincan, Marmaris, which are medium size cities)*
- c. Third Zones (smaller than the medium size cities)*
- d. Forth Zones (in between third zones and fifth zone)*
- e. Fifth Zones (poor and small cities)*

*Article 3 of the Bylaw: the term of duty in each zone is determined as follows.*

- a. The term of the duty in the first Zones is 7 years*
- b. The term of the duty in the second Zones is 5 years*
- c. The term of the duty in the third Zones is 3 years*
- d. The term of the duty in the fourth Zones is 3 years*
- e. The term of the duty in the fifth Zones is 2 years*

In general new judges and prosecutors start to work in the fifth zones and go to zones 4 and 3 after completing the term of duty in each zone. In some circumstances, the needs of the judiciary give a mandate to the High Council to post new judges and prosecutors in the lower numbered zones. But each judge or prosecutors must work in each zone respectively.

Articles 8 to 12 of the Bylaw deal with exceptions which give a right to judges and prosecutors, who have some personal, family, health, education and other substantiated reasons to do so, to request from the Council to be appointed/transferred to another city or to stay longer in the same city.

## **VI. The European and international standards**

### **A) Standards regarding transfer of judges:**

Judicial independence is a fundamental prerequisite for the very existence of the Rule of Law (CCJE, Magna Carta of Judges, para 1). A fair trial by an independent and impartial judge in the determination of his/her civil rights and obligations or of any criminal charge against him/her is guaranteed everybody by the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6). This is also expressed in the UN Basic Principles on the Independence of the Judiciary.

Irremovability of judges is a key element of their independence (Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency and responsibilities (paragraph 49), hereafter referred to as Recommendation CM/Rec(2010)12). This means that *“a judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system”* (Recommendation CM/Rec 2010/12, paragraph 52). This echoes Opinion No. 1, paragraph 60, of the CCJE<sup>1</sup>.

The European Charter on the Statute for Judges of 1998 states that *“a judge holding office at a court may not in principle be appointed to another judicial office or assigned elsewhere, even by way of promotion, without having freely consented thereto”*(para. 3.4).

The European Charter clearly enumerates the only possible exceptions, which are:

- a) *“where transfer is provided for and has been pronounced by way of disciplinary sanction”*
- b) *“in the case of a lawful alteration of the court system”* and
- c) *“in the case of a temporary assignment to reinforce a neighbouring court, the maximum duration of such assignment being strictly limited by the statute.”*

### **B) Standards regarding disciplinary procedures:**

Disciplinary sanctions against judges can only be imposed following disciplinary proceedings respecting all requirements of a fair trial and providing the judge with the right to challenge the decision and sanction (Recommendation CM/Rec 2010/12, paragraph 69). Disciplinary liability should be exercised in line with section B 4) c. of Opinion No 3 of the CCJE on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality.

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<sup>1</sup> See the CCJE Opinion No. 1(2001) on standards concerning the independence of the judiciary and the irremovability of judges.

C) Standards regarding the work of Councils for the Judiciary:

In its Opinion No. 10<sup>2</sup>, the CCJE defines in paragraph 8 the general mission of such a Council: it *“is intended to safeguard both the independence of the judicial system and the independence of individual judges. The existence of independent and impartial courts is a structural requirement of a state governed by the rule of law”*.

Recommendation CM/Rec 2010/12 repeats this overall task in para 26. In para 28 and 29 this Recommendation clearly requests:

*“28. Councils for the judiciary should demonstrate the highest degree of transparency towards judges and society by developing pre-established procedures and reasoned decisions.*

*29. In exercising their functions, councils for the judiciary should not interfere with the independence of individual judges”*.

The CCJE Opinion No 10 contains additional standards regarding the work of Councils for the Judiciary.

## **VII. Assessment**

A) Assessment of the legal framework:

- 1.) Irremovability is a key element of the independence of judges. Exceptions must be limited. Only three exceptions are accepted within the relevant European standards and are set out above.
- 2.) According to international standards, the independence of the judiciary and of judges should be enshrined in the constitution or at the highest possible level of law. The principle of judicial independence and the irremovability of judges must not be weakened or undermined by regulations at a lower level of law. Therefore, exceptions from the principle of irremovability must be regulated at a sufficiently high level of law.

The Turkish Constitution delegates the regulations regarding transfer of judges to the ordinary laws (Art. 140). Law No 2802 on Judges and Prosecutors is itself very general and leaves an important part of the regulations to Bylaws issued by the High Council of Judges and Prosecutors. Such delegation of authority may pave the way for regulations allowing more extensive transfer of judges, with unclear limitations and with extensive discretionary powers left to the Judicial Council.

Regarding the current Turkish regulations in this respect, the Bureau of the CCJE is of the opinion that much more should have been determined in the law itself. This concerns in particular the definition of the zones, the minimum terms of office in the various zones, the indicators for a situation that might justify a temporary assignment and the use of replacement as a disciplinary sanction. In addition, the possible exceptions to the principle of irremovability should have been elaborated in more detail in the law itself.

As mentioned, the Bureau of the CCJE is not in a position to assess the constitutionality of the laws in question. However, it seems that the framers of the Turkish Constitution

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<sup>2</sup> See the CCJE Opinion No. 10(2007) on the Council for the Judiciary at the service of society.

were aware of the risk that regulations adopted by ordinary laws may jeopardize the independence of judges and the judiciary. According to Article 140 of the Constitution, the ordinary laws aiming at regulating, inter alia, the transfer of judges, must do so “*in accordance with the independence of the courts and the security of tenure of judges*”.

- 3.) A system that allows the governing bodies of the judiciary to transfer judges and prosecutors several times during their career to another judicial office without their consent is not in accordance with international standards for judicial independence. It is argued that such a system is necessary due to the fact that judges and prosecutors would not volunteer for a post in the regions currently classified as zone 4 or 5. The Bureau of the CCJE does not contest that some geographical areas may be less attractive than others with regard to the recruitment of judges to courts situated in these areas. However, this is the situation also in other member states of the Council of Europe. The Bureau of the CCJE is of the opinion that these challenges must be resolved first by other means than the forced transfer of judges.

Even if the Turkish concept is accepted as a necessary additional exception to the principle of irremovability of judges, the conditions for such transfers of judges must be defined clearly and exhaustively in advance, with only limited discretionary powers left to the deciding body.

In any case, the Bureau of the CCJE considers the existing Turkish regulations in this respect to be too far-reaching as they allow for transfers without the consent of the judge in question to any jurisdiction in the country and to different types of courts and offices.

The lack of clear and exhaustively predetermined regulations for transfers, in conjunction with the fact that the law enumerates a variety of possible exceptions from transfers (such as personal, family and other "substantiated" reasons), leave the deciding body with such extensive discretionary powers that it may endanger the independence of judges.

- 4.) European standards on judicial independence acknowledge temporary assignments of judges to neighbouring courts in order to help to overcome problems there temporarily, provided that the maximum duration of such assignment is strictly limited by law (statute). Paragraph 47 of the Turkish Law on Judges and Prosecutors is in conflict with these standards because it does not limit the assignment to neighbouring courts.

B) Assessment of the Decree of 12 June 2015:

- 1.) The Bureau of the CCJE is neither able nor authorised to determine whether the decree of 12 June 2015 ordering the transfer of civil and criminal judges, prosecutors and administrative judges, is legally correct as far as the merits of the decision are concerned.
- 2.) Decisions of the councils for the judiciary or similar bodies as regards mobility of judges should contain an explanation of their grounds subject to the possibility of a judicial review (CCJE Opinion No 10<sup>3</sup>, paragraph 39). The decree of 12 June 2015 is not motivated. As described above, it contains a general introduction which refers to legal provisions and the concrete dates regarding the transfer and the period of time within which objections may be raised, which follows the law, and two attachments listing the judges and prosecutors concerned and their future posts. It is possible to analyse whether the transfer of the respective judge or prosecutor entailed a better or

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<sup>3</sup> See the CCJE Opinion No. 10(2007) on the Council for the Judiciary at the service of society.

less advantageous new zone or post, but the reasons for the transfers cannot be identified, nor why the concrete post was chosen. There is no information with regard to the judge's possible consent to the transfer. According to European standards on judicial independence, and as a fundamental principle of the rule of law, it is essential that decisions of a council for the judiciary in respect of transfers of judges are motivated and transparent. Apart from the fact that this is a self-evident legal requirement, it is a precondition for building trust in the council and in the judiciary at large.

- 3.) According to the Turkish High Council of Judges and Prosecutors, the announcement of the grounds as to why judges and prosecutors who are subject to disciplinary sanctions are transferred, may tarnish their reputation among their colleagues. For this reason, this practice has been abandoned by the new High Council of Judges and Prosecutors. However, grounds for the transfer will be provided to the person concerned privately upon request.

Firstly, this practice raises the question whether the judge in question, without delay and at the initiative of the Council, should be provided with the reasons for the transfer. Secondly, the question arises whether these decisions should be made public or not.

Even though grounds for the transfer will be provided to the judge concerned upon request, the Bureau of the CCJE finds this practice not to be in accordance with international standards for judicial independence. As mentioned, decisions of councils for the judiciary on mobility of judges should contain an explanation of their grounds, subject to the possibility of a judicial review (CCJE Opinion No 10<sup>4</sup>, paragraph 39). Therefore, the judge in question should, without delay and at the initiative of the Council, be provided with the reasons for transfer. Providing reasoning only upon request reduces the possibilities for the judge or prosecutor concerned to prepare his or her appeal.

As to the publication of the decisions, the Bureau of the CCJE reiterates the position of the CCJE in its Opinion No 10, paragraph 95, on decisions following disciplinary proceedings: when a council for the judiciary has disciplinary powers, that council should consider the publication of these decisions in order to inform, not only the whole of the judiciary, but also the general public of the way in which proceedings have been conducted. The Bureau of the CCJE takes the same position with regard to decisions concerning the transfer of judges, regardless of whether the decisions are based on disciplinary grounds or other reasons. It may well be of considerable importance for a judge to be able to compare one's own transfer with the transfer of colleagues, in order to, as the case may be, prove non-discrimination, or to be reassured of the equal application of the rules, etc.

In any case, in order to safeguard procedural fairness in disciplinary proceedings, such proceedings against a judge should be kept strictly separate from cases of transfer based on other grounds.

- 4.) Each transfer of a judge infringes the right of the parties of a case not to be deprived of their natural judge. Therefore, removal of a judge or a prosecutor from a case should happen as rarely as possible.

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<sup>4</sup> See the CCJE Opinion No. 10(2007) on the Council for the Judiciary at the service of society.

C) Assessment of the Announcement of the transfer of Prosecutor Mendires Arican of 19 February 2016

- 1.) The transfer pertains to prosecutor Mendires Arican. Article 139 and 140 of the Constitution apply to judges and prosecutors in the same way. So does Article 47 of the Law on Judges and Prosecutors. The considerations above regarding judges are therefore equally relevant for prosecutors, despite the fact that international standards are not exactly the same.
- 2.) The AEAJ provided the CCJE with a document announcing the transfer of Prosecutor Mendires Arican addressed to the Chief Public Prosecutor of the Province of Cannakale, which is the Province where prosecutor Mendires Arican held office prior to the transfer. The Bureau of the CCJE does not know whether this was the only document issued by the High Council, or if the underlying decree was reasoned and sent to the prosecutor concerned, or whether it was published. The only reasoning included in the document forwarded to the CCJE, is *“taking into account the current workload and personal cadre of the Courthouse of the Cannakale Province.”* This is not a sufficient reasoning. Such a decision must set out the reasons why this individual prosecutor is selected, and why nobody closer than 1300 km away from Malatya could be assigned to the position. The decision to transfer a judge or a public prosecutor to a court or prosecution office which is not a neighbouring office, is in any case not in accordance with European standards on judicial independence<sup>5</sup>.

### VIII. Conclusions

- 1) Irremovability of judges is an essential element of judicial independence. European standards limit exceptions from this principle to the following cases only: a) transfer, which *“is provided for and has been pronounced by way of disciplinary sanction”*, b) *“in the case of a lawful alteration of the court system”* and c) *“in the case of a temporary assignment to reinforce a neighbouring court, the maximum duration of such assignment being strictly limited by the statute”*. As Recommendation CM/Rec(2010)12 points out (paragraph 52), *“a judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system”*.
- 2) The Turkish legal framework does not comply with these standards. The existing Turkish regulations on transfer of judges are too far-reaching, allowing transfer without the consent of the judge in question to any jurisdiction in the country and to different types of courts and offices. Article 47 of the Turkish Law on Judges and Prosecutors No 2802 does not limit temporary assignments to situations of need to reinforce a neighbouring court.
- 3) Article 47 of the Turkish Law on Judges and Prosecutors No 2802 and the other provisions regarding transfer of judges do not specify the conditions for transfers clearly and exhaustively. This, in conjunction with the fact that the law enumerates a variety of possible exceptions from transfers, leave the deciding body with such extensive discretionary powers that it may endanger the independence of judges.
- 4) The Turkish Constitution delegates the power to determine the rules for transfer of judges to the ordinary laws. The Law No 2802 on Judges and Prosecutors leaves a significant part of the regulations to bylaws issued by the High Council of Judges and

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<sup>5</sup> See Recommendation CM/Rec(2010)12; see the CCJE Opinion No. 1(2001) on standards concerning the independence of the judiciary and the irremovability of judges.

Prosecutors. Such delegation of authority may pave the way for regulations allowing extensive transfers of judges, with unclear limitations and with extensive discretionary powers left to the High Council. The Bureau of the CCJE is of the opinion that much more should have been determined in the law itself.

- 5) Decisions of a council for the judiciary with regard to transfer of judges have to be motivated. The motivation must explain the reasons for the transfer and why the respective future post was chosen. In cases of transfer, the judge in question, without any exceptions and delay and at the initiative of the Turkish High Council of Judges and Prosecutors, should be provided with the reasons for the transfer. These decisions should be made public in full.
- 6) Each transfer of a judge deprives the parties to a case of the natural judge and a transfer may influence the proceedings and the outcome of the case. Therefore, such situations should be avoided as much as possible.
- 7) The large number of communications addressed to the CCJE and other bodies of the Council of Europe claiming that Turkish judges have been transferred without their consent as a means of punishment, the high number of transfers as such, the concrete example of a public prosecutor being transferred to a new post 1300 km away, and the lack of transparency with regard to decisions on transfer of Turkish judges, may be seen as indicators of the alleged misuse of transfers. For these reasons, the Bureau of the CCJE strongly recommends that the Turkish authorities improve this system in order to safeguard the independence of the judiciary in a transparent manner.

## ANNEX I

### **RESPONSE OF THE CCJE MEMBER FROM TURKEY, ALSO EXPRESSING THE VIEW OF THE TURKISH HIGH COUNCIL OF JUDGES AND PROSECUTORS, TO THE LETTER DATED 25 MARCH 2016 OF THE ASSOCIATION OF EUROPEAN ADMINISTRATIVE JUDGES, COMMUNICATED BY THE CCJE TO THE CCJE MEMBER FROM TURKEY**

The letter of the Association of European Administrative Judges (AEAJ) sent to the Consultative Council of European Judges (CCJE) requests that certain problems regarding judges and prosecutors in Turkey be analysed. It is pointed out in the letter that many judges and prosecutors have been transferred to other posts without their consent by decisions of the High Council of Judges and Prosecutors (HCJP).

First of all, on what grounds this Association, whose members consist of judges, reached to such assessment raises several questions, for we have not been officially asked to respond to any questions or to provide statistical data regarding the matter.

Reaching final conclusions on such a critical matter via a questionnaire without any scientific value (the members of the web site where the questionnaire was conducted are not only judges and prosecutors, but they also include lawyers, academicians and other persons interested in law, therefore it cannot be known if the persons who responded to the questionnaire are all judges and prosecutors) while there is a possibility to also obtain information from official authorities in order to make an objective assessment constitutes an evident inconsistency with the ethical codes and the principle of the rule of law, which primarily legal entities are obligated to respect.

Below is the analysis of the letter item by item;

1- Even though it is stated in the 16<sup>th</sup> Meeting Report No. (2015)5 of the CCJE that judges were suspended due to decisions they rendered, detailed information proving this assessment wrong can be found in the response<sup>6</sup> of our Council to the erroneous parts of the report entitled “Challenges For Judicial Independence And Impartiality In The Member States of The Council Of Europe”.

Furthermore, it is emphasized in paragraph 161 of the decision of the Constitutional Court dated 20 January 2016, application no. 2015/7908, that the allegations that the two judges in question, who are mentioned in the 16<sup>th</sup> Meeting Report No. (2015)5 of the CCJE, were arrested without strong doubt of offense or reasonable doubt, that the action was not filed as an offense by the legal system, that there were no reasons for arrest in the incident and that they were arrested due to the decisions they had rendered were manifestly ill-founded and there has not been a violation of rights.

2- It is pointed out in the letter that the decrees regarding judges and prosecutors had no justification. In the decrees issued during the previous HCJPs, the announcement of the grounds as to why judges and prosecutors who were subject to disciplinary sanction were transferred tarnished their reputation among their colleagues, therefore this exercise has been abandoned in the following decrees. However, grounds of transfer is immediately

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<sup>6</sup> [http://www.coe.int/t/DGHL/cooperation/ccje/textes/SGInf\\_2016\\_3rev\\_comments%20by%20member%20states\\_rev1.pdf](http://www.coe.int/t/DGHL/cooperation/ccje/textes/SGInf_2016_3rev_comments%20by%20member%20states_rev1.pdf)  
(see pages 23, 25-26)

provided to the person privately upon request. After this notification, they may resort to legal remedies.

Statistical information regarding the decrees of the HCJP as of 2011 and an explanatory information note on the decree process can also be found in the response<sup>7</sup> of our Council to the erroneous parts of the report entitled “Challenges For Judicial Independence And Impartiality In The Member States of The Council Of Europe”.

3- Although it is alleged in the letter that the transfer of the Canakkale public prosecutor Menderes Arıcan to Malatya was due to a post he shared on social media, this transfer was actually made due to the status of work and personnel pursuant to article 47 of the Law No. 2802.

There are files of examination and investigation concerning the relevant person at the Third Chamber of the HCJP, and in this regard, an investigation permit was granted on 28 January 2016. 21 days after this decision, on 18 February 2016, the first chamber of the HCJP rendered a temporary transfer (secondment) decision due to the status of work and personnel. The temporary transfer decision regarding the person in question, also taking the time passed into consideration, is not related to his actions that are the subject matter of the investigation, and the Second Chamber of the HCJP has the authority to render a temporary transfer decision regarding any judge or prosecutor as an interim measure due to investigation (Article 77 of the Law No. 2802). In this respect, it is not reasonable to accept a comment stating that his temporary transfer due to the status of work and personnel was a punishment.

In conclusion, article 47 of the Law No. 2802 is implemented in view of the nature of judiciary services, and temporary transfers outside of the area of post, as seen in the case of the public prosecutor in question, is a method rarely resorted to and such transfers are restricted to 4-months' time with the same article.

4- On the other hand, even though it is alleged in the letter that many judges and prosecutors were transferred due to the decisions they had rendered, upon the analysis of the statistics regarding the number of decrees issued by the HCJP between January 2014 and June 2015, the period taken into consideration in the appended document entitled 'Survey', it is seen that the ratio of the number of judges and prosecutors in the civil judiciary that were transferred without consent in the given period of time is 15.51% compared to the total number of those who were transferred by the decrees, and of this ratio, 3.87% is composed of judges and prosecutors who were transferred due to status of registry (performance) and 12.38% is composed of judges and prosecutors who were transferred due to completion of their duty in the area. In this case, the ratio of the judges and prosecutors who were transferred without their request is 12.99% compared to the judges and prosecutors who were in the scope of the decrees, and since these transfers were made in consideration of the needs of the organization, similar ratios were observed in the decrees of the previous HCJPs.

In the decrees issued regarding the administrative judiciary during the given period of time, the ratio of the number of judges who were transferred without consent is 28.61% compared to the total number of those who were transferred by the decrees, and of this ratio, 3.14% is composed of judges who were transferred due to status of registry and 7.65% is composed of judges who were transferred due to completion of their duty in the area. In this case, the ratio of the judges who were transferred without their request is 25.52% compared to the judges who were in the scope of the decrees, and since these transfers were made in consideration of the needs of the organization, similar ratios were observed in the decrees of the previous HCJPs.

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<sup>7</sup> [http://www.coe.int/t/DGHL/cooperation/ccje/textes/SGInf\\_2016\\_3rev\\_comments%20by%20member%20states\\_rev1.pdf](http://www.coe.int/t/DGHL/cooperation/ccje/textes/SGInf_2016_3rev_comments%20by%20member%20states_rev1.pdf)  
(see pages 28-36)

During the same period, the number of administrative judges appointed to Taxation Courts although they were working at a Regional Administrative Court or an Administrative Court is 79, and of these, 27 were appointed upon their own request, 2 were appointed based on performance and status of registry, and 6 were appointed for spouse-related excuses. In this case, the number of judges appointed without any request or excuse is 44, and of these 44 judges, the objection of 3 were admitted and the appointment of 1 of these 3 persons to a Taxation Court was cancelled, and the cities to which the remaining 2 were appointed were changed.

5- Regarding the questionnaire results entitled ‘Survey’;

Even though it is stated that the number of judges and prosecutors who were transferred without any disciplinary action, whose title was changed disregarding the incompleteness of his/her time of duty required in the area, and who were transferred for two or more times is 55, as can be seen in the table below, 29 persons in total were appointed two or more times in the same year due to needs and service requirements. Therefore, it is clear that the numbers given in the document presented by the Association of European Administrative Judges is noncompliant with the reality.

YEAR	JUDGES AND PROSECUTORS TRANSFERRED TWICE IN THE SAME YEAR DUE TO SERVICE REQUIREMENTS			
	JUDGE (Civil Judiciary)	PROSECUTOR (Civil Judiciary)	ADMINISTRATIVE (Judge-Prosecutor)	TOTAL
2014	7	15	1	23
2015	2	3	1	6
<b>TOTAL</b>	<b>9</b>	<b>18</b>	<b>2</b>	<b>29</b>

Even though it is stated that there are judges and prosecutors who were transferred without their consent and without the completion of the required time of duty in the area they work at, it should be pointed out that such transfers are made when the needs of the judiciary makes it obligatory and by transferring the judges and prosecutors from lower-profile areas to higher-profile areas (bigger courthouses in cities that are more developed geographically) since the incompleteness of the minimum time of duty is generally considered on their benefit.

Although it is stated in the questionnaire that there were judges and prosecutors who were transferred in spite of severe health problems, it is obvious that the requests based on health excuses are evaluated in terms of the official health reports submitted by the relevant persons and whether there are health institutions in their new place of work where they can receive treatment for the said health problems. The requests of those who submit such documents and prove that they can only receive proper health care where they are located are accepted.

On the other hand, although it is claimed that among the judges and prosecutors transferred by the decrees of the HCJP after 17-23 December 2013, 47% consider said transfers as punishment, and 68% are not content with the transfers while only 32% are, it can be seen that 84.48% of the judges and prosecutors in the civil judiciary who were transferred or whose titles were changed by the decrees are composed of those who were included in the decrees upon their own request, and of these, 86.67% were appointed to a duty or one of the duties they had requested with a letter themselves, 10.98% were appointed to a duty nearby or at a higher-profile area, and only 2.3% were appointed to a place that was not included in their letter for appointment, as seen in the table below.

STATISTICS OF CIVIL JUDICIARY DECREES BETWEEN 2014 JANUARY - 2015 JUNE														
Date of the Decree	Grand Total	Request		Request for Appointment		Request for Appointment for Service Requirements		Service Requirements		Status of Registry (Performance)		Other		Explanation
		Number	Per cent	Number	Per cent	Number	Per cent	Number	Per cent	Number	Per cent	Number	Per cent	
16.01.2014	20	3	15.00 %	-	-	-	-	17	85.00 %	-	-	-	-	Regarding decomposed Public Prosecutor's Offices, and judges and prosecutors of some areas
21.01.2014	79	60	75.95 %	-	-	-	-	19	24.05 %	-	-	-	-	On grounds of excuses and service requirements
11.02.2014	123	117	95.12 %	-	-	-	-	6	4.88 %	-	-	-	-	On grounds of excuses, admittance to profession and service requirements
06.03.2014	115	99	86.09 %	13	11.30 %	-	-	3	2.61 %	-	-	-	-	Law No. 6524, admittance to profession and ballots
22.03.2014	271	240	88.56 %	4	1.48 %	-	-	27	9.96 %	-	-	-	-	Law No. 6526, excuses and service requirements
11.06.2014	2224	1611	72.44 %	267	12.01 %	28	1.26 %	195	8.77 %	24	1.08 %	99	4.45 %	Main Decree of 2014
26.06.2014	33	33	100.00 %	-	-	-	-	-	-	-	-	-	-	Revision and excuses as a result of re-examination
26.09.2014	153	134	87.58 %	7	4.58 %	-	-	8	5.23 %	-	-	4	2.61 %	Regarding unification of spouses following the decree on ballots and excuse requests
05.11.2014	7	7	100.00 %	-	-	-	-	-	-	-	-	-	-	Regarding the appointment of the HCJP members whose term or service ended on 25 October 2014
27.11.2014	124	61	49.19 %	3	-	-	-	60	-	-	-	-	-	Unification of spouses following the decree on ballots, and public prosecutors working at HCJP and the Ministry of Justice
28.11.2014	3	2	66.67 %	1	33.33 %	-	-	-	-	-	-	-	-	Regarding some civil judiciary judges and admittance to profession
18.12.2014	66		0.00 %	-	-	-	-	66	100.00 %	-	-	-	-	Regarding some public prosecutors and rapporteur judges working at the Court of Cassation
15.01.2015	784	563	71.81 %	17	2.17 %	3	0.38 %	201	25.64 %	-	-	-	-	Regarding some civil judiciary judges
27.01.2015	19	18	94.74 %		0.00 %		0.00 %	1	5.26 %	-	-	-	-	Regarding some civil judiciary judges and prosecutors whose admittance to profession was decided
05.03.2015	25	20	80.00 %	2	8.00 %	2	8.00 %					1	4.00 %	Regarding Rapporteurs of Constitutional Courts and some civil judiciary judges and prosecutors whose admittance to profession was decided
19.03.2015	10	7	70.00 %	1	10.00 %	2	20.00 %							Regarding some civil judiciary judges and prosecutors whose admittance to profession was decided
12.06.2015	2401	1753	73.01 %	284	11.83 %	93	3.87 %	236	9.83 %	15	0.62 %	20	0.83 %	Main Decree of 2015
TOTAL	6457	4728	73.22 %	599	9.28 %	128	1.98 %	839	12.99 %	39	0.60 %	124	1.92 %	

Among the administrative judges and prosecutors transferred by the decrees of the HCJP in the same period, 71.39% were included in the decree upon their own request, and of these, 93.86% were appointed to a duty or one of the duties they had requested with a letter themselves, 3.2% were appointed to a duty nearby or at a higher-profile area, and only 2.8% were appointed to a place that was not included in their letter for appointment, as clearly seen in the table below.

STATISTICS OF ADMINISTRATIVE JUDICIARY DECREES BETWEEN 2014 JANUARY - 2015 JUNE														
Date of the Decree	Grand Total	Request		Request for Appointment		Request for Appointment for Service Requirements		Service Requirements		Status of Registry (Performance)		Other		Explanation
		Number	Per cent	Number	Per cent	Number	Per cent	Number	Per cent	Number	Per cent	Number	Per cent	
21.01.2014	17	17	100.00 %	-	-		0.00 %		0.00 %	-	-	-	-	Regarding excuses and service requirements
11.02.2104	43	38	88.37 %	-	-		0.00 %	5	11.63 %	-	-	-	-	On grounds of excuses and service requirements
06.03.2014	12	7	58.33 %	3	25.00 %		0.00 %	2	16.67 %	-	-	-	-	On grounds of Law No. 6524
11.06.2014	293	202	68.94 %	8	2.73 %	11	3.75 %	70	23.89 %	2	0.68 %	-	-	Main Decree of 2014
25.06.2014	8	8	100.00 %	-	-		0.00 %		0.00 %	-	-	-	-	Revision and excuses as a result of re-examination
26.09.2014	13	11	84.62 %									2	15.38 %	Regarding unification of spouses following the decree on ballots and excuse requests
05.11.2014	1	1	100.00 %											Regarding the appointment of the HCJP members whose term or service ended on 25 October 2014
27.11.2014	12	6	50.00 %					6	50.00 %					Unification of spouses following the decree on ballots, and public prosecutors working at HCJP and the Ministry of Justice
28.11.2014	1	1	100.00 %											Regarding some civil judiciary judges and admittance to profession
15.01.2015	104	65	62.50 %	2	1.92 %			37	35.58 %					Regarding some civil judiciary judges
27.01.2015	5	5	100.00 %											Regarding some civil judiciary judges and prosecutors whose admittance to profession was decided
05.03.2015	2	1	50.00 %			1	50.00 %							Regarding Rapporteurs of Constitutional Courts and some civil judiciary judges and prosecutors whose admittance to profession was decided
12.06.2015	265	158	59.62 %	5	1.89 %	4	1.51 %	78	29.43 %	5	1.89 %	15	5.66 %	Main Decree of 2015
TOTAL	776	520	67.01 %	18	2.32 %	16	2.06 %	198	25.52 %	7	0.90 %	17	2.19 %	

Therefore, since the numbers of civil and administrative judges and prosecutors who were included in the decree in the said period being content or not are far from the conclusions reached in the document entitled 'Survey', it is obvious that this study has no scientific value.