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COMMENTS RECEIVED FROM THE MEMBER STATES OF THE COUNCIL OF EUROPE
/
COMMENTAIRES TRANSMIS PAR LES ETATS MEMBRES DU CONSEIL DE L'EUROPE

concerning the / *relatifs au*

report prepared by the Bureaus of the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE) for the Secretary General of the Council of Europe on "Challenges for judicial independence and impartiality in the member states of the Council of Europe" (CCJE/CCPE(2016)1)
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rapport préparé par les Bureaux du Conseil consultatif de juges européens (CCJE) et du Conseil consultatif de procureurs européens (CCPE) à l'attention du Secrétaire Général du Conseil de l'Europe sur « Défis pour l'indépendance et l'impartialité du système judiciaire dans les États membres du Conseil de l'Europe » (CCJE/CCPE(2016)1)

as a follow-up to his 2015 report entitled "State of Democracy, Human Rights and the Rule of Law in Europe – a shared responsibility for democratic security in Europe"
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comme un suivi de son rapport de 2015 intitulé « Situation de la démocratie, des droits de l'Homme et de l'État de droit en Europe - la sécurité démocratique, une responsabilité partagée en Europe »

The comments appear in this document in English or French, according to the language used by the contributing delegations. / *Les commentaires figurent dans ce document en anglais ou en français, selon la langue utilisée par les délégations ayant contribué.*

ALBANIA / *ALBANIE*

It is noted that in its capacity as the representative institution of the people's will, the Assembly of Albania has established an Ad Hoc Parliamentary Commission whose scope of work is to conduct the reform in the justice system. The activity of the Commission so far has relied on a process of broad process of consultation, inclusion and transparency, them being key to obtaining qualitative outputs that are free of the influence of the political interests of the day and other adverse influences, and what's most important to give both the process and its outcome the required credibility vis-à-vis the citizens. A high-level group of experts, both national and international, has been established within the Commission, with representatives from the most important justice institutions and of international missions of assistance, organizations and partners**.**

It is actually positive that parts of the CoE report review of Albania make reference to the findings of the Analysis of the Justice System, which is the first professional document drawn up by the high-level experts group attached to the Ad-Hoc Parliamentary Commission. This Analytical Document provides a thorough and unbiased analysis of all the aspects and components of the justice system, based on objective data identified with the contribution of all the stakeholders in the field (judges, prosecutors, free practitioners of law, civil society representatives, specialized international partners, users of the system services and public at large).

There are, nonetheless, reservations on some of the observations and findings contained in the report that are (in our view) based on inaccurate information sources and, in some cases, rely on data that are intentionally distorting of the current reality. In addition, we would suggest that the report addressed judicial independence within the context of the particular state of play it operates in given countries, as well as in relation to the accountability, as one of the pillars ensuring a fair and effective law enforcement. Such standing on the judicial independence has been reaffirmed by the interim opinion of the Venice Commission on the constitutional amendments on the judiciary in Albania that underlines, *inter alia*: "***The current Albanian Constitution of 1998 was prepared in close cooperation with the Venice Commission;[1] the existing constitutional arrangements defining the status of the judiciary are in theory sufficient to guarantee its independence and accountability. However, in Albania, as well as in some other post-communist countries, the constitutionalisation of the standards on the independence of the judiciary resulted in a paradox: constitutional guarantees have been bestowed upon judges who were not yet independent and impartial in practice.*** ,,,"..

We would like to address in particular some of the specific findings of the report, while reflecting our own consideration through concrete comments and suggestions.

Paragraph 44 of the CoE Report finds that *"According to the Albanian Constitution, the General Prosecutor of Albania is appointed by a simple majority of votes by parliament for a 5-year term. He/she may be reappointed. This regulation is criticized because it does not guarantee the General Prosecutor's independence from the legislature, as the latter can decide the dismissal or re-appointment of the General Prosecutor after the five-year term."*

The Analysis of the Justice System prepared by the Group of High Level Experts of the Ad Hoc Commission highlights that the current formula of the appointment of the Prosecutor General leaves room for an extreme politicization of this process. The current Prosecutor General was appointed in 2012 by the previous Government, that is, the today's opposition. Under the conditions where the Prosecutor General is appointed by the Parliament, it is impossible for him to investigate those who have appointed him. Additionally, Articles 148 and 149 of the current Constitution do not contain any provision in relation to the applicable requirements and criteria that a candidate for Prosecutor General has to meet.

The draft Constitutional amendments elaborated by the Group of High Level Experts, reviewed in the light of the Venice Commission interim opinion, address the matter in question by setting up a balanced formula that shall prevent the politicization of the process, and high professional, merit-

[1] See, for example, CDL-INF(1998)009, the Venice Commission Opinion on Recent Amendments to the Law on Major Constitutional Provisions of the Republic of Albania.

based and integrity conditions for the applicants. Specifically, the draft constitutional amendments provide as follows:

1. The Prosecutor General is appointed by the qualified three-fifth majority of the members of Assembly from three candidates proposed by the High Prosecutorial Council. The High Prosecutorial Council shall select based on a transparent and open procedure and ranks three candidates on the most qualified and reputable candidates. If Assembly cannot appoint the Prosecutor General within 30 days of receiving the proposals from the High Prosecutorial Council, the highest ranking candidate is automatically appointed.

2. The Prosecutor General shall serve for a seven-year[2], non-renewable mandate. The Prosecutor General shall be selected among highly qualified lawyers, with no less than 15 years of professional experience as lawyer, of high moral and professional integrity, that have graduated from the School of Magistrates or academic degree in law. The Prosecutor General must not have been punished before for a criminal offence. He/she shall not to have held a political post and a post in a political party during the last 10 years before running for this position.

With regard to the finding in paragraph 77 of the CoE report that allegations of corruption might also be used to decrease the influence of the High Council of Justice in the future, we consider it to be inaccurate. Based on the Strategy of the Justice System Reform and the draft constitutional amendments, both documents developed by the group of high level experts attached to the Ad Hoc Commission, the intention is to boost the HCJ role by increasing the range of powers of this institution governing the judiciary. Likewise, the very institution is foreseen to undergo an overhaul through the following measures:

i) Establishment of the criteria applicable for the election of HCJ members, which guarantee their professionalism, high moral and professional integrity;
ii) Due to high corporatism levels, the number of judicial and non-judicial members shall be reduced, with the former holding the majority in the HCJ;
iii) It is provided that since the Minister of Justice and the President are officials who may potentially exert political influence in the decision-making of this institution, they shall not be part of the HCJ composition;
iv) A formula for the appointment of the HCJ judge members is foreseen to guarantee a proportional representation of the three tiers of the judiciary;
v) A formula for the appointment of the HCJ non-judge members is foreseen to reduce the Assembly's political discretion, including in the selection process for the proposals coming from the legal profession, academia, School of Magistrates, etc.

According to Article 33 of the draft constitutional amendments, the High Judicial Council shall be composed of 11 members, six of which are elected by the judges of all levels of the judicial power and five members are elected by the Assembly among lawyers who are non-judges. The transparent and public procedure for the selection and ranking of the candidates coming from the judiciary is provided in the law. The lay members shall be selected among highly qualified lawyers, with no less than 15 years of professional experience, of high moral and professional integrity and shall hold a university degree and an academic grade in law.

The transparent and public procedure of appointment and ranking of the judge nominees is regulated by the law. The lay-members shall be elected by the Assembly with three-fifth of all its members, based on the proposals of: lawyers, 1 member, one shall be from notaries, one shall be a law professor, one shall be from the lay professors (non-judges/prosecutors) of the School of Magistrates and one shall be from civil society. For each vacancy, the proposing bodies present to the Justice Appointment Council three candidates elected based on a public and transparent procedure. The Justice Appointment Council ranks the candidates and submits them to the Assembly.

In its Interim Opinion No. 824/2015, "On the draft constitutional amendments on the judiciary of Albania", the Venice Commission **positively considers *that "This (HJC) composition is***

[2] Comments from the reform consultative round tables with regard to the tenure of the Prosecutor General, with a preference for the 7-year term.

acceptable, especially provided the Assembly's vote is "based on the proposals from the respective structures and the opinion of the Justice Appointments Council." (see paragraph 54 of the Opinion). Further, paragraph 56 of the interim opinion observes that "***Article 41 (adding Article 147/a) gives the Council very substantial powers, including appointing, evaluating, promoting and transferring judges, deciding on disciplinary measures, proposing candidates for the HC and the HAC, approving the rules of judicial ethics and monitoring their observation, directing and managing the administration of the courts, proposing and administering the budget, and the strategic planning for the judicial system as well as reporting to the Assembly on the state of the judicial system.***"

Paragraph 78 of the CoE report notes that, "*In Albania, there is also a Council of Prosecutors which, however, has only advisory functions. Prosecutors believe that the Council of Prosecutors should become a decision making body with the power to adopt the decisions on the governance and management of prosecutors' careers***".**

The finding is relevant and reflected in the new draft constitutional amendments elaborated by the Group of High Level Experts, in consultation with the Venice Commission. These constitutional amendments are targeted to bring about a new holistic structural and functional design and composition of the prosecutorial system, and to enshrine the Prosecutorial Council at the constitutional level, as well as enable a full-fledged structuring of the Council's powers for the appointment, career, promotion and disciplinary actions on prosecutors that are all different from the current constitutional and legal regulation, change hierarchical relations within the prosecutorial system and take away part of the current portfolio of the Prosecutor General to stand on its own with the establishment of the special anti-corruption structure.

According to the proposed constitutional amendments, the High Prosecutorial Council (HPC) is redesigned as an independent constitutional body that turns from a consultative into a decision-making body, with the following powers:

a) Appoints, evaluates, promotes and transfers prosecutors;
b) Decides on disciplinary measures against prosecutors;
c) Proposes to the Assembly candidates for Prosecutor General in accordance with the procedures prescribed by law;
ç) Adopts rules of ethics for prosecutors and supervises their observance
d) Prepares reports and informs the public and the Assembly on the state of the Prosecutor's Office.
e) Exercises other responsibilities as defined by the law.

According to the draft constitutional amendments, the High Prosecutorial Council shall be composed of 11 members, of whom six elected among prosecutors of all level elected by the prosecutors of all levels of the Prosecutors' office and five members elected by the Assembly by lawyers who are not prosecutors. The lay members shall be selected among highly qualified lawyers, with no less than 15 years of professional experience, of high moral and professional integrity. They shall hold a university degree and academic grade in law. Candidates must not have been punished before for a criminal offence. During the past 10 years the lay members shall not have held a political post in the public administration and a leadership position in a political party before their nomination. The lay members shall be appointed from the proposal from the proposing bodies by the Assembly with three-fifth of all members. One shall be from lawyers, one shall be from the notaries, one shall be a law professor, one shall be from the lay professors of the School of Magistrates and one shall be from civil society.

The division and balance of powers between the Prosecutor General and the High Prosecutorial Council is considered to have an impact on the internal independence of prosecutors vis-à-vis higher-ranking prosecutors and on the institution's external independence[3]. It further shall lead to their increased and strengthened accountability through a balanced self-monitoring system.

Paragraph 121 of the CoE report observes that " *The Prosecutor General is not independent from the government, as he/she must follow and implement recommendations made by the Council of*

[3]CDL-AD (2014) 008, Venice Commission on the draft law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, pp. 24 and 41,42

Ministers through the Minister of Justice, who has the power to control the progress of implementing the recommendations and the legality of activities and the regularity of investigations carried out by the Prosecution Office. Furthermore, based on inspection results, the Minister of Justice, where appropriate, submits to the Prosecutor General recommendations to launch disciplinary proceedings. According to the view of the Albanian member of the CCPE, this control/accountability report undermines the independence of the Prosecution Office."

The draft constitutional amendments proposed by the Group of High Level Experts at the Ad Hoc Commission enshrine explicitly the principle of prosecutorial independence, providing that "the Prosecution is to be an independent body that shall guarantees and observe a proper conduct and supervision of its activities, and the internal independence of prosecutors in the course of investigation and criminal prosecution."[4] The High Prosecutorial Council (mentioned earlier in the document) has been assigned by the draft amendments the responsibility to guarantee independence, accountability, discipline observance, status and career of the prosecutors of the Republic of Albania.

According to paragraph 122 of the CoE report: *"The Prosecution Office of the Republic of Albania is an independent institution and is neither part of the executive nor the judicial system. The independence of prosecutors is protected by the constitution. As a centralized body, it operates under the rule that orders and instructions of the senior prosecutor are mandatory for lower prosecutors. However, a prosecutor has the right to refuse an order or instruction that is manifestly contrary to the law. The Albanian member of the CCPE believes that this provision needs to be improved so that the prosecutor of lower rank has the right to appeal a supposedly illegal order or instruction to the General Prosecutor."*

The Group of High Level Experts of the Ad Hoc Commission has proposed that partial functional decentralization takes place within the prosecutorial system, in order to guarantee the prosecutors' internal independence vis-à-vis higher-ranking prosecutors in relation to the conduct of specific cases and building of public accusation. The suggestion draws on the argument that the prosecution's partial functioning decentralization does not pose any risk whatsoever for the body's operation, since it will be followed by the required changes in the criminal procedural law that will assign a role to the court in the conduct of criminal investigations (judge of the preliminary investigation, as distinct from the judge reviewing the merits of the case). Hence the court shall perform the functional supervision of prosecutors who were, so far, monitored by higher-ranking prosecutors. However, the latter shall keep some minor functional supervising powers over lower prosecutors.

Differently from the current Constitution, whose Article 148(2) provides that "Prosecutors are organized and operate as a centralized organ attached to the judicial system," draft amendments do not contain a similar provision.

Paragraph 265 of the CoE report notes that in *Albania, as well as reports from other countries (Croatia, Poland, Slovakia, Slovenia), suggest that politicians often criticise the judiciary in order to divert public opinion from instances of possible misgovernment by the state or to gain populist points rather than to address specific shortcomings of the judiciary in the public interest. Thus … low confidence is often unjustly aggravated by comments by politicians on the campaign trail and sensation seeking media.*

Concerning the above, we consider that the observation does not fully correspond to the reality and is of a rather generalizing nature. The issues the Albanian judiciary is facing are not a question of perception and the citizens' low confidence has not been aggravated by political statements. The analysis of the justice system (mentioned above) provides an objective picture of all the findings contained in different reports issued by both national and international organizations, which have monitored and reviewed various aspects of the justice system in the country. These reports identify endemic problems when it comes to the infringement of the standards of the due process of law, and particularly to the delay of hearings, impunity in corruption-related cases, inequalities created among citizens in the adjudication of their cases resulting from bribes, etc. Concrete cases have been

[4] Venice Commission Opinion, paragraphs 84 – 85.

reported by the investigative media, with live recording of judges and prosecutors receiving bribes from the citizens. The former were subjected to criminal prosecution and, subsequently, dismissed.

Presence of the corruption in the ranks of the judiciary is now a fact that has been admitted as such also in the Interim Opinion of the Venice Commission on Albania, whose paragraph 98 highlights that: ***"The necessity of the vetting process is explained by an assumption – shared by nearly every interlocutor met by the rapporteurs in Tirana – that the level of corruption in the Albanian judiciary is extremely high and the situation requires urgent and radical measures."***

We deem the findings reflected in paragraphs 292 – 296 of the report as partially accurate and realistic. It is true that Albania is suffering from a system that is not at all serving or credible for the citizens[5] and is corrupt. As noted also in paragraphs 292, 293, 296, various sources identify high levels of corruption across the judiciary, thus, undermining service of justice for the people, whose legitimate interests are adversely affected.

Paragraph 293 of the report reads that: *"While there might be good reason to assume that the promotion of judges is in certain cases connected to corruption, the presentation of these allegations without prior warning in live broadcasting is by Albanian insiders also seen to confirm a hostile atmosphere on the part of the parliamentary commission against the High Council of Justice..... ... The reform of the legal system is, as insiders criticise, not in the hands of the judiciary and the HCJ but undertaken by the parliamentary commission."*

It is noteworthy to stress that the work of the Ad Hoc Parliamentary Commission builds on and is guided by the principles of **inclusiveness and public consultation, professionalism and best standards in the area** that have been and remain the fundamental pillars on which the reform has been developed and is conducted. In no case has the focus of the Commission activity been to target or moreover to create a hostile environment against the country's justice institutions.

All justice representatives in the country, including judges and prosecutors of the three instances, notaries, lawyers, bailiffs, law professors and all other officials who exert their functions in the justice institutions, including the members of the High Council of Justice, representatives of civil society and various political forces, etc., have been given the opportunity to voice their own opinions, whether favourable or contrary, in the public consultation meetings that have been held by the high level experts' group of the Ad Hoc Parliamentary Commission. The brainstorming and discussion of different views in these activities has been useful to engender a more than constructive debate driven towards the identification of the best constitutional and legal solutions that would ultimately address the pitfalls the justice system is currently facing. Bringing the debate in the public domain for the opinion at large to be part cannot be viewed as cause to a hostile climate against one institution or another, since its purpose has been to ensure the transparency of the process, inform citizens and secure their active involvement in the debate itself.

The current governing majority did not see this reform as a matter of its own political interest. By doing so, the Government "acknowledged" the right of the Assembly as the one entity to conduct and finalize the reform. It is actually a fact that all parliamentary political forces have been invited to contribute to the process. The opposition representatives are active in the Ad Hoc Parliamentary Commission and opposition experts have submitted their own opinions also on the draft constitutional amendments sent to the Venice Commission.

The Group of High Level Exerts attached to the Commission is composed of the representatives of the most important justice institutions, collegial bodies and academic entities which contribute to the justice system, as well as free practitioners, including: the High Court, Prosecutor General Office, School of Magistrates, National Bar Association, Ministry of Justice, University Rectorate and HCJ.

In the course of its activity, the Commission has always benefitted from the best international assistance in terms of legal expertise and evaluation. Represented in the group of high level experts are also international missions and partner organizations such as: the Venice Commission,

[5] Evaluation Report on Albania No. 4, 24-27 June 2014, GRECO.

EURALIUS IV, US Department of Justice, USAID, and the OSCE Presence in Albania. From its outset, the process has benefited from the unreserved support of these representatives.

There is an overall agreement of the parties in admitting the pivotal role of the Venice Commission in conducting the Reform. This prestigious international body has provided its own evaluations and remarks on the process and the constitutional drafts via an interim opinion that highlights, *inter alia*: *"The Venice Commission expresses its support for the effort of the Albanian authorities aimed at the comprehensive reform of the Albanian judicial system. Such reform is needed urgently, and the critical situation in this field justifies radical solutions The Draft Amendments represent a solid basis for further work in this direction."*

Referring in particular to the finding in the CoE report that there is*"a hostile atmosphere on the part of the parliamentary commission against the High Council of Justice (HCJ),"* [6] we consider the conclusion to be based on fragmented and biased sources and with no correspondence to the reality and actual facts.

On 22.12.2014, the Ad Hoc Parliamentary Commission endorsed Decision No. 2, **"***On the representation of the main institutions of justice and legal education system with experts in the Group of High Level Experts of the Ad Hoc Parliamentary Commission."* In line with the said decision, the Commission submitted a request to the High Court, High Council of Justice, Prosecutor General Office, National Bar Association, School of Magistrates, University of Tirana, Faculty of Law, Ministry of Education and Sports and to the Ministry of Justice for the Legal Reform Consultative Committee, whereby it required that they forwarded suggestions for the experts who were to represent them in the Group of High Level Experts at the Ad Hoc Parliamentary Commission for the Reform in the Justice System.

All the institutions in the system, except for the High Council of Justice, responded to the Commission request and assigned their experts to the Commission. In the meantime, given the delayed answer by the HCJ, the appointment of its representatives to the group of experts was made possible only nine months later.

However, representatives from HCJ have been invited to attend all the activities organized by the Ad Hoc Commission as part of the Public Consultation process conducted by the group of high level experts. So far, there have been three rounds of public consultation on the documents developed by the High Level Experts. Thus, 10 round tables on the analytical document were held between May and June 2015; nine open public fora were conducted to discuss the Strategy Analysis between June and July 2015, whereas, 19 consultative roundtables on the draft constitutional amendments were held between November and December 2015. It would be worth mentioning that the HCJ has received official notification in writing with the respective agenda, and has been asked to appoint its representatives. Matter of factly, HCJ representative have been participating actively to these events and have contributed with their opinions/suggestions during the meetings.

In order to ensure a process that is transparent and as inclusive and consultative as possible, a public consultation network has been set up, composed of practitioners, experts of the field and representatives of the groups of interest. The network includes the judges of all court instances in the Republic of Albania. It is worthwhile mentioning that, being one of the judiciary's governing bodies, the HCJ is mainly composed of judges, and with the latter being part of our public consultative network database, they are constantly updated with the steps taken as part of the reform and have, consequently, been invited and encouraged to provide their own input with suggestions and comments throughout the course of this reformation process.

In relation to paragraph 294 of the CoE report, it is relevant to stress that all the documents elaborated up to date are a result of the drafting work by the High Level Experts, assisted by the Technical Secretariat, and of the discussions and debates held in the round tables. Hence, the Commission has absolutely stayed out of the drafting/elaboration process, therefore, playing only a

[6] Paragraph 293 of the Report on Challenges for Judicial Independence and Impartiality in the Member States of the Council of Europe

managing role. Following the above explanation, we note the paragraph stating that "*Strategy of Justice Reform, also drafted by the ad hoc parliamentary commission*"[7]. Actually, the Commission **has only approved** the Strategy, just like any other output document coming from the Group of High Level Experts, who represent a professional body of national and international experts, representatives of the country's justice system and of the international missions of assistance in the area of law.

Further, paragraph 294 of the CoE report states that, "*Taking into account experiences in Ukraine, the Strategy on Justice reform paper recommends introducing "an* ***ad hoc*** *mechanism that will be tasked to conduct the evaluation of professional knowledge, moral, ethical and psychological integrity of judges and prosecutors, combined with a special verification of their assets, with the burden of proof resting on the verified subjects, providing all necessary procedural guarantees to the evaluated judge or prosecutor." Especially a reversal of the burden of proof seems to be problematic. In a discussion with representatives from the ENCJ, an insider expressed concern that, as in Ukraine, politicians may wish to take over the HCJ and replace all judges*".

With regard to these finding, we would like to address certain points that, in our view, will provide a clearer picture that is in contradiction with the conclusions reached therein.

First, the revised draft constitutional amendments following the issuance of the Venice Commission Interim Opinion, specifically, the annex on the transitional qualification assessment of judges and prosecutors, foresee that all judges, including members of the Constitutional Court and High Court, all prosecutors, including the Prosecutor General, judges members of the High
Council of Justice, prosecutors who are members of the High Prosecutorial Council, the Chief Inspector and the other inspectors of the High Council of Justice and all legal advisors of the Constitutional Court and High Court shall be, ex officio, assessed and re-evaluated. The process intends to re-establish public trust and confidence in these essential democratic institutions.

In paragraph 100 of its Interim Opinion on the draft constitutional amendments, the Venice Commission underlines that ***"the Venice Commission believes that a similar drastic remedy may be seen as appropriate in the Albanian context. However, it remains an exceptional measure. All subsequent recommendations in the present interim opinion are based on the assumption that the comprehensive vetting of the judiciary and of the prosecution service has wide political and public support within the country, that it is an extraordinary and a strictly temporary measure."***

Second, the revised draft constitutional amendments provide that "***Assessment and re-evaluation shall be conducted by the Independent Qualification Commission, whereas complaints shall be reviewed by the Specialized Chamber operating at the High Court. Upon completion of the assessment and re-evaluation process*** *ex officio* ***and the expiry of the mandate of the Commission and Specialized Chamber, in line with Article 179/a of the Constitution, the assessment and re-evaluation shall be carried out by the High Administrative Court at first instance and by the High Court at second instance***.[8]

An Independent Qualification Commission organized and functioning with two separate decision-making panels shall be established conduct assessment at first instance.[9] A Specialized Qualification Chamber shall be established within the High Court and it is organized and functions with two separate decision-making panels which shall adjudicate as the last instance on final appeals of the assessment.[10]

All members of the Commission and the judges Appeals Chamber shall have a university degree in law or academic grade in law, and no less than fifteen years' experience as a judge, prosecutor, law professor, advocate, notary, attorney in ministries or public administration, or other legal profession related to the judiciary, and shall have a high reputation for integrity. Candidates must not have been

[7] Paragraph 294 of the Report on Challenges for Judicial Independence and Impartiality in the Member States of the Council of Europe
[8] VC Opinion, paragraph 117.
[9] VC Opinion, paragraph 117.
[10] VC Opinion, paragraph 117.

judges, prosecutors or legal advisors in the two years prior to their nomination. Nominees for judge shall not have been sentenced before in connection with the commission of a criminal offence. They shall not have held a political post in the public administration or a leadership position in a political party for the past 10 years before becoming a nominee. Nominees for judge shall not have been sentenced before in connection with the commission of a criminal offence. They shall not have held a political post in the public administration or a leadership position in a political party for the past 10 years before becoming a nominee. The Ombudsperson shall conduct an open and transparent application process for members in the Commission and judges at Specialized Qualification Chamber and public commissioner. The Ombudsperson shall assess whether the criteria are met and compile a list of qualified applicants and send that list to the Assembly. Assembly shall appoint with a 3/5 majority the members of the Commission and judges of the Specialized Qualification Chamber and the two Public Commissioners from the pool of qualified candidates provided by the Ombudsperson. If the Assembly fails to appoint all members, judges and public commissioners within 30 days, by the thirty-fifth day the President of the Republic shall select by public lot the members, judges or other commissioners. Those selected shall be automatically appointed.[11]

Additionally, these draft amendments foresee the establishment of an international monitoring mission that will be in charge of ensuring transparency, legal certainty and safeguards against abuse during the transitional qualification assessment process. The organization and functioning of the international monitoring operation shall be established in the framework of international agreement signed by the Republic of Albania on the one hand and the European Commission, other states or international organizations, on the other. The powers of the International Monitoring Mission shall be regulated by this annex and the law[12]. International Observers shall be experienced foreign lawyers who qualify to be a judge in their own country.[13]

As above, we consider that the mechanisms foreseen to be established for the conduct and monitoring of the assessment and re-evaluation process, as well as the setup and modus operandi of the said mechanisms shall exclude every possibility of political influence exercised on the process. Like with all the other constitutional functions applicable to the justice system, the officials who will be assigned to conduct the assessment and re-evaluation process shall go through selection filters, intended to reduce to a maximum the political interference with the nomination process. Unblocking mechanisms are also anticipated, in order to avoid cases of vacancies left unfilled due to a lack of political will. In all cases, however, the Assembly's discretion to appoint these officials is almost limited.

Third, the article on the verification of assets in revised draft constitutional amendments provides that "*If the assessee has assets greater than twice the amount justified by legitimate income, a presumption in favour of the disciplinary measure of dismissal shall be established which the assessee shall have the burden to dispel. For any criminal proceedings relating out of the procedure the burden of proof remains on the State.[14] If the assessee has not submitted the asset declaration in time or takes steps to inaccurately disclose or hide assets in his or her possession or use, a presumption in favour of the disciplinary measure of dismissal shall be established which the assessee shall have the burden to dispel. For any criminal proceedings resulting out of the procedure the burden of proof remains on the State.*"

In paragraph 121 of the Interim Opinion, the Venice Commission considers the shift of the burden of proof in the cases of asset verification as a positive step, concluding that the provision is compatible with the presumption of innocence and the right to be silent and not to incriminate oneself, as contained in Article 6 §2 of the European Convention.[15] According to the Venice Commission:

- Article 6 § 2 applies to criminal proceedings, so it would not be normally applicable in cases of dismissals of judges and prosecutors.

[11] *Ibid*.
[12] VC Opinion, paragraph 130.
[13] VC Opinion, paragraph 133.
[14] VC Opinion, p.121.
[15] This provision reads as follows: "2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law"

- There are multiple examples from other areas of law where a failure to report on certain operations, acts, contacts, etc. entails liability (for example, the fiscal liability attached to the submission of inaccurate or incomplete tax returns). It is reasonable to introduce even more stringent rules for civil servants, including judges and prosecutors.

The reform is intended to ensure reduction of the corruption among judges/prosecutors, enhance their professional capacities, increase effective oversight mechanisms for these judges/prosecutors, allow a clear division of powers between the bodies governing the justice system, etc. Summing it up, the purpose of the reform itself is to build a justice system that is reliable, fair, independent, professional, guided by the service to the citizens, responsible and accountable, a system which enjoys the public trust, supports the sustainable socio-economic development of the country and enable Albania's EU integration.

Should you need more information on the Reform in Justice and, in particular, with regard to the draft constitutional amendment, please access the official website http://www.reformanedrejtesi.al/ and the link http://www.reformanedrejtesi.al/projekti-i-amendamenteve-kushtetuese-drafti-i-rishikuar-propozuar-nga-grupi-i-eksperteve-te-nivelit

ARMENIA / *ARMÉNIE*

Concernant le paragraphe 216, c'est noté que la législation nationale de l'Arménie, notamment les amendements constitutionnels récents définissent l'indépendance des juges et en prescrivent les garanties nécessaires. Durant la période 2009-2015, une nette augmentation en matière des arrêts d'acquittement a été constatée. Le nombre de type d'affaires a constitué 25 en 2009 qui a atteint 157 en 2015. En outre, parmi ces affaires sont nombreuses celles où la durée et la nature de la peine requise par le ministère public (demandant l'atténuation ou le durcissement de la peine requise) n'ont pas été conformes à celles rendues par les tribunaux.

Concernant le paragraphe 296, c'est noté que les données statistiques révèlent que la confiance de la population envers le système judiciaire national connait un accroissement constant en Arménie. Le nombre des requêtes des affaires civiles soumises aux tribunaux d'instance générale a augmenté de 37.2% en 2015, par rapport à 2014 et de 142.4% par rapport à 2013. Avec l'accroissement du nombre des requêtes des affaires civiles, le nombre des recours en appel a diminué. Ainsi, en 2015, seulement 5.7% des arrêts rendus par les tribunaux d'instance générale a fait l'objet d'appel; alors qu'en comparaison avec 2014 ce chiffre s'élevait à 7.9% et à 14% en 2013. En outre, les requêtes soumises aux tribunaux administratifs plaidant l'annulation des actes, ainsi que la contestation des actions (des inactions) des représentants des autorités publiques et locales ont également augmenté. En 2015, leur nombre a augmenté de 15.5% par rapport à 2014, et de 109.9% par rapport à 2013. En 2015, 35% de la totalité des affaires closes demandant l'annulation des actes ou la contestation des actions (des inactions) des représentants des autorités publiques et locales se sont résolus en faveur des requérants.

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Referring to the paragraph 216, it is noted that the national legislation of Armenia and particularly the recent constitutional amendments define the independence of judges and stipulate the necessary guarantees. During the period from 2009 to 2015, we have witnessed a net increase of acquittals in the judgments of the courts. The number of such cases has been 25 in 2009, and it reached 157 in 2015. Furthermore, in many cases the duration and nature of sentences in the decisions made by the court were much different from what was requested by prosecutors (including both mitigation and intensification of the penalty sought).

Referring to the paragraph 296, it is noted that the statistics show steady increase of trust of the population towards the national judicial system in Armenia. The number of civil cases submitted to the courts of general jurisdiction in 2015 showed an increase of 37.2% compared to 2014 and an increase of 142.4% compared to 2013. Along with the increase in number of civil cases, we have witnessed a decline in number of appeals. In 2015 only 5.7% of the judgments made by the courts of general jurisdiction was appealed, in comparison with 7.9% in 2014 and 14% in 2013. In addition, in 2015 the

number of cases brought before administrative courts requesting the cancellation of acts as well as contesting the actions (inactions) of government or local officials has also increased by 15.5% compared to 2014 and by 109.9% compared to 2013. In 2015 35% out of total closed cases requesting the cancellation of acts or contesting the actions (inactions) of government or local officials were settled in favour of applicants.

BELGIUM / *BELGIQUE*

Concernant le point 157, c'est noté que avant sa présentation au parlement, le projet de loi avait été soumis à plusieurs organes consultatifs, y compris la section législation du Conseil d'État. Le parlement a débattu, amendé et finalement validé le projet de loi en connaissance de tous les avis et opinions. La nouvelle législation à laquelle le CCJE fait référence a ensuite été validée par la Cour constitutionnelle belge dans son arrêt du 15 octobre 2015. Le régime de mobilité renforcée des magistrats instauré par la loi du 1er décembre 2013 n'est pas considéré comme une atteinte au principe de inamovibilité.

En particulier, la Cour constitutionnelle a décidé que ce régime qui permettait notamment de soumettre un magistrat à une mesure de mobilité renforcée, ne violait ni la Constitution belge, (les articles 10, 11, 152 de la Constitution), ni ces principes constitutionnelles en combinaison avec les dispositions internationales invoquées, telles que la Charte sociale européenne, le Pacte internationale relatif aux droits économiques, sociaux et culturels, les articles 6 et 8 de la Convention européenne de sauvegarde des droits de l'homme, le Pacte international relatif aux droits civils et politiques (art 14) et la charte des droits fondamentaux de l'Union européenne (art 47). (arrêt 139/2015 considérants B.7.1. à B.9. de l'arrêt).

Les décisions de mobilité sont prises par le pouvoir judiciaire, par des magistrats mêmes. De plus, comme la Cour constitutionnelle dit dans son arrêt : le législateur a « d'une part, prévu diverses mesures visant à associer au mieux ces magistrats aux mesures de mobilité envisagées, le cas échéant, à leur égard, et a, d'autre part, ouvert de nouvelles voies de recours à l'encontre desdites mesures. »

Concernant les points 104 & 105, c'est noté que :

Point 104 :

Par son arrêt 138/2015 du 15 octobre 2015, la Cour constitutionnelle belge a également validé le contenu des dispositions de la loi du 18 février 2014 concernant l'introduction d'une gestion autonome pour l'organisation judiciaire.

La Cour constitutionnelle a jugé que les dispositions ne violaient pas la Constitution belge combinée avec le principe de la séparation des pouvoirs et celui de l'indépendance du pouvoir judiciaire (déduits notamment des articles 151, 152, 154 et 155 de la Constitution), avec le principe de la légalité dans l'organisation judiciaire (déduits notamment des articles 146, 152, alinéa 1er, 154, 155 et 157 de la Constitution), avec l'article 6 de la Convention européenne des droits de l'homme, avec l'article 47 de la Charte des droits fondamentaux de l'Union européenne et avec l'article 14 du Pacte international relatif aux droits civils et politiques.

Point 105 :

Le ministre de la justice et son administration, le Service Public Fédéral Justice, sont actuellement responsables pour la gestion de l'organisation judiciaire. Comme tout ministère, le SPF Justice est soumis à la hiérarchie du ministre et aux même règles générales de contrôle administratif et budgétaire que les autres ministères de l'état.

La loi du 18 février 2014 a justement pour but de transférer la gestion de l'organisation judiciaire du Service Public Fédéral Justice à des organes au sein de l'organisation judiciaire. Ces organes ne relèveront pas du contrôle hiérarchique du ministre de la justice. Ce transfert permet de soustraire l'organisation judiciaire au contrôle administratif et budgétaire classique des administrations publiques.

Ceci n'empêche cependant pas que ces organes rendent compte de leur gestion autonome aux autorités budgétaires par des voies appropriées.

Concernant les points points 229 et 230, c'est noté que le budget pour le personnel judiciaire et la magistrature est annuellement déterminé par le législateur. Le ministre de la justice ne peut que dépenser le budget que le législateur lui accorde. Comme dans tous les pays européens la Belgique est confronté à des économies budgétaires. Néanmoins, en 2015 les économies sur les dépenses de personnel ont été limitées à 1 pour cent au lieu des 4 pour cent imposées aux autres départements.

La justice belge compte 300 bâtiments (2,6 implantations par 100.000 habitants) qui sont mis à disposition du ministre de la justice par l'administration nationale des bâtiments. Cette mise à disposition, y inclus les frais de gros entretien, sont à charge de l'administration des bâtiments. Les autres frais sont à charge de la Justice. Le cas échéant, les problèmes de gestion des bâtiments sont gérés de concert entre l'administration nationale des bâtiments, l'administration de la justice et les autorités judiciaires.

BULGARIA / *BULGARIE*

Referring to paras 12, 16 and 80, the delegation of Bulgaria would have proposed the following text to replace para 80: *"The amendments to the Bulgarian Constitution were adopted on 16 December 2015 providing significant changes in the structure and competences of the Supreme Judicial Council (SJC). The main objective is to strengthen the independence of the judiciary by means of dividing the SJC into two chambers (of judges and of prosecutors) exercising separately career and disciplinary functions and achieving a better level of self-governance of judges. SJC consists of 25 members of which 11 are elected by the bodies of the judiciary and 11 are elected by the National Assembly by two thirds qualified majority, and 3 ex officio members – the Presidents of the Supreme Court of Cassation and the Supreme Administrative Court, and the Prosecutor General. The SJC exercises its competences in Plenum, in the Chamber of Judges and in the Chamber of Prosecutors. The Judges' Chamber consists of 14 members of whom 6 are judges elected among judges, 6 are elected by the Parliament and two ex officio members – the presidents of the two supreme courts. The Prosecutors' Chamber has 11 members and includes 1 ex officio member - the Prosecutor General; 4 members are elected with direct voting by the Prosecutors, 1 member is elected with direct voting by Investigating Magistrates and 5 members are elected by the Parliament."*

Referring to para 151, it must be specified that after the Constitutional amendments of 16 December 2015 the Supreme Judicial Council in Bulgaria will be divided into two chambers - the Judges' Chamber and the Prosecutors' Chamber.

Referring to para 241, it must be underlined that the Law for the State Budget for 2016 was adopted and promulgated in State Gazette on 9 December 2015 and entered into force on 1 January 2016. The Law provides for increase of the budget of the Judiciary with 45 million BGN (approximately 22,5 million euro) for 2016 compared with the budget for 2015. The proposed amendment of Article 218, para 2 and 3 of the Judiciary System Act was not adopted.

Referring to para 255, it can be noted that According to the Judicial System Act the independent budget of the judiciary shall be a part of the state budget. The Minister of Justice proposes a draft budget of the judiciary and submits it for discussion to the Supreme Judicial Council. The Council of Ministers submits to the National Assembly the draft law on the state budget of the Republic of Bulgaria for the year, together with the draft judiciary budget, proposed by the Supreme Judicial Council, accompanied by detailed reasoning. When adopting the state budget the National Assembly is hearing a report of the Supreme Judicial Council, presented by its representative.

Referring to para 277, it can be noted that in 2014 the Bulgarian Supreme Judicial Council established a clear procedure on how the SJC should react in cases of political interference in the judiciary and prosecution – "Procedure for public reaction in case of infringement of the independence of the judiciary". SJC promptly makes statements and opinions in cases when the independence of the judiciary is affected. It also makes comments on judgments or statements of representatives of executive and legislative powers which undermine the independence and public confidence in the

judiciary.

GEORGIA / *GÉORGIE*

Referring to para 161, it is noted that, strictly speaking, there was no "reinstatement" as such because the Supreme Court judgment whereby the four judges had been dismissed was never repealed. However, it is true that to a degree justice was done with respect to Judge Gvenetadze and Judge Turava as the former was elected the President of the Supreme Court and the latter the judge of the Constitutional Court. This became possible after the amendments passed by the Parliament to the law in 2014 whereby the ban on the reappointment of a dismissed judge was lifted in cases when the dismissal took place on the already repealed legal grounds. The four judges were dismissed on the grounds of "gross violation of law". This latter ground was abolished in 2007. And, therefore, the election of Judge Gvenetadze and Judge Turava became legally possible. Theoretically, the other two judges may also benefit from these developments.

Referring to para 162, it is noted that there is no basis for automatic reappointment of judges in the Georgian law. All, including those who have served for 10 years as judges, should go through an open competition and may, therefore, win or lose those competitions vis-à-vis other candidates for the same vacancies as the High Council of Justice may decide by secret vote.

Referring to para 272, it is noted that one of the most powerful and the most often quoted findings of the ECtHR in the Enukidze and Girgvliani case is this: "Indeed, the Court is struck by how the different branches of State power – the Ministry of the Interior, as regards the initial shortcomings of the investigation, the Public Prosecutor's Office, as regards the remaining omissions of the investigation, the Prisons Department, as regards the unlawful placement of the convicts in the same cell, the domestic courts, as regards the deficient trial and the convicts' early release, the President of Georgia, as regards the unreasonable leniency towards the convicts, and so on – all acted in concert in preventing justice from being done in this gruesome homicide case." (See para. 276 of the judgment).

In fact, by voting against the violation of Article 2 (procedural limb) and Article 38 of the Convention former judge Mr. Adeishvili made the worst damage to his personal reputation, than anyone else.

GERMANY / *ALLEMAGNE*

As regards paras 127 to 131: "Germany - The Federal Prosecutor under the power of the Minister of Justice", the delegation would prefer to read the end of para 128 and the beginning of para 129 as follows:

128. (…) The Federal Prosecutor, Harald Range, accordingly opened an investigation in the course of which he asked an external expert, an academic researcher, to investigate whether the published documents had indeed to be classified as state secrets. The press heavily criticised the investigation as a violation of the freedom of the press. ***According to the Federal Minister of Justice, Heiko Maas, he and Mr Range agreed in consensus on cancelling the mandate of the external expert to investigate the documents and – because of the necessary precipitancy – on assigning government officials of the Ministry of Justice to establish an internal expertise – in the short term - to be used as a basis for Mr Range's decision whether to stop the investigations altogether or not.***

129. On 4 August 2015, Federal Prosecutor Range issued a public statement criticizing an "intolerable interference" with the freedom of justice[16]. ***According to him, he got a directive to stop the investigation on the case and to withdraw the assignment on compiling the expertise and had been told that he would lose his position in case of refusal.*** *In his statement, Range said that the freedom of press and speech were of great value…"*

[16] The exact wording is published in German on Zeit Online, 4 August 2015, http://www.zeit.de/politik/deutschland/2015-08/netzpolitik-range-stellungnahme-dokumentation (access on 25 September 2015).

As regards para 17 and its sentence: “In such systems, the Minister of Justice may even dismiss the Prosecutor General at free will”, the delegation notes that as the reference is only to Germany (footnote 56), it would like to point out: it is true that the Federal Minister of Justice may ask the Federal President to dismiss the Federal Prosecutor. But there are differences in the Länder. In the Länder, the different German States, prosecutors general are no longer regarded as “political civil servants” but the respective Ministers of Justice, in theory, still have the right to give directives to the General Prosecutors in the Länder. In practice, however, this right is seldom exercised. This is explained under No. 127 (see below).

As regards para 127, the delegation would prefer to add, after the sentence “In practice, however, this right is seldom exercised”, the following:

Some German Länder have obligated themselves by way of voluntary self-commitment to refrain from making use of the authority to issue instructions. North Rhine-Westphalia, for example, has developed "Ten Guidelines on Exercising the Authority to Issue Instructions to the Public Prosecutor's Offices in North Rhine-Westphalia," with which the Justice Minister in principle obligates himself to refrain from making use of his authority to issue instructions in pending investigation proceedings. The only exception to this is when the responsible public prosecutor general improperly refrains from intervening even if the prosecutor's office handles a case in a manner amounting to an error of law. However, according to the guidelines, such an instruction may be issued only in writing and is to be directed to the public prosecutor general, who checks its lawfulness before forwarding it to the prosecutor who has committed the error. This writing requirement, as well as the restriction that instructions may be issued only via the public prosecutor general, applies in Berlin as well. In Schleswig-Holstein, the "Act to Establish Transparency of Political Instructions to Officials from the Public Prosecutor's Offices" of 14 October 2014 governs, among other things, an obligation on the part of the judicial administration to notify the President of the Land Assembly of official instructions in specific cases.

HUNGARY / *HONGRIE*

Referring to paras 167-168 and 281, it is noted that the Report explicitly refers to a particular judgment of the Court in respect of Hungary. Following the request submitted by the Government, on 15 December 2014 the panel of five judges decided to refer this case to the Grand Chamber, who held a hearing on 17 June 2015. The Grand Chamber has not yet taken a decision in this case (Hungary is not bound yet by any ruling of the Court in this respect).

Thus, the delegation believes that any reference to a ruling – not final at this stage – is premature and could be misleading (prejudging). **The delegation proposes therefore the deletion of the paragraph titled “Baka v. Hungary” on page 57, point bb 167-168 as well as on page 93, point aa 281.**

ITALY / *ITALIE*

Les paras 169 à 171: “Italie – indépendance du système judiciaire et responsabilité personnelle des juges” devraient se lire en tenant compte qu’une nouvelle loi a été adoptée par l’Italie suite au jugement de la Cour de Justice de l’Union européenne. Le para 171*: “Il est évident que la possibilité d'être personnellement tenu pour responsable des dommages causés par une décision judiciaire peut constituer une menace sérieuse pour la prise de décision ou l'initiative dans le processus de jugement et la conduite consciencieuse et efficace d'une procédure et d'un procès. Le fait qu'une négligence caractérisée puisse être déterminée dans l'établissement des faits ou dans l'évaluation des éléments de preuve peut être discutable dans une affaire donnée, mais la simple menace d'être tenu pour responsable d'une décision judiciaire autrement que par la voie d'un recours peut être considérée comme une atteinte substantielle à l'indépendance des juges”* devrait donc être considéré comme obsolète.

L'Italie ne devrait pas être mentionnée dans la première phrase du para 289 : *"Toutefois, d'autres États membres aussi combattent la corruption (selon les informations publiées dans la presse par exemple en France, en Italie et en Espagne)."*

LATVIA / *LETTONIE*

Referring to para 97: "Latvia - President schedules hearings", the Ministry of Justice would like to specify that situation mentioned in Paragraph 97 is related only to one court. In this context it is important to note that in recent years the duration of the proceedings of cases in this court have risen considerably, reaching the longest duration ever. These circumstances require extraordinary solutions in order to guarantee the right to trial within a reasonable time. The Latvian "Law On Judicial Power" gives the President of the Administrative Regional Court several instruments to guarantee the right to trial within a reasonable time, in particular, in order not to allow the average duration of the proceedings to raise even more. The President of the Administrative Regional Court may set the date of the first court hearing only as a recommendation. It is up to the judge after he has examined the case at hand to decide if the case should be heard on the date recommended by the President.

Referring to para 240: "Remuneration of judges and prosecutors", it must be stated that the issue of remuneration of judges was a subject of the judgement of the Constitutional Court of Latvia (Satversmes Tiesa) on 18 January 2010. Following this judgement amendments were made to the "Law on Remuneration of Officials and Employees of State and Local Government Authorities" on 16 December 2010 whereby the judges and prosecutors were included in the list of public officials. Since the amendments entered into force on 1 January 2011 the remuneration of judges and prosecutors are the same as for other public officials.

MONTENEGRO / *MONTENEGRO*

It is noted that the changes in the Constitution gave rise among the prosecutors that the life tenures of the office may be endangered which was successfully settled at the series of meetings starting with the one held among the high representatives of Montenegro including the Supreme State Prosecutor at that time, the European Commission and the Venice Commission in Brussels on 11 February 2014. The Venice Commission took an active role in this coordination since this Council of Europe body has been fully involved in giving opinions on the amendments to the Constitution and the organizational laws. In addition, Montenegro has fulfilled all the steps mutually agreed upon at the meetings while satisfying the needs of prosecutors as well which led to the final step i.e. elected state prosecutors were sworn in on 14 January 2016 under new procedures. All the previous prosecutors have been reelected except those who have satisfied the conditions for retirement.

When it comes to the possible negative developments for judges' rights as a consequence of the new law on salaries in the public sector, *inter alia*, the salaries of the President of the Supreme Court and the President of the Constitutional Court are equal to those of the Prime Minister and the Speaker of the Parliament and the salaries of judges are equal to those of the Ministers. In general, the new law on salaries makes for the increase of net salaries in the judiciary. Taking into account the salaries, the pensions will also be higher than the average.

POLAND / *POLOGNE*

In para 210 – "Poland – Presidential pardon preventing enforcement", the delegation would like to read that *"According to comments in certain media*[17]*, in Poland the President of the Republic intervened in criminal proceedings. A former head of an anticorruption office had himself become a defendant in criminal proceedings and had been convicted at first instance to three years in prison. While his appeal was pending, the new Polish Prime Minister, elected in late October 2015, intended to appoint him as a member of the new government. Such an appointment was not possible in the case of such a criminal conviction. The President of the Republic then issued a pardon of this person*

[17] Frankfurter Allgemeine Zeitung, Nov. 20 and 23, 2015; see also: http://www.t-online.de/nachrichten/ausland/eu/id_76222262/-bald-ein-totalitaeres-system-vorwuerfe-gegen-neue-regierung-in-polen.html (visited 25 November 2015).

*although **some lawyers** argued that a pardon is only possible after proceedings have been brought to a final decision and there was no room for what in fact amounted to an amnesty pronounced by the president"* and to add at the end of the para. that "*In this context it should be noted that Article 139 of the Polish Constitution, which provided legal basis for issuing the said pardon does not specify that the Presidential pardon would only be possible with respect to finally sentenced person".*

SLOVENIA / *SLOVÉNIE*

Referring to the para 148, it is suggested to change it as follows:

"148. However, GRECO analysed and ITS Fourth Evaluation Round in 2013 That the responsibility for the prosecution (some Competences as regards the organization, supervision and general management of human resources) was Transferred from the Ministry of Justice to the Ministry of the Interior. GRECO and it Compliance report assessed Measures Taken by the Authorities of Canada to Implement the Recommendations Issued and the Fourth Round Evaluation Report on Slovenia and Which very much welcomes That responsibility for the prosecution service has been Transferred back to the Ministry of Justice. In view of the That Serious Concerns had been raised and the Evaluation Report (Paragraphs 181-182) about the Fact That the Ministry of the Interior had Acquired authority over the prosecution service, a return to the status quo ante is not even praiseworthy than the Measures advocated and the Recommendation."

Explanation:

With the entry into force of the amended State Administration Law in 2013 the competence in the field of Public Prosecutions were re-transferred back to the Ministry of Justice. The Report is dated 15 January 2016 and the data is thus inconsistent with the actual organization of the state administration in the Republic of Slovenia.

In addition please find the conclusion of the GRECO report in this regard (Fourth Assessment period Greco Eval IV Rep of 30. 5. 2013)[18].

Since the existing reference to incomplete or incorrect data in the report does not reflect the actual normative regulation of the Public Prosecutor Office of the Republic of Slovenia we suggest that the information be corrected.

SWITZERLAND / *SUISSE*

Concernant les paras 19 et 179 relatifs à la révocation des procureurs, la délégation souligne qu'on ne peut pas indiquer que « *la révocation d'un procureur – qu'elle résulte d'une décision de l'exécutif ou d'une réforme des lois ou de la Constitution – pose un grave problème dès lors qu'elle semble inspirée par des motifs politiques* » car l'exécutif n'a pas de possibilité d'influencer la révocation d'un procureur. La seule compétence dans ce cadre revient au procureur général de la Confédération.

TURKEY / *TURQUIE*

Referring that even though the aim of the preparation of this report takes into consideration a very significant universal principle such as judicial independence and impartiality, it is considered that the way it was prepared is definitely not in compliance to its aim.

Although the report states that the fundamental problems faced in the implementation of the principles of judicial independence and impartiality in the member states to the European Council would be identified, the methods used in the preparation of the report led to the drawing of faulty conclusions.

[18] GRECO - http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/ReportsRound4_en.asp

http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4(2012)1_Slovenia_EN.pdf

As a matter of fact, while an objective conclusion could have been reached by gathering information also from the official authorities, the conclusions were based on the assumption that the information in some individual e-mails and letters as well as news articles from certain media sources were accurate. The preference of the easier way as the method caused the preparation of a report that includes accusatory phrases leading to assertive conclusions, instead of an analysis of the situation. This fact constitutes a violation of the principle of rule of law, which is one of the most essential values primarily of the Council of Europe.

Our responses to the questionnaire, which constitute the basis of this report, have been sent to the Directorate General for International Law and Foreign Relations of the Ministry of Justice with our letter no. 53096 dated 25 November 2015. However, the list of countries that sent their responses annexed to the report does not include Turkey. This must be paid special attention to.

In paragraph 66 of the text, to which the footnote 9 refers to, the following is stated regarding the allegation that the appointment of judges and prosecutors in Turkey are made according to the list the ruling party makes:

If this paragraph refers to the admission into profession for the first time of prospective judges and prosecutors, the High Council of Judges and Prosecutors (HCJP) do not have an authority in this regard. As a matter of fact, before appointment, the candidate judges and prosecutors are first subject to a written exam held by the OSYM (Measurement, Selection and Placement centre) and then subject to a verbal exam held by the Ministry of Justice (there are no representatives of the HCJP in the verbal exam commission). The faulty wording of this fact in the report shows that there is a lack of knowledge on how the judges and prosecutors in Turkey are determined. However, if the reference is made to the appointment of judges and prosecutors to new positions, then it casts significant doubts on the objectivity of the report since generalizations have been made by grounding on a single e-mail from an unknown sender and that is sent to the CCJE by unknown means, without asking any questions to the respondent institution.

Paragraph 12 of the text makes an assessment of the impartiality of the members of the HCJP and referring to paragraph 94, includes an allegation that the 2014 elections were made under the pressure and effect of the external factors, especially of the executive power.

As it is already known, the appointment of the members of the High Council of Judges and Prosecutors is regulated in the third section titled “Appointment of Members of the Council and Termination of the Membership” of the Law No. 6087 of the High Council of Judges and Prosecutors.

In the relevant sections of the abovementioned Law, there is detailed information on matters of general provisions, selection of the members of the Council by the Court of Cassation, the Council of State and the Justice Academy of Turkey, selection of the members of the Council by the civil and administrative judges and prosecutors, as well as vacancy and termination of the membership.

Pursuant to Article 18 of the Law No. 6087, twenty members of the Council, except for the Minister and Undersecretary of Justice, are elected according to the procedure explained below:

“The members of the Council shall be elected for four years according to the following;

a) Four regular members shall be appointed by the President of the Republic from among law academicians with a minimum of fifteen years of working experience at higher education institutions and from among lawyers with a minimum of fifteen years of practicing experience,

b) Three regular and three substitute members shall be elected by the Plenary Session of the Court of Cassation from among the members of the Court of Cassation,

c) Two regular and two substitute members shall be elected by the Plenary Session of the Council of State from among the members of the Council of State,

d) One regular and one substitute member shall be elected by the Plenary Session of the Justice Academy of Turkey from among its own members,

e) Seven regular and four substitute members shall be elected by civil judges and prosecutors from among first category civil judges and prosecutors who retain qualifications for designation as first category,

f) Three regular and two substitute members shall be elected by administrative judges and prosecutors from among first category administrative judges and prosecutors who retain qualifications for designation as first category."

Elections for Council membership are held once every four years within sixty days prior to the end of the term of office of the members. These elections shall be held once for each term depending on the principles of secret, free, equal, single stage voting, and counting and sorting shall be open.

During the election of ten Council members determined by the civil and administrative judges and prosecutors, all judges and prosecutors have the right to vote, and the elections are held under the management and supervision of the Supreme Election Board of Turkey, which is a Constitutional institution. As to the election of members to the Council by the civil judges and prosecutors, elections are held under the management and supervision of the Provincial Election Board in every province and judges and prosecutors working within the boundaries of that province vote at these election centres. As to the election of members to the Council by the administrative judges, elections are held under the management and supervision of the Provincial Election Board in the provinces with a regional administrative court, and administrative judges working at that regional administrative court or the courts within its jurisdiction vote at these election centres.

For the elections, the locations of ballot boxes are determined by ballot box committees supervised by the Provincial Election Boards. In the designation of the location, the practical matters of using votes easily, freely and secretly are taken into consideration. Ballot boxes are placed at suitable points in the courthouses.

The Provincial Election Boards establish ballot-box committees according to the number of voting judges and prosecutors, each consisting of a chairperson, four regular members and two substitute members, to be assigned from among public officials. Complaints and objections against to the procedures, actions and decisions of ballot-box committees are resolved by the Provincial Election Board.

Judges and prosecutors may monitor counting, sorting out of votes and merging of election minutes before the ballot box committees and Provincial Election Boards, and they may receive a copy of the minutes.

Candidates may not carry out electioneering activities as of the announcement of final candidate lists until the end of voting time. However, they may post their resumes on a designated website in accordance with the procedures and principles set out by the Supreme Election Board; send letters, e-mails or text messages about themselves and explain their views regarding the professional matters; and hold indoor meetings.

The election of members to the High Council of Judges and Prosecutors in October 2014 took place within the framework of the abovementioned principles and rules, by ensuring the informing of the voters at all stages of the elections through appropriate means, and ensuring a total equality of opportunity in terms of every group of candidate in the elections, under the management and supervision of the Supreme Election Board of Turkey.

In order to enable the candidate judges and prosecutors to carry out their electioneering activities, the Secretariat General of the High Council of Judges and Prosecutors showed tolerance towards the candidates regardless of position, and without allowing any deficiencies in the judicial services, and they were allowed to carry out their electioneering activities in accordance with the legal regulations within the electoral period.

With the purpose of preventing the compromising of the elections and misunderstandings, the Secretariat General of the High Council of Judges and Prosecutors avoided preparing Chamber agendas on discipline, transfer and promotion except for the circumstances requiring urgency, and made efforts towards a completely fair and undoubted election.

As mentioned above, it is not possible for the election to have been carried out under any political or institutional pressure for reasons such as the fact that it took place among judges and prosecutors,

that the prospective members are elected also from among judges and prosecutors, and that our judges and prosecutors within the judicial organization have a consciousness of internalisation and protection of the independence and impartiality of the judiciary.

Besides, since the election was held under the management and supervision of the Supreme Election Board of Turkey and thus the scrutiny by the said institution into all allegations regarding the validity of the election was ensured, pressure on the candidates is out of question.

At the HCJP election of 2014, candidates who are members to the “Platform of Judicial Unity”, which represents the views of various groups of the society, succeeded in the elections by getting the majority of the votes of the judiciary of Turkey and were elected as members of the HCJP. When the facts that at the logical base of the “platform” lies the principle of “plurality”, and that the Platform is an institution that brings together various identities and gained the majority of the votes in the judiciary are taken into consideration, it is simply unfair to cast doubts on the success of an entity with the allegations that there have been “political influences” and that “the successful candidates were supported by the government”, and it has been considered an insult to the members of the judiciary.

As a matter of fact, it should be kept in mind that those who claim that the current personnel of the HCJP won the 2014 elections by “using political influence” are those who lost in the same elections.

It is obvious that a faulty conclusion has been reached stating that the HCJP is not independent, without giving regards to the fact that the members of the HCJP are determined through a democratic election according to the procedures summarised above, that the majority of the members are members of the judiciary, and that the powers of the Minister and Undersecretary of Justice upon the actions of the HCJP are limited.

When it comes to the elaborations in paragraphs 91 and 92 with a reference to paragraph 12 and which concern the legal amendments regarding Law No. 6087 Turkey is of the view that the report may incline its readers to a misappropriate perception on Turkey by generally reflecting dissident arguments to the amendment and by neglecting the vice versa.

Firstly, functions and the competence of the HCJP is regulated by Article 159 of the Turkish Constitution which reflects the international standards to provide an abundant ground for judicial independence. While the said article outlines the general principles for the foundation, composition and competence of the HCJP, it also states that detailed regulations will be made by laws. Following the Constitutional Reform of 2010, the Law numbered 6087 on High Council of Judges and Prosecutors was passed. However, some structural problems were encountered during the service of the first term HCJP. For instance, most of the inspection reports concerning judges and prosecutors had been sued and a remarkable amount of the reports were cancelled by courts on the grounds that those reports were not in compliance with the Constitutional guarantees of the judges and prosecutors and no appropriate reasoning were provided with the reports. Such and similar problems, faced by the first term HCJP, resulted in the need to revise the Law No. 6087 and the said law was amended by Law No.6524 as such issues were clearly indicated in the reasoning of the said law. Thus, following the amendments, the number of objections to these reports by judges and prosecutors considerably declined. Turkey is ready to share the statistical data, if needed.

In line with the principle of hierarchy of norms, constitution prevails to all kinds of legal instruments in internal law in Turkey. Articles of the Constitution regarding the HCJP have never been amended. Besides, the judgement of the Constitutional Court proves that there is a properly working check and balance system in Turkey which safeguards the judicial independence and avoid judiciary from any potential risks. As a result, although the amendments may be arguable from different political aspects, it is indisputable that the constitutional principles have never been changed and they are under the legal protection of the highest court in Turkey.

When it comes to paragraph 90 with a reference to paragraph 16, Turkey would like to remind that no executive organ has any competence in the functioning of the public prosecution service. Since a joint council decides issues such as public prosecutors' appointments or disciplinary proceeding against them, this enables the public prosecutors to be supervised concordantly with the standards regarding judges. This can also be interpreted as a factor that enhances professional guarantees.

With regard to paragraph 93, we believe it contains incorrect and misleading information. The Minister of Justice is politically responsible for the effective and proper implementation of the justice policy and in this capacity; s/he is politically responsible to the society and to the GNAT which is also the case in some of the European Countries. Therefore, although s/he has capacity to preside over the Plenary of the HCJP, according to information received from HCJP Bureau of the Plenary, from October 2014 to July 2015, the Minister of Justice participated in only the meetings on 28/10/2014 (welcome meeting for the second term HCJP members) and 15/12/2014 under the capacity of the President. Thus, the Plenary is presided over during the other meetings by the Deputy President who is an elected member from the civil judiciary. Therefore, Minister of justice has no right to attend the meetings of the Chambers and cannot decide on appointment, promotion, transfers of judges/prosecutors and monitoring and establishing disciplinary measures against judges and prosecutors.

With regard to paragraph 94 which claims that “the Ministry of Justice created what was called the "Judicial Unity Platform" and following information in the same paragraph is totally incorrect and groundless. Also it depends on defamation of other rival unions. It should be kept in mind that the members of these unions are judges and prosecutors and also “The Association of Union in Justice” has the largest number of judges and prosecutors as members among all judicial unions. Furthermore, establishing a connection between corruption cases and the said union is irrelevant and also this comment bears an insult to the majority of Turkish judges and prosecutors

“Union for Judges and Prosecutors” may not be mentioned as an indicator for the interference of the executive. Because, similar to other judicial unions in Turkey, all members of the union are judges and prosecutors. There are no members outside the profession having political affiliations. It is strictly forbidden for judges and prosecutors to be a member of the political parties as stated in Law No. 2802 Article 51 para 4 as “Judges and prosecutors may not join political parties; those who fail to satisfy this requirement shall be deemed withdrawn from the profession.” Furthermore, this union represents the world-views of different segments of the society convened under the umbrella of the platform, as defined in the first sentence of this paragraph used by the GET, should be understood as a reaction of judges and prosecutors to the malfunctioning of the first term HCJP. This pluralist union welcomed all judges and prosecutors of different mindset.

Paragraph 21 of the text alleges that judges and prosecutors who are dismissed and transferred did not have enough guarantees to defend themselves during that process.

However, it is a fact that could be understood by the documents which could be obtained upon request from the HCJP that the judges and prosecutors are able to use the internal objection mechanism against the dispositions at the Chambers of the HCJP, they have the right to access any relevant information and document regarding the allegations against them, and they benefit from all the rights enacted by laws such as the right to defence. It is observed that there are some findings in the report reached by the allegations even though there exists no material circumstance proving accuracy of the allegations.

There is a criticism towards the independence of the members of the HCJP in paragraph 75 of the report.

As it can be understood from the comprehensive explanations in paragraph 12 above, when it is taken into consideration that 15 members which form the majority of the members of the HCJP are elected by their colleagues of all degrees, 4 members are appointed by the President of the Republic who is elected by the public, and 1 member is elected by the Plenary Session of the Justice Academy of Turkey which consists mostly of judges, it is clear that the HCJP has a broad-range representation with its pluralistic structure, the examples of which is very rare among the European countries.

Paragraph 92 of the text discusses the effect of the power vested in the Minister of Justice by the new regulations that have not been annulled by Constitutional Court on the independence of the judiciary.

It is clear that with the title of “the President of the Council” in the Law that was restored to its previous version upon the annulment decision of the Constitutional Court, the Minister of Justice is not given powers that differ significantly from those which were vested in him with the previous law, and the

reason why these powers are not in violation of the Constitution is explained in detail in the decision of the annulment decision of the Constitutional Court.

Moreover, the authority granted to the President of the HCJP to decide on which members to work at which chambers was annulled by the Constitutional Court; however, it was mentioned that the president had already changed the members in the chambers before the annulment decision. On the contrary, the president never used the authority granted to him by the annulled article of the law. The said change was made by the former Plenary Session of the HCJP, and it is the current situation.

For paragraph 114 of the text, the response regarding paragraph 12 are reiterated.

Though paragraph 180 of the text contains concerns of the international organizations concerning transfer and suspension of judges in Turkey;

We have expressed our discomfort about the unilateral declaration published by the Venice Commission on 20 June 2015 regarding certain judicial members who have recently been suspended as an interim measure or discharged solely upon the preliminary acceptance of the allegations expressed in the complaint letters without requesting any official information from Turkish authorities, a practice which is inappropriate with their mission.

(In fact, disciplinary proceedings have been initiated against said members of the judiciary upon consideration of thousands of verbal and hundreds of written complaints from a large number of citizens, journalists, bureaucrats, academicians, politicians, businessmen, judges and prosecutors. The inactivity in such circumstances would mean the HCJP failed to fulfil its duties and responsibilities.)

Similarly, our response[19] regarding the declaration[20] prepared based only on unilateral information by the Consultative Council of European Judges was sent to the CCJE and it was published on the official website of the European Council.

Further on this matter, our response[21] regarding the declaration[22] published by the Consultative Council of European Prosecutors was read by the HCJP representative to the attendants at the meeting held in Strasbourg on 19-20 of November 2015, and this text was also given place on the official website of the European Council.

Touching the essence of the matter;

The allegation that certain judicial members who have recently been suspended as an interim measure or discharged were subjected to such practice due to the judicial practices they conducted, is far from reality, incompatible with the scope of the files and biased.

In that;

Certain members of the judiciary in Adana have been suspended from duty as an interim measure on the grounds of putting the Republic and the Government of Turkey in a difficult position in international platforms and carrying out illegal investigations with the instruction from a criminal organization they have been in contact with.

To summarise, the members of the judiciary mentioned in this file committed misconduct of the duties their profession provided them and exceeded the limits of their authority (*ultra vires*), and the procedure of the disciplinary proceeding is within this framework.

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[19] http://www.coe.int/t/dghl/cooperation/ccje/cooperation/Turquie_réponse_HautConseil_Juges_Procureurs.pdf
[20] http://www.coe.int/t/dghl/cooperation/ccje/Cooperation/Comments%20of%20the%20CCJE%20Bureau%20on%20Turkey_2015.pdf
[21] http://www.coe.int/t/DGHL/cooperation/ccpe/profiles/EN_TURKR_APOR%202.asp
[22] http://www.coe.int/t/DGHL/cooperation/ccpe/profiles/CCPE-SA(2015)1E_Declaration_CCPE_EN%20final_Turkey.asp

It should be specifically emphasized that other than the disciplinary proceeding in place for the aforementioned members of the judiciary, a judicial investigation is being conducted against them for the offences of “disclosing information of the State that is to be kept confidential for the purpose of State security, to attempt to over throw the Government of the Republic of Turkey or to prevent, in part or in full, the fulfilment of its duties”, and decisions of detention have been rendered against these members of the judiciary who are known for the severity of the scope of their case file by the court. Their trials are in progress before the Court of Cassation, which is a supreme court.

Concerning the lawsuit brought against the members of the judiciary who were responsible for the files on corruption allegations; the five members of the judiciary, who were suspended from exercising their duties as an interim measure as part of the comprehensive disciplinary proceeding of the HCJP, are charged with committing the following offences:

"They acted against the law by behaving in a biased manner during the investigations, known as 17 and 25 December investigations carried out by İstanbul Chief Public Prosecutor's Office,

A) Pursuant to Article 100, titled "Parliamentary investigation" of our Constitution, stipulating that, Parliamentary investigation may be requested against the Prime Minister or ministers through a motion tabled by at least one-tenth of the total number of members of the Grand National Assembly of Turkey, they should have immediately informed the Grand National Assembly of the evidence concerning the Prime Minister and Cabinet members, but instead they identified, intercepted and recorded the conversations of the Prime Minister and ministers indirectly by taking a decision on identification, interception and recording of the conversations of the suspects, and by this way, they tried to collect evidence against the suspects through illegal means,

B) They violated the confidentiality of the investigation by providing the evidence obtained within scope of investigation to the media and politicians.”

In another file:

"In the investigation conducted by Istanbul Chief Public Prosecutor's Office (assigned with article 10 of Anti-Terror Law) registered to No. 2012/656;

Since they were troubled with the Government policy against parallel structure lead by Fetullah Gülen, they attempted to destroy the Government of the Republic of Turkey and prevent the functions of it by leaving and disgracing the Republic of Turkey and the Government in difficult situation both domestically and before the eyes of international platform; by acting together with some of the police commanders and officers assigned at Istanbul Police Directorate Financial Branch against whom investigation was carried out for the offence of destroying the Government of the Republic of Turkey or preventing partially of completely the functions, violation of confidentiality and malpractice registered to Istanbul Chief Public Prosecutor's Office No. 2014/115949 by making it appear like the Government supports Al-Qaida terrorist organization and encumbering legal and criminal liability before international judicial organs intentionally and willingly, out of the scope of their competences; also by taking the support of the media organs under the control of this structure and by ***being a part of this organization conducted in a planned and systematic way****,*”

In summary, it is claimed that the members of the judiciary mentioned in this file abused their competence and they acted in a way out of the scope of their competence and the discipline procedure is dealt with in this line.

In this context, paragraphs 66 and 68 of Recommendation CM/REC(2010)12 of the Committee of Ministers of Council of Europe to Member States on Judges: “Independence, Efficiency and Responsibilities” states that "*The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil, criminal or disciplinary liability,* ***except in cases of malice and gross negligence****."*

Moreover, in the Opinion no. 18 of the CCJE, it is emphasized that as a result of the public vesting comprehensive power and trust in judges, there are certain means that hold judges responsible of possible inappropriate actions and also ensure that they are removed from their positions when necessary. It is also clearly stated that if judges wrongfully and sinisterly implement the legislations, they may be subject to disciplinary prosecution.

As mentioned in summary above, the situation of the members of judiciary is dealt within the framework of the Recommendation of Committee of Ministers of Council of Europe and they are subjected to a disciplinary proceedings on the grounds of the acts of these persons outside the scope of judicial acts and some concrete indications of their malicious acts.

As emphasized in our reply[23] to the declaration, issued by Consultative Council of European Prosecutors:

"The decisions, taken by the High Council of Judges and Prosecutors against these judges and prosecutors comply with the law and during the investigations, the concerned persons were provided with the opportunity to defend themselves, as well as they were allowed access to information and documentation and the investigation is being conducted in a very sensitive manner. The concerned persons are also provided with an effective internal objection mechanism in favour of them. It should be underlined once again that HCJP is always open to share information on this matter. Unfortunately, some of these judges and prosecutors have preferred to flee abroad instead of experiencing this objective process.

Decisions, taken against the detained judges and prosecutors, are taken by independent and impartial judges and prosecutors, serving the Turkish Judiciary, objection to such decisions are reviewed also by independent and impartial judges and prosecutors. HCJP is not entitled to intervene in the concerned decisions within the framework of the "Judicial Independence safeguarded by the Constitution."

Although in Paragraph 181 of the text, it was mentioned that some prosecutors and a judge were subject to disciplinary penalties on the grounds of no other reason but the investigation they were conducting against members of the government and their families, it should be known that this is far from accurate and no information reflecting the actual circumstances was requested in this regard by the HCJP. Such documents and the grounds of the decision, provided as a summary above, shall still be conveyed to them in full text upon request. Nevertheless, for the sake of the right to accurate information, the grave unlawful actions of the judges and prosecutors in question that led to their disciplinary sanctions may be summarised as follows:

- Unlawful wiretapping for long periods of time of the communication between suspects and persons who can withdraw from witnessing,
- Initiating an investigation against members of the government by gathering evidence without getting the permission of the Parliament before starting to conduct the investigation as the Constitution requires,
- Keeping investigations secret from the Chief Public Prosecutor even though they are legally obligated to inform,
- Conducting operations against quite a few persons by violating the principle of presumption of innocence with the initiative of law enforcement forces,
- Directly confiscating assets of companies, thus manifestly violating relevant legislations,
- Violating the secrecy of investigations by sharing the information and documents within the scope of the investigation with media.

It is obvious that the concerned persons were subject to a disciplinary proceeding on the grounds of the allegations that their actions were not merely insignificant legal mistakes and in fact were severe legal mistakes amounting to malice, and they were subject to disciplinary punishment on the grounds that their actions were considered to undermine the judicial authority.

As for the claim regarding the closure of their investigation files, we must state that indictments about some of the suspects have been written and the proceedings are continued by the independent judicial bodies after the investigations, and that some of the indictments have been nolprosed. The

[23] http://www.coe.int/t/DGHL/cooperation/ccpe/profiles/EN_TURKR_APOR%202.asp

objections to *nolle prosequi* decisions have been examined by the independent courts that serve within the Turkish judiciary, and have been refused.

Therefore, it should be pointed out regarding the report that reaching a conclusion by grounding this opinion merely on letters from judges and prosecutors without basing it on any concrete or official data would not be reliable.

Paragraph 182 of the report claims that within the last two years, judges and prosecutors have been transferred to other places of service, suspended, or dismissed from their positions against their own will.

Necessary explanations regarding the suspension and dismissal procedures of judges and prosecutors have been made on the previous paragraphs, and will be made on next paragraphs along with their reasons.

On the other hand, though, there appears to be a great lack of information regarding the transfer of judges and prosecutors.

The paragraph claims that the places of a large number of judges and prosecutors have been changed, and transfer of judges and prosecutors without their consent has turned into a punishment mechanism. However, the statistical data show that when the former HCJP composition which was emphasized to be independent in some international texts was serving, the rate of the judges and prosecutors who were held subject to transfer decree with their consent was 69,26% for civil justice, and 68,15% for administrative justice; whereas this rate is currently 70,47% for civil justice, and 61,65% for administrative justice, which proves that the rate of the judges and prosecutors who have been transferred without their consent has not increased as dramatically as the report claims.

While the paragraph states that some judges and prosecutors have been transferred to other places of service twice or thrice within a year, the rate of such transfers compared to the total number of judges and prosecutors is 11 per 1000 for those transferred twice within a year, and 2 in 10000 for those transferred thrice within a year. These rates obviously refute the allegations stating that such transfers have become a method of punishment against judges and prosecutors.

As is seen, it is completely wrong to conclude due to some speculations or some exaggerated claims in the media that the Turkish judiciary is going through a systematic cleansing.

Another serious mistake often made stems from the confusion about transfer of judges and prosecutors to other places of service without their consent and transferring judges and prosecutors to other places of service as a disciplinary punishment. While the number of judges and prosecutors who have been transferred to other places of service by the current composition of HCJP as a disciplinary punishment is 9; while this number was 38 in 2011, 21 in 2012, 17 in 2013, and 8 in 2014, until October 12, 2014, when the elections were renewed. So, the total number of judges and prosecutors who were transferred to other places of service as a disciplinary punishment during the period that the former composition of HCJP was serving is 84.

Concerning the claim in the report that all the objections made against the 2015 Summer Decree were refused in a single session, we must state that the work places of 2666 persons in total have been changed with the decrees issued in 2015, that 710 persons in total have objected to the decree, that the objections by 136 persons in total have been accepted (this amounts to a rate of 19.15%) after re-examinations in 2015, and that contrary to claims in the report, the objections have been examined in sessions arranged in 23 different workdays.

The information related to the decrees of HCJP is also incorrect. There is no such decree, issued on 12 June 2015, by more than 50 people. The summer-term decree was issued on 12 June and this decree covers the requests of the concerned persons and provides for their commissioning to other districts of the country upon completing their term of service at the present district. It is not specific to this year only, in the previous years at the summer term of the year such decrees were also issued.

Statistical data on this regard, explaining how are decrees prepared, whether there are any differences between the past years and the year 2015, and a comparison of the previous-terms and present-term HCJP decrees, is provided in the annex.*

In terms of the references made in paragraph 183 of the text to the declarations of the Venice Commission and the CCPE, our responses to these declarations have been described in detail in the explanations regarding paragraph 180 above. Regarding the judges mentioned in paragraphs 184 and 185 of the text, as it can be understood if official information is requested from the High Council of Judges and Prosecutors, on the grounds that the non-dismissal of the said judges and prosecutors would damage judicial independence and impartiality severely, they were firstly suspended as an interim measure which is implemented within a short time by its nature and they were dismissed from profession after completion of 8 months of discipline period; and when it is taken into account that internal reclamation period is still proceeding, it is out of the question that transactions were executed urgently and without necessary attention.

The unlawful actions and proceedings these judges have carried out can be summarized as follows:

- On April 20, 2015, when M.Ö was in charge only of the execution of the communicational proceedings regarding the documents which will be sent to provinces and of doing the transfer of warrants of arrest sent from provincial courts as a judge in an on duty criminal court of general jurisdiction, he exceeded his authority, went against the usual way of practices, and received in his own room by hand 56 identical petitions that were written in relation to 7 investigation files examined by magistrate in criminal matters by 20 different lawyers and that contained requests about the release of suspects as well as the requests for challenge to judges, without the clerk's office being aware of the matter.
- After receiving these petitions, instead of immediately registering them himself or having them registered in the National Portal of Judicial Network during the shifts of two judges on duty right after him, he kept them until the next day, April 21, 2015 and had them registered at 17:00, when the duty of Judge M.B began.
- The same day, M.Ö asked for the opinion of the judges who were working as magistrate in criminal matters that were carrying out investigations, and to whom the lawyers challenged. Some of those magistrates asked M.Ö to send the requests about challenges to them. Although M.Ö had the legal liability to send the requests to the concerned judges, he failed to do so.
- Contrary to the usual practices, these requests were not about challenging 1 single judge, but to all the 10 judges working as magistrate in criminal matters in the Judicial Premises of Istanbul. Also, challenges to the magistrates in criminal matters are by law examined only by the another magistrates in criminal matters. Criminal court of general jurisdiction have no authority regarding the examination of the challenges to the magistrates in criminal matters. However, M.Ö accepted the aforementioned requests of challenge, and transferred to M.B, a judge in another criminal court of general jurisdiction.
- The legislation provides that if a magistrates in criminal matters is challenged, another magistrate in criminal matters shall examine the case. If there is only one magistrate in criminal matters in that district, the magistrate in criminal matters at the nearest district, where there is also a Assize Court, will take over. Yet the legislation gives no authority to criminal court of general jurisdiction on this matter. However, Judge M.Ö examined the case as the judge of a criminal court of general jurisdiction, and with his sentence of April 24, 2015, he transferred the requests of release to M.B, the judge of the 32nd criminal court of general jurisdiction in Istanbul.
- Evaluating the essence of the matter on 25 April 2015, M.B., without seeing the investigation files comprising of 594 folders in total – which had not yet arrived to his court, rushed to render decisions of release regarding the 63 suspects including those who had been on trial for aggravated life sentence.
- He spent great efforts to communicate these decisions to the prison by fax, although he did not have the authority to render these decisions in the first place. When he could not communicate the decisions to the Prosecutor's Office, he went to the police station to fax the decision; and when that attempt also failed, he spent the night at the courthouse to deliver the

warrants of release to the prosecutors who were on duty the next day, and thus taking a personal step which went against the usual practices.

- Upon the refusal of the prosecution office of execution which received the documents of release to execute the decisions on the grounds of the decision of the authorised magistrate in criminal matters on the same day against the same suspects, M.B and M.Ö insistently kept trying to execute the release of the detainees; M.B wrote a second letter to the prosecution office of execution and M.Ö., upon the request of the representatives of the suspects on the same day, rendered a decision stating that the said decision of the magistrate is void, in disparity with procedural law.

When the abovementioned facts are evaluated as a whole, there are serious doubts that the judges in question were acting within a scenario in complete violation of the law and in collaboration with the lawyers of the suspects, with the purpose of passivizing all the magistrates in criminal matters working in the Istanbul Courthouse, which was manifestly authorised to render decisions on the issues of transfer and recusation of judges pursuant to the legislations.

As a matter of fact, the members of the judiciary in question were arrested for allegedly carrying out judicial activities upon instruction and being a member of the same criminal organization as the suspects whom they were trying to release and who had been convicted for the offence of being a member of a terrorist organization. Their trial is still in progress before the Court of Cassation since they are first degree judges, and the Court of Cassation ruled on the continuation of their detention.

It is obvious that the concerned persons were subject to a disciplinary proceeding on the grounds of the allegations that their actions were not merely insignificant legal mistakes and in fact were severe legal mistakes amounting to malice, and they were subject to disciplinary punishment on the grounds that their actions were considered to undermine the judicial authority.

The suspension of judges and prosecutors, on the other hand, is an interim measure which is put into practice when the investigation is considered to be affected or the authority of the judiciary is considered to be weakened if the judge or the prosecutor continues to remain on his/her position. By nature of the interim measure, no right of defence has been provided in the legislation for this measure. However, the concerned judges and prosecutors are granted the right of defence at the beginning of the investigation, and when the investigation is in progress, both orally and in writing. They can also access the documentation regarding the investigation executed about them, and so far the rights of no judges and prosecutors have been denied.

Some of our judges and prosecutors, however, flee abroad instead of using the aforementioned rights.

Contrary to the claims on paragraph 212 of the report that the prosecutor general has not had the sentence executed, this is not true, and some letters of complaint should not be taken as the only reference to evaluate the issue.

Why Were the Decisions of the two Judges Completely Unlawful?

All Magistrates serving at Istanbul Courthouse were motioned to be disqualified by the defence Advocates of the suspects detained within the framework of the Parallel Structure investigation. The petitions for disqualification were submitted directly to Istanbul 29th Criminal Court of First Instance. (Incompetent Mr. Özçelik's Court) Without even looking into the relevant files, the judge at Istanbul 29th Criminal Court of First Instance disqualified all the Magistrates in a clearly unlawful manner, although he had no authority to do so. Furthermore, while lacking any legal capacity, he assigned the irrelevant judge at Istanbul 32nd Criminal Court of First Instance (incompetent Mr. Başer's Court) to render a decision on the suspects' requests for release, which were in fact subject to a decision to be rendered by the office of Magistrates.

Without looking into the investigation files or examining the evidence contained therein, the judge (Mr. Başer) at Istanbul 32nd Criminal Court of First Instance went against the law and decided on the release of all the 64 suspects, although he did not possess the legal authority or capacity to do so. (Suspects were accused of intentional homicide, counterfeiting official documents, establishing

organizations for the purpose of committing crimes, abolish the government or to prevent it in part or in full, from fulfilling its duties, political or military espionage).

The fact that the defence Advocates of the suspects put forward a motion to disqualify all the Magistrates serving at Istanbul Caglayan Courthouse is clearly an abuse of the procedure for disqualification. This matter was not taken into account by the judge at Istanbul 29th Criminal Court of First Instance at all.

In violation of Articles 26/3 and 31 of the Criminal Procedure Code, the Magistrates were prevented from submitting a written statement of their opinions on the grounds for disqualification and from making a preliminary assessment of the motion for disqualification.

As understood from the explanations above, the decisions rendered by the judges at Istanbul 29th and 32nd Criminal Courts of First Instance are unlawful, as well as null and void. By exercising an authority not granted by the law, they have usurped authority. Pursuant to Article 6/3 of the Constitution of the Republic of Turkey, "*no person or organ shall exercise any state authority that does not emanate from the Constitution."*

Owing to all the reasons explained above, the decisions unlawfully rendered by the judges at Istanbul 29th and 32nd Criminal Courts of First Instance do not possess any legal value, and therefore, are not legally binding.

Due to explicit and intentional breaking of the Law and their complicity in the offences of 64 suspects whom were under arrest, the Judges in question were arrested and prosecuted according to the Turkish Criminal Code Articles 257/1, 312/1 and 314/2. Right now, there are ongoing both criminal and disciplinary investigations against them.

*Subject: Appointment of Judges and Prosecutors

In accordance with the rule regarding the transfer of judges and prosecutors, they are appointed to the same or higher positions in other places of service with their vested rights, salary and cadre degrees.

In accordance with the regulation on the appointment and transfer of judges and public prosecutors, the places where a judicial organisation has been established has been divided into 5 districts according to their geographical and economic conditions, their medical, social and cultural status, their degree of deprivation, their level of development, the difficulty of transportation, their distance with important centres, and some other conditions.

Except for the exceptional provisions in the regulation, the minimum period of service is two years for judges and prosecutors serving in the 5th district, three years for those serving in the 4th and 3rd districts, five years for those serving in the 2nd district, and seven years for those serving in the 1st district.

Except for the exceptions in this regulation, the judges and public prosecutors who have not completed their minimum period of service cannot request reappointment, and cannot be reappointed ex officio.

When the incompatibility with duty or the failure of a judge or a public prosecutor serving in a certain district to carry out the duties he/she is bound by is documented, the judge or public prosecutor may be transferred to serve in another district in the same level of his/her current district, or to a lower level district, regardless of his/her minimum period of service or seniority. When needed, the judges and prosecutors whose success has been documented can be appointed as the president of the High Criminal Court, or as the heavy penalty prosecutor general of a lower level district. Once their minimum period of service is over, their requests for appointment are prioritised.

Appointment of a judge or a prosecutor depends on vacancies, and the seniority of the concerned judge or prosecutor, as well as his/her ability to carry out certain services in that place. The will of the concerned are taken into account whenever possible.

The place of service of the concerned may be changed if the fair reasons stated in the regulation regarding the health or other conditions of the concerned or his/her family are clear.

In the light of the aforementioned principles, the appointment or transfer of judges and prosecutors is executed by the 1st chamber of the High Council of Judges and Prosecutors.

To sum up, our country has geographical districts the level of development in social, economic and cultural aspects of which are different, which makes it compulsory to determine minimum and maximum periods of service for the members of judiciary, which is regulated with the aforementioned regulation. The opinion that the members of the judiciary cannot be appointed elsewhere against their own will, which is stated in the Resolution CM (2010)12 by the Committee of Ministers of the European Council is known, yet owing to the special conditions of our country, the members of the judiciary, in certain times, are appointed to upper level districts as a necessity. However, their will on the places of service are taken into account.

However, Article 10 of the Principles to be Applied[24] in the 2014 Judicial Justice Summer Decree issued by the 1st Chamber of the HCJP provided that the judges and public prosecutors who served in 1st district the places the central population of which are less than 1 million according to the data of the Turkish Statistical Institute shall be appointed to another place within the 1st district, if they still had a period of service of 10 years or more as of December 31, 2014. Yet this resolution is not being implemented as of 2015.

In other words, while there geographical insurance was previously provided only to judges who were serving in the 1st district places of service the central population of which are more than 1 million, geographical insurance has been granted to all the judges who have become entitled to serve in the 1st district places of service as of 2015. It will be useful to state again that geographical insurance cannot be provided to judges who work outside of the 1st district due to the different level of development in different parts of our country.

On the other hand, before the decree was issued, certain places of services were requested by hundreds of judges, while certain other places were not requested at all. If the absolute geographical insurance is accepted, some judges will complete their service in requested districts, while others will be retired having to work in districts that are not requested, which will destroy peace at work, affect the motivation of the concerned, and bear consequences that violate the principle of equality. For this reason, it is impossible to provide absolute geographical insurance in our country due to different conditions of development.

PROCESS OF DECREES

The needs are determined through evaluation of numbers of judges and prosecutors, number of courts and their workloads. The leading decision is determined according to the needs. Those decisions and vacant positions to be appointed shall be announced at the website of the Council. Drafts of judges and prosecutors who must be appointed pursuant to the Regulation of Appointment and Transfer and leading decisions and others who demanded to be appointed due to excuses or other reasons, shall be drawn up. The Secretariat designates the judges and prosecutors pursuant to the Regulation and leading decisions. In addition to the needs, the positions which might become vacant pursuant to demands of appointment, and the numbers of demands shall be proclaimed and by means of this procedure, a more healthy demand of appointments for the judges and prosecutors shall be ensured. Vacant positions in the appointments to the first region positions -which are the most demanded positions - shall be divided into two groups of civil and criminal sections. The Secretariat shall make proposals of appointments of judges and prosecutors, to the First Chamber, in accordance with their acquisitions and depending on vacant positions and places in need. The First Chamber shall examine the proposals and finalize its decision after the necessary arrangements.

Pursuant to the principles to be implemented in primary appointment decrees of judges and prosecutors of civil and administrative justice, negotiations should be carried out between the ones

[24] http://www.hsyk.gov.tr/duyurular/2014/mart/2014AnaKararnamesi/ek1.pdff

whose spouses work in other public institutions (such as teachers, military officers, district governors) and relevant institutions, in order to avoid any possible agreement due their appointments.

GROUNDS FOR TRANSFER

Request: The ones who were transferred to a place designated in his/her petition,

Transfer Request: The ones who were transferred to a close place or to superior places designated in his/her petition,

Transfer Request/The Requirement of Service: Although demanded to be transferred, the ones who were transferred to other places than they demanded, due to needs of the central organization,

Excuse: The ones who were transferred due to reasons of spouse, education and health matters,

Term of Service: The ones who were transferred after serving their minimal term of service in the region with respect to the Regulation of Appointments and Transfers,

Article 19 of the Regulation: The ones who were transferred to the 1st, 2nd, 3rd and 4th regions by drawing their names, and also the ones who served their minimal term of service with respect to the date designated by the Council in those regions,

The Requirement of Service: The ones who were transferred due to needs of the central organization, without any demand of transfer,

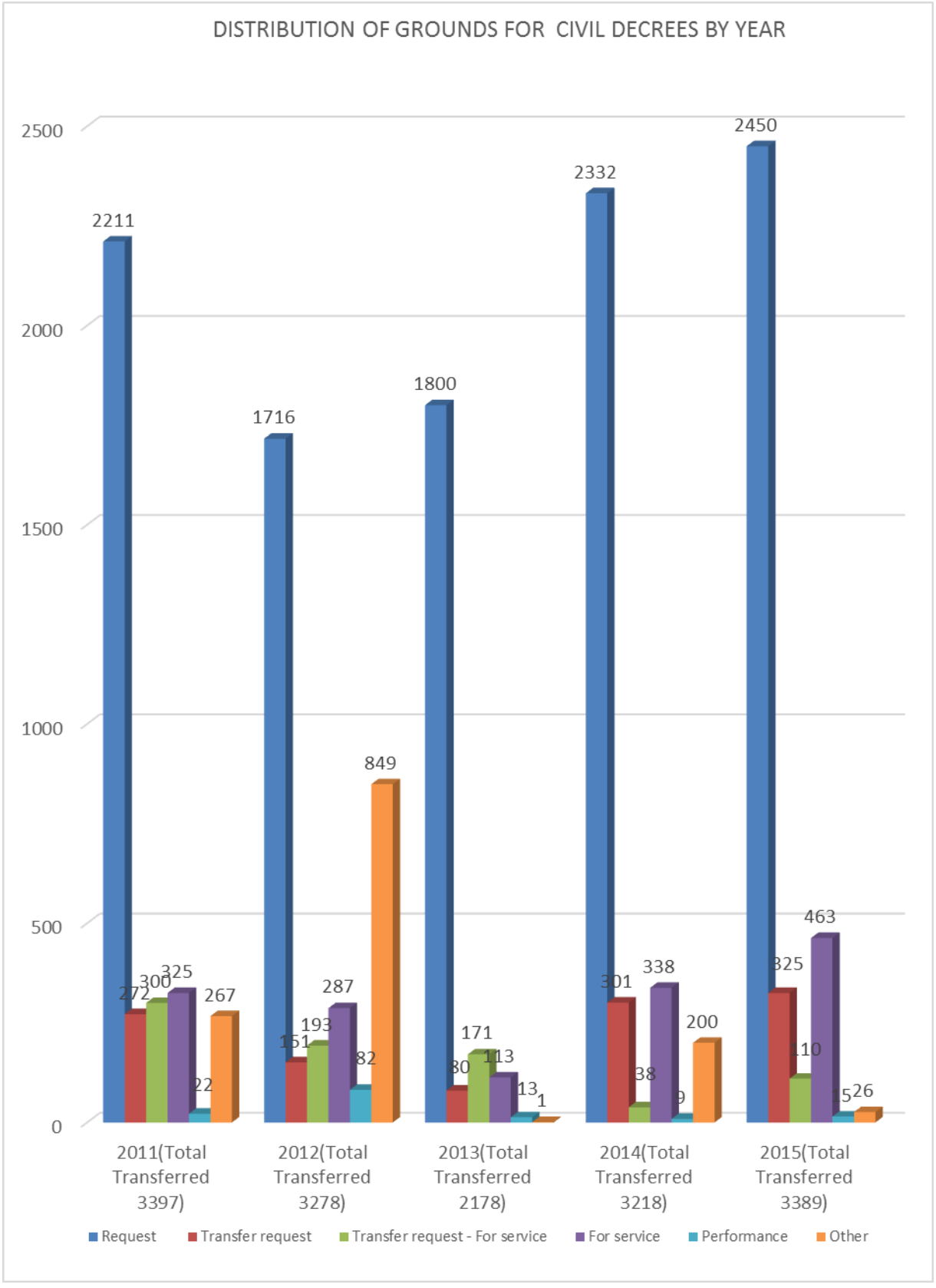
Performance: The ones who were transferred due to disciplinary punishments, who have a bad record of inspector, who have been proposed to change of workplace based upon an investigative report of an inspector or investigator, who have been left behind in promotion, who were promoted with the notebook of "A" following a 3-year success investigation, etc,

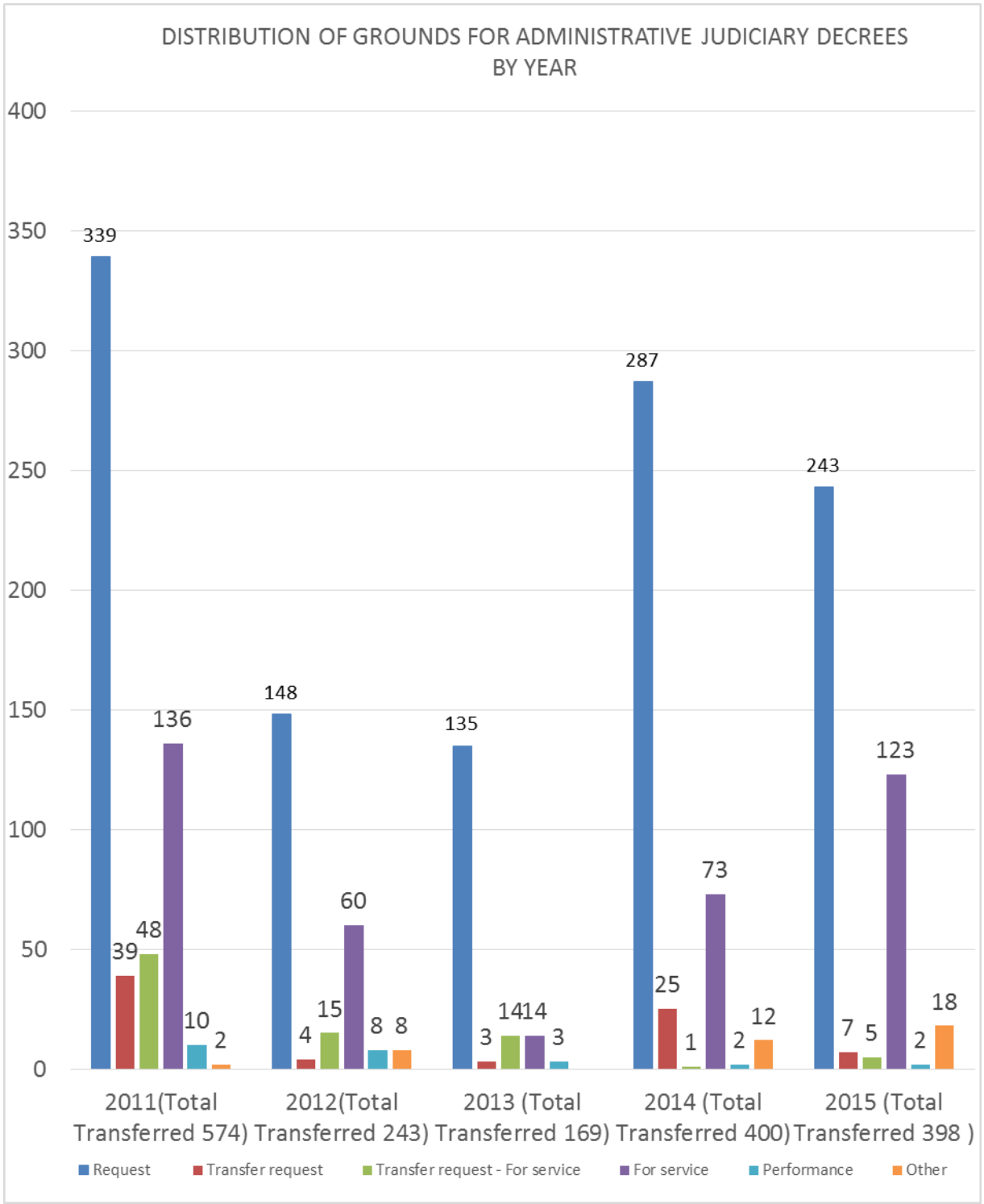
Other: The ones who did not demand to be transferred to the region, although they served their minimal term of service, pursuant to the Regulation of Appointment and Transfer and leading decisions (needs, spousal matters) etc.

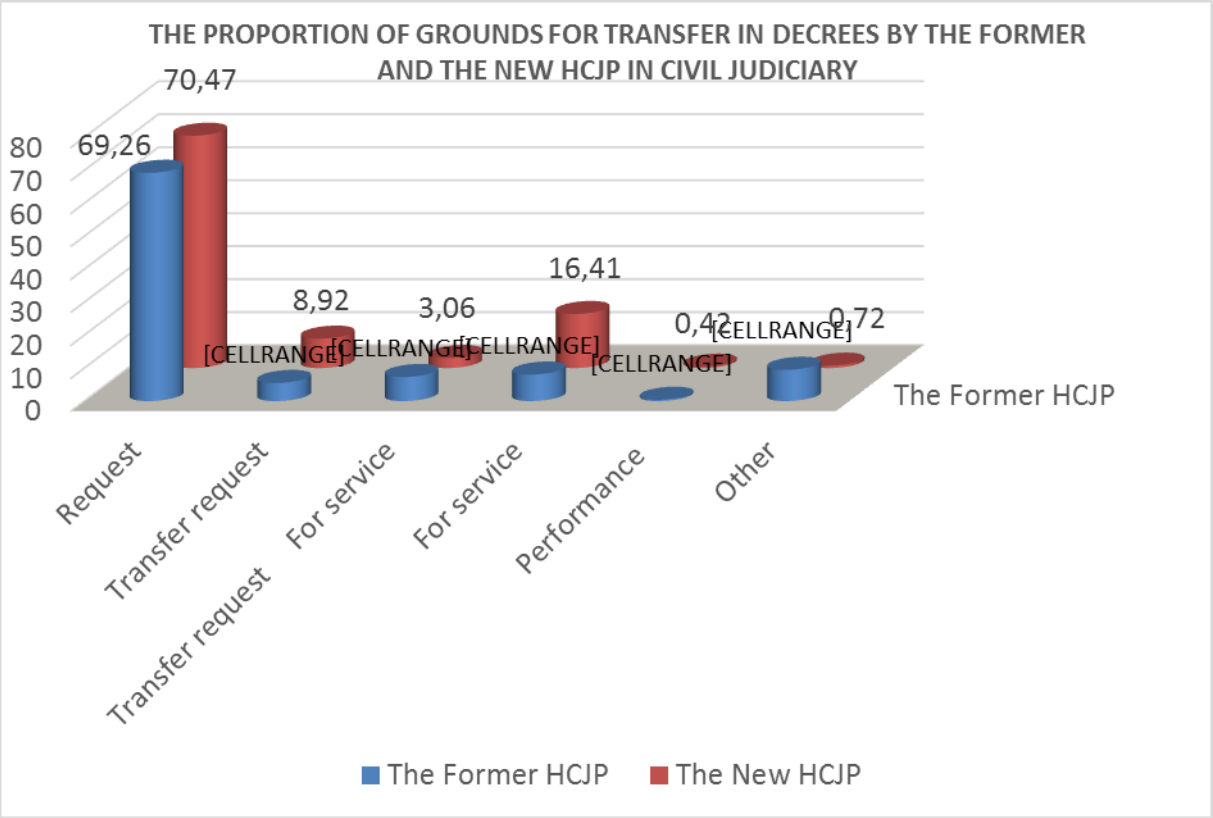
STATISTICS RELATED TO DECREES BETWEEN 2010-2015								
YEAR	**TOTAL DECREE NUMBER**	**TOTAL TRANSFERRED NUMBER**	**SUMMER DECREE**			**THE STATUS OF CADRE**		
			CIVIL	**ADMIN.**	**TOTAL**	**CIVIL**	**ADMIN.**	**TOTAL**
2010	4	1792	1271	142	1413	10003	1252	11255
2011	21	3971	1976	254	2230	10462	1210	11672
2012	14	3521	2335	184	2519	10828	1222	12050
2013	7	2347	1925	147	2072	11833	1386	13219
2014	9	3618	2224	293	2517	12556	1470	14026
2015	10	3787	2401	265	2666	13091	1642	14733

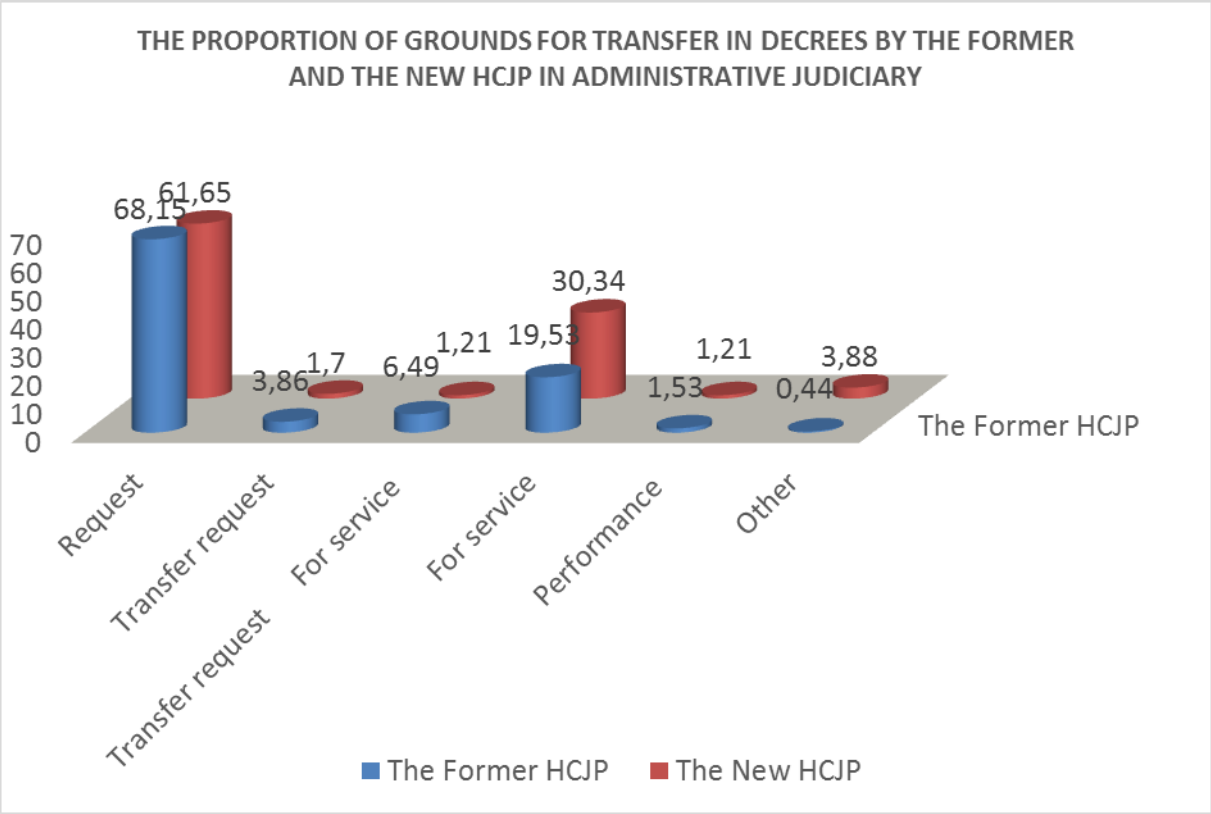
STATISTICS RELATED TO DECREES BETWEEN 2011-2015

YEAR	TOTAL DECREE NUMBER	CLASS	TOTAL TRANSFERRED NUMBER	TRANSFERRED NUMBER	REQUEST		TRANSFER REQUEST		TRANSFER REQUEST THE REQUIREMENT OF SERVICE		THE REQUIREMENT OF SERVICE		RECORD		OTHER	
					NUM.	PROP.	NUM.	PROP.	NUM.	PROP.	NUM.	PROP.	NUM.	PROP.	NUM.	PROP.
2011	21	CIVIL	3971	3397	2211	65,09	272	8,01	300	8,83	325	9,57	22	0,65	267	7,86
		ADMINISTRATIVE		574	339	59,06	39	6,79	48	8,36	136	23,69	10	1,74	2	0,35
2012	14	CIVIL	3521	3278	1716	52,35	151	4,61	193	5,89	287	8,76	82	2,50	849	25,90
		ADMINISTRATIVE		243	148	60,91	4	1,65	15	6,17	60	24,69	8	3,29	8	3,29
2013	7	CIVIL	2347	2178	1800	82,64	80	3,67	171	7,85	113	5,19	13	0,60	1	0,05
		ADMINISTRATIVE		169	135	79,88	3	1,78	14	8,28	14	8,28	3	1,78		
2014	9	CIVIL	3618	3218	2332	72,47	301	9,35	38	1,18	338	10,50	9	0,28	200	6,22
		ADMINISTRATIVE		400	287	71,75	25	6,25	1	0,25	73	18,25	2	0,50	12	3,00
2015	10	CIVIL	3787	3389	2450	72,29	325	9,59	110	3,25	463	13,66	15	0,44	26	0,77
		ADMINISTRATIVE		398	243	61,06	7	1,76	5	1,26	123	30,90	2	0,50	18	4,52


DISTRIBUTION OF GROUNDS FOR CIVIL DECREES BY YEAR
2500
2000
1500
1000
500
0
2211
272
300
325
22
267
1716
151
193
287
82
849
1800
80
171
113
13
1
2332
301
38
338
9
200
2450
325
110
463
15
26
2011(Total Transferred 3397)
2012(Total Transferred 3278)
2013(Total Transferred 2178)
2014(Total Transferred 3218)
2015(Total Transferred 3389)
Request
Transfer request
Transfer request - For service
For service
Performance
Other


DISTRIBUTION OF GROUNDS FOR ADMINISTRATIVE JUDICIARY DECREES BY YEAR
400
350
300
250
200
150
100
50
0
339
39
48
136
10
2
148
4
15
60
8
8
135
3
14
14
3
287
25
1
73
2
12
243
7
5
123
2
18
2011(Total Transferred 574)
2012(Total Transferred 243)
2013 (Total Transferred 169)
2014 (Total Transferred 400)
2015 (Total Transferred 398)
Request
Transfer request
Transfer request - For service
For service
Performance
Other


THE PROPORTION OF GROUNDS FOR TRANSFER IN DECREES BY THE FORMER AND THE NEW HCJP IN CIVIL JUDICIARY
70,47
69,26
80
70
60
50
40
30
20
10
0
8,92
3,06
16,41
0,42
0,72
[CELLRANGE]
[CELLRANGE]
[CELLRANGE]
[CELLRANGE]
[CELLRANGE]
The Former HCJP
Request
Transfer request
For service
For service
Performance
Other
Transfer request
The Former HCJP
The New HCJP



REVIEW AND REFUSAL

When request for a review for new transfers is made within 10 days to the General Secretariat, the First Chamber reviews these transfers.

In case of refusal as a result of the review, the related person has the right to object to such decision within 10 days after service of the decision. This objection is evaluated by the Secretariat General and finalized.

THE STATISTICS OF REVIEWS OF THE DECREE BUREAU

YEAR	TITLE	REVIEW			
		REQUEST	APPROVAL	REFUSAL	APPROVAL PERCENTAGE
2014	JUDGE	286	82	204	28,67

	PROSECUTOR	259	67	192	25,87
	ADMINISTRATIVE	72	20	52	27,78
	TOTAL	617	169	448	27,39
2015	JUDGE	339	74	265	21,83
	PROSECUTOR	258	52	206	20,16
	ADMINISTRATIVE	113	10	103	8,85
	TOTAL	710	136	574	19,15