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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

TURKEY

DRAFT OPINION

ON THE JULY 2020 AMENDMENTS TO THE ATTORNEYSHIP LAW OF 1969

on the basis of comments by

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I. Introduction

1. By letter of 29 May 2020, Mr Michael Aastrup Jensen, Chairperson of the PACE Monitoring Committee, requested the opinion of the Venice Commission on the draft amendments to the Attorneyship Law (see the original version of the Law no 1136 of 19 March 1969, CDL-REF(2020)032). On 11 July 2020 the draft amendments were adopted by the Turkish Parliament (see CDL-REF(2020)033, containing the amendments of 11 July 2020, with the explanatory note of 30 June 2020). The focus of this opinion will be on the July 2020 amendments to the original Attorneyship Law (hereinafter referred to as "the 2020 amendments"; see the consolidated version of the Attorneyship Law after July 2020, CDL-REF(2020)064).

2. Mr Paolo Carozza (member, USA), Mr. Nicolae Ešanu (substitute member, Moldova), Ms Regina Kiener (member, Switzerland) and Mr Jørgen Steen Sørensen (member, Denmark) acted as rapporteurs. Mr Jeremy McBride was appointed as legal expert for the DGI.

3. Due to the Covid-19 pandemic, no visit to Ankara was possible, but several videoconferences were held on 4, 9 and 10 September 2020. The rapporteurs discussed the amendments with the representatives of various bar associations, of the Union of Turkish Bar Associations, of the Ministry of Justice, of political parties in Parliament, and of civil society. The Commission is grateful to the Turkish Ministry of Justice for facilitation of those virtual meetings.

4. This opinion was prepared in reliance on the English translation of the of original Law and the 2020 amendments. These translations may not always accurately reflect the original version in Turkish on all points. Therefore, certain issues raised may be due to problems of translation.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the series of virtual meetings with Turkish interlocutors. It was adopted by the Venice Commission at its … Plenary Session (Venice, …).

II. Background

A. A general overview of the constitutional and legal framework

6. In 1969, Turkey adopted the Attorneyship Law (hereinafter referred to as the "1969 Law"). This law regulated the status of attorneys, accession to the legal profession, attorney's fees, legal aid, professional duties and discipline of attorneys, disbarment, etc. It also defined the powers and the structure of the professional associations of attorneys – provincial bar associations (hereinafter – the BAs)[1] and the Union of Turkish Bar Associations.

7. The Constitution of 1982 (as amended) does not contain provisions specifically describing the organisation of the legal profession. Bar associations and the Union of Turkish Bar Associations are briefly mentioned twice: in Article 146 and in the provisional Article 18, in the context of elections of the members of the Constitutional Court.

8. In addition, Article 135 of the Constitution defines the status of "public professional organisations and their higher bodies" as being "public corporate bodies established by law, with the objectives of meeting the common needs of the members of a given profession". Under Article 135, the organs of public professional organisations "shall be elected by secret ballot by their members in accordance with the procedure set forth in the law, and under judicial supervision." [2]

[1] The term used in this opinion – Bar Associations – is taken from the translation of the Attorneyship Law. In some jurisdictions similar bodies are called simply "the Bar".

[2] The full text of Article 135 reads as follows:

> "Public professional organisations and their higher organisations are public corporate bodies established by law, with the objectives of meeting the common needs of the members of a given profession, to facilitate

9. Article 135 of the Constitution does not mention professional organisations of lawyers explicitly. However, under Article 76 of the 1969 Law, the BAs are defined as "professional organisations" having the "nature of public agencies". The Union of Turkish Bar Associations is also defined, in Article 109 of the 1969 Law, as a "professional organisation" having "the nature of a public agency". This language implies that BAs and the Union of the Turkish Bar Associations may be seen as "professional organisations" and their "higher body" respectively, governed by Article 135 of the Constitution. This reading of the law was confirmed to the rapporteurs by the Ministry of Justice during the videoconference meeting.[3]

B. Organisation of the Turkish bar before the 2020 amendments

10. Under the 1969 Law, BAs are established in each province.[4] The BAs register all attorneys working in their respective provinces and may decide on disbarring them. Membership in the BAs is mandatory, in the sense that it is a pre-requisite for rendering legal services and practicing law in Turkish courts (Articles 63 and 66 of the 1969 Law). If an attorney moves to practice in another province, he or she has to re-register with the BA of that province (Article 68). Thus, under the law as it stood before the 2020 amendments, membership in BAs was based on a purely geographical principle.

11. The BAs (through their governing bodies) perform important functions vis-à-vis attorneys: they admit lawyers to the bar (see Article 7), organise mandatory trainings for young lawyers ("apprenticeships" – see Article 15 et seq.), register partnerships (Article 44), decide on disciplinary cases (see Article 103 et seq.), advise attorneys on ethical obligations, mediate between attorneys and between attorneys and their clients (Article 95), and may impose disciplinary sanctions on attorneys, including temporary prohibitions to practice or definitive disbarments (Article 136).

12. Under Article 76, BAs are "operating on the basis of democratic principles". That means that attorneys participate in the General Assembly of the BA which elects the governing bodies of the BA (the President, the Management Board, the Disciplinary Board, etc. – see Articles 89, 90 and 104), by secret vote, and decides certain other questions (for example, decides on the amount of the BA admission fees – see Article 81). Every attorney must pay dues to support the

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their professional activities, to ensure the development of the profession in keeping with common interests, to safeguard professional discipline and ethics in order to ensure integrity and trust in relations among its members and with the public; their organs shall be elected by secret ballot by their members in accordance with the procedure set forth in the law, and under judicial supervision.

Persons regularly employed in public institutions, or in state economic enterprises shall not be required to become members of public professional organisations.

These professional organizations shall not engage in activities outside the aims for which they are established.

Political parties shall not nominate candidates in elections for the organs of these professional organizations or their higher bodies.

The rules concerning the administrative and financial supervision of these professional organizations by the state shall be prescribed by law.

The responsible organs of professional organizations which engage in activities beyond their objectives shall be dissolved by court decision at the request of the authority designated by law or the public prosecutor, and new organs shall be elected in their place.

However, in cases where delay endangers national security, public order and in cases where it is necessary to prevent the perpetration or the continuation of a crime or to effect an arrest, an authority designated by law may be vested with power to suspend professional organizations from activity. The decision of the said authority shall be submitted for approval to the responsible judge within twenty-four hours. Unless the judge declares a decision within forty-eight hours, this administrative decision is annulled automatically."

[3] See also the response of Turkey to the questionnaire by the UN Special Rapporteur https://www.ohchr.org/Documents/Issues/IJudiciary/BarAssociations/Turkey.docx

[4] According to the information received by the rapporteurs, currently bar associations are established in 80 out of 81 provinces of Turkey.

functioning of his/her BA (Article 65 of the 1969 Law). Decisions of the General Assembly of each BA are taken by "the largest number of votes" (Article 87). This rule also applies for the election of delegates to the Union of Turkish Bar Associations (Article 81 (1) and Article 87 (4) of the 1969 Law).

13. At the national level, the 1969 Law established the Union of Turkish Bar Associations (the UTBA). The UTBA is the umbrella organisation of the provincial BAs. It represents BAs before State authorities (see Article 110 p. 7). It also has competencies vis-à-vis individual attorneys. Thus, the UTBA may review certain decisions of the provincial BAs in matters related to the bar admissions, disciplinary sanctions, disbarment etc. Decisions of the UTBA are appealable to the Ministry of Justice, but the Ministry's decisions are not final: the UTBA may outvote the Ministry of Justice by a 2/3 majority of its management board members on certain matters related to admission, discipline and disbarment (see Articles 8, 9, 142, 157, etc.). The UTBA has other important functions. For example, it sets out rules of professional conduct (see Article 34) and determines the amounts of dues which attorneys must pay to the UTBA (Article 117).

14. The main body of the UTBA is the General Assembly (the GA), which is composed of delegates representing the BAs. Before the 2020 amendments, the number of delegates to the UTBA from each BA was somewhat proportional to the number of registered attorneys in the respective BA. Article 114 of the 1969 Law provided that each BA sends to the General Assembly two delegates plus the President of the BA *ex officio*. In addition, BAs having more than 100 members were entitled to send one additional delegate for every 300 attorneys. That rule meant that bar association established in Ankara and in large provincial centres, like Istanbul or Izmir, where the number of registered attorneys is very high, would send to the UTBA GA significantly more delegates than the BAs from smaller provincial centres.

C. The essence of the 2020 amendments

15. The 2020 amendments were introduced before Parliament by a group of MPs belonging to the ruling majority, without any proposal by the BAs and without having consulted them beforehand. Various sources,[5] as well as most of the interlocutors to whom the rapporteurs spoke, claimed that most of the BAs were not consulted in the process of preparing the draft amendments or during the debates in Parliament. The authorities and the President of the UTBA argued, on the contrary, that the leadership of the larger BAs had been invited to take part in the discussions, but had refused to engage in a dialogue and, instead, had preferred to hold demonstrations on the streets protesting against the reform.

16. The 2020 amendments made two major changes to the organisation of the Turkish bar. The first introduced the possibility of having multiple BAs in large cities, like Ankara, Istanbul and Izmir. New Article 77 provides that in the BAs having more than 5000 members, not less than 2000 members may leave and create an "alternative" BA. If their number drops below 2000, they must join one of the existing BAs in their province having 2000 members or more.

17. The second major change concerned the number of delegates each BA sends to the UTBA GA. Instead of the previous model, where each BA was sending one additional delegate per 300 members (in addition to the minimum of 3 delegates), new Article 114 provides that each BA will send to the UTBA a minimum of four delegates (three elected and one *ex officio*) plus one additional delegate per 5000 members. It follows that the number of delegates representing large BAs will be drastically reduced.

18. Previously, delegates representing large provincial centres dominated the UTBA GA. Thus, on 31 December 2019 there were 127,691 registered attorneys in Turkey. 46,052 attorneys were registered in Istanbul, 17,598 in Ankara, and 9,612 in Izmir. Under the previous system, the Izmir

[5] *Inter alia*, Human Rights Watch and the International Commission of Jurists.

BA was entitled to send ca. 35 delegates to the UTBA GA. Under the 2020 amendments, the Izmir BA will be entitled to five delegates (four regular plus one additional delegate per 5000 members).[6] The number of delegates sent on behalf of the largest BA – that of Istanbul – will go from ca. 136[7] to 13. In comparison, even the smallest BA (some of them having less than 100 members) will be entitled to send four delegates.

19. In essence, this second amendment changes the *rapport de force* within the UTBA. The previous principle of roughly proportional representation of attorneys within the UTBA has thus been replaced with a principle of nearly equal representation of all BAs in the UTBA.

20. These two major amendments – introducing multiple bars and removing proportional representation of BAs in the UTBA GA – were central to the 2020 amendments and sparked heated debate in Turkey[8] as well as internationally.[9] While the government considers the amendments as necessary in view of the increasing number of attorneys in Turkey and poorly functioning BAs, critics consider them as an instrument to silence the large BAs which criticise the state of the rule of law and human rights in Turkey. This Opinion will be essentially focused on these two major amendments to the 1969 Law. As to other changes, they were either technical or did not raise any controversy, so the Venice Commission will not comment on them.

III. Analysis

A. International standards

1. International human rights treaties

21. The international human rights treaties ratified by Turkey do not specify how a bar association should be organised. As observed by M. Diego García-Sayán, the UN Special Rapporteur on the independence of judges and lawyers, "the ways in which lawyers assemble and associate vary among different jurisdictions".[10] That does not mean, however, that international standards in this area are non-existent.

22. Article 1 of the European Convention on Human Rights (the ECHR) requires the contracting parties to "secure" the rights and freedoms included in the Convention. Similarly, Article 2 of the International Covenant on Civil and Political Rights (ICCPR) holds that the parties to the Covenant undertake "to respect and to ensure" the rights recognised in the Covenant. These provisions have been interpreted as imposing both negative and positive obligations upon States.[11] While some positive obligations of States are explicitly mentioned in the international human rights treaties, others are implied.

23. Thus, the right to a fair trial includes the right to legal assistance in criminal matters (see Article 6 § 3 (c) of the ECHR and Article 14 § 3 (d) of the ICCPR). It is reasonable to assume that the right to legal assistance implies some degree of *independence* of defence attorneys from the State.[12] Without this independence defence attorneys cannot perform their main function,

[6] Even if the Izmir BA splits into four new BAs (following the amendment allowing for multiple bars), Izmir attorneys will be represented in the UTBA by 16 delegates.
[7] Source: https://www.barobirlik.org.tr/tbb-delegeleri
[8] See https://www.arabnews.com/node/1673261/middle-east.
[9] See https://www.icj.org/turkey-plan-to-divide-undermine-legal-profession/
[10] Report of UN Special Rapporteur on the independence of judges and lawyers, p. 32: https://www.ohchr.org/EN/Issues/Judiciary/Pages/ReportGAOnBarAssociations.aspx
[11] In today's human rights law, a tripartite typology is established, distinguishing duties or obligations to respect, protect and fulfil human rights, with the duty to respect as a negative obligation, and the duties to protect and fulfil as positive obligations - see, among others, Harris, O'Boyle, Bates and Buckley, Law of the European Convention on Human Rights, 3rd ed., p. 21 and 22.
[12] See, for example, the judgment in *Faig Mammadov v. Azerbaijan*, no. 60802/09, § 32, 26 January 2017, which mentions expressly the principle of "independence of the legal profession from the State".

namely, to be the procedural opponents of the prosecution and serve the interests of their clients and the interests of the administration of justice in general.[13]

24. Another implicit requirement of Article 6 § 3 (c) of the ECHR is that legal assistance should be practical and effective.[14] "Effectiveness" of legal assistance implies a certain level of professionalism of the defence attorney. Thus, the ECtHR repeatedly held that the choice of defence counsel is not entirely free, and that the defendant may be required to choose amongst persons having certain qualifications.[15] By adverse implication, free legal assistance provided to defendants in need at the expense of the State should be at least minimally *professional*. That being said, this is not a very demanding standard: for instance, legal assistance provided by a trainee lawyer not having the status of a registered attorney was found to be "effective" for the purposes Article 6 § 3 (c).[16]

25. The requirement to ensure independent and professional legal assistance is implied in other international human rights standards as well. Thus, for the ECtHR, access to a lawyer is one of the fundamental procedural guarantees in matters of deprivation of liberty under Article 5 of the ECHR.[17] Moreover, the right to a lawyer has a prominent place in other, more specific human rights instruments, namely those regulating detention, treatment of prisoners, protection of victims of crime, protection against torture, etc.[18] A common point of these human rights instruments is that a lawyer not only acts in the interests of his/her client in a specific case but also plays an important role in defending human rights and the rule of law in general.

26. How the *independence* and *professionalism* of defence attorneys is to be guaranteed in practice is a difficult question. Neither the ECHR nor the ICCPR prescribe a system of governance for the legal profession. Arguably, the creation of an independent bar association may strengthen the independence of individual lawyers. However, while there is a considerable body of case-law on the independence of judges in light of how they are appointed or removed from office,[19] the independence of defence attorneys has not yet been examined from this "institutional" angle,[20] at least not in European human rights law. In the Venice Commission's assessment, States therefore seem to have a large margin of appreciation in these matters.

27. Finally, the Commission notes that Article 11 of the ECHR, guaranteeing freedom of association, may be relevant for some professional associations (see also Article 22 of the ICCPR). However, according to the ECtHR's case-law, public law institutions are not "associations" within the meaning of Article 11. The former European Commission on Human Rights concluded that bar associations in Spain set up by law in the public interest, with mandatory membership and with regulatory functions, are not "associations" within the meaning

[13] Some elements of the right to legal assistance – for example, confidentiality of lawyer-client contacts – also point in the same direction.
[14] See, for example, *Güveç v. Turkey*, §§ 119 – 133.
[15] See *Zagorodniy v. Ukraine*, § 53, with further references to the case-law.
[16] See *Dmitrijevs v. Latvia* (dec.), no 62390/00, 7 November 2002, with further references to the case-law.
[17] ECtHR, *Salduz v.Turkey* [GC], §§ 54-55; Ibrahim and Others v. the United Kingdom [GC], § 256, 272).
[18] Thus, the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* provides that a detained person shall be entitled to have the assistance of, and to communicate and consult with, legal counsel. The *Standard Minimum Rules for the Treatment of Prisoners*, which recommend, in particular, that legal assistance and confidential communication with counsel should be ensured to untried prisoners. The *Safeguards guaranteeing protection of those facing the death penalty* reaffirm the right of everyone suspected or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings. The *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* recommends measures to be taken at the international and national levels to improve access to justice and fair treatment, restitution, compensation and assistance for victims of crime.
[19] See *Langborger v. Sweden*, § 32; *Kleyn and Others v. the Netherlands* [GC], § 190.
[20] The IBA commentary, cited above, (p. 13) develops this approach as follows: "Independence of a lawyer requires also that the process for the lawyer's admission to the bar, professional discipline, and professional supervision in general, are organised and carried out in a manner that guarantees that administration of the legal profession is free from undue or improper influence, whether governmental, by the courts or otherwise."

of Article 11 § 1.[21] This approach was later confirmed by the European Court of Human Rights in a case concerning Romania.[22] In Turkey the 1969 Law describes the BAs and the UTBA as "public" bodies. They are created by the law itself, in the general interest, they are based on mandatory membership and they have regulatory functions. It follows that Article 11 of the ECHR is not applicable to the UTBA and BAs.[23]

28. In sum, while international human rights treaties do not prescribe a particular model of governance of the legal profession, the positive obligation of states to secure human rights can be read to require a *robust degree of independence* and *professionalism* of attorneys. In the following section the Venice Commission will examine how those principles are interpreted in nonbinding "soft law" instruments.

2. International soft law instruments

29. Contrary to international human rights treaties, international soft law instruments look at the independence and professionalism of the bar from an institutional angle and are more specific on how the legal profession should be organised. Thus, Recommendation Rec(2000)21 of the Committee of Ministers of the Council of Europe (see principle V/1)[24] and the UN Basic Principles on the Role of Lawyers (see p. 24)[25] are both based on the idea that the independence and professionalism of lawyers is best ensured through *the creation of independent bar associations*.

30. Recommendation Rec(2000)21 and the UN Basic Principles recommend the establishment of bar associations; however, these instruments do not rule out the possibility of having more than one such association in any given area.[26] Also, the World Bank comparative analysis seems to confirm that there is great variety in the number of bar associations in the selected European jurisdictions.[27] From the World Bank analysis it appears that where a country has multiple bars they are usually organised according to the geographical principle (local-regional-national levels). However, international instruments do not exclude the possibility of having multiple bar associations at the same level, based of voluntary membership, at least not expressly.

31. The second prong of the reform consisted of abandoning the principle of proportional representation of all Turkish attorneys in the UTBA. In essence, the UTBA was turned into a confederacy of provincial bars.[28] This potentially affected the representative character of the UTBA vis-à-vis individual attorneys, since in the new system attorneys from big cities are seriously under-represented. Thus, in the example discussed above (see paragraph 18), one delegate from a small BA would represent less than 25 attorneys, while a delegate from Izmir would represent approximately 1900. This difference will be even more spectacular if a very small BA is compared with the biggest one, from Istanbul.

32. The requirement that bar associations should be representative of their members (i.e. individual attorneys) transpires from Recommendation Rec(2000)21, which specifies that bar associations "should be self-governing bodies".[29] The idea of self-government implies the

[21] A. *and others v. Spain* (application no. 13750/88, admissibility decision of 2 July 1990).
[22] *Pompiliu Bota v. Romania* (dec.), no 24057/03, 12 October 2004.
[23] Paradoxically, the 2020 amendments bring BAs closer to the private law bodies, in the sense that attorneys in big cities will henceforth be able to decide to which BA they wish to belong. However, most likely, this change is not sufficient to bring the Turkish BAs within the ambit of Article 11.
[24] 25 October 2000, "Freedom of exercise of the profession of lawyer" https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804d0fc8.
[25] https://www.un.org/ruleoflaw/files/UNBasicPrinciplesontheRoleofLawyers.pdf.
[26] E.g. Principle V of Rec(2000)21 or p. 24 of the UN Basic Principles, referred to above.
[27] See pp. 74 et seq., https://documents.worldbank.org/curated/en/512071511257170449/pdf/Comparative-analysis-of-bar-associations-and-law-societies-in-select-European-jurisdictions.pdf.
[28] One additional delegate for every 5000 members of a BA does not change anything in this analysis.
[29] See Principle V/2.

representative character of the bodies of the association. More clearly this requirement is formulated in the UN Basic Principles, stipulating that "lawyers shall be entitled to form and join *self-governing professional associations* […]. The executive body of the professional associations shall be *elected by its members* […]" (emphasis added).[30]

33. The idea of "self-government" or "self-regulation" of the legal profession is also mentioned in documents of authoritative international professional associations – the International Bar Association (the IBA) and the Council of Bars and Law Societies of Europe (the CCBE, uniting the Bars and Law Societies of 45 European Countries). Thus, according to the CCBE, bars should seek to uphold and protect, in the public interest, core principles like, *inter alia*, the independence of the lawyer, and the freedom of the lawyer to pursue the client's case, respect for the rule of law and the fair administration of justice, and the self-regulation of the legal profession. [31] Principle 17 of the IBA Standards provides that "there shall be established in each jurisdiction one or more independent self-governing associations of lawyers recognised in law, whose council or other executive body shall be freely elected by all the members without interference of any kind by any other body or person. This shall be without prejudice to their right to form or join in addition other professional associations of lawyers and jurists". [32]

34. A report on bar associations, prepared by the UN Special Rapporteur on the independence of judges and lawyers,[33] develops the concept of "self-governance" of professional associations of lawyers in more detail. Of particular interest for the present Opinion are the following two recommendations:

> "100. The majority of members of the executive body of the bar association should be lawyers elected by their peers" […]
>
> 102. The selection process for members of the executive body of a bar association must be transparent and participatory so as to avoid corporatism or politicization of the process. […] ."

35. In Turkey, the executive bodies of the BAs and of the UTBA are composed exclusively of attorneys. The Venice Commission does not think that, in current circumstances, this should be changed. What is important in this citation is that the notion of self-governance implies a requirement that the organs of bar associations should be *representative* of the members of the legal profession.

36. That being said, the condition that bar associations should be "self-governing" and that their bodies should be composed of "lawyers elected by their peers" is not applicable to the same extent to all types of bar associations. Recommendation Rec(2000)21 (principle V/2) and UN Basic Principles (p. 24) seem to develop the idea of "self-governance" essentially with reference to those bar associations which are based on voluntary membership and play a representative role. Bar associations of this type are closer to private law associations (NGOs) and, as such, should be self-governed and be representative of their members. However, this is not the only possible model of organisation of the bar. As acknowledged by the UN Special Rapporteur, "State involvement in the regulation of the legal profession varies greatly".[34] The IBA notes, in a similar vein, that "there is an ongoing debate as to the extent to which governmental and legislative

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[30] Pp. 24-25.
[31] See Charter of Core Principles of the European Legal Profession (edition 2019). https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf#:~:text=The%20more%20recent%20one%20is%20the%20Charter%20of,member%2C%20associate%20and%20observer%20states%20of%20the%20CCBE.
[32] The 1990 IBA Standards For The Independence Of The Legal Profession: https://www.ibanet.org/publications/publications_iba_guides_and_free_materials.aspx#collapse18.
[33] Cited above.
[34] *Ibid.*, p. 24

interference with the administration and conduct of the legal profession may be warranted."[35] It is difficult to insist that the requirement of self-governance should be applicable in the same measure to those bar associations which have the status of a public body, are based on mandatory membership and have important regulatory functions, as is the case with the BAs in Turkey.[36] The Venice Commission, in an opinion on Ukraine, did not question an arrangements in which qualifications and disciplinary commissions included members who were not attorneys.[37] Full self-governance of bar associations which are public-law bodies with regulatory functions may be seen as an optimal model, but not as a strict standard.[38]

B. Effects of the 2020 amendments on the independence of attorneys and the proper functioning of the legal profession

37. As demonstrated above, international human rights treaties imply that attorneys should be independent and professional. Soft-law instruments recommend that bar associations should be representative of lawyers (without, however, prescribing any particular model of organisation of bar associations). Complying with these principles is also important from a rule of law perspective. Thus, in its Rule of Law Checklist, the Venice Commission stressed that "it is […] crucial that [the bar] is organised so as to ensure its independence and proper functioning".[39] In an opinion on Ukraine, the Venice Commission noted as follows: "The main arguments for self-regulation of the legal profession are that it is necessary to preserve the independence of the bar, the independence of the judiciary, and the rule of law […]."[40] Therefore, in this section the Venice Commission will assess whether the 2020 amendments furthers these principles.

1. The law-making process and the rationale for the reform

38. The Venice Commission has consistently maintained that the public should have a meaningful opportunity to provide input into the legislative process.[41] This is *a fortiori* true of the consultations with the main stakeholders – in the case at hand, the attorneys.[42] Critics and supporters of the 2020 amendments disagreed whether the BAs were given a chance to influence the content of the amendments What is evident, by contrast, is that the initiative for reforming BAs came not from the Turkish legal community but from the outside, and that the majority of the Turkish attorneys opposed the amendments.[43]

39. This situation is hardly compatible with the principles of self-regulation and self-governance of the legal profession, analysed in the previous section. Normally, such reforms should be driven

[35] The International Bar Association (the IBA), Commentary to the "International Principles on Conduct for the Legal Profession", adopted by the IBA on 28 May 2011, page 14: See https://www.icj.org/wp-content/uploads/2014/10/IBA_International_Principles_on_Conduct_for_the_legal_prof.pdf.
[36] For example, the Recommendation does not insist that bar associations should have all the powers which the Turkish BAs have. For example, the Recommendation stipulates that bar associations "should be responsible for"… or, where appropriate "be entitled to participate in the conduct of disciplinary proceedings" concerning lawyers.
[37] See CDL-AD(2011)039, Joint Opinion on the draft law on the bar and practice of law of Ukraine by the Venice Commission and the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe, § 95.
[38] In addition, it is unclear to what extent the principle of self-governance should apply to the UTBA. The Venice Commission considers that the UTBA, by virtue of its powers and its relations with the provincial BAs, plays the role of an "upper chamber" in a vertically organised two-tier system (see the analysis in paragraph 61 below). However, it also has some characteristics of a confederation of provincial BAs; one may claim that the UTBA should be representative of the BAs, and not of individual attorneys.
[39] CDL-AD(2016)007, Rule of Law Checklist, §§ 97 and 98
[40] See CDL-AD(2011)039, cited above, § 11.
[41] See the Rule of Law Checklist, Section 5 (iv).
[42] See CDL-AD(2020)017, Poland - Joint Urgent Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on amendments to the Law on the Common courts, the Law on the Supreme court and some other Laws, § 18.
[43] Thus, 78 out of the 80 bar associations of Turkey signed a public statement opposing the amendments. See also https://www.istanbulbarosu.org.tr/files/docs/UIA-MrJeromeCRoth24082020.pdf.

by the legal community itself, or at least by a significant part of it, unless there is a compelling public interest to do otherwise and impose the reform from the outside.

40. The Venice Commission does not see any such compelling reason in this case. It recalls that another important element of due process of law-making is that the bills should be adequately justified, and that the impact of any draft legislation should be carefully assessed, in particular, from a human rights perspective.[44] One of the central arguments of the supporters of the reform was that it would improve the quality of governance within the legal profession. This assumption, however, was not supported by any hard evidence. No effort was made to collect data or obtain the opinions of the BAs beforehand, to conduct an appropriate impact assessment, etc. To start a reform, one needs to demonstrate that there is a real problem in need of a solution, and that the proposed solution will be at least somewhat effective. However, it has not been convincingly demonstrated in the present case.

2. Creation of multiple BAs in large cities

41. Other arguments in support of the 2020 amendments were arguments of principle. Thus, the authorities referred to the growing alienation of the Turkish attorneys from the governing bodies of their BAs. For example, only a fraction of members of the Istanbul BA participated in the last elections of its governing bodies. That made the governing bodies of the large BAs not representative of the respective legal communities. Smaller BAs created after the reform would be more democratic in the sense that they would give stronger voice to individual attorneys.

42. The Commission is ready to admit that, arguably, the leadership of smaller BAs is closer to the rank-and-file attorneys, and that the latter have more leverage in defining the policy of their BAs. If this assumption is correct, breaking up large BAs into smaller ones is a reasonable step. The question, however, is how to create smaller BAs without affecting the quality of the administration of the legal profession and the independence of the individual attorneys – which is one of the pre-requisite for securing the rights of the parties in court procedures. At the meetings with the rapporteurs, the critics of the reform pointed at many downsides of the model based on voluntary[45] membership in BAs. The Venice Commission will address these counterarguments one by one.

a. The risk of politicisation

43. The overriding concern of the critics of the reform is that creation of alternative BAs will lead to *politicisation* of the profession. It would disempower the large bar associations which happen to be also those that have mainly criticised the government on issues of human rights and the rule of law. It would encourage the legal profession to split along political lines so that criticism expressed by some bar associations will be challenged by other associations, leading to disintegration of the "public voice" of attorneys in Turkey.

44. The potential politicisation of the legal profession was also admitted by the representatives of the ruling majority and of the Ministry of Justice during the discussion with the rapporteurs. They noted that even before the reform the Turkish attorneys were already very politicised, which is demonstrated by their active involvement in certain political debates. For the Venice Commission, it is likely that the amendments would incite politically like-minded attorneys to create their own BAs.

45. The Venice Commission recalls that lawyers are entitled to have political opinions and even participate in the political life. However, bar associations should not become political actors. The

[44] Rule of Law Checklist, *ibid*.
[45] "Voluntary" in the sense that an attorney may choose to which bar he or she wants to belong; otherwise belonging to a BA remains mandatory.

mandate of the bar associations is defined in Article 76 of the 1969 Law: "ensuring honesty and confidence in the mutual relations between the members of the profession and their relations with clients; defending and safeguarding the order, ethics and respectability of the profession, the supremacy of law, and human rights; and to satisfy the common needs of attorneys." Associations may not "engage in activities other than those befitting their purpose of establishment". This mandate is well in line with mandates of bar associations in many other European countries.[46]

46. Many interlocutors, and in particular the attorneys themselves, were concerned that the attorneys' political preferences would become evident from the BA to which they belong. In the view of the Venice Commission, this can potentially affect how those attorneys are treated by the courts and the administrative bodies and will ultimately push the attorneys to join "loyalist" bar associations. This may have a negative impact on the independence of the legal profession in general.

47. The Venice Commission reiterates that in the previously existing system, the affiliation to a BA was based on purely geographical criteria. As a consequence, BAs were inevitably inclusive; they assembled a broad spectrum of political views, religious beliefs, ethnic origins, age groups, or professional specialisations. Due to this form of organisation, previously BAs represented the legal profession as such, and not specific views, beliefs, attitudes or professional preferences of their members. The 2020 reform, especially against the background of current political tensions in Turkey (on this see below), risks transforming BAs into political clubs and endanger the neutral status of these bodies.

b. Weakening the capacity of the BA to be involved in the human rights work

48. Not least, the 2020 amendments should be seen in the wider context of the raising pressure on the judiciary, prosecutors and attorneys in Turkey, in the aftermath of the failed *coup d'état* in 2016, and the following declaration of the state of emergency.[47] Pursuant to emergency decree laws, thousands of judges working at all levels of jurisdiction lost their jobs.[48] Mass dismissals were conducted in the prosecution service as well, and in other law-enforcement agencies. In such an extraordinary situation, when the judiciary and prosecution service are weakened, an independent legal profession, which is a *third pillar* of any modern justice system, is indispensable to ensure the fairness of the proceedings. However, the legal profession has been weakened as well. Thus, according to The Arrested Lawyers Initiative, Turkey has prosecuted more than 1,500 attorneys, arresting 599 of them on terrorism charges, since the 2016 failed coup. As of 1 September 2019, 1,321 lawyers had been sentenced for terrorist group membership or disseminating terrorist propaganda. The rapporteurs understand that larger BAs have, within their structures, specialised units dealing with human rights questions. Splitting larger BAs into smaller ones may undermine the capacity of the BAs to provide that kind of services to the society or defend the rights of the members of the legal profession, which is a very important task in the current context.

[46] See for example, the Austrian *Rechtsanwaltsordnung*, a law regulating the lawyers' profession, which defines the mandate of the bar as safeguarding, promoting and representing the interests of lawyers and protecting the honour, reputation and *independence* (emphasis added) of lawyers, as well as protecting their rights and monitoring their duties (§ 21 (2), see https://www.ccbe.eu/documents/professional-regulations/) See, more generally, the CCBE Code of Conduct for European lawyers, http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf

[47] A detailed description of those measures can be found in the Venice Commission's Opinion CDL-AD(2016)037 on the Emergency Decree Laws Nos. 667 –676 adopted following the failed coup of 15 July 2016.

[48] Venice Commission, Opinion CDL-AD(2016)037 on the Emergency Decree Laws Nos. 667 – 676 adopted following the failed coup of 15 July 2016, at § 147. See also Human Rights Council, Thirty-seventh session, 26 February–23 March 2018, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on his mission to Turkey, UN Doc A/HRC/37/50/Add.1, at paragraph 24.

c. Administrative instability

49. The creation of multiple bars has other downsides. Thus, it will be more difficult to ensure uniform practice in the execution of their mandates, for example in the delivery of legal aid and disciplinary proceedings against individual attorneys. Political cleavages between alternative BAs (see above) may lead to polarisation of practice.

50. The 2020 amendments do not specify what happens to the property of an existing BA if a part of its members form a new BA. It is understood that currently existing BAs own real estate and other property, acquired over the years with the attorney's fees. The 2020 amendments do not specify how property issues are to be decided when a new BAs is formed, or when attorneys pass from one BA to another.

51. Finally, the BAs in the new system may become very unstable. Under the new Article 77 of the 1969 Law, if the number of members in a newly created BA goes below 2000, it should be liquidated. Attorneys are free to go and join other BAs, if they so wish. A BA which has slightly over 2000 members will be in a very fragile position, and if political winds change and a group of the attorneys decides to leave, the very existence of this BA may be put at risk.

52. These risks were unknown in the previous system, where each attorney belonged to one association in the place of his or her practice and where they were not given the right to come and go.

d. Will the new system provide better services to attorneys?

53. The proponents of the reform argued that smaller BAs would provide better administrative services to their members and thus improve the quality of the legal assistance in general. In particular, smaller BAs would ensure better training to the young lawyers during the mandatory apprenticeship period.

54. These assumptions may be correct, but, as stressed above, the rapporteurs have not been presented with evidence, and no attempt to test these assumptions had been made in the process of preparation of the law. In addition, if there was such a direct correlation between the quality of apprenticeship and the size of the BA as the authorities claim, one might assume that the best trained lawyers would work in the smallest BAs, and not in the big cities. It is equally unclear why other administrative services should improve if the size of the BAs is reduced to 2000 members.

e. Unequal treatment of attorneys in large cities and smaller towns

55. It is important that the "democratisation" of provincial BAs introduced by the 2020 reform will affect only a part of Turkish attorneys. The system of multiple bars will only exist in three big cities, where the number of attorneys exceeds 5000. It is unclear why attorneys in three major cities will be entitled to join a bar association of their choice, whereas attorneys in 77 other provinces will still be compelled to belong to the one and single BA. If the concern of the drafters of the amendment was to promote democratic principles, these principles should be extended to all the Turkish territory.

f. Possible solutions

56. As demonstrated above, the new model of multiple bars based on voluntary membership has many downsides. Most importantly, it may lead to politicisation, which endangers the independence of attorneys and the political neutrality of the legal profession. It may also result in administrative instability. Its assumed benefits for the quality of administrative services are not

clear. Finally, it creates an unjustified distinction between attorneys from three big cities and other attorneys.

57. The Venice Commission considers that the problems suggested by the Turkish authorities to exist could have been addressed by other means. For example, consideration could have been given to creating smaller constituencies which would respect the geographical principle, as before (i.e. each attorney belonging to his or her district BAs, for example), but will cover a smaller territory and consequently a smaller number of attorneys. That would make the BAs smaller and more "manageable", and, at the same time, avoid the risk of politicisation and of other administrative inconveniences identified above.

3. Is the new system of election of delegates to the UTBA GA more fair than the old one?

58. The proponents of the reform maintained that the new model of nearly equal representation of all BAs in the UTBA GA is fairer, since it removes the dominance of three largest BAs and gives more voice to smaller BAs. It approximates the balance between smaller and larger BAs which existed in 1969, when the gap between them was not so important (at the time, there were many fewer attorneys in the three large cities than now).

59. By itself, the legislator is not prevented from changing the principles of election in order to return to the original proportion between delegates from larger and smaller BAs within the UTBA GA, or to establish any other proportion. However, changing the proportion should not be a goal in itself - the reform must promote some vital public interest. It is not clear for the Venice Commission how this new system improves the quality of services provided by the UTBA to the attorneys, or by the attorneys to the general public. Quite contrary: the Venice Commission considers that the new system reduces the representative character of the UTBA, which, eventually, may have negative consequences for attorney's independence.

60. In the opinion of the Venice Commission, the way that the UTBA GA is elected should be analysed in light of the role this body plays in the system of governance of the legal profession. From the functional perspective the UTBA is not only a union of BAs – it has important powers vis-à-vis individual attorneys. Thus, the UTBA can overrule decisions taken by the BAs in respect of attorneys in the disciplinary sphere, and as regards the admission to the legal profession. The UTBA develops ethical standards which should be applied to individual attorneys by the BAs' disciplinary bodies. Finally, the UTBA collects membership dues from the individual attorneys. In essence, the UTBA interacts with individual attorneys directly, not only with the BAs. The 1969 Law established a two-tier system of governance of the legal profession, with the UTBA on the top of it. The UTBA is also a "higher body" of BAs within the meaning of Article 135 of the Turkish Constitution (see paragraph 9 above).

61. Article 76 of the 1969 Law provides for the "democratic" method of election of the governing bodies of the BAs. It would not be logical and coherent to guarantee democratic elections only at the level of BAs, if the "higher body" is not composed in a broadly similar manner. Given its functions, the UTBA should have democratic legitimacy vis-à-vis the members of the legal profession, be *representative* of the individual attorneys.

62. The Venice Commission also believes that the representative character of the UTBA GA implies that individual attorneys should have an approximately equal voting power in electing its bodies. The principle of "equal voting power" is one of the cornerstone principles of the electoral law, and of the democracy in general.[49] It may be impossible to achieve a perfectly equal voting power in all types of elections. For example, in federated bodies some constituencies (territories, professional groups, etc.) may be better represented than others, for historical or political

[49] See the Venice Commission Code of good practice in electoral matters, CDL-AD(2002)023rev2-cor, p. 2.2.

reasons. Even in the old system the individual attorneys had only an approximately equal voting power vis-à-vis the UTBA. However, replacing a relatively balanced system with a clearly unbalanced one, where the difference in the voting power may be hundredfold, needs a very strong justification, which the Commission cannot find in the case at hand.

63. It is noteworthy that in 2002, in case no. 2002/31, the Constitutional Court of Turkey already addressed the issue of equal voting power.[50] This case concerned the method of elections to the Grand Congress of the Medical Association, a nationwide organisation of Turkish medics. The Grand Congress consisted of delegates selected by the general assemblies of medical chambers. The law at the time provided that chambers having up to 300 members would send to the Grand Congress 3 delegates; chambers having up to 500 members would be entitled to 5, and chambers having more than 500 members would be entitled to 7 delegates maximum. The Constitutional Court ruled that limiting the maximum number of delegates to 7 was incompatible with the principle of fair representation, which is a cornerstone of any democracy.

64. This judgment supports the Venice Commission's analysis above: the recent move from a roughly proportionate system of representation of attorneys from different BAs towards a clearly disproportionate system, where the attorneys from different BAs have dramatically different voting power, is not justified.

65. This conclusion does not mean that the previously existing system was perfect. The authorities claimed that delegates of the UTBA GA elected on behalf of the Istanbul BA do not represent all the attorneys but only an insignificant majority of them. In the elections at the level of provincial BAs attorneys choose amongst several lists of candidates. Each list contains candidates to all leadership positions, including delegates to the UTBA. As a result, candidates from the list which received a relative majority of votes (that was the case of Istanbul), filled *all* the vacant posts. Given the very low turn-out at those elections, it means that the governing bodies of the Istanbul BA and the delegates to the UTBA may not be very representative of the Istanbul legal community.

66. In the opinion of the Venice Commission, this problem would be better addressed by other means, not by abandoning the principle of roughly proportional representation of the BAs in the UTBA GA. The most evident solution would be to redesign the electoral system at the level of provincial BAs. For example, one may consider increasing the quorum and/or introducing a proportional system of voting. That would ensure that delegates to the UTBA from each BAs better represent different currents within the legal profession and are not as homogenous as before. This will also increase the role of the delegates from the smaller BAs, who they will be able to join forces with "dissident" delegates from the larger BAs. At the same time, this solution will avoid creating a huge disparity in the voting power of individual attorneys. The Venice Commission stresses that any such reform should involve a meaningful participation of the legal community in the process of its development.

IV. Conclusion

67. The 2020 amendments to the Attorneyship Law of 1969 introduced two major changes to the system of governance of the legal profession in Turkey. First, they made it possible to create multiple bar associations in large provincial centres (instead of a single one, as before). Second, they changed the relative voting power of bar associations within the Union of the Turkish Bar Associations (the UTBA), thus reducing the influence of those that are large, and increasing that of small bar associations.

68. The international human rights treaties do not specify how legal profession should be governed. However, they can be construed as requiring a robust degree of independence and

[50] See (in Turksih): https://normkararlarbilgibankasi.anayasa.gov.tr/ND/2002/31?KararNo=2002%2F31.

professionalism of the lawyers. International soft law instruments develop these principles further. They promote the idea that the independence and professionalism of lawyers are best ensured through the creation of independent bar associations. They also proclaim the principle of "self-governance" of the legal profession, which implies that the bodies of bar association should be representative of their members, i.e. individual attorneys.

69. The Turkish authorities identified certain flaws in the previously existing system. However, it is not clear for the Venice Commission how the new system will improve the quality of services provided by the UTBA or the BAs to the attorneys, and, eventually, by the attorneys to the general public.

70. The Turkish authorities also asserted that currently existing bar associations in large cities are not really representative of their members, and that large bar associations unjustly dominate the General Assembly of the UTBA. The Venice Commission admits that it may be necessary to address this issue, but the solutions proposed by the 2020 amendments appear to have many drawbacks.

71. Most importantly, there is a real risk that creation of multiple bar associations in the same city, based on voluntary membership, will lead to further politicisation of the legal profession. This is incompatible with the neutral role which the attorneys should normally play. It will also endanger the independence of attorneys, which is implicitly required by the international human rights treaties, by the soft law standards and which is one of the requirements of the rule of law.

72. Furthermore, the creation of alternative bar associations may lead to incoherent practice in disciplinary matters and create administrative instability. It is unclear how it will improve the quality of the training or other services provided by bar associations to its members. Finally, the possibility to join alternative bar associations will be open only to attorneys from large cities, and not to all Turkish attorneys.

73. The Venice Commission considers that the problem identified by the Turkish authorities may be addressed by other means. For example, the Turkish authorities may explore the idea of creating smaller BAs while respecting the geographical principle. This solution is free from the drawbacks identified above, and, at the same time, will make the system more "democratic".

74. A similar recommendation is made in respect of the second prong of the reform. The new model (where all BAs send nearly equal number of delegates to the UTBA GA) distorts the representative character of this body. However, it should be possible to review the system of election of delegates by provincial BAs in order to make it proportional and so ensure that these delegates represent different currents within the legal profession and are not as homogenous as before.

75. The Venice Commission invites the Turkish authorities to consider those alternative solutions. It also encourages the authorities to ensure meaningful involvement of the community of Turkish attorneys in the discussions about any further reforms of the legal profession. The Commission remains at the disposal of the Turkish authorities and the Parliamentary Assembly for further assistance in this matter.