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(VENICE COMMISSION)

DRAFT OPINION

ON THE DRAFT LAW ON THE HIGH COUNCIL FOR JUDGES AND PROSECUTORS (OF 27 SEPTEMBER 2010)

OF TURKEY

On the basis of comments by

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I. INTRODUCTION

1. By a letter of 27 September 2010, Mr Sadullah Ergin, Minister for Justice of Turkey, requested an opinion on draft laws implementing the constitutional amendments approved by referendum on 12 September 2010. The letter referred in particular to four draft laws: (1) on the High Council for Judges and Prosecutors, (2) on the Organisation of the Ministry of Justice, (3) on the Organisation of the Constitutional Court and (4) on Judges and Prosecutors. The present Opinion only deals with (1) the draft Law on the High Council for Judges and Prosecutors, however this draft Law will be assessed within the context of the broader constitutional reform package.

2. On 25-26 November 2010, the rapporteurs Mr Harry Gstöhl, Mr Wolfgang Hoffmann-Riem, Mr Bert Maan and Mr Fredrik Sejersted accompanied by Mr Thomas Markert and Ms Tanja Gerwien from the Secretariat of the Venice Commission, visited Ankara, where they met with the Deputy Undersecretary and General Director for EU Affairs of the Ministry of Justice, the Vice President of the Court of Cassation, the President of the Constitutional Court, the President of the Council of State, the President of the High Council of Judges and Prosecutors and representatives of the Turkish Bar Association as well as representatives of political parties.

3. This Opinion was prepared jointly with the Legal and Human Rights Capacity Building Department of the Directorate of Co-operation of the Council of Europe on the basis of comments by Mr Sergio Bartole (Italy), Ms Jacqueline De Guillenchmidt (France), Mr James Hamilton (Ireland), Mr Wolfgang Hoffmann-Riem (Germany), Mr Bert Maan (Netherlands) and Mr Fredrik Sejersted (Norway), who were invited by the Venice Commission and, in the case of Mr Maan, by the Legal and Human Rights Capacity Building Department to act as rapporteurs. Their comments are in documents CDL(2010)118, CDL(2010)119, CDL(2010)120, CDL(2010)121, DG-HL (2010)22 and CDL(2010)123, respectively.

4. *The Opinion was adopted by the Venice Commission at its … Plenary Session on ….*

II. PRELIMINARY REMARKS

5. The Venice Commission received a preliminary version of the draft Law on the High Council for Judges and Prosecutors (hereinafter, the "draft Law on HSYK") dated 27 September 2010 in early October 2010 on which this Opinion is based. It was requested to comment on this version, which has undergone further revision, among others, following the individual comments prepared by the rapporteurs that were transmitted to the Turkish authorities in mid-November 2010. The Venice Commission was informed that some of the comments were taken into account in the revised version. This Opinion is solely based on the draft Law on HSYK. The rapporteurs did not have knowledge of the text of the Law as finally adopted by Parliament.

6. The request from the Turkish authorities only asks for the opinion of the Venice Commission on the draft laws that are being prepared in order to implement the constitutional reforms of 2010, not on the new constitutional provisions themselves. However, when the Venice Commission is assessing the extent to which national law corresponds to European standards, it is not possible to draw a line between national constitutional and statutory law. Either the national rules are in compliance with European standards or they are not, regardless of which level of the legal hierarchy they are regulated at.

7. This is all the more clear when it comes to the Turkish reform of the High Council for Judges and Prosecutors, since the revised Article 159 of the Constitution now lays down the basic principles for this institution in some detail. The draft law is thus primarily a text which implements the principles already embodied in the Constitution, and makes them operational.

8. The present Opinion must therefore necessarily cover both the new Article 159 and the draft Law on HSYK. Having said that, the Venice Commission is aware that the constitutional reform has already been adopted, and cannot at the moment be changed following our advice. However, this Opinion should be seen as input in the broader and longer process of constitutional reform in Turkey, which will hopefully continue with further reforms being made in the years to come. For this reason, the Venice Commission will also take the opportunity to give more general comments on the ongoing constitutional reform process in Turkey.

III. EUROPEAN STANDARDS

9. The Venice Commission's assessment, for this Opinion, is based on European standards that consist of documents and standards (soft law), *inter alia*, from the Council of Europe's Committee of Ministers, the Venice Commission and the Consultative Council of European Judges (hereinafter, the "CCJE"). These include: Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, which updates and replaces Recommendation No. R(94)12 of the Committee of Ministers to member states on the independence, efficiency and role of judges; Opinion no.1 (2001) of the CCJE for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges; Opinion no.10 (2007) of the CCJE for the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society and the Venice Commission's Report on Judicial Appointments (CDL-AD(2007)028).

10. For this Opinion, the changes that came after 1989 should be noted, which affect both prosecutors and judges alike in both Central and Western Europe, that took into account society's increased juridification and the higher media interest in the judiciary's daily work. This can be seen in the new constitutions and the laws on the judiciary adopted by the new democracies in Europe[1]. The influence of the case-law of the European Court of Human Rights in this respect is also relevant as are the recommendations of the Committee of Ministers.

IV. GENERAL COMMENTS ON THE CONSTITUTIONAL REFORM PROCESS IN TURKEY

11. In recent years, there has been an increasing debate in Turkey on whether there should be a full constitutional reform in order to replace the 1982 Constitution with a new one, that is more suited to modern Turkish democracy. The Venice Commission has stated its support for the idea of such a reform in its Opinion on the constitutional and legal provisions relevant to the prohibition of political parties in Turkey (CDL-AD(2009)006) and is ready to provide its assistance in such a process, should the Turkish authorities make such a request.

12. Attempts to launch a full constitutional reform process have, so far, not received the necessary political backing. Instead, the Turkish Government presented, in March 2010, a partial reform package to Parliament, which was put to a vote in May 2010. The outcome of this vote was that none of the proposals for amendment received the necessary two-third majority (367 votes) that are needed to pass directly, but all except for one passed the threshold of a 60% majority (330 votes) that are needed to be put to a referendum. The only part to fail this threshold was the proposal to change Article 69 on the prohibition of political parties.

13. The rest of the reform package was approved by the President in May 2010, and then submitted to a referendum that was set for 12 September 2010. In July 2010, the Constitutional Court rendered a judgment that annulled a few elements of the package, but accepted the rest. The referendum process then went ahead. On 12 September 2010, the proposals were put to the voters as a single package, with one yes/no alternative. Voter turnout was 74% and the

[1] See Recommendation CM/Rec(2010)12, paragraph 7.

result was that 58% voted “yes” and 42% voted “no”. The constitutional amendments then entered into force, although some of the changes needed legislative implementation in order to become fully operational.

14. The constitutional reform package adopted consists of a number of different elements, involving the revision of altogether 23 articles of the Constitution. Key elements are the reform of the judicial system (civilian and military), the introduction of an Ombudsman system, collective bargaining rights for public servants, positive discrimination for women, children and the elderly, and the lifting of protection for previous military coup leaders.

15. The most discussed and controversial element of the 2010 reform package was the issue of judicial reform. This involved a number of articles in the Constitution that regulate, *inter alia*, the Constitutional Court, the HSYK, the relationship between military and civilian courts, and the administration of the judicial sector (Articles 144-149, 156-157 and 159). The present Opinion only deals with changes made to Article 159, but it is important to understand the context in which this provision has been revised.

16. The Venice Commission, in general, supports the recent constitutional reform package of 2010, as a clear step in the right direction. However, the Venice Commission noted that there is still a need for a broader constitutional reform. In particular, the Venice Commission regrets that the Government did not obtain the necessary qualified majority in Parliament to amend the constitutional provisions on party prohibition in line with the Venice Commission criteria. It is to be hoped that this reform initiative will be taken up again in the future.

17. The Venice Commission also noted that the issue of constitutional reform has been very high on the political agenda in Turkey for years, and that it still attracts great political and public attention. To some extent, this is good and reflects the vibrant and dynamic democracy that Turkey has become. At the same time, the Venice Commission cannot help noting that Turkish society appears to be quite polarised on many of the most basic issues, with mutual suspicion on the part of the political parties involved. This is to be regretted. When considering broad constitutional reform, a certain amount of broader consensus is desirable on the most fundamental principles for the organisation of society. This element seems to be lacking in Turkey for the moment, although this is clearly not an inevitable situation.

18. It is not for the Venice Commission to take a position on who is to blame for the present polarisation, which is in any case certainly a complex question. But, the Venice Commission would like to call upon all the responsible parties to participate in this process in a constructive manner. For the governing party, this means a political and moral obligation to organise the future constitutional processes in a manner that is as inclusive and comprehensive as possible, taking into account the interest and arguments of the opposition, civil society, non-governmental organisations and the public opinion. For the opposition, this means a corresponding political and moral obligation to participate constructively, in view of the broader interest of society in reaching a consensus on basic principles, so as to make the Constitution a proper basis for the entire Turkish society.

V. DRAFT LAW ON THE HIGH COUNCIL FOR JUDGES AND PROSECUTORS

System for the organisation of the judiciary

19. In order to understand the new reform of the HSYK, an understanding of the general organisation of the Turkish judiciary is necessary, in particular the system for the qualification,

appointment, transfer and dismissal of judges and prosecutors, as well as supervision, complaints, inspection and disciplinary measures.[2]

20. In comparison with most European countries, the system for the organisation of the judiciary in Turkey is highly centralised, rather strict, provides for wide powers of supervision and inspection and has a large institutional framework. Combined with a certain tradition for politicising the administration and controlling the judiciary, this explains why the issue of the composition and competences of the HSYK is of such paramount importance not only to the Turkish judiciary itself, but also to political and public life in general. Under this system, most aspects of the organisation of judges and prosecutors have been handled directly by the authorities in Ankara, including qualification, appointments, transfers, dismissals, complaints, disciplinary actions, etc.

21. There can clearly be many reasons for this particular system of judicial organisation and control in Turkey. One is a general Turkish tradition of having a strong centralised administration, which covers many sectors, including the judiciary. Another is the fact that most Turkish courts do not have court presidents, with the same kind of supervisory and disciplinary powers that exist in many other European countries. Yet another factor may be that in Turkey, there is no fully-fledged system of courts of appeals, which in many other countries can also hear complaints against judges and judicial proceedings as part of their normal procedures.

22. In addition to these factors, it seems clear that there has been a strong political interest in keeping centralised control over judges and prosecutors, and that the HSYK has traditionally held more of a political function than is usually the case for judicial councils of this kind in most other European countries. Therefore, the HSYK has been able to control the appointment of judges and prosecutors and also initiate or block or otherwise influence controversial investigations and judicial proceedings.

23. Up until the present reform, the competences to administer and supervise the judiciary and prosecution service were, to a large extent, divided between the Ministry of Justice and the HSYK, with the Ministry itself responsible for many of the tasks. The seven-member HSYK was also under considerable influence from the Ministry of Justice, with the Minister acting as President, with wide powers. The Undersecretary was also an *ex officio* member, while the five other members came from the two ordinary high courts, the Court of Cassation (three) and the Council of State (two). This system has now been substantially reformed. The number of members of the HSYK was increased from 7 to 22 (with 12 substitutes), with a much broader and more pluralistic composition. The HSYK was given the status of a separate and independent public legal entity, with its own budget, administrative staff and premises. Most of the relevant competences that formerly belonged to the Ministry of Justice were transferred exclusively to the HSYK as an independent institution (formally within the executive branch).

24. To understand the new changes, it is important to note that this is an *institutional* reform which, for the most part, concerns the top layer of the judicial administrative structure in Turkey. It is the management of the judicial administration that is being changed, and moved from the Ministry of Justice and the former HSYK to the much more independent and pluralistically

[2] The draft Law on HSYK seems to follow the Southern European model, although there are signs that it is taking into account both the Southern and the Northern European models. At the moment, it is similar to the French system, where the chairperson is the President of the Republic, while the Vice Chair is the Minister for Justice. This is also true for Italy, where the Vice Chair of the Council is a Vice President who is elected from among the members elected by Parliament. In Spain and in Portugal, the President of the Supreme Court acts as Chairperson of the High Council. In Northern Europe (Denmark, Sweden), the High Council has more managerial tasks and deals with the budget and with administrative matters. For this reason, the head is usually a director, while representatives of the judiciary are represented in the councils. This shows that different tasks by councils call for different responsibilities, which is mentioned in Recommendation No. R(94)12, which states that decisions concerning independent judges should be taken by their peers (see Principle 1 under 2; see also CCJE Opinion no.1, paragraph 37)

composed new HSYK. The underlying administrative structure seems not to have undergone any major changes, except for having moved formally and physically from the Ministry of Justice to the HSYK. This includes the existing judges, the Inspection Board and the rest of the administrative staff.

25. The result is that the new HSYK has been established as a strong and separate new institution not only in legal, but also in actual terms. It is large, consisting of the 22 members (of which 20 are full time), some 40 judge rapporteurs, the Inspection Board with approximately 160 inspectors (judges by training) and ordinary staff amounting to around 380 people. Altogether this is now an institution with approximately 600 people, in a large 15-story building in central Ankara.

26. The Venice Commission notes that the new institutionalisation of the HSYK will be at least as important for its future role and function as the formal rules. Much will depend on the institutional culture, dynamics and context, which is difficult to assess and predict from the outside. It is to be hoped that it will develop in an independent, impartial, professional and efficient way.

27. It seems that the *substantive* side of the administration of the judiciary has not formally changed with the recent reform. It also seems that the rules for appointing, transferring and removing judges and prosecutors are not substantially altered, and neither are the procedures for handling complaints and the wide powers of supervision and inspection of the judiciary. The interpretation and application of these competences may of course change under the leadership of the new HSYK, especially over time, but this is not in itself part of the formal reform.

General observations on the new reform of the HSYK

28. The new reform of the HSYK is regulated by Article 159 of the Constitution, which has been completely revised. It is now a rather lengthy provision, which regulates all the basic principles of the new institution. The draft Law on HSYK mainly implements these principles and makes them operational. It is however, still a quite detailed piece of legislation, containing 49 articles divided into six parts.

29. When studying Article 159 and the draft Law on HSYK, it is evident that the Turkish authorities are familiar with the European standards laid down by the Committee of Ministers of the Council of Europe and by the Venice Commission in its earlier reports and opinions. The draft Law on HSYK reflects the criteria of the Venice Commission on a number of points, and should, in general, be welcomed as a substantive and definite step in the right direction. In particular, the Venice Commission welcomes:

- the increase in the number of members of the HSYK;
- the pluralistic composition of the HSYK, which ensures participation from all levels of the Turkish judiciary, with 10 of the members elected by the ordinary judges and prosecutors;
- the institutionalisation of the HSYK as a separate legal entity with public law status, administrative autonomy, and with its own budget, premises and staff;
- the wide transfer of power from the Ministry of Justice to the HSYK, both as regards legal competences, staff and resources;
- the substantial reduction in the power and position of the Minister for Justice as President of the HSYK;

- the creation of an internal appeals system, and the introduction of judicial review against decisions that are still made by the President (Minister for Justice).

30. The new HSYK is formally a much more independent institution than its predecessor, and the new system formally fulfils most European standards. However, at the same time, the Venice Commission has noted that there is considerable controversy in Turkey as to whether the new HSYK will in fact prove to be a more independent and impartial institution. The supporters of the reform, who extend far beyond the governing party, claim that it will. The critics however argue that the organisation and election system was designed and applied in such a way as to ensure that the ruling party has taken over substantial influence of the HSYK, making it their own. It is not the task of the Venice Commission to try to judge who is right or wrong on this issue, which is in any case difficult to assess from the outside. But, the Venice Commission must nevertheless be aware of the underlying sensitivities and controversies when conducting its assessment of the legal provisions.

31. While many of the new rules on the HSYK are in line with European standards, there are some issues that still require attention, and which will be dealt with in the following parts of this Opinion.

Composition and elections of the HSYK

32. Under the new system, the HSYK is now composed of 22 members (with 12 substitutes). Two of these are the Minister for Justice and the Undersecretary, who sit *ex officio*. For the other 20 members, the work in the HSYK is a full-time occupation, and they no longer have formal ties to their original institutions. Of the 20 members, four regular members are to be appointed by the President of the Republic, three regular and three substitute members are to be elected by the Court of Cassation, two regular and two substitute members are to be elected from the Council of State, one regular and one substitute member are to be elected from the Turkish Justice Academy, seven regular and four substitute members are to be elected from among the first class civil judiciary judges and prosecutors, and three regular and two substitute members are to be elected from among the first class administrative judges and prosecutors.

33. This means that the representation of the former seven-member HSYK is kept, with two *ex officio* representatives from the Ministry of Justice, the three members from the Court of Cassation and the two from the State Council. But, these are now supplemented by 15 more members, of which 10 (and six substitutes) are directly elected by the judges and prosecutors of Turkey. This means that the draft Law on HSYK is in line with Recommendation CM/Rec(2010)12, which states that:

> *"Not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary. [...] "The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers".*[3]

The Venice Commission has taken a more nuanced approach and stated in its 2007 Report on Judicial Appointments that:

> *"As regards the existing practice related to the composition of judicial councils, "a basic rule appears to be that a large proportion of its membership should be made up of members of the judiciary and that a fair balance should be struck between members of*

[3] Recommendation CM/Rec(2010)12, paragraphs 27 and 46.

the judiciary and other ex officio or elected members." Thus, a substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself. In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualification taking into account possible conflicts of interest"[4].

34. Notwithstanding that the suggestion was made that the presence in the HSYK of members elected by Parliament by a qualified majority could provide the link between this body and the will of the people[5], a different solution was adopted in Article 159 of the Constitution, which is that the President of the Republic appoints four members who are not judges. The draft Law on HSYK implements this, and establishes that these members must have served at least 15 years "in the law discipline of higher education institutions" or to have worked at least for 15 years as a legal counsel. It may have been difficult to improve the constitutional choice in line with a more pluralistic approach, especially in view of the need to avoid any interference with the discretionary power of the President of the Republic. However, the adopted solution does not establish a link between the HSYK and Parliament and does not ensure the presence in the HSYK of different cultural and political orientations, which are present in Turkish society. The result is that the relationship between the HSYK and the world of politics is conducted through the Minister for Justice.

35. While the Venice Commission, in general, supports the new composition of the HSYK, it regrets the fact that Parliament is not included in the processes of appointing members to the HSYK. It is advisable for judicial councils to include members who are not themselves representatives of the judicial branch. But, such members should preferably be appointed by the legislative branch instead of by the executive.

36. The Venice Commission therefore recommends, as the best solution, that at least the four members now appointed by the President or representing the executive *ex officio* (the Undersecretary), be elected by Parliament, preferably with a qualified majority, ensuring a process that will lead to the representation of different political interests, although the presence of the Minister for Justice as such does not impair the independence of the HSYK[6].

37. The decision to provide for a majority presence of members elected by the judiciary in the HSYK is to be welcomed. However, the wording of the rules with respect to time and the principles of elections is not entirely clear, notably between the first two sentences of Article 19.2 of the draft Law on HSYK. If the first sentence does not seem to add anything new, the second sentence seems to give every judge and prosecutor the right to vote:

"for the total number of regular and substitute Council members to be elected".

If this is so, it does not leave much room for the election of minority candidates (i.e. candidates who do not share the opinions of the majority), because the candidates who are voted for by the majority of the voters could cover all the seats and exclude those supported by the votes from a minority. It is true that the submission of the candidatures is made on an individual basis and not within the framework of "multi-person" lists (Articles 20 and 21) and electioneering is prohibited (Article 25), but these rules do not exclude the possibility of informal electoral majority agreements aimed at avoiding the election of candidates who are the expression of minority orientations, which should, in any case, be present in the body if the HSYK is to be representative of the entire judiciary.

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[4] Venice Commission's Report on Judicial Appointments (CDL-AD(2007)028), paragraph 29.
[5] see "A Judicial Conundrum: Opinions and Recommendations on Constitutional Reform in Turkey" (article, July 2010) edited by Serap Yazici and written by Ozan Erözden, Ümİt Kardaş, Ergun Özbudun and Serap Yazıcı, p. 17.
[6] See the Venice Commission's Report on Judicial Appointments (CDL-AD(2007)028) paragraph 33.

38. In the original proposal of the Government for a new Article 159, it was stated that each voter could vote for only one candidate, which is a way of promoting a pluralistic composition. In its Judgment of July 2010, the Constitutional Court, however, struck this down as unconstitutional, which meant that the voters instead voted for the total number of candidates in each category. The Venice Commission has not seen the reasoning for this Judgment, merely a summary, which from an outside legal constitutional perspective is difficult to understand. The actual effect, however, appears to have been, as regards the lower level judges, to open the way for a number of unofficial "lists". Of these it is said to be the "list" endorsed by the governing party that won, with 60% of the votes in an election in which altogether more than 11 000 judges and prosecutors participated. The list is also said to be composed relatively broadly, including persons not normally affiliated with the ruling party. However, it also includes former high-ranking officials from the Ministry of Justice (who are also judges by nomination).

39. The electors should be authorised to vote for a smaller number of candidates than the number of members to be elected. Moreover, the possibility of being elected again for the members at the end of their term of office could be subject to criticism. However, the rule introduced in the draft Law on HSYK is covered by a specific provision of the Constitution.

40. The provisions that deal with the composition of the chambers (Article 8 of the draft Law) 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 in each Chamber. The members elected from among the judges and prosecutors working at the civil and criminal courts have two members in the First Chamber, three members in the Second Chamber and two members in the Third Chamber. The members elected from among the judges and prosecutors working at the administrative courts have one member in each Chamber. The Council of State has one member in the Second and Third Chambers, the Undersecretary 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 in each of the First and Second Chambers and two members in the Third Chamber. It is clear that in the case of the member elected by the Turkish Justice Academy, permissions for participations in in-service training are a task of the First Chamber, however, the reasoning behind the other allocations should be clarified.

Role of the Minister for Justice in the HSYK

41. One of the most controversial aspects of the reform is the continued presence of the Minister for Justice as *ex officio* President of the HSYK, as well as the Undersecretary as an ordinary member of the HSYK. At the same time, the formal competences and position of the Minister as President of the HSYK have been radically diminished and circumscribed as compared to the previous situation. The Venice Commission welcomes this reduced role, which is a substantial improvement to the previous situation.

42. Under the new rules, the President (Minister for Justice) appears, from a legal point of view, to have a mostly ceremonial role, although he or she retains some substantive powers, most notably with regard to the setting of the agenda, the appointment of the Secretary General and the fact that he or she has to approve all investigations proposed by the relevant body of the HSYK (the Third Chamber), which in effect gives him or her the power of veto over investigations of judges and prosecutors. The President (Minister) cannot participate in the Plenary meetings regarding disciplinary procedures nor may he or she be a member of one of the chambers or participate in their work. Nevertheless, he or she can influence other decisions affecting judges where the Plenary examines the decisions of chambers.

43. The Venice Commission considers that it would be preferable that the power of the President (Minister) be further limited. In particular, his or her power to veto investigations of

judges and prosecutors should be eliminated. Further deliberations are needed to determine whether the President (Minister) should chair the Plenary and whether his or her role could be confined so as to exclude him or her from matters pertaining to the internal organisation or the functioning of the judiciary or decisions pertaining to individual judges, such as assignments, transfers, promotions or classification.

44. The Minister for Justice is the point of reference of political accountability in matters concerning the judiciary. The Information Note to the draft Law on HSYK explains that the Ministry of Justice takes the position of:

> *"the associated Ministry for the High Council"*

and that

> *"the concept – associated – is used for autonomous bodies and expresses the weakest link with the relevant ministry in Turkish Public Law".*

Although this is not in line with the Turkish legal culture, it shows that the Ministry can be qualified as a political state body, which creates the risk of jeopardising the independence of the HSYK within the framework of the powers of the state.

45. On this basis and as a matter of principle, the Venice Commission considers that at the present stage it is not necessarily against the membership of the Minister and the Undersecretary of the HSYK. The real test will lie in the actual functioning of this arrangement. If the position of the two members of Government can be used for the purpose of exerting undue pressure and influence on the functioning of the HSYK, then the model should be reconsidered and, if necessary, changed in the next phase of the constitutional reform.

46. If the drafters would like to allow the HSYK to be as independent as possible, within the framework provided by the Constitution, they could provide for mandatory co-operation between the Minister and the Vice President in setting the agenda for the Plenary. This could be a solution within the limits of the authority of the Minister introduced by the draft Law on HSYK, when it requires that the President shall only appoint the Secretary General of the HSYK from among three candidates nominated by the Plenary of the HSYK. The delegation of the Venice Commission that visited Ankara was informed that such a change would probably be put into the draft Law on HSYK before its adoption.

47. In addition, the Venice Commission delegation that visited Ankara was informed that the powers of the Minister shall not be absolute, but "non discretionary". If this expression means that the President is not completely free in the exercise of his or her powers, this doctrine could also be used as a basis for dealing with other problematic issues in the draft Law on HSYK. For instance, the choice of providing for the HSYK's budgetary and administrative autonomy is to be welcomed: the HSYK is to have its own premises and an independent secretariat and budget, but Articles 6 and 7 of the draft Law on HSYK are silent on the adoption of the budget: is it the duty of the President on the basis of the proposal of the Office of the Secretary General (Article 10) or the duty of the Plenary which, *inter alia*, has to approve the HSYK's strategic plan and follow up its implementation (Article 7.2.j)? This should be clarified in the draft Law on HSYK in order to ensure the full administrative and budgetary autonomy of the HSYK.

48. Further clarification is also needed with respect to the relationship between the budgetary decisions of Parliament and the budgetary autonomy of the HSYK. Does the HSYK have to submit a proposal to Parliament? Is this proposal mandatory? Is there a law that provides for the amount of funds placed at the disposal of the HSYK?

49. As for the power of veto of the President (Minister) over proposals for investigations by the competent body of the HSYK (the Third Chamber), the legitimacy of this arrangement will depend on how it is exercised. The idea of giving a certain power of influence over investigations to someone who is politically accountable is not necessarily a bad idea. However, this provides the Minister with the opportunity to misuse such a competence in order to block legitimate investigations that are uncomfortable for the Government. In many countries, this threat would be countered by unwritten political norms and traditions, which would in effect make it politically impossible for a minister to interfere in legal proceedings of this kind. In Turkey, the same cannot as yet be taken for granted. The way in which this competence is used in the time to come should therefore be closely followed, and if necessary re-evaluated and reformed in the next constitutional revision.

50. It should also be noted that the President (Minister)'s power of veto is subject to judicial review, if this power were given to the HSYK, the decision would not be appealable, except for decisions that entail the "removal from the profession" (i.e. dismissal). See paragraphs 43-44 and the section on Judicial review, paragraphs 60-62, below.

Inspection and supervisory powers of the HSYK

51. The main concern of the Venice Commission with regard to the HSYK in Turkey is now not so much the institutional framework, which has clearly been improved, but its *substantive* powers of supervision and control. The foundations for this concern are, to a large extent, rooted in the new provisions of the Constitution. The Venice Commission is aware that the draft Law on HSYK cannot alter the Constitution, the Venice Commission's recommendations are therefore aimed at the ongoing reform process and notably at Article 159 of the Constitution. Most of the substantive powers do not seem to have been altered by the reform, although they are now to be exercised under the management of a more representative and pluralistic council, with a higher degree of legitimacy.

52. It is not uncommon in Europe to have some kind of inspection body that supervises judges and/or prosecutors to some extent, to see if they perform their duties correctly. Some countries have such institutions, others manage without them. However, from a comparative perspective it is clear that the powers of the Turkish HSYK to supervise and control the judges and prosecutors are not only greater than in most other European countries, but they have also been traditionally interpreted and applied in such a manner as to exert great influence on core judicial and prosecutorial powers, in a politicised manner that has been quite controversial.

53. The core issue with regard to the future independence, efficiency and legitimacy of the Turkish judiciary is whether the recent institutional reform will lead to a change in the way the substantial powers of the HSYK are used, or whether the tradition for political interference will be continued within the new framework.

54. From a legal perspective, the crucial provision in this regard appears to be Article 17 of the draft Law on HSYK, which lays down the "Duties and Powers of the Council Inspectors". The general competence given in Article 17.1 is very wide, stating, *inter alia,* that the inspectors have the right and duty to:

> *"supervise whether judges and prosecutors perform their duties in compliance with laws, regulations, bylaws and circulars".*

This is then limited by Article 17.4, which states that the inspectors:

> *"performing in accordance with the principles of independence of the courts and tenure of judges cannot interfere with the judicial power and discretion…".*

55. The Venice Commission considers that, although the very wide powers of supervision in Article 17.1 are in principle countered by Article 17.4, it would be preferable to regulate the inspection powers in a more restricted and detailed manner, with greater precision and predictability. Pending such regulation, it is all the more important that Article 17 be interpreted and applied in a restrictive manner, which neither directly or indirectly infringes judicial independence.

56. On this basis, the Venice Commission strongly recommends that in order to be in line with European standards, Article 17 of the draft Law on HSYK be revised and restricted in scope, in order to ensure that there is no interference with activities covered by the guarantee for independence. Towards that end, it should be noted that the language of the draft Law on HSYK is different to (possibly broader than) that of the Constitution (e.g.: "behaviour and conduct" vs. "manner and acts"; "status and duties" vs. "capacities and duties").

57. The draft Law on HSYK makes no provision for an appeal to a court of law against a disciplinary finding against a judge or prosecutor, except 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[7].

58. Also, if mistakes are made by judges or courts in applying laws, this may be corrected through legal remedies by the parties concerned, not through the intervention of higher ranking judges or other persons or organs. Judges benefit from a functional immunity. The remedy for judicial errors should lie in an appropriate system of appeals.

59. One of the solutions that could be adopted in Turkey, where court presidents only exist in administrative courts, might be to consider the introduction of such a function in ordinary courts.

60. Furthermore, sanctioning powers should be restricted to serious violations of duties. In this respect, the draft Law on HSYK goes too far when it relates disciplinary powers in general terms to "manners" and "acts"[8] of the judicial personnel checking their:

> *"compliance with the requirements of the capacities and duties"[9].*

CCJE Opinion no. 10 states the following:

> *"A judge who neglects his/ her cases through indolence or who is blatantly incompetent when dealing with them should face disciplinary sanctions. Even in such cases, as indicated by CCJE Opinion No.3 (2002), it is important that judges enjoy the protection of disciplinary proceeding guaranteeing the respect of the principle of independence of the judiciary and carried out before a body free from any political influence, on the basis of clearly defined disciplinary faults: a Head of State, Minister for Justice or any other representative of political authorities cannot take part in the disciplinary body."[10]*

61. Another issue that should be addressed are the duties of the HSYK and their distribution to the different chambers. In this respect, it should be noted that the draft Law on HSYK provides that the supervision of judicial activities is entrusted to two different bodies: (1) the Inspection

[7] For instance, Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia CDL-AD(2007)009, paragraphs 8, 9, 23 and 29; Joint Opinion on the Law on the Judicial System and the Status of Judges of Ukraine CDL-AD(2010)026, paragraphs 77 and 90.

[8] The Venice Commission was informed that « act » and « manners » (a better translation would be "ethical behaviour") only relate to behaviour as defined in disciplinary offences. However, it is important that this be clarified in legal terms in such a way as to exclude any broad interpretation of what amounts to ethical behaviour.

[9] See Article 9. 2.c and 9.3.c of the draft Law on HSYK.

[10] CCJE Opinion no. 10, paragraph 63.

Board of the HSYK (see Article 14) and (2) the office of judicial inspectors established in the Ministry of Justice (the Ministry Inspection Board, see Article 15.2). It seems that the competence of the latter is restricted to administrative duties of the judicial services and public prosecutors, but the HSYK's Inspection Board shall also deal with the compliance by the judges with administrative circulars. The merging of these two bodies might be considered to create just one inspection body.

62. Under Article 9, the Third Chamber is given the function of inspection (through the Inspection Board) as to whether judges and prosecutors perform their duties in compliance with laws, regulations, bylaws and circulars, to examine notices and complaints about judges or prosecutors and to act accordingly, and to scrutinise whether judges or prosecutors commit offences in connection with or during the exercise of their duties[11] or:

> *"whether their manners and acts are in compliance with the requirements of their capacities and duties".*

What is covered by the terms "manners and acts" should be clarified in a very restrictive manner.

63. Furthermore, this raises problems with regard to the relationship between the judiciary and the executive. On the one hand, it is clear that the freedom of movement of the HSYK in disciplinary matters is restricted by the requirement of the permission of the Minister for Justice in order to carry out inquiries and investigations concerning judges and prosecutors. On the other hand, the terms of the co-existence between this provision (based on Article 159 of the Constitution) and Article 144 of the Constitution are not clear: as a matter of fact Article 144 states that:

> *"supervision, inquiry, inspection and investigation proceedings of judicial services and public prosecutors with regard to their administrative duties shall be carried out by the Ministry of Justice through judiciary inspectors and internal inspectors".*

Although it may be difficult to draw a line between these duties in some cases, the term "administrative duties" must be interpreted in a narrow sense in order to ensure that the inspection carried out by the Ministry of Justice does not interfere with the guarantee for judicial independence.

64. The logic behind the assignment of functions as between the First and Second Chamber of the HSYK seems to be unclear. 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 authorisations or removal from office due to disciplinary or criminal investigations". The First Chamber, as mentioned, deals with appointment and with distribution (it is not clear what is meant by this) and also with the granting of permanent authorisations, 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.

65. In addition, 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 whether the Third Chamber is meant to scrutinise 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.

[11] See also Article 159 of the Constitution.

66. Another question that arises is the involvement of the Minister for Justice in the inspection process. Although, the draft Law on HSYK makes no reference to this, the Constitution states, in its Article 144, that the "judiciary inspector" performs its duties through the Ministry of Justice". It would be useful to clarify how this relates to Article 14 *et seq*.

Legal status of members of the HSYK

67. For an outside observer, the provisions on investigations and sanctions with respect to the members of the HSYK in the draft Law seem odd, because the HSYK consists of members who are selected and elected in a formal manner that include many safeguards with respect to their competences. The members usually do no act individually, but are part of a HSYK consisting of 22 members and are members of three chambers, each with seven regular members. The working methods are defined in Articles 29-33 of the draft Law on HSYK. In such an environment, the risk of violations of duties, of criminal offenses etc. may exist, but should be very low.

68. Alleged criminal conduct by members of the HSYK should be investigated and prosecuted in the normal way. Presumably this is intended to give protection to members of the HSYK 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 HSYK must authorise 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 HSYK. In other opinions, the Venice Commission has been critical of overbroad immunities being granted to judges[12]. In this case, it is difficult to see why members of the HSYK should have an immunity from investigation and prosecution unless this immunity is waived by the HSYK. The only exception to this provision seems to relate to *flagrante delicto* cases (Article 38.9).

69. The explanation for these rules is that there are a number of special investigation procedures regarding public officers that exist under the current legal system of Turkey. For instance, academics, military officers, high-ranking bureaucrats and Members of Parliament all have their own special investigation procedures. These procedures are intended to be safeguards for both the victims and the public officers that are accused of an offence. The introduction of a special investigation procedure for members of the HSYK is based on the Turkish legal system. In particular, members of the Court of Cassation and the Council of State, who are also members of the HSYK, are subject to a special investigation procedure provided in their respective laws. It was therefore considered important by the drafters of the Law that, in order to ensure the proper functioning of the HSYK, all of its members, who come from different institutions and different levels of the judiciary, be subject to one and the same investigation procedure. The Venice Commission understands the aim to achieve harmonisation of the rules applicable to the members of the HSYK, but wonders whether it would not be better to streamline and reduce the multitude of such rules in the Turkish legal system.

Relationship between judges and prosecutors in the HSYK

70. In European countries that have traditionally regulated judges and prosecutors in the same manner, there has been a noted increase over the past decades in the distinction made between these two professions. However, the draft Law on HSYK regulates judges and prosecutors in the same way, as one category. Nevertheless, recent developments in Turkey have shown that a distinction between the two professions is starting to appear.

[12] For instance, Opinion on the draft amendments to the Constitutional Law on the Status of Judges of Kyrgyzstan CDL-AD(2008)039, paragraphs 21-22, 24, 60 and 64.6; Joint Opinion on the draft Law on the Judicial System and the Status of Judges of Ukraine CDL-AD(2010)003, paragraph 27-28 and 123.3.

71. Under the Turkish system, the prosecution service is a part of the judicial branch, and the HSYK oversees both judges and prosecutors. The problem of the relationship between the prosecutors' offices and the Ministry of Justice has not been resolved, which leads to the question: is the executive authorised to adopt circulars on the activities of prosecutors' offices? Article 4.1.c.2 allows the HSYK to issue circulars on "the judicial tasks of the prosecutors other than those related to the power of assessment of evident and determination of crime". This might be clarified, it refers to judicial tasks of prosecutors which should be better defined if they are to preserve the independence of the activities of the prosecutors' offices. But, the fact that even this provision makes a distinction between the administrative duties of judges (Article 4.1.c.1) and the judicial tasks of prosecutors gives the impression that the constitutional position of the prosecutors is not comparable to that of the judges and requires a clearer definition.

72. 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. The Venice Commission does not have any information as to the respective total numbers of elected judges or prosecutors, but the situation could occur in which 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[13]. In other opinions, the Venice 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[14]. These opinions have emphasised the important difference between the functions of judges and prosecutors even in jurisdictions where prosecutors are regarded as part of the magistracy.

73. The Constitution, in its Article 159, makes no distinction between judges and prosecutors. Article 159.1 states that their functions are distinguished as far as they have to be exercised, on the one hand, in accordance with the principles of the independence of the courts and, on the other hand, in accordance with the security of tenure of judges. Does the guarantee of the independence cover only the courts, i.e. the bodies which exercise the function of judging cases? What about the security of tenure? Should it be distinguished from the independence of the courts and does it also affect the prosecutors? If this is the case, the guarantee of the personal status of the prosecutors is not connected to the guarantees concerning the respective offices. Problems may arise both as regards the composition of the HSYK and the chambers, and as regards the procedures and substantive work of the institution. Even in legal systems that place the prosecution service within the judiciary, these are still two distinct and different functions, which should not be regulated in the same manner. The Turkish system, at present, does not reflect these differences, and should be reassessed in order to take these differences into account, both in the organisational as well as the substantive rules.

Judicial review

74. Article 7.2.c of the draft Law on HSYK establishes the competence of the HSYK's Plenary to:

[13] Opinion on the Albanian law on the organisation of the judiciary (Chapter VI of the Transitional Constitution of Albania) CDL(1995)074; Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia CDL-AD(2008)006, paragraphs 19 and 21.
[14] Opinion on the reform of the judiciary in Bulgaria CDL-INF(1999)005, paragraph 28.

"examine and render decisions about the objections raised against the decisions taken by the chambers".

Article 33 adds that the re-examination of decisions "established for the first time" by the Plenary and of those of the chambers may be requested by the President or "the concerned ones" within 10 days after notification of the decisions themselves; complaints can also be made in respect of decisions pertaining to discipline; the Plenary decisions are final and no appeal may be made to judicial authorities for decisions of the Plenary and chambers other than those for the removal of office (i.e. dismissal), which are dealt with by the Council of State as the first instance court. Judicial review of the acts of the Council concerning judges should be required by adopting a bureaucratic model, regulated by law.

75. In addition, as far as disciplinary deliberations are concerned, one could argue that the HSYK is a superior judicial organ and that therefore the provisions of the draft Law on HSYK are in line with European standards, as set out in Principle VI.3 of Recommendation No. R(94)12. However, in the information the Venice Commission received from the Turkish authorities, the HSYK is frequently defined as an administrative body. The position taken by the Venice Commission is that an appeal to a court has to be provided as an additional safeguard of the independence of the judiciary and as a guarantee for the persons concerned. This should apply not only to disciplinary decisions, but also to other decisions which affect the interests and rights of judges and prosecutors.

76. Article 159 of the Constitution and the draft Law on HSYK provide that the decision of the President (Minister) to approve or reject an investigation is subject to judicial review. No mention is made as to how this review will be conducted, but the delegation of the Venice Commission that visited Ankara was informed that it will be treated as an ordinary administrative decision, to be handled by the administrative court of first instance according to the ordinary general criteria for reviewing decisions. The case will probably have to be raised by the original complainant. How this will function in practice is difficult to assess from the outside, but some concern could be raised as to whether such an arrangement is really sufficient to provide an effective control and review of what is in effect a ministerial decision not to open an investigation proposed by the relevant Chamber of the HSYK.

Other aspects

77. A brief clarification is needed with respect to Article 2 of the draft Law on HSYK, the definition Article, where the definition of what is meant by the term "court" is missing. The situation in Turkey seems to show that an ordinary court consists of one or three judges with their own registry and staff. This applies to both civil and criminal courts. But, in a courthouse one can find different courts dealing with the same sort of cases, allotted to them according to an automated system. In other countries, one would see that a court is a judicial authority in a certain determined region, that deals with criminal and civil cases, according to a system which is administered by the leadership of the whole court organisation. It seems that administrative courts in Turkey are organised according to the latter concept. It is therefore important for the interpretation of the draft Law on HSYK that the term "court" be clearly defined. This term is often used in relation to administrative courts, but also in other contexts; in the latter, clarification may be useful.

78. Article 11 of the draft Law on HSYK concerning the position of the Secretary General is a major improvement on the earlier situation. The work of the HSYK is important and deals with around 11 000 judges and prosecutors. A supporting organisation must therefore be available, preferably independent from the Ministry of Justice with sufficient autonomy. There seems to be an idea that only judges can perform duties like these (see also Article 12), while being a Secretary General constitutes a managerial role, albeit with important responsibilities. It is

submitted that, in general, judges rarely make good managers and, in the future, the requirement to be a judge might therefore be reconsidered.

79. It might also be useful to refer to the conclusions of the Report of the CEPEJ on the Councils for the Judiciary in EU Countries, which suggests that regulations be adopted, on a very broad basis, on the job description of such judicial councils. Delivering opinions should cover not only acts formally adopted by the other state powers, but also on their political behaviour and expression of ideas and intentions, as far as it can affect the constitutional position of the judiciary. The Italian Council for the Judiciary, for instance, offered interesting precedents in this respect, when it reacted to statements and declarations of politicians who were endangering the independence of the judiciary as well as its dignity.

VI. CONCLUSION

80. The Venice Commission welcomes the 2010 constitutional reform process, which it sees as a step in the right direction in the ongoing process towards the modernisation of the Turkish Constitution. The Venice Commission would like to encourage the Turkish authorities in continuing on their path of constitutional reform and in so doing, broaden the process by inviting the active participation of the opposition parties, civil society, non-governmental organisations and the general public – in a process that should be as inclusive and transparent as possible.

81. As regards the reform of the HSYK, the Venice Commission welcomes it as a considerable improvement on the existing situation, in particular the transfer of competences from the Ministry of Justice to the HSYK, the broadening of the composition of the HSYK, the increased independence both in law and actual resources, and a number of other points.

82. However, there is scope for further improvement in future revisions of the Law and preferably also of Article 159 of the Constitution. These include:

- revising the composition of the HSYK by replacing, in particular, the Undersecretary and the members appointed by the President, who could be replaced by members appointed by the legislative branch by a qualified majority;
- revising the very wide powers of inspection and supervision, as laid down in Article 159 of the Constitution and Article 17 of the draft Law on HSYK, in order to ensure that these do not infringe upon judicial independence, preferably accompanied by a general reform of the judicial system (see paragraphs 69 and 70);
- revising the relationship between judges and prosecutors, taking into account their different functions and the need to distinguish procedurally between them as well as ensure that both categories are represented. In this respect, the relationship between the Turkish Academy of Justice and the HSYK needs to be reconsidered;
- revising the rules and practices for election of the HSYK members, which should be designed in such a manner as to ensure broad and pluralistic representation.

83. The eventual success of the new HSYK rests not only on the new legal provisions, but on the way they are going to be implemented and applied in the years to come. The considerable powers of the new HSYK should be exercised in an objective, impartial and professional manner in order to prove as unfounded the criticism that the new system still remains under political control, and to ensure that the judiciary in Turkey is an organ for society at large and not only for the state.

84. The Venice Commission would like to encourage the Turkish authorities and legislator not to confine themselves to institutional reform, but to also revise and reform the *substance* of the strict and centralised system of judicial supervision and control. In particular, one should

reconsider whether there is a need for the very wide powers of inspection, and steps should be taken to ensure that this supervision neither directly nor indirectly infringes the independence of the judiciary. Furthermore, it might be considered to what extent the very centralised system could in part be decentralised and made more flexible, leaving some supervisory tasks to the courts themselves as part of their ordinary work. In particular, consideration might be given to introducing a system of regional courts that has the capacity to solve the daily administrative problems of these courts, in relative autonomy, and to find a legal solution to carry out certain disciplinary functions in a decentralised manner.

85. The Venice Commission would also like to encourage the Turkish authorities to speed up the process of judicial reform in general, including the establishment of regional courts of appeal, which should serve to strengthen the quality of the judicial procedures and results. The overall aim of the judicial reform should be to have a system that is perceived as legitimate by the parties concerned and which renders good judgments. In such a system, there will be less need for centralised inspection, and any disagreement with the judgments rendered will be channelled more generally through appeals through the ordinary system instead of as complaints to a central authority in the capital.

86. The Venice Commission remains at the disposal of the Turkish authorities for any further assistance they may need.