

RESOLUTION OF THE EAJ REGARDING THE TURKISH JUDICIARY

At its meeting in Washington D.C. (USA) on November 11th, 2012, the European Association of Judges unanimously adopted the following

Resolution Concerning the Situation of the Judiciary in Turkey

1. With great concern the European Association of Judges takes note of certain developments regarding the reorganization of the judiciary in Turkey, which may infringe judicial independence at least factually if not legally. As a matter of fact, EAJ recalls that safeguarding judicial independence and the rule of law demand not only an appropriate legislation but also conduct and attitudes of the authorities which respect those fundamental principles. Experience in many countries shows that even the best institutional rules may not work without the good will and positive approach on the part of those responsible for their application and implementation. The efficient and appropriate implementation of existing regulations is therefore at least as important as the wording of relevant legislation.
2. EAJ respects the efforts of the Turkish authorities to improve the situation of the judiciary and acknowledges the progress that has been reached especially in enacting and implementing the new laws on Judges and Prosecutors and the High Council for Judges and Prosecutors. We must observe though that the Venice Commission in its opinions on these laws has already identified other regulations which might leave room for conduct or behavior which could harm both judicial independence and the rule of law. Those regulations have not only not been improved but according to the information which the IAJ has received have been, in effect, misused, incompatibly with an independent judiciary. Notably the following information is worrisome in our view and should be examined closely¹:
 - a. It seems that the principle of rotation of judges and prosecutors to different posts in the country is misused to put pressure on judges and prosecutors who are promoting the independence of the judiciary. The fact that there is no effective legal remedy against decisions on rotation – and the Venice Commission has already mentioned this deficiency – must be seen as a crucial point. The guarantee of irremovability is strictly linked to external and internal independence. The transfer of a judge to another court or to another judicial function should take place only with his or her consent, or in case of disciplinary sanctions, or the lawful alteration of the court system. The fear of being transferred without consent to another court of office can undermine the freedom of judgment and interfere generally with judicial independence.² It should be noted, that the displacement of judges and prosecutors against their wishes, without objective reasoning and without legal remedies, infringes international standards (cp. Opinion No. 610/2011 of the Venice Commission [CDL-AD{2011}004], par. 48).³

¹ Cfr. for details the table in the attachment.

² “52. A judge should not receive a new appointment of be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organization of the judicial system.” Recommendation CM/Rec(2010)12 of the Committee of Ministers.

³ “48. Article 35 deals with appointment to different locations. One of the provisions (which is not amended by the draft Law), allows judges and prosecutors, who have been found unsuccessful in one region, to be transferred to another region. Again, one can see the possible potential for using this as a means of exerting pressure on the individual judge or prosecutor. It would be important that the procedural safeguards for any judge or prosecutor who is to be transferred under compulsion should be set out in the law and the criteria for such transfer clearly stated together with the possibility for the judge or prosecutor affected to answer any case which is made against him

- b. It appears that the Turkish Government has used the reorganization of the High Council for Judges and Prosecutors to include in it members who do not represent the Turkish judiciary but rather the view expressed by government. Concerns have been raised that the High Council in its current composition is not effectively acting to promote an independent judiciary.
 - c. It appears that the separation of powers is endangered by too close connections between members of the three branches of power. This can be demonstrated for example by the fact that confidential information on judicial investigations is shared with members of the Government; or by the fact that the Minister of Justice seems to demand information from relevant prosecutors whenever he thinks it necessary; or by the fact that members of the High Council for Justice are trying to influence ongoing investigations and processes.
 - d. There appears to be a fundamentally erroneous conception on the part of representatives of government of the role of an independent judiciary and the function of judicial independence in any state that follows the separation of powers and the rule of law. For example according to an article in *Hürriyet Daily News*, Prime Minister Erdoğan is reported to have indicated that his government would favor the abolishment of BDP MP's parliamentary immunity by saying: "We've already told the judiciary what is necessary; the judiciary is doing what is necessary." IAJ reminds that separation of power and safeguard of the independence of judiciary does not allow members of the other powers to instruct the judiciary on what is necessary. Independent justice has to be based on constitution and law, not on instructions or directives by other stakeholders.
3. Those examples show clearly that the important point is that judicial independence requires not only the enactment of appropriate laws and regulations but also the proper application in practice of the relevant universal principles already developed.

Washington, 11th November 2012