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COMMENTS

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

by

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Comments on the Turkish draft law on the High Council for Judges and Prosecutors, by Sergio Bartole, Emeritus Professor of Constitutional Law, University of Trieste.

The Justice Minister of the Republic of Turkey submitted to the Venice Commission the draft law (preliminary draft) on the High Council for Judges and Prosecutors asking its Opinion on the document. The draft is implementing the new text of Article 159 of the Turkish Constitution which was recently amended to conform to European standards. In the preparatory papers which have been sent to the Secretariat of the Commission two documents are specially quoted as establishing the main yardstick in view of the evaluation of the draft, that is the Recommendation no. R(94)12 of the Committee of Ministers of the Council of Europe on independence, efficiency and role of the judges and the Comments of the Venice Commission on the draft opinion of the Consultative Council of European Judges on Judicial Councils adopted on 19 – 20 October 2007 (CDL-AD(2007)032). The present comments are written taking into account both these documents, but also some other papers of the Venice Commission, specially the Opinion on Nominations Judiciaires (CDL-AD(2007)028), the Report on the Independence of the Judicial System (CDL-AD(2010)004) and the draft Vademecum on the Judiciary (CDL-JD(2008)001), which was prepared by the Secretariat summarizing the opinions of the Commission in the matter but was not formally adopted by this body. The draft is examined following the systematization of the matter adopted by CDL-AD(2007)032. But it has to be kept in mind that the Opinion asked to the Venice Commission does not directly regard the new constitutional provisions dealing with the High Council, therefore the discrepancies between the mentioned yardsticks and the draft which are underlined in the comments cannot be understood as suggestions for amendment as far as the strict implementation of the new text of the Constitution is concerned, while they certainly envisage the possibility of amendments of the draft when alternatives of choice are possible and the choices made by the Turkish authorities in filling the space left to them by the constitutional provisions are at stake and arise some problems.

Institution and composition of the High Council. The decision of providing for a presence of a majority of members elected by the Judiciary in the High Council deserves positive appreciation. But the text of the rules concerning time and principles of their election (Article 19 of the draft) is not completely clear as far as the passage from the first alinea to the second alinea of the paragraph (2) is concerned. If the first alinea does not add something which cannot be easily understood, the second alinea apparently gives to every judge and prosecutor the right to vote "for the total number of regular and substitute Council members to be elected". If this is the case, it does not leave space for the election of minority candidates (that is, candidates who don't share the opinions of the majority) because the candidates who are voted by the majority of the voters could cover all the seats and exclude those supported by the votes of a minority. It is true that the submission of the candidatures is made on an individual basis and not in the frame of "multi-person" lists (Articles 20 and 21) and electioneering is prohibited (Article 25), but these rules do not exclude the possibility of informal electoral majority agreements aimed at avoiding the election of candidates who are the expression of minority orientations, which should in any case be present in the body if the High Council has to be really representative of the whole judiciary. The electors should be authorised to vote for a smaller number of candidates than the number of members to be elected. Moreover the possibility of being elected again for the members at the end of their term of office could be criticized but the rule introduced in the draft is covered by a specific provision of the Constitution.

Notwithstanding the fact that somebody suggested the presence in the High Council of members elected by the Parliament by qualified majority to link this body to the representation of the will of the people (see the paper of Serap Yazici published at page 17 of "A judicial conundrum") in compliance with the Venice Commission's Comments, the Constitution adopted the different solution of providing for the appointment of members who are not judges, by the President of the Republic. The draft implements this choice establishing that these members

have to have served at least 15 years in the law discipline of higher education institutions or to have worked at least 15 years as legal counsels. Perhaps it was difficult to improve the constitutional choice according to a pluralistic approach, specially in view of the necessity of avoiding interfering with the discretional powers of the President of the Republic, but it is evident that the adopted solution does not establish a link of the Council with the Parliament and does not insure the presence in the Council of different cultural and political orientations which are present in the Turkish society. Therefore the relations between the High Council and the world of the politics are due to pass through the Minister of Justice only. Article 7 (2)k) entrusts to the Council the power of delivering opinions on draft laws, regulations and by-laws concerning Council's own jurisdiction apparently without an explicit request of the Executive or of the Parliament but, obviously, on the basis of the agenda of the meetings adopted by the President of the Council who is the Minister of Justice. It could be useful keeping in mind the conclusions of the Report of the CEPEJ on the Councils for the Judiciary in EU Countries which suggests to adopt regulations of the job description of these bodies in very broad terms. The delivering of opinions should cover not only acts formally adopted by the other State's powers but also their political behaviour and expression of ideas and intentions as far as it can affect the constitutional position of the Judiciary. The Italian Council for the Judiciary offered interesting precedents in this regard when it reacted to statements and declarations of politicians endangering the independence of the Judiciary and its dignity.

The role of the Minister of Justice. Because a direct connection of the High Council with the Parliament through member elected by the Assembly is missing, the draft chooses to establish a relation between the two State's bodies placing the Minister of Justice at the chairmanship of the body. The Minister is supposed to be the point of reference of the political accountability in the matter of judiciary. The adopted solution raises some problems. The Information Note explains that the Ministry of Justice takes the position of "the associated Ministry for the High Council" and that "the concept < associated > is used for autonomous bodies and expresses the weakest tie with the relevant ministry in Turkish Public Law ". The writer of these comments is not well acquainted with this doctrine of the Turkish legal culture but it is evident that it does not prevent from qualifying the Ministry as a political State's body and from confronting the following risk of a danger for the independence of the Council in the frame of the powers of the State. The CCJE-GT insists that no minister can be among the members of the Council, while according to the Venice Commission "such presence does not seem, in itself, to impair the independence of the Council". The entrusting the chairmanship to a Minister has, instead, a completely different relevance and can endanger the independence of the body: we have to remember that the Venice Commission and the CCJE-GT fully share the solution of avoiding to entrust the chair of the Council to a body which does not have only formal powers in a parliamentary system. Even an Head of State who has more than formal powers, should not be entrusted with the chairmanship of the Council in parliamentary systems, "whereas in other systems the chair should be elected by the Council itself". The choice we are dealing with was made by the Constitution: therefore we cannot contest it if we don't want to propose an new amendment of the Constitution. We can suggest to try limiting the powers of the Minister as the President of the Council. For instance, it is evident that the adoption of the Council's agenda by the Minister can restrict the freedom of movement of the body, even if the agenda adopted by the president can be changed upon the request of the members and by the affirmative opinion of the Plenary. If the drafters want to allow the High Council to act as far as possible, in the frame of the Constitution presently in force, "in a completely independent manner" (according to the mentioned Information Note), they could provide for a mandatory cooperation between the Minister and the Deputy President in setting the agenda of the Plenary meetings. This can be a coherent solution with the limitation of the authority of the Minister introduced by the draft law when it requires that the president shall only appoint the Secretary General of the High Council from among three candidates nominated by the Plenary of the High Council. The Turkish papers say that the powers of the Minister shall not be absolute powers but "non-discretionary" powers. If this expression means that the president is not completely free in the exercise of his

powers, this doctrine can be a basis for dealing with other problematic solutions adopted by the draft law too.

The choice of providing for the fiscal and administrative autonomy of the High Council has to be approved: the High Council shall have it own premises, independent secretariat and budget. But Articles 6 and 7 of the draft are silent on the adoption of the budget: is it a duty of the President on the basis of the proposal of the Office of the Secretary General (Article 10) or a duty of the Plenary which, inter alia, has to approve the Council's strategic plan and follow up its implementation (Article 7 (2) j)? The point deserves to be clarified in the draft to insure the full administrative and fiscal autonomy of the Council. Moreover, which are the relations between the parliamentary budgetary decisions of the Parliament and the fiscal autonomy of the Council? Has the Council to submit a proposal to the Parliament? Is this proposal mandatory? Is there a law providing for the amount of the funds to be put at disposal of the Council?
Supervision carried out by the Inspection Board. According to the new text of the Article 159 "supervision of judges and public prosecutors with regard to the performance of their duties in accordance with laws, regulations, bylaws and circulars (administrative circulars, in the case of judges), investigation into whether they have committed offences in connection with, or in the course of their duties, whether their behaviour and conduct are in conformity with their status and duties and if necessary, inquiries and investigations concerning them shall be carried out by the Council's inspectors, upon the proposal of the related chambers and with the permission of the President of the Supreme Council of Judges and Public Prosecutors". This complex and (at least in the English translation) confusing provision arises problems with regard to the relations between the Judiciary and the Executive. On one side it is evident that the freedom of movement of the Council in the disciplinary matters is restricted by the requirement of the permission of the Minister for carrying out of inquiries and investigations concerning judges and prosecutors. On another side the terms of the coexistence between this provision and Article 144 of the Constitution are not clear: as a matter of fact Article 144 states that "supervision, inquiry, inspection and investigation proceedings of judicial services and public prosecutors with regard to their administrative duties shall be carried out by the Ministry of Justice through judiciary inspectors and internal inspectors".

On the basis of the choice of the Turkish authorities the supervision of the judicial activities is entrusted to two different bodies: the Inspection Board of the High Council (see Article 14 of the draft) and the office of the judiciary inspectors established in the Ministry of Justice. Apparently the competence of this last office is restricted to the administrative duties of the judicial services and public prosecutors, but also the High Council's Inspection Board shall deal with the compliance with administrative circulars by the judges. Moreover Article 159 does not distinguish between administrative and judicial duties of the prosecutors and entrusts all the relevant supervision's functions to that Board. The draft law does not offer useful clarifications in the matter. The difficulties of the interpretation of law start from the very beginning as far as it is not clear whether there is a difference of status between the judges and the public prosecutors. Even if the High Council is dealing with both of them, in the first alinea of Article 159 its functions are distinguished as far as they have to be exercised, on one side, in accordance with the principles of the independence of the courts and, on the other side, in accordance with the security of tenure of judges. Does the guarantee of the independence cover only the courts, that is the bodies which exercise the function of judging cases? What about the security of tenure? Has it to be distinguished from the independence of the courts and does it interest also the prosecutors? If this is the case, the guarantee of the personal status of the prosecutors is disconnected from the guarantees concerning the respective offices. While the courts should be independent in the exercise of their functions, the activity of the prosecutorial offices could not share the same guarantee, even if the prosecutors have stability of tenure too. Article 17 (4) of the draft states that the inspectors of the Council have to perform their duties in accordance with the principles of independence of the courts and tenure of the judges and "cannot interfere with judicial power and judicial discretion during inspections", avoiding to make recommendations and suggestions. Does these rules not

interest the activity of the prosecutors? But in the provisions of the Constitution (Articles 138 – 144) the legislator very often uses the same expression “judges“ apparently referring both to judges and to prosecutors. If this choice is coherent with the rules dealing with the personal status of judges and prosecutors, the extension of the supervision to the compliance with non administrative circulars and duties by the prosecutors (which does not correctly interest the judges) should be explained in view of a better understanding of the draft submitted to the Venice Commission.

The above comments introduce us to other different questions. Is it admissible a supervision power of the Ministry in the field of the administrative services of the judiciary? Which is the content of the power of the Minister to authorize the inspection and prosecution of judges and prosecutors? According to the Venice Commission Comments “the management of the administrative organisation of the judiciary should not necessarily be entirely in the hands of judges“: it can be left to the Ministry of Justice. The Turkish Constitution has apparently made an intermediate choice leaving the general competence in the matter to the Executive but allowing the courts to deal with the relative administrative business in conformity with the law and the administrative circulars of the Ministry itself. Therefore there is a concurrence of the functions of the Ministry and of the courts. In this perspective the power of the Minister to approve the inspection and prosecution of judges and prosecutors can be justified as far as administrative matters are at stake. Perhaps this is the meaning of the Informative Note when states that “the absolute power of the Minister transforms into a non discretionary power“. If this is the case it could be advisable that the law implementing Article 159 of the Constitution restricts the power of the Minister of denying the mentioned authorization to the questions concerning the administrative management of the courts. The point deserves attention because the ministerial control and responsibility on the management and budgeting of the courts can always be – according to the conclusions of the CEPEJ Report on Councils for the Judiciary in EU Countries – “ very intrusive “ (page 111).

The short comments submitted by pro. Hoffmann-Riem on the provisions concerning the inspection, examination and prosecution regarding activities of judges and prosecutors are very clear and convincing. Therefore in the present Comments I avoid to add more detailed remarks to the examination of the matter. I would only remind to the Commission § I 2a I and VI 1 of the Recommendation no. R(94)12.

The position of the prosecutors. In any case we have to admit that the problem of the relations between the prosecutorial offices and the Ministry is still unsolved. Is the Executive authorized to adopt circulars concerning the prosecutorial activities of those offices? Article 4 (1) c 2) allows the Council to issue circulars concerning “the judicial tasks of the prosecutors other than those related to the power of assessment of evidence and determination of crime“. This statement is not very clear, it refers to judicial tasks of the prosecutors which should be better defined if the independence of the prosecutorial activities has to be preserved. But the fact that even in this provision the administrative duties of the judges (Article 4 (1) c 1) are distinguished from judicial tasks of the prosecutors leaves the impression that the constitutional position of the prosecutors is not comparable to that of the judges and requires a more precise definition.

The problem of the judicial review of the decisions of the High Council. Also the problem of the review of the decisions of the Council deserves attention in the light of Venice Commission standards. Article 7 (2) c of the draft establishes the competence of the Plenary of the Council to “ examine and render decisions about the objections raised against the decisions taken by the Chambers “. The following Article 33 adds that the re-examination of decisions “established for the first time“ of the Plenary and of those of the Chambers may be requested by the President or “the concerned ones“ within ten days after notification of the decisions themselves; complaints can also regard decisions pertaining to discipline; the Plenary decisions are final but no appeal may be made to judicial authorities for decisions of Plenary and chambers other than

those for removal from profession which are dealt with by the Council of State as the first instance court. According to these provisions an appeal to a court is normally excluded.

The solution is coherent with suggestions made by the CCJE-GT opinion which supports the idea that final decisions of the Council in disciplinary matters don't require a subsequent control by an independent tribunal. Moreover, as far as disciplinary deliberations are concerned, the Turkish authorities could object that the High Council is a superior judicial organ and the Recommendation No. R(94)12 states that the European standards are complied with when disciplinary measures are controlled or adopted by a superior judicial body. But in the papers we received from the Turkish authorities the High Council is frequently defined as an administrative body. Therefore any defensive position is not practicable. In any case the position taken by the Venice Commission in the Comments looks preferable, an appeal to a court has to be provided as an additional safeguard of the independence of the Judiciary and a guarantee of the concerned persons. But it should regard not only the disciplinary decisions but also other decisions which affect interests and rights of the judges and prosecutors. The implementation of Article 6 of the ECHR is at stake and it is a clear reference to the principle of rule of law the requirement of the mentioned Recommendation that "all decisions concerning the professional career of judges should be based on objective criteria". Moreover the provisions of the draft concerning the submissions of the complaints and the objections are very poor while the law should establish the modalities of the appeal to the Plenary providing for a fair and public hearing and for adequate defence. Similar rules are also missing both in Article 17 which deals with the activities of the Council Inspectors who are entrusted with the investigative powers in view of the carrying out of the disciplinary proceedings, and in Article 9 which concerns the activities of the Chambers in the disciplinary field.