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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**COMMENTS**

**ON THE DRAFT LAW ON THE HIGH COUNCIL  
FOR JUDGES AND PROSECUTORS  
OF TURKEY**

**by**

**Mr James HAMILTON (Substitute Member, Ireland)**

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**Provisional Opinion on the draft Law on the High Council for Judges and Prosecutors  
(Preliminary Draft) as of 27 September 2010**

1. The opinion of the Venice Commission has been sought in relation to a draft law of Turkey on the High Council for Judges and Prosecutors.
2. The purpose of the law is to set forth the procedures and principles concerning the establishment, organization, duties and functions of the High Council for Judges and Prosecutors. According to Article 1 these are to be carried in compliance with the principle of independence of the courts and the security of tenure of judges.
3. The Council will consist of 22 regular and 12 substitute members. The President of the Council is the Minister for Justice. The Council functions both in Plenary session and through three chambers each consisting of seven members (Article 3).
4. Article 4 defines the duties of the Council. These include the making of final decisions about proposals from the Ministry concerning the abolition of a court or a change in a court's jurisdiction, functions relating to the careers of judges and prosecutors including the appointment and transfer of judges, the provision of temporary authorizations, promotions or allocations as first class, the issue of disciplinary punishments, suspension from office, and the supervision of whether judges and prosecutors perform their duties in compliance with laws, regulations, by-laws and circulars, to examine whether they commit offences in connection with or during the exercise of their duties, or whether "their behaviours and acts are in compliance with the requirements of their capacities and duties", and if necessary, to launch examination or investigation.
5. Under Article 7 the Plenary consists of the 22 regular members of the Council. The Plenary has the function of electing the deputy president and the heads of the chambers of the Council, determining the chambers that each member will be assigned to, examining and deciding on objections raised against the decisions taken by chambers, making final decisions about disputes regarding duties or division of labour among the chambers, deciding who is the competent authority for a matter falling within the jurisdiction of the Council where it is not specified whether the Plenary or a specific chamber should deal with the matter, transferring the workload between specific chambers where the work cannot be handled, conducting transactions concerning criminal and disciplinary investigation or prosecution regarding Council members and making decisions, and giving final decisions about the Ministry's proposals concerning the abolition of a court or a change in the court's jurisdiction. Other functions include the election of members of the Court of Cassation and the Council of State, proposing three candidates to the President of the Council from whom he appoints a Secretary General of the High Council, appointing the President and Deputy Presidents of the Inspection Boards, deputies of the Secretary General and other functionaries of the Council, adopting by-laws or issuing circulars concerning the Council's jurisdiction, approving the Council's strategic plan, delivering opinions on draft laws regulations and by-laws concerning the Council's jurisdiction, and the performance of other duties set forth in law.
6. The President has the function of administering the Council, chairing the Plenary at which he can vote, appointing the Secretary General of the Council from among three candidates proposed by the Plenary, and upon the request of the relevant chamber, consenting to procedures of inspection, examination, investigation and prosecution regarding judges and prosecutors. He cannot participate in the Plenary meetings regarding disciplinary procedures nor may he be a member of one of the chambers or participate in their work.

7. The composition of the Council is as follows: - the Minister for Justice, the Under-Secretary of the Justice Minister, four regular members to be elected by the President of the Republic, three regular and three substitute members to be elected from the Court of Cassation, two regular and two substitute members to be elected from the Council of State, one regular and one substitute member to be elected from the Turkish Justice Academy, seven regular and four substitute members to be elected from among the first class civil judiciary judges and prosecutors, and three regular and two substitute members to be elected from among the first class administrative judges and prosecutors.
8. Article 8 deals with the composition of the chambers. These provisions are quite complex and to some extent people are assigned to particular chambers depending on where they are elected from. For example, the member elected by the Plenary of the Turkish Justice Academy is a member of the first chamber. The Court of Cassation has one of its representatives on each chamber. The members elected from among the judges and prosecutors working at the civil and criminal courts have two members on the first chamber, three members on the second chamber and two members on the third chamber. The members elected from among the judges and prosecutors working at the Administrative Courts have one member on each chamber. The Council of State has one member on the second and third chambers, the Under Secretary of the Minister for Justice is a member of the first chamber. Of the four members assigned by the President of the Republic, there is one member of each of the first and second chambers and two members of the third chamber. The precise reasoning behind these allocations is not clear to me. In the case of the member elected by the Turkish Justice Academy, there is a logic in the sense that permissions for participations in in-service training are a function of the first chamber.
9. Article 9 assigns different duties to the three chambers. The third chamber is given the function of inspection as to whether judges and prosecutors perform their duties in compliance with laws, regulations, by-laws and circulars, to examine notices and complaints about judges or prosecutors and to act accordingly, and to scrutinize whether judges or prosecutors commit offences in connection with or during the exercise of their duties or "whether their manners and acts are in compliance with the requirements of their capacities and duties".
10. The logic behind the assignment of functions as between the first and second chamber seems unclear to me. For example, the first chamber has the duty of "appointment and transfer" whereas the second has the duty of "transfer" to another locality with temporary authorizations or removal from office due to disciplinary or criminal investigations". The first chamber as mentioned deals with appointment and also with distribution (I am not sure what is meant by this) and also the granting of permanent authorizations, whereas the second chamber has the duties of accepting candidate judges into the profession, making decisions concerning requests for reassignment as a judge or prosecutor, or for assignment as a judge or a prosecutor from other professions. There seems to be a certain amount of overlap here. Furthermore, it seems illogical that as the third chamber deals with inspection and questions of whether prosecutors have committed offences in connection with or during the exercise of their duties the second chamber should have the function of removing a judge from office due to disciplinary or criminal investigations. It is not clear to me whether the third chamber is meant to scrutinize reports and then pass them to the second chamber who are to make a decision which in turn can be referred to the Plenary. The reasoning behind different allocations of function are not clear to me.
11. I have read Mr. Hoffmann-Riem's comments concerning the supervision, enquiry and investigation of proceedings of the judges and prosecutors as dealt with in this law and I

agree fully with his comments in relation to these provisions and the extent to which they require to be removed or amended in order to ensure the protection of judicial independence. In particular I agree that including within the competence of the third chamber the question of whether the manners and acts of judges are in compliance with the requirements of their capacities and duties goes far beyond any mere question of the administrative activities of judges and involves an evaluation by outsiders of the core work of judges.

12. It is to be noted that the judges and prosecutors working at the civil and criminal courts are jointly entitled to elect seven regular and four substitute members and the administrative judges and prosecutors are jointly to elect three regular and two substitute members. I do not have any information as to the respective total numbers of judges or prosecutors, but in principle at least it seems entirely conceivable that the election could result in either of these panels consisting wholly or predominantly either of judges or of prosecutors. It would seem to be desirable to separate the two to some extent. The Venice Commission in previous opinions has expressed concerns about systems which mix judges and prosecutors on High Councils of the judiciary and which allow for a situation whereby in particular prosecutors may end up sitting in judgment on judges in relation to disciplinary matters or even suspension. In other opinions the Commission has expressed the view that this should not happen and if there are to be both prosecutors and judges on such a council then the work should be allocated between chambers in such a way as to ensure judicial independence is not compromised by having prosecutors exercise control over judges. These opinions have emphasized the important difference between the functions of judges and prosecutors even in jurisdictions where prosecutors are regarded as part of the magistracy.
13. I have read Mr. Hoffmann-Riem's opinion concerning the provisions on the investigation and prosecution of members of the High Council and I agree with his comments on this question. I do not understand why alleged criminal conduct by members of the High Council could not be investigated and prosecuted in the normal way. Presumably this is intended to give protection to members of the High Council against arbitrary or unjustified accusations. However, it seems to go very far indeed to provide, as Article 38 (1) does that the Plenary of the High Council must authorize an investigation and prosecution for an offence committed by an elected council member even in the case of personal offences which are nothing to do with the performance of their duties as members of the High Council. In other opinions the Venice Commission has been critical of overbroad immunities being granted to judges. In this case it is difficult to see why members of the Council should have an immunity from investigation and prosecution unless this immunity is waived by the Council. The only exception to this provision seems to relate to *flagrante delicto* cases (Article 38(9)).
14. The quota for a Plenary is 15 members (Article 29(3)). The Plenary is required to take decisions with an absolute majority of the total number of its members (which is 12). Where an absolute majority cannot be achieved the topic in question can be discussed again during the next meeting and concluded with an absolute majority of attending members. This seems a reasonable and workable provision. In the case of the chambers, they convene with at least five members and take decisions with an absolute majority of the total number (which is four members). There is no provision for any other method of taking decisions in chambers where this becomes impossible. It is understandable that this should be so given that the total number of each chamber is as small as seven. However, in a case where a number of people are unable to act, this could give rise to difficulties. Surely there could be some procedure whereby persons would be temporarily assigned from one of the other chambers or substitute judges could be used to make up the numbers? I note also that in Articles 40 and 41 there are provisions preventing members of the Council from taking part in activities where they

have a conflict of interest. Where a member is challenged that member cannot take part in the discussions and the other members make the decision whether he should be disqualified from doing so. However, under Article 41(5) a rejection request for a number of members which will result in the obstruction of the convening of the Plenary is unacceptable. In other words an upper limit of seven is put on the number of members who can be objected to since the total number is 22 and the quorum 15. It seems unlikely that there would ever be valid grounds to object to such a large number, but nevertheless in principle this may be possible and the provisions of Article 41(5) seem somewhat absolute in their nature. One might have thought that the use of substitute members might have proved of some assistance in cases where members cannot act due to a conflict of interest. I can, however, find nothing in the draft to suggest in what circumstances the substitute members are to substitute for the regular members.

15. I note the draft makes no provision for an appeal to a court of law against a disciplinary finding against a judge or prosecutor, including where dismissal is the outcome. There is, of course, an internal appeal of a sort in that the Plenary can review the decision of a chamber. In other opinions the Venice Commission has expressed the view that such decisions should be subject to appeal or review to a court of law. Article 33 specifically rules out appeals except in cases of removal from the profession, in which case the appeal is to the Council of State. Although the Council is, according to Article 155 of the Constitution, the final instance review for decisions of administrative courts, it does not appear to be a court in the usual sense, in that three-quarters of its membership consists of judges *and public prosecutors* (my emphasis) appointed by the High Council, and one-quarter appointed by the President of the Republic from among officials meeting the requirements designated by law (I do not know who these are).
16. In other opinions the Venice Commission has expressed the view that bodies such as the High Council should elect their own chair, and has criticized provisions whereby a Minister for Justice would chair such a body as tending to politicize the process and undermine the independence of the judiciary. It is true that the Minister cannot take part in meetings regarding disciplinary proceedings, or in the work of chambers, which is to be welcomed. Nevertheless the Minister can influence other decisions affecting judges where the Plenary examines the decisions of chambers. It would be preferable that the Minister not be chairman of the Plenary and that his role should be confined so as to exclude him from matters pertaining to the internal organization or the functioning of the judiciary or decisions pertaining to individual judges, such as assignments, transfers, promotions or classification.
17. Finally, while the above represent a number of criticisms of the draft text, there is no doubt that the draft would represent a considerable improvement on the existing situation. The existing provisions relating to the High Council for Judges and Prosecutors are set forth in a comparison table which we have been provided with. Quite a number of the changes affected by the draft law represent an improvement over the current position. These include the provision establishing the High Council as a legal entity with its own budget and premises, the provision whereby first instance court and administrative court judges and prosecutors are represented on the Council together with the Justice Academy, the fact that the inspection board is attached to the High Council rather than the Minister, the provision whereby the officers of the inspection board are appointed by the Plenary rather than the Minister, the involvement of the High Council in decisions when to carry out inspections which at the moment are solely a matter for the Minister, the strengthening of the control of the secretariat by the High Council rather than having it controlled solely by the Minister, the limitation of the Minister's power to attend meetings (even though for the reasons expressed above this is still not entirely satisfactory), the increased control by the High Council of its own

agenda, and the possibility of an appeal to the Council of State against a dismissal where there is no possibility of appeal at present. In conclusion, therefore, the draft law represents a substantial improvement on the existing situation even though there is scope for further improvement and a further strengthening of provisions relating to the independence of the judiciary.

**James Hamilton**  
**11 November 2010**