



CCJE-BU(2014)2

Strasbourg, 12 February 2014

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

**Comment
on the Draft Law to Amend the
Law on the High Council of Judges and Prosecutors
and Related Laws**

Comment
On the Draft Law to Amend the
Law on the High Council of Judges and Prosecutors
and Related Laws

I. REQUEST:

The High Council of Judges and Prosecutors of Turkey (the Council) has informed the Consultative Council of European Judges (CCJE) of certain amendments that are envisaged concerning the Law of the High Council of Judges and Prosecutors. The Council fears that these amendments will endanger the independence of the Council and of the Turkish judiciary generally.

The European Association of Judges (EAJ) and the Magistrates Européens pour la Démocratie et les Libertés (MEDEL) have also requested an examination of these developments, in particular the amendments that are proposed in this draft law.

The CCJE is aware of events in Turkey and various allegations which have been widely reported in many national and international media. It is not the task of the CCJE to comment either on these issues or allegations. However, under its terms of reference the CCJE is entrusted with commenting on and giving advice on specific situations concerning judges and of providing targeted cooperation upon the request of member states of the Council of Europe, or of judicial bodies or relevant associations of judges in member states so as to enable States to comply with Council of Europe standards concerning judges, in particular with regard to the maintenance of their independence from the executive power.

This opinion aims to meet the requests of the two European Judges' Associations and the High Council of Judges and Prosecutors of Turkey.

The CCJE has been provided with the text of the Law on High Council of Judges and Prosecutors (in the following text HCJP-Law) in the version which is in force at the moment (last amendment 2010) and also with the draft of the proposed amendments. It has also examined the relevant parts of the Constitution (Chapter 3), the Law on Judges and Prosecutors and the Law on the Turkish Justice Academy.

It must be emphasised that the CCJE has considered only the issue of compatibility of the proposed amendments with European standards. The question of their constitutionality under Turkish law is not and cannot be the subject of this report. All legal texts were provided in English translation. It is appreciated that the use of English translations may have resulted in minor misunderstandings.

II. THE DRAFT AMENDMENTS:

The main reforms of the proposed package concern:

- 1.) the powers of and within the High Council of Judges and Prosecutors
- 2.) the organisation and administration of the Turkish Justice Academy.
- 3.) transitional provisions, which will terminate the office of current office holders

It is very clear from the general scheme of the proposal that the influence of the Minister of Justice would be enormously increased.

1. Regarding the High Council of Judges and Prosecutors the following changes are proposed in the draft law:

1.1. the competence of the HCJP should be reduced:

- issues concerning permits for judges and prosecutors to study abroad (Art 49 Law on Judges and prosecutors) would be transferred to the ministry of justice

- the abolition of the need for the agreement of the HCJP to an assignment of judges and prosecutors to the ministry or to other state or international institutions (Art 50 Law on Judges and prosecutors)
- the issue of the assignment of certain members to the Justice Commissions of first instance courts and of Regional Courts of Appeal (Art 113 Law on Judges and Prosecutors and Art 31 Law No 5235) transferred to the ministry of justice and the chief public prosecutor
- The disciplinary investigation and prosecution of elected members of the HCJP (Art 36 Law on HCJP) would be transferred to the Minister of Justice.
- The power to conduct in-service training (Art 119 Law on Judges and Prosecutors) would be transferred to the Justice Academy in its new organisational structure (see 2 below)
- the authority to issue circulars (Art 4 Law on HCJP)
- the recruitment of the staff of the HCJP (Art 13 Law on HCJP) would be transferred to a committee which would be nominated by the Minister of Justice.

1.2. The internal structure of the HCJP and the powers within the HCJP would be reorganized.

The overall scheme of the proposed restructuring will be to strengthen the powers of the president of the HCJP, who is ex officio the Minister of Justice, and it will correspondingly weaken the powers of the HCJP as a whole and the elected members of the judiciary:

- the president (=minister) will appoint the President and the Deputy Presidents of the Inspection board (Art 6 Law on HCJP) whereas this was previously to be done by the HCJP as a body
- the president will appoint the deputy secretary generals (Art 6 Law on HCJP) whereas this previously was to be done by the HCJP as a body
- the president would have the power to issue circulars on matters that fall within the competence of the HCJP (Art 6 Law on HCJP) whereas this was previously to be done on the decision of the HCJP as a body
- the president would be able to conduct and render decisions for criminal or disciplinary decisions of the members of the HCJP (Art 6 Law on HCJP) whereas this was previously to be decided by the HCJP as a body
- the president would have the power to transfer “workload” from one chamber to the another (Art 6 Law on HCJP) whereas this was previously within the power of the HCJP as a body
- the body of the HCJP, when electing the heads of the three chambers would only be able to select from the two candidates which would be proposed by the president (=minister). (Art 8 Law on HCJP) Previously there was no such limitation and no proposal by the president.
- When the body of the HCJP appoints rapporteur judges, who are part of the staff attached to the Secretary General, its choice would be limited to those on a list provided by the president, which previously was not the case (Art 12 Law on HCJP)
- The Council Inspection Board would not be responsible to the HCJP under the supervision of the Head of the Third Chamber, but instead would be responsible to the president under his supervision, who in his capacity as minister also runs the inspection service of the ministry of justice. (Art 14 Law on HCJP)
- when the plenary appoints Council Inspectors from among experienced judges and prosecutors its choice would be limited to those on a list provided by the president, which previously was not the case (Art 15 Law on HCJP)

- the remedy against decisions of a chamber to the HCJP as a whole would be abolished. Objections against decisions will be dealt by the other chamber which numerically follows the one which had decided at first instance. (Art 33 Law on HCJP)

2. The Turkish Justice Academy will be restructured

- the HCJP would no longer be in charge of the in-service training; instead it would fall within the jurisdiction of the Justice Academy (Art 119 Law on Judges and Prosecutors)
- The composition of the governing body of the Justice Academy is changed by reducing the number of members selected by the courts (3 instead of 7) which are not to be elected by the members of the Supreme Court and the Council of State anymore but would be appointed by the presidents of the court. In addition to these members the minister of justice would appoint 4 members from among civil and criminal court judges and 2 members from among administrative court judges. Ex officio three members of the ministry of justice would belong to this governing body. (Art 12 Law on Justice Academy).
- The office of Secretary General of the Justice Academy is to be abolished; the board of directors is enlarged. There would now be a president and three vice-presidents, the three vice-presidents being directly appointed by the Minister of Justice and the president to be elected by the governing body from among a list of candidates to be nominated by the minister. (Art 3, 8, 9, 17 and 43 Law on Justice Academy)
- The assignment of lecturers, civil servants from other public institutions, experts and assistant experts will, in future, need the approval of the ministry of justice. (Art 22 and 23 Law on Justice Academy)

3. Transitional Provisions – loss of office

- It is foreseen in the provisional Article 4 of the Law on HCJP that the offices of Secretary general, Deputy Secretary Generals, President of the Inspection Board, Deputy Presidents of the Inspection Board, rapporteur judges and other staff will be terminated when the new law is put in effect.
- Provisional Article 12 of the Law on Justice Academy makes the same provision for the president, vice-presidents, members of the governing body, members of the supervisory board and all assigned and administrative staff, who all will lose their position, once the law is put into effect.

III. THE PROPOSED AMENDMENTS AND EUROPEAN STANDARDS:

In a state governed by the rule of law which is also a democracy there are two indispensable elements. The first is the independence of judges from any undue influence, whether it be external or internal. The second is that there be full respect for the principle of the division and balance of powers within the state, by guaranteeing the independence of the judiciary. These principles are fully recognised in international and European legal instruments like Article 10 of the Universal Declaration of Human Rights and Article 6 of the European Convention on Human Rights which guarantee everybody a fair trial by an independent and impartial tribunal which can only be the case if a judiciary is truly independent.

The amendments which are proposed by the draft law endanger the independence of the judges and the judiciary and contradict European standards.

These standards are expressed in the following, among other, documents:

- Article 6 of the European Convention on Human Rights and the case law of the ECHR
- Recommendation 2010/12 of the Committee of Ministers of the Council of Europe on Judges: Independence, Efficiency and Responsibilities
- Opinion No 1 of the CCJE on “Standards Concerning the Independence of the Judiciary and the Irremovability of Judges”
- Opinion No 4 of the CCJE on “Appropriate Initial- and In-service Training for Judges at National and European Level”

- Opinion No 10 of the CCJE on “The Council for the Judiciary at the Service of Society”
- European Charter on the Statute for Judges
- Venice Commission Report on the Independence of the Judicial System Part I: The Independence of Judges.

1.) Council for the Judiciary (HCJP):

The overall task of a council of the judiciary should be to protect the independence of the judges. It will function as a buffer between the judges on the one hand and the other powers of the state and others on the other hand and it will thereby prevent undue influence.

This concept is perhaps best expressed in Para 8, 12 and 13 of Opinion No 10 of the CCJE

8. *The Council for the Judiciary 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.*
12. *Beyond its management and administrative role vis-à-vis the judiciary, the Council for the Judiciary should also embody the autonomous government of the judicial power, enabling individual judges to exercise their functions outside any control of the executive and the legislature, and without improper pressure from within the judiciary.¹²*
13. *In this perspective, the CCJE considers that it would be inappropriate for the Council for the Judiciary to be restricted by other authorities in its autonomy to decide on its own operating methods and on subjects for discussion. The relations between the Council for the Judiciary and the Minister of Justice, the Head of State and Parliament need to be determined. Furthermore, considering that the Council for the Judiciary does not belong to the hierarchy of the court system and cannot as such decide on the merits of the cases, relations with the courts, and especially with judges, need careful handling.*

Recommendation 2010/12 takes this up and states in para 26 and 46

26. Councils for the judiciary are independent bodies, established by law or under the constitution, that seek to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system.

46. The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers.

This principle had already been expressed in the European Charter for Judges point 1.3.

1.3. In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.

and by the Report on the Independence of Judicial Systems of the Venice Commission para 32

32. To sum up, it is the Venice Commission’s view that it is an appropriate method for guaranteeing for the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges. Owing to the richness of legal culture in Europe, which is precious and should be safeguarded, there is no single model which applies to all countries. While respecting this variety of legal systems, the Venice Commission recommends that states which have not yet done so consider the establishment of an independent judicial council or similar body. In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers.

To fulfil this requirement Opinion 10 of the CCJE enumerates in para 42 several tasks which it recommends be entrusted to the Council for the Judiciary. Amongst these are:

- the selection and appointment of judges
- the promotion of judges
- the evaluation of judges
- disciplinary and ethical matters
- the training of judges

The proposals to transfer to the ministry the power to decide on the assignment of judges , to transfer to the minister the decisive influence on the Inspection Board of the Council, and to exclude the HCJP from the organisation of the in-service training all disregard the recommendations set out above. The proposed new role of the minister in his capacity of president of the HCJP, which gives him enormous influence on decision making will also have a large impact on the other important tasks of the HCJP which will remain within its jurisdiction, such as the appointment and transfer (First Chamber) or promotion, transfers (Second Chamber) or admission of candidates, examination of complaints, decisions on withdrawals (Third Chamber) (see Article 9 of the Law on HCJP).

The sensitive role of a Council for the Judiciary has to be taken into account when deciding upon the composition of this body:

Para 15 of Opinion 10 of the CCJE states:

15. The composition of the Council for the Judiciary shall be such as to guarantee its independence and to enable it to carry out its functions effectively.

Judges elected by their peers should have a decisive say in the Council. (see Recommendation 2010/12 para 46 above, European Charter point 1.3. above and Venice Commission's Report para 32 above.

But this role of the judiciary is not enough; the possible impact of the other powers of the state must be excluded. Therefore Opinion 10 in its para 23 demands:

23. Prospective members of the Council for the Judiciary, whether judges or non judges, should not be active politicians, members of parliament, the executive or the administration. This means that neither the Head of the State, if he/she is the head of the government, nor any minister can be a member of the Council for the Judiciary. Each state should enact specific legal rules in this area. 23

The provision in the Turkish Constitution (Article 159) that the Minister of Justice should not only be a member but should chair the HCJP was already contrary to this recommendation. Under the proposed amendments he will be the one who can influence, decide or at least block everything. De facto the Council will very much depend on him. Starting with the recruiting of the staff, be it rapporteur judges, or be it inspectors, nobody will be able to take such an office without the *fiat* of the minister of justice, who alone has the power to nominate candidates to the list from which the Council must select the successful person. The Minister of Justice will become the de facto chief of the Inspection Board of the Council, which has to report to him and is to be supervised by him. He can assign and exchange inspectors of the ministry with inspectors of the board. There are countries in which inspection systems are misused to exercise pressure on judges. It is possible for an inspection system to be so misused even when it is established within the judiciary, but the danger increases if the inspectors are under an excessive influence of the executive power.

It is of special note that the minister should also be given the exclusive power to initiate and conduct disciplinary procedures against the other members of the Council. This means, effectively, the total subordination of the highest organ of the judicial branch of the powers of state to the executive branch.

It should also be especially noted that the system of remedies against the decisions of a chamber is going to be changed. The regulation which is in force at the moment (Article 33 of the Law on HCJP) foresees an objection to the whole body of the Council. Now it is proposed that the objection against the decision of a chamber should be examined and decided by the chamber which numerically follows the one that has made the decision. (So a decision by chamber 1 is to

be reviewed by chamber 2). So the whole body is not involved at all in almost all cases. The fact that there is also an increased influence of the president (=minister) on the election of the Heads of the Chambers, on the assignment of the other members of the Council to the particular chambers and last but not least his possibility to “transfer workload” all demonstrate that there is now very large scope for possible influence in the affairs of the judiciary by the executive branch of the state.

2. Training of Judges and Justice Academy:

Training of judges is one of the core pre-requisites for an efficient justice system. (see Art 31 of Recommendation 2010/12 and Opinion 11 of the CCJE on “Quality of Judicial Decisions” and Opinion 4 of the CCJE).

Initial training is necessary to get the best possible candidates to become judges or prosecutors. In-service training is a right and a duty of every judge to keep up to date with the developments of society and of the law. (see Opinion 4 para 31 and 32), Opinion 3 of the CCJE on the Principles and Rules governing Judges’ Professional Conduct in Particular Ethics, Incompatible Behaviour and Impartiality para 50 ix.)

Training is also a possible means by which to influence judges, either positively or negatively. It can help to keep them open minded, which is essential for the challenges of their work or it can be misused to try to restrict them. Therefore European standards claim for an independent body within the judiciary, which should be in charge of the training.

The European Charter on the Status for Judges already explains in point 2.3.

The statute ensures by means of appropriate training at the expense of the State, the preparation of the chosen candidates for the effective exercise of judicial duties. The authority referred to at paragraph 1.3 hereof, ensures the appropriateness of training programmes and of the organization which implements them, in the light of the requirements of open-mindedness, competence and impartiality which are bound up with the exercise of judicial duties.

The CCJE in Opinion 4 para 13, 14, 16, 19, and 20 takes this up and further elaborates this necessary requirement:

13. *The European Charter on the Statute for Judges (paragraph 2.3) states that any authority responsible for supervising the quality of the training programme should be independent of the Executive and the Legislature and that at least half its members should be judges. The Explanatory Memorandum also indicates that the training of judges should not be limited to technical legal training, but should also take into account that the nature of the judicial office often requires the judge to intervene in complex and difficult situations.*

14. *This highlights the key importance attaching to the independence and composition of the authority responsible for training and its content. This is a corollary of the general principle of judicial independence.*

16. *The judiciary should play a major role in or itself be responsible for organising and supervising training. Accordingly, and in keeping with the recommendations of the European Charter on the Statute for Judges, the CCJE advocates that these responsibilities should, in each country, be entrusted, not to the Ministry of Justice or any other authority answerable to the Legislature or the Executive, but to the judiciary itself or another independent body (including a Judicial Service Commission). Judges’ associations can also play a valuable role in encouraging and facilitating training, working in conjunction with the judicial or other body which has direct responsibility.*

19. *In order to shield the establishment from inappropriate outside influence, the CCJE recommends that the managerial staff and trainers of the establishment should be appointed by the judiciary or other independent body responsible for organising and supervising training.*

20. *It is important that the training is carried out by judges and by experts in each discipline. Trainers should be chosen from among the best in their profession and carefully selected by the body responsible for training, taking into account their knowledge of the subjects being taught and their teaching skills.*

When dealing with the Council for the Judiciary in Opinion 10 CCJE, para 65 and 68 once again underline the following:

65. The responsibility for organising and supervising judicial training should in each country be entrusted not to the ministry of justice or any other authority answerable to the legislature or the executive, but to the judiciary itself or preferably to the Council for the Judiciary; judges' associations can also play a valuable role in that respect. Furthermore, the conception of training programmes and their implementation should be entrusted, under the authority of the judiciary or preferably the Council for the Judiciary, to a special autonomous body (e.g. a training academy) with its own budget and which should work in consultation with judges. A clear division of functions should be encouraged between the Council for the Judiciary and the training academy, when it exists.

68. In order for candidates for appointment as judges to receive quality training, the CCJE recommends that the Council for the Judiciary should participate directly or in other ways cooperate with training institutions in the creation and the development of the programme for initial training, through which candidates will develop and deepen not only their legal knowledge of the national and international substantive and procedural law and practice, but also develop complementary skills, e.g. knowledge of foreign languages, ethics, alternative dispute resolution, so that society may be served by judges capable of applying the law correctly, and of critical and independent thinking, social sensitivity and open-mindedness.⁶⁸

Finally the Committee of Ministers has itself made the same point and has underlined the various requirements of training as stated in Recommendation 2010/12 para 57:

57. An independent authority should ensure, in full compliance with educational autonomy, that initial and in-service training programmes meet the requirements of openness, competence and impartiality inherent in judicial office.

It is evident that the proposed amendments are entirely contrary to these international standards. Instead of expanding the influence of the independent body HCJP its powers concerning in-service training are to be abolished. Like the proposals regarding the reform of the HCJP the reforms proposed for the Justice Academy would serve to increase the influence of the ministry of justice. The new composition of the board would exclude the election of members in the Supreme Court and of the Council of State, substituting for appointments that will be determined by the presidents of these courts, and would introduce 6 members from among the judges who would be appointed by the minister. The three vice-presidents of the Academy would also directly be appointed by the minister. By these changes the Justice Academy will be totally under the influence of the ministry of justice. But even worse than this organizational subordination is the strong impact the minister is going to make on the content of training. Lecturers, experts, assistant experts can only be engaged if the minister consents.

The proposed reforms can be fairly summarised as having the effect of turning the Justice Academy into an executive-run school to train members of the judiciary. This is a clear step backwards. It infringes the principles of the balance of powers and the independence of the judiciary. As a consequence the proposals will very likely have a deleterious influence to the quality of the justice system.

3. Transitional Provisions:

The proposal that all the office holders will lose their position when the new law is put in effect, regardless of whether their position will continue to exist (like inspectors, rapporteur judges, members of the plenary etc.) or will be abolished (like Secretary General of the Justice Academy) needs no further comment. It is a radical encroachment of the other powers of state on the central institutions of the judicial power and will manifestly encroach on judicial independence.