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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION

ON THE DRAFT LAW ON JUDGES AND PROSECUTORS

OF TURKEY

Adopted by the Venice Commission
at its 86th Plenary Session
(Venice, 25-26 March 2011)

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 deals with (4) the draft Law on Judges and Prosecutors of Turkey (CDL-REF(2011)002). The Venice Commission has adopted an Interim Opinion on the draft Law on the High Council for Judges and Prosecutors of Turkey (CDL-AD(2010)042). This Law was enacted on 11 December 2010, Law number 6087.

2. The following rapporteurs were invited by the Venice Commission to provide their comments on this draft Law: Mr James Hamilton (Ireland) and Mr Wolfgang Hoffmann-Riem (Germany) who were joined by Mr Bert Maan (Netherlands) invited by the Legal and Human Rights Capacity Building Department to act as rapporteur for this opinion. Their comments appear respectively in documents CDL(2011)001, CDL(2011)002 and DG-HL (2011) 3. This opinion is based on their comments.

3. In the course of the discussions with the Turkish authorities, the latter have made a number of clarifications in relation to the draft Law on Judges and Prosecutors. The present opinion was adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011).

II. GENERAL REMARKS

A. Amendments

4. The draft Law on Judges and Prosecutors (hereinafter, the "draft Law") amends many provisions of the existing Law on Judges and Prosecutors of February 1983 (hereinafter, the "1983-Law") to take into account recent constitutional changes that have been introduced as well as the changes made to the Law on the High Council for Judges and Prosecutors. The 1983-Law regulates a number of important matters concerning prosecutors and judges. These include the qualifications required for appointment, the method of appointment, the rights and duties of prosecutors and judges, their salaries and allowances, their promotion and assignment to posts and duties, disciplinary proceedings and penalties, the investigation and prosecution of complaints or infringements of the Law on Judges and Prosecutors, dismissal and in-service training.

5. While there are many amendments to the 1983-Law, it remains largely unchanged and the amendments cannot be regarded as a comprehensive or fundamental reform. The draft Law on Judges and Prosecutors can therefore not be considered as being a new codification, nor has it introduced a new type of "philosophy" for regulations and it does not introduce any new ways of protecting judicial independence, at least not as far as appointments, promotions, supervision, inspection and disciplinary sanctions are concerned.

6. Most of the amendments are therefore simply consequential on the restructuring of the High Judicial Council of Judges and Prosecutors (hereinafter, the "HSYK") and the transfer of certain functions to it from the Ministry of Justice.

7. There are also extensive amendments in relation to investigations and criminal prosecution of judges and prosecutors which, on the whole, are to be welcomed. However, there are certain fundamental problems within the system, mainly centring on the role of the Ministry of

Justice and its relationship to the judiciary, which are not addressed in the amendments in any fundamental way.

8. The draft Law does not indicate that it is a preliminary draft nor does it contain any provision explaining what further steps will be taken after its enactment. The introductory remarks to the draft Law (the "Guide for reading") explain that it is subject to still further change, in other words this draft is not yet a final version – as it is unclear whether the newly elected Parliament will make any further changes to it.

9. The recommendations made by the Venice Commission in its opinion on the HSYK[1], which contained several critical remarks, do not seem to be reflected in this draft Law.

B. Possible additions

10. A clear distinction should be made between: legal position, rank and function.

11. The draft Law makes a distinction between the roles of the HSYK and the Ministry of Justice. The draft Law regulates judges and prosecutors "serving at the central and provincial organisation at the Ministry" as well as those working for international organisations. This makes the draft Law difficult to read and consideration might be given to separating ordinary judges and prosecutors from those working outside the judiciary and providing a separate chapter for the latter in this draft Law, for clarity.

III. GENERAL PROVISIONS (Chapter 1, articles 1-5)

12. Section 1 sets out general provisions, including a definition of the purpose and scope of the legislation and relevant definitions.

13. Section 2 sets out the main principles concerning the rights and duties of judges and prosecutors.

14. The independence of judges and courts is guaranteed by the Constitution, especially by Article 138, as well as in the revised version of Article 159. In its general Report on the Independence of the Judicial System (part I: the Independence of Judges) of March 2010 (CDL-AD(2010)004), the Venice Commission explained that the independence of the judiciary has both an objective component, as an indispensable quality of the judiciary as such, and a subjective component, as a right of an individual to have his or her rights and freedoms determined by an independent judge[2]. In this Report, the Venice Commission set out the existing standards as well as the relevant aspects of judicial independence in Europe. It specifically underlined the need to protect judicial activities against external influences and also to protect independence within the judiciary. Independence can be violated by both direct interference and by acts which indirectly interfere with judicial activities. The need for protection is therefore not limited to activities of judges and courts in direct relation to judicial decisions, but also covers other actions, which may have an indirect effect on judicial activities.

15. For this reason, Article 4, which is not amended by the draft Law, is to be welcomed. It states that judges discharge their duties in accordance with the principles of the independence of the courts and the security of tenure of judges, and prohibits any person or institution from giving orders or instructions to courts or judges or to send them circulars, make

[1] Interim Opinion on the draft Law on the High Council for Judges and Prosecutors (of 27 September 2010) of Turkey, (No. 600/2010), CDL-AD(2010) 042.
[2] Report on the Independence of the Judicial System (part I: the Independence of Judges), CDL-AD(2010)004, paragraph 6.

recommendations or suggestions. Judges are stated to be independent in the discharge of their duties and to be required to give judgment in accordance with the Constitution, the law and their personal conviction in conformity with the law.

16. However, such a principle is in itself not sufficient to protect the independence of courts and judges, since it does not deal with indirect and/or subtle influences on judicial decision-making. The draft Law should therefore be examined as to whether its detailed regulations – for instance on promotion, supervision, inspection and disciplinary sanctions – provide for sufficient guarantees for independence or whether they create a climate of control and provide for positive as well as negative sanctions, leading to the threat that judges are tempted or even encouraged to keep their decisions in line with the expectations of other "actors". Although the HSYK has become an independent and more pluralistic organ, there are still risks that its activities, including the activities of Council Inspectors and others, may lead to a certain type of repressive climate that endangers the ability of judges to decide in accordance with their own convictions regarding the content of the laws and facts alone.

17. In evaluating the draft Law, it must be kept in mind that the overall structure of promotion, evaluation, inspection, investigation etc. will not be changed. In its Interim Opinion (No. 600/2010), the Venice Commission stated:

> *"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."* [3]

The Venice Commission refers to:

> *"a certain tradition for politicising the administration and controlling the judiciary".*[4]

It adds:

> *"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."* [5]

18. The reform of the HSYK is a step in the right direction – but not a guarantee – to overcome the tradition of politicising the administration and controlling the judiciary. Nonetheless, it is not in itself a sufficient safeguard against temptations to streamline the attitudes and judicial activities of judges in a centralised system. The risks are serious, since the overall structure of controlling and supervising judges has not been changed.

19. Article 5 (and further provisions) is crucial for the risks with respect to the protection of the independence of courts and judges. It is difficult to draw a line between the different competences for supervision dealt with in Article 5.1 and Article 5.2 and the supervision by the HSYK in Article 5.3. Article 5 provides that the Court of Cassation has the right of supervision and monitoring over all the civil courts, the Council of State over all the administrative courts and the various chief prosecutors over the junior prosecutors. Heads of courts are stated to have the right of supervision over judges of their courts in respect of the proper functioning of the exercise of jurisdiction. A proposed amendment to this Article will add a provision to the

[3] Interim Opinion on the draft Law on the High Council for Judges and Prosecutors (of 27 September 2010) of Turkey, (No. 600/2010), CDL-AD(2010) 042, paragraph 18.
[4] *Ibid.*
[5] *Ibid.*

effect that, except for the circumstances for judges within the context of judicial power, the competence for supervision over judges and prosecutors belongs to the HSYK.

20. It is common for higher courts, such as those mentioned in Article 5.1, to be entitled and limited to act on appeal against a decision of a lower court, but in most European countries they do not have a "right of supervision and monitoring" over lower courts. Judicial decisions should not be subject to any kind of supervision or monitoring or even to revision outside the appeals process. In its Interim Opinion (No. 600/2010), the Venice Commission encouraged 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. 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"*[6].

21. The draft Law should therefore clarify that the right of supervision and monitoring by the Court of Cassation should not be used in relation to the procedure and content of court decisions outside of an appeals process.

22. The right of supervision over judges by the heads of courts (Article 5.2) should also be limited. It must be made clear that the term "proper functioning of the exercise of jurisdiction" only applies to problems that are not directly or indirectly related to the procedure and content of court decisions.

23. However, supervision as a matter of self-regulation of courts (not necessarily only entrusted to their heads) is – in principle – an adequate instrument to ensure that the official duties are exercised properly and promptly. Effective self-regulation related to the execution of the official duties seems preferable to a system that heavily relies on external supervision and disciplinary sanctions. In the Turkish court system, there seems to be a lack of reliance on such self-regulation. This may be due, *inter alia,* to the fact that the Turkish system consists of many small courts and the understanding in most parts of the judiciary that each judge is his or her own "president". Consideration might be given to providing (larger) courthouses with "real" presidents and structures of internal self-regulation.

24. Article 5 could benefit from some further revision to clarify what the scope of the supervision and monitoring is which may be exercised over the individual judge by more senior judges and how the right of inspection is related to supervision (see Article 99 for instance). It is clearly essential that the independence of the individual judge in reaching a judicial decision is protected, and it would seem desirable to make it clear that this Article is not intended to dilute this principle, which has been stated very clearly in the preceding Article 4.

25. It is not at all clear from the text what the function of supervision and monitoring covers in relation to prosecutors.

26. Article 5.3, first sentence, tries to define the competence of supervision, excluding its exercise in relation to judicial powers. The wording is unclear, presumably due to the translation into English. The Secretary of the Venice Commission was informed by the Ministry of Justice of Turkey that the exclusion of supervision is related to the use of judicial powers, which were illustrated by examples: conducting a trial, examining the case file, deciding about a case etc. These are core judicial functions, which have to be protected against direct or indirect

[6] Interim Opinion on the draft Law on the High Council for Judges and Prosecutors (of 27 September 2010) of Turkey, (No. 600/2010), CDL-AD(2010) 042, paragraph 86.

interferences by anyone inside or outside the court. The phrase "judicial power" or – in the former version of the Law – "jurisdictional functions" must be interpreted in a way that includes all activities which may have an effect on the procedure and the outcome of the concrete decision in a specific case. This protection should also be directed against supervisory activities based on Article 5, paragraphs 2 and 3.

27. An amendment to Article 5 removes the existing provision relating to the right of supervision of the Minister for Justice over judges and prosecutors, which was up to now confined to their duties other than those related to the exercise of jurisdictional functions. The amendment now expands the text to make it clear that ministerial supervision is confined to administrative tasks for prosecutors, the works and functioning of civil and administrative justice commissions, and for judges and prosecutors who hold administrative tasks within the Ministry of Justice and its affiliated and associated institutions, as well as at international organisations and courts or of those temporarily assigned or seconded to other institutions, boards or organisations. However, it is not clear what exactly is involved in civil and administrative justice commissions. Furthermore, the Ministry's supervision should not cover judges working in international courts.

28. The term "judge" has been given a broad definition under Article 3(c) of the draft Law. As far as the application of the draft Law is concerned, the term is not limited to persons who work as judges, but also covers those who have been appointed as judges, but are employed in administrative positions at the HSYK, in units of the Ministry of Justice, at international organisations and courts etc. Such a broad definition may be used in order to regulate the status of these persons, but it is not helpful in making a distinction between judicial functions that require absolute protection to ensure independence, and other (especially administrative) functions. With the exception of Article 5.3, second sentence, such a distinction is not included in the provisions on supervision, inspection, disciplinary sanctions etc.

29. As a general rule, it seems that if judges and prosecutors hold administrative functions within the Ministry of Justice, this tends to blur the distinction between the judiciary or the prosecutors and the executive branch of government. Furthermore, the possibility of judges and prosecutors being assigned to such tasks runs the risk of inculcating a statist attitude among judges and prosecutors and possibly causing them to seek favour from the executive.

IV. RECRUITMENT AND TRAINING

30. The draft Law maintains the provisions on recruitment, appointment and promotion of the 1983-Law, although some amendments have been made. It is to be welcomed that the draft Law defines the requirements for recruitment, appointment and promotion. However, it is important that these regulations are not used indirectly to impair judicial independence.

31. Chapter 2 deals with recruitment of judges and prosecutors and Section 1 deals with the traineeship period. Article 8 sets out the qualifications of trainees. Among the qualities required of a trainee judge or prosecutor is the following (Article 8(g)):

> *"Not to have physical or mental health problems or disabilities which will prevent to perform the profession of judgeship and prosecutorship throughout the country, or not to have handicaps such as unusual difficulties for speaking or controlling movement of organs that may be regarded as odd by other people."*

This provision is far too broad and would not be regarded as generally acceptable according to European standards in its approach to how to deal with persons under a physical or mental disability. The test of something appearing odd to other people seems an inappropriate one.

32. Article 8(h) disqualifies persons who have been convicted of an intentionally committed crime and punished by imprisonment of more than six months. It seems inappropriate that any person who has committed an intentional offence serious enough to be punished by imprisonment of any duration should be regarded as suitable for appointment as a judge or prosecutor. However from the explanations given by the Turkish authorities, it appears they seek to evaluate the nature and quality of the offence concerned.

33. Article 8(j) requires a trainee:

> *"not to behave in an inconvenient way for the profession of judgeship and prosecutorship".*

This may be merely a translation difficulty, but certainly in the English language the test of inconvenience as one which would render a person unsuitable to be a judge or prosecutor does not seem at all appropriate.

34. Since under the present system a person may only become judge or prosecutor after finishing the initial education provided for in Chapter 2, consideration might be given to removing the age-limit provided in Article 8(k).

35. Article 9(a) is an extremely detailed provision in relation to written examinations and interview for positions as trainee judges and prosecutors. A long list of exam subjects is specified. This list does not include the constitutional and legal protection of suspects, victims and witnesses, or human rights, as recommended by paragraph 7 of the Committee of Ministers of the Council of Europe's Recommendation Rec(2000)19 in the case of prosecutors[7]. At the interview, the interview board is required to evaluate candidates under a number of headings. These include:

> *"the appropriateness of the applicants to the profession from his / her physical appearance, behaviour and reactions point of view".*

Again, it seems extraordinary that physical appearance should be a valid criterion for suitability for appointment as a judge or prosecutor. So far as concerns behaviour and reactions it needs to be clarified what is meant by these and what type of behaviour or reaction would disqualify a candidate.

36. An amendment to Article 9 provides that persons who have been unsuccessful in interviews on three separate occasions may not be allowed to attend future written exams. This is probably justifiable from a practical point of view to avoid having to continuously evaluate a candidate who has already been found unsuitable on three occasions.

37. As the number of trainees taken on must relate to the caseload of the judges, it might be advisable for the Minister for Justice to seek prior advice from the HSYK before determining the number of trainees to take on (also under Article 9).

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[7] "7. Training is both a duty and a right for all public prosecutors, before their appointment as well as on a permanent basis. States should therefore take effective measures to ensure that public prosecutors have appropriate education and training, both before and after their appointment. In particular, public prosecutors should be made aware of:

…

b. the constitutional and legal protection of suspects, victims and witnesses;

c. human rights and freedoms as laid down by the Convention for the Protection of Human Rights and Fundamental Freedoms, especially the rights as established by Articles 5 and 6 of this Convention;

…".

38. In this draft Law, not only are the members of the interview not chosen by their peers, but the board also consists of seven members of whom five are high ranking officials from the Ministry, while two are selected by the executive board of the Academy of Justice (who will probably be judges, as the following Section seems to imply). It may well be that these civil servants at the Ministry of Justice are also judges, however it seems that this is not what was meant by the above-mentioned Recommendation.

39. Article 10 contains a provision that trainees at a certain point in the pre-service training are to be designated for either judgeship or prosecutorship by the Ministry of Justice. It seems that while it is appropriate for the Ministry of Justice to determine the total number of persons to be appointed to either profession, it would be preferable that the function of assigning people to one or the other lie with the HSYK rather than with the Ministry of Justice. Furthermore, it is not clear from the draft Law how long the initial training is, including the pre-service and in-service training. The Turkish authorities informed the Venice Commission that pre-service training is of a period of two years.

40. Article 12 deals with dismissal from Office within the traineeship period. The first ground on which a trainee can be dismissed following the commencement of traineeship is when it is realised afterwards that the trainee does not meet some of the recruitment requirements. It would be very undesirable that somebody who did not meet some of the recruitment requirements should be allowed to embark on training in the first place and subsequently be dismissed unless there had been some element of fraud or deception on the part of the trainee.

V. PERFORMANCE, PROMOTION AND APPOINTMENT

41. The Turkish law is characterised by a system of classes and degrees of judgeship and of different degrees and grades of promotion that leads to permanent evaluations of the activities of judges. Chapter 2, Section 2 of the draft Law deals with classes and degrees of judgeship and prosecutorship. Section 3 deals with degree and grade promotion. Article 21 deals with conditions for promotion from one degree to a higher one. The concept of “moral characteristics” as a criterion for promotion has been removed from the list and this is to be welcomed. The new list of criteria includes a number of new matters which include obeying the rules on professional ethics, and the substitution of a revised performance evaluation and development system in place of the earlier appraisal system. The new criteria seem on the whole to be more appropriate than the old, and in the case of prosecutors go some way to implement paragraph 7 of Recommendation Rec(2000)19.

42. Article 23 contains revised provisions in relation to performance forms in the case of judges below the first class and success forms for judges of the first class. These forms are filled by the various heads of courts or chief prosecutors and are to be compiled according to the criteria set out in Article 21. There does not seem to be any requirement that the appraisal carried out by the senior judges and prosecutors has to be discussed with the subject of the appraisal before the forms are completed, which would be regarded as good practice. The whole question of appraising the performance of judges and prosecutors, in particular of judges is a delicate one and if not handled with great care has the potential to interfere with the independence of the individual judge. It seems that these provisions are not directed at trainees, but rather at prosecutors and judges who have actually been appointed to Office.

43. In addition to the performance evaluation by senior judges and prosecutors, there is also performance evaluation and development prepared by inspectors from the HSYK and Judicial Inspectors which are provided for in Article 24. While the draft Law is very detailed, it does not really explain how these evaluations are carried out, although it seems from Article 24 that one aspect of it is the examination of data gained from the National Judicial Network information system. The evaluation forms are apparently placed on the confidential files of the judges and

prosecutors concerned. The Article concludes by saying that the procedures and merits of performance evaluation and development forms are regulated through byelaw.

44. The draft Law proposes to delete Article 28 of the 1983-Law. The existing Article 28 appears to provide for appellate courts evaluating the judges in lower courts by giving marks of excellent, good, average and poor during the course of an appeal. The deletion of this existing Article seems to be welcome as the confusion of the appellate function of courts with the evaluation of judges in the lower courts seems to be quite a remarkable idea. It should not be the function of an appellate court to evaluate the performance of a judge in a lower court. Rather is it the appellate court's function to decide whether the law has been correctly applied and to do justice in the individual case.

45. Although no amendment has been proposed for Article 30, if a judge performs so poorly that he or she is not eligible for a promotion two consecutive times, the question arises whether he or she should not be dismissed. The second paragraph of this Article does not provide which Chamber of the HSYK makes the decision or whether it is made by HSYK in full.

46. Chapter 2, Section 4 deals with the allocation of judges as to the first class and evaluation of their work. Article 33, which is extensively amended under the draft Law, provides that in the case of judges who have been appointed to the first class the HSYK is to assess once in every three years whether they are successful or not taking into consideration the inspector's evaluation and development forms, work performance records, works which were subject to review through legal remedies, and other information related to the professional and academic works. This system of permanent evaluations and of decisions on promotion etc. brings with it the serious risk that the judges streamline their judicial decisions in order to get a promotion etc. by trying to satisfy the expectations of the inspectors and the majority of the HSYK, even with respect to the contents of judicial decisions.

47. Chapter 2, Section 5 deals with various assignments of judges and prosecutors. Article 34 provides that judges and prosecutors employed in administrative positions at the HSYK or in the Ministry of Justice are deemed to serve as judges and prosecutors. It can be undesirable for persons to be transferred between the executive and the judiciary or the prosecution in this manner. Some states have a practice that gives the opportunity to persons who are qualified as judges or prosecutors to gain experience of the legislative process by serving for a period of time at the Ministry of Justice. However, it is vital that there is a clear demarcation in their rights and duties when they serve in these quite different functions, on the one hand as civil servants within a hierarchy and on the other as independent prosecutors or judges.

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

49. Article 36 provides for judges and prosecutors to change from one branch to the other which does not give rise to objection in principle, but see paragraph 47 above. Article 37 deals with the appointment of judges and prosecutors to the Ministry of Justice and these appointments are made by the Minister. This latter procedure seems to give scope for the executive to exercise influence and control over the judiciary and at the very least to have potential to interfere with the independence of individual judges. The last paragraph of the Article provides as follows:

"Except those who are not assigned or temporarily seconded to international institutions and courts, the consent of the individuals who are assigned from among judicial posts is required for assignments to the central, provincial and abroad units of the Ministry."

This provision is difficult to understand and this may be due to a translation difficulty. The proviso at the beginning of the sentence seems particularly difficult to understand or interpret. On a literal reading it seems to mean consent is required only for transfer from international bodies to the Ministry of Justice and not for serving judges or prosecutors to be transferred to the Ministry, but if so the syntax, in the English translation, is unnecessarily complicated.

VI. TENURE

50. Chapter 3 deals with the tenure of judges and prosecutors. Article 44 states that judges and prosecutors cannot be dismissed or deprived of their salaries and payments and other rights of an essential character, or retired against their will before the age of 65. The exceptions to this are reserved for those who are convicted of a crime requiring dismissal, who are definitely incapable of performing their job because of their health, or who are decided to be inappropriate for the profession. This latter criterion seems somewhat vague and the concept of appropriateness is a very general one.

51. Article 46 prohibits the appointment of spouses or certain relatives in close degree to the same chamber of a court. The third paragraph of this Article is rather curious and again may be due to the translation:

"The ones who are decided to be incapable of working in their current place because of the determination that they cannot function with honour and impartiality or their existence in that place breaches the influence and esteem of the profession upon the prosecution or documental facts without their faults, will be appointed without their consent to another place within the region they are in."

It is difficult to understand how a person who cannot function with honour or impartiality or whose function breaches the influence and esteem of the judicial or prosecution profession can be regarded as suitable for transfer to another place rather than meriting dismissal.

52. Chapter 3, Section 2 deals with temporary competencies and tasks including training and assignment abroad. There are extensive amendments of a very detailed sort relating to persons who are sent abroad for training and setting out their financial entitlements. Similar provisions relate to assignments abroad.

53. Chapter 3, Section 3 relates to the termination of judgeship or prosecution posts. Article 51 deals with resignation from the profession. Judges and prosecutors are entitled to resign on one month's notice. Persons who leave their posts without permission or excuse for more than 10 days or who do not attend work for a total of 30 days in the year are deemed to have resigned from the profession. There does not seem to be any exception in this last provision made for persons who are ill and this should be remedied. Judges and prosecutors may not be members of political parties and those who become members are deemed to have resigned from the profession. The question of judges and prosecutors joining political parties is one which is at times controversial and it may be reasonable in the developmental state of Turkey to impose such a condition.

54. Article 53(a) provides for the termination of posts of judges and prosecutors where it is decided to dismiss them or their stay in the profession is found inconvenient. While the latter

criterion may well be the result of a translation error, the concept of inconvenience as a grounds for dismissal seems wholly inappropriate.

55. Chapter 4 deals with working hours and leave. Section 1 deals with working hours and places of residence. Section 2 deals with leave.

VII. RECORDS AND APPRAISALS

56. Chapter 5 deals with records and appraisal files and professional identity cards. Article 59 provides for the keeping of a confidential record, which includes performance forms, performance evaluation and development forms, which are to be kept in the confidential record.

57. Rules should be set to deal with the files on the professional functioning of these judicial officers. It seems that if performance forms and performance evaluation and development forms are to be kept in relation to judges and prosecutors, the judges and prosecutors themselves should be entitled to see those forms and be aware of their contents, and should be entitled to comment on them at the time when they are drawn up.

58. With respect to Article 60, it should be clarified what is meant by “open records”. The right of personality has to be protected. Therefore, it may not be appropriate to include medical reports in open records as well as disciplinary and penal investigations and prosecutions, at least if they have not resulted in sanctions. If there have been sanctions, only sanctions for severe violations should be included in open records. In any case, access to the file should be regulated, i.e. not just anyone should have access to this information.

VIII. DISCIPLINE AND DISMISSAL

59. Chapter 6 deals with disciplinary sanctions as well as the circumstances which allow such sanctions and dismissal from the profession. The preconditions for disciplinary sanctions have not been changed by the draft Law. While some of them are vague, others are too broad (for instance, improper conduct, harming respect and trust required by the official position, dressing inappropriately, jeopardising the harmony of the service etc.) These can be abused to indirectly sanction judicial activities. If they are not revised they must at least be interpreted narrowly in such a way as to not endanger the protection of the independence of the exercise of judicial power. Although there are no references to the use of judicial powers in provisions on disciplinary sanctions, there might be risks of indirect interferences, since the terms, which describe the preconditions justifying disciplinary sanctions, are very broad and often vague. This leads to the risk that the disciplinary power could be used to sanction a judge whose judicial decisions are disliked, without explicitly referring to such a motive.

60. Article 62 provides for the following disciplinary sanctions, which can be imposed on judges and prosecutors by the HSYK where it is has established that their behaviour is incompatible with the requirements of the profession and post, taking the circumstances and gravity of the situation into account:

(a) warning;
(b) cut from salary;
(c) condemnation;
(d) suspension of grade advance;
(e) suspension of degree promotion;
(f) change of location;
(g) dismissal from profession.

61. A fundamental difficulty with the provisions on discipline and dismissal is that no provision is made for appeal against a decision to a court of law. This should be remedied by amending Article 159 of the Constitution.

62. Article 63 states that a warning is a written notification indicating that more careful discharge of duties is necessary. It can be imposed for various matters including disorderliness, carelessness on duty, improper conduct towards colleagues and staff and people the judge or prosecutor has contact with in the course of carrying out his or her duties, on punctuality, negligence or incomplete performance of duties.

63. Article 64 provides that the cutting of salary relates to unauthorised absence. Condemnation is a written notification indicating a fault and can be imposed for conduct harming respect and trust for the official position, discrediting the service by dressing in an inappropriate manner, using state owned instruments for private purposes, ill-treatment towards colleagues and other persons. The risk of abusing disciplinary power has been reduced by the fact that the final decision on disciplinary sanction is now made by the HSYK, but such a risk still remains. It is therefore highly recommended that the regulations on disciplinary sanctions be revised in order to reduce the reasons for such sanctions, to secure proportionality and to limit disciplinary sanctions to severe violations of the duties of a judge or a prosecutor.[8]

64. Article 65(e) contains a curious provision that is difficult to understand, as follows:

> *"Not notifying the Council the commercial or fetching activities of his / her spouses, children under legal age or interdicted children within 15 days."*

Clearly there seems to be a translation difficulty here.

65. In addition, condemnation can be imposed for not fulfilling instructions given by the Ministry of Justice under the relevant legislation and neglecting supervision over offices and bureaus. Article 65(g) is somewhat vague "conduct that prevents the harmony of the service".

66. Article 66 provides that a grade advance can be prevented for one year. This can be imposed for having the habit of unpunctuality, incurring a debt which the judge or prosecutor is unable to pay, not declaring property, not coming to the Office for four to nine continuous days.

67. Article 67 permits suspension of promotion to a higher degree for two years. This is imposed for not coming to the office for 15 days in total during one calendar year without permission or an admissible excuse, or carrying out activities which are banned for members of the profession or commercial activities which are not in compliance with the requirements of the profession.

68. Article 68 provides that change of location can be imposed for:

> *"loss of the honour and ascendency of the profession or personal honour and dignity by faulty or improper conduct and affairs".*

69. Secondly, it can be imposed for:

> *"causing a perception that he cannot perform his duty properly and impartially by his performance and conduct."*

[8] Interim Opinion on the draft Law on the High Council for Judges and Prosecutors (of 27 September 2010) of Turkey, (No. 600/2010), CDL-AD(2010) 042, paragraph 57.

70. It can also be imposed for:

> *"causing a perception that he performs his duties according to his individual emotions or in one's favours."*

71. It seems that causing a perception of something rather than actually doing it are not appropriate criteria for carrying out a serious sanction on a judge or prosecutor. A perception may be entirely wrong and it should be necessary to prove that the judge or prosecutor has engaged in misconduct rather than that some persons thinks he or she might have done. This is carried to extremes in Article 68(e) which permits a change of location where a judge is deemed to have:

> *"caused a perception that he has been involved in bribery or extortion even though no material evidence is obtained."*

72. This may be contrasted with Article 68(f) which again provides for change of location where a judge:

> *"demands gifts directly or through an intermediary or accepts gifts given for obtaining benefits even out of duty or requesting or taking debt from clients in court."*

73. It seems this latter conduct, if proved, would warrant dismissal and not merely transfer and is to be contrasted with the notion that somebody can be transferred simply for the fact that there is a perception they have taken a bribe even where there is no evidence.

74. Article 69 deals with dismissal. The first ground of dismissal is for those who are sanctioned twice with change of location. Given that change of location can be imposed on a judge who has caused the perception of something without any evidence that he or she has actually done it, to allow dismissal where somebody has twice been sentenced to a change of location seems unacceptable. Apart from that, dismissal seems to be applied only where the judge or prosecutor has committed a criminal offence except in cases where behaviour, which does not result in a conviction, violates the honour and dignity of the profession or ascendency and honour of the position which the judge or prosecutor holds.

75. Article 71 (which will be extensively amended by the draft Law) provides for the right of a judge or prosecutor to defend himself or herself in disciplinary cases. The Article requires that the judge or prosecutor be informed in a way which includes separately and clearly the actions attributed to him or her, the subject matter of the investigation and the place, time and aspects of the actions which are alleged to have occurred. The judge or prosecutor has the right to require the testimony of the witness and the collection of evidence in his or her favour. They have the right to examine the files in person or through their legal representatives and to receive copies and may also defend themselves orally or in writing before the HSYK or via their legal representatives. These provisions seem clear and appropriate and the amendment is a considerable improvement to the text. The right of defence will be regulated in a more detailed manner, increasing the protection of the judge concerned. Nevertheless, such procedural safeguards in the disciplinary proceeding are not a sufficient substitute for legal remedies against decisions which interfere with subjective rights of judges and the absence of any right of appeal to a court of law is a serious defect in the draft Law.

76. The need for provisions that introduce an appeal to a court of law should not be limited to disciplinary sanctions, but should also cover other acts that have negative effects on the status or the activities of judges, for instance: denial of a promotion, adding (negative) comments to files, class allocation, changes of location etc. This might be provided for in other regulations of Turkish law. In a state where the rule of law applies, there is a need for provisions on legal remedies to courts of law in such cases.

77. Article 72 states that it is not necessary to have a disciplinary investigation as well as a prosecution where one is brought. However, the conviction or acquittal of the person on criminal charges does not prevent imposition of a disciplinary sanction. These provisions seem appropriate. There is a three year limitation on the initiation of a disciplinary investigation and a five-year limit on the imposition of disciplinary sanctions.

78. Article 73 of the 1983-Law is to be abolished. That Article gave the Minister for Justice the right to request a review of a disciplinary decision. In that case, the HSYK was required to make a decision after conducting the necessary examination. The deletion of this Article is to be welcomed.

79. According to Article 74, disciplinary sanctions become effective on the date they are finalised. Persons whose dismissal is sought may be suspended until matters are finalised and in such a case they are paid half their salaries. Where disciplinary sanctions less than dismissal are imposed, the record of those sanctions is deleted from the personnel records after four years. Remuneration should remain untouched during these kinds of proceedings. The main rule should be that remuneration be paid until the end of tenure.

80. Chapter 6, Section 2 deals with suspension from office. This may be carried out where an investigation is taking place and it is decided that continuation of the judge or prosecutor will harm the investigation or the honour of the judicial power. The decision is for the HSYK. A suspended person is paid two-thirds of the salary.

81. According to Article 80, where criminal proceedings are discontinued or a disciplinary sanction other than dismissal is imposed or where there is an acquittal or a decision not to prosecute in a criminal case or where a sanction less than dismissal is imposed at that stage the suspension is lifted. According to Article 81, the maximum duration of suspension is 18 months.

IX. INVESTIGATION AND PROSECUTION

82. Chapter 7, Part 1 deals with investigations and Chapter 7, Part 2 deals with criminal prosecutions. These provisions will be extensively amended by the draft Law.

83. Article 82 removes the requirement for the permission of the Minister for Justice to undertake criminal investigations. Under the new provision, criminal investigations as to whether judges or prosecutors have committed criminal offences in connection or in the course of their duties or in relation to conduct considered incompatible with the requirements of their status and duties, are to be carried out through the HSYK's own inspectors with the approval of the HSYK. As an alternative, an investigation may be carried out through a judge or prosecutor more senior than the one who is to be investigated. In the case of judges and prosecutors employed in the Ministry of Justice, investigation may be carried out by judicial inspectors with the Minister's permission. They may also be undertaken by a judge or prosecutor more senior than the one being examined.

84. Nevertheless, under Article 82, which is in line with Article 159 of the Constitution, permission of the Minister for Justice (as the Council's President) is still needed, even if a proposal by the relevant Chamber of the HSYK is first required. Therefore, consideration might be given to transferring the competences from the Minister to the HSYK and its inspectors, in the underlined passages in the following:

> *"The inquiry and if need be, investigation and examination on whether judges and prosecutors have committed an offence in connection or in the course of their duties or*

on their conducts have been compatible with the requirements of their status and duties shall be carried out through Council's inspectors with the approval of the Council President upon the proposal of the relevant chamber." (first paragraph of Article 82)

and:

"The inquiry, examination and investigations on the judges and prosecutors working at the central, provincial and abroad units of the Ministry of Justice and its attached and associated institutions, the judges and prosecutors working at the international institutions or courts, the judges and prosecutors working at other institutions, boards or organizations on a temporarily authorization or secondment, the prosecutors in view of their administrative duties, the President and members of the justice commission in view of their commission-related duties shall be undertaken by judicial inspectors upon the permission of the Minister. Examination and investigations may also be undertaken by a judge or a prosecutor more senior than the one to be examined. Judges and prosecutors assigned for the examination and investigation have competencies of the judicial inspectors." (third paragraph of Article 82).

The Venice Commission recommends that Article 159 of the Constitution be amended to allow appeals to a court of law.

85. Article 84 of the draft Law provides for defence rights of the judge. They seem rather formal and limited. In the present times, with all the communication and travelling possibilities, a better defence could be organised. For instance, the judge may protest and ask for a review by the chairman or deputy chairman of the HSYK or – in case of a judicial inspector – to the chairman of the relevant Chamber of the Council of State.

86. According to Article 85, requests for arrests are decided by the authority authorised to open prosecution.

87. The draft Law proposes to abolish existing Article 86, which says that persons who are not judges or prosecutors and who jointly commit offences with judges and prosecutors are subject to the same procedures. This abolition is to be welcomed. Article 87 is proposed to be amended so that completed investigations are sent not to the Ministry of Justice, but to the HSYK. The relevant chamber of the HSYK makes the decision whether to investigate on the investigation file, whether to initiate disciplinary proceedings where a criminal prosecution is not found necessary. It decides whether to impose a penalty after hearing the defence of the person concerned. It can decide to send the file to the competent judicial authority if initiation of a criminal prosecution is found necessary. It can send the file to the Ministry in relation to disciplinary penalties against judges or prosecutors working in the Ministry.

88. Article 88 provides that judges and prosecutors alleged to have committed an offence cannot be arrested, searched, or interrogated nor can their houses be searched except in cases where an offender is found committing an offence *flagrante delicto*. In previous opinions, the Venice Commission has criticised the exclusion of judges and prosecutors from provisions relating to arrest, search or interrogation, except in cases where such arrests or other procedures would interfere directly with the operation of a court of law.

89. Chapter 7, Section 2 deals with the prosecution of judges and prosecutors and again the draft Law proposes extensive amendments to this Section. Under the proposed new provisions where the HSYK, or the Ministry of Justice in the case of judges and prosecutors working in the Ministry, consider that prosecution should be initiated the file is then sent to the appropriate prosecution office.

90. Article 90 provides for the conduct of prosecutions by prosecutors more senior than the judges or prosecutors who are charged with criminal offences.

91. Chapter 7, Section 3 deals with personal offences (i.e. offences committed by judges and prosecutors which are not directly related to the performance of their duties). It provides that these investigations and prosecutions are to be carried out by senior prosecutors and the more high level courts. Article 95 requires cases related to judges and prosecutors to be considered as urgent cases and states that unless there are obstacles stemming from legal obligations, these cases cannot continue for more than three months. The main rule here should be a fair trial, not a speedy one at any cost.

92. In the draft Law, reference is made to regional courts of appeal, yet such courts have not yet been established despite the fact that legislation introducing them exists. When this draft Law enters into force, these courts of appeal must be operational or else there will not be any competent court to hear the cases (see articles 89 and 90).

X. OTHER MATTERS

93. Chapter 8 deals with the inspection of judges and prosecutors. The effect of this Chapter is to transfer the function of inspection from judicial inspectors appointed by the Minister for Justice to Council inspectors appointed by and under the control of the HSYK, except in the case of judges and prosecutors working at the Ministry of Justice. Again this reform should be welcomed.

94. However, Chapter 8 does not clearly define the scope of inspection in relation to all the other supervisory and controlling powers dealt with in the draft Law. Article 99 is related to Article 159 of the Constitution, providing for supervision of judges with regard to the performance of their duties in accordance with laws, regulations, byelaws and circulars etc., to be carried out by the Council's inspectors. The content of such provisions has already been criticised by the Venice Commission in its Interim Opinion (No. 600/2010) in relation to Article 17 of the draft Law on HSYK. The Venice Commission has stated that it would be preferable to regulate the inspection powers in a more restricted and detailed manner, with greater precision and predictability. A more detailed regulation is not prohibited by Article 159 of the Constitution, since the Constitution only outlines the general competence of the HSYK without regulating all concrete details.

95. Although Article 99 must be interpreted in the light of Article 5.3, safeguards against interferences into judicial independence seem to be lacking. It should be expressly provided that inspection proceedings regarding judges on the performance of their duties in accordance with the laws, regulations, byelaws and circulars, does not refer to laws etc. on court decisions themselves, but solely to general provisions which provide for the proper functioning of courts. The same restriction should apply when inspection rights arise with respect to the "behaviours and conducts", enquiring whether they are "compatible with the requirements of their profession and status".

96. In its Interim Opinion (No. 600/2010), the Venice Commission has already criticised that the draft Law on HSYK has 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.[9] This problem is rooted in Article 159 of the Constitution, which should be amended.

[9] See paragraph 55. See also the Report on the Independence of the Judicial System (part I: the Independence of Judges) of March 2010 (CDL-AD(2010)004), paragraph 43 and 82.6.

97. Chapter 9 deals with the financial and social rights and benefits of judges and prosecutors. The draft Law does not propose to amend this Chapter.

98. Chapter 10 deals with the establishment and duties of justice commissions. The draft Law does not contain any amendments to this Chapter, except for one minor amendment to Article 114.

99. Chapter 11 deals with miscellaneous provisions and the only proposed amendment, which is to be welcomed, amends the provision relating to the issuing of byelaws concerning in-service training of judges and prosecutors so that these in future will be made by the HSYK and the Turkish Justice Academy instead of by the Ministry of Justice and the Academy as heretofore.

XI. CONCLUSIONS

100. The draft Law is a comprehensive and very detailed law regarding most aspects of the professional lives of judges and prosecutors. It amends a substantial number of the provisions of the 1983-Law and the amendments range from those which are relatively trivial to the technical and some which are of importance. However, the amendments do not amount to a systematic and fundamental reform of the Law.

101. In general, the amendments are to be welcomed. An important element in the amendments consists of provisions transferring powers of supervision from the Ministry of Justice to the HSYK. These changes are to be welcomed as representing a step in the right direction, albeit a relatively modest one.

102. Another welcome amendment concerns the strengthening of the rights of judges and prosecutors to answer disciplinary charges and complaints.

103. The preconditions for disciplinary sanctions should be rendered more specific by the draft Law as they can be abused to indirectly sanction judicial activities.

104. The absence of an appeal to a court of law against disciplinary sanctions is a serious defect in Article 159 of the Constitution, as well as in the draft Law.

105. Consideration might also be given to providing larger courthouses with “real” presidents and structures of internal self-regulation.

106. On the whole, many of the provisions of both the 1983-Law and the proposed amendments are unexceptionable. Among matters which give some concern, however, is the relationship between the executive in the form of the Ministry of Justice and the judiciary and prosecutors, which in some respects seems too close in a manner which may pose a risk to independence, in particular through the transfer of judges and prosecutors to work in the Ministry of Justice.

107. Aspects of the system of performance evaluation also give rise to some concerns which should be addressed. The function of supervision and monitoring of judges is not clearly defined and the scope of supervision and monitoring is unclear giving rise to concerns that it would be a means to undermine the independence of judges and prosecutors. In particular, the draft Law should clarify that the right of supervision and monitoring by the Court of Cassation should not be used in relation to the procedure and content of court decisions outside of an appeals process, and the right of supervision over judges by heads of courts only applies to problems that are not directly or indirectly related to the procedure and content of court decisions.

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