



Strasbourg, 30 November 2010

CDL(2010)121*
Engl. only

Opinion No. 600 / 2010

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

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

by

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Comments on the Draft Law on the High Council for Judges and Prosecutors (as of 27 Sept. 2010)

Due to the short time, my statement will be restricted to some parts of the Draft Law. I will focus my comments on the inspection powers etc. of the High Council (1.) and on the provisions concerning the investigation and prosecution of members (2.).

1. Inspection powers etc. of the High Council

a. Preliminary remarks

(1) Art. 144 of the Constitution provides for “supervision, inquiry, inspection and investigation proceedings of judicial services and public prosecutors with regard to their administrative duties“. It shall be carried out by the Ministry of Justice through inspectors. The procedures and principles regarding supervision shall be laid down in law.

This provision is restricted to the performance of “administrative duties“, that means: not related to judicial duties of judges or prosecutors. Though it may be difficult to draw the borderline in some cases, the term “administrative duties“ must be interpreted in a narrow way in order to make sure that inspection activities carried out by the Ministry do not interfere with the guarantee of judicial independence.

(2) Art. 159 of the Constitution deals – inter alia – with supervision of judges and public prosecutors with regard to the performance of their duties in accordance with laws, regulations, by-laws and circulars. It provides for investigations into whether judges or prosecutors 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 etc. Though the term is not used expressly here, these provisions refers to the judicial activities, i.e. the core duties of judges and prosecutors.

The draft law on the High Council tries to implement the Constitution in so far. According to Art. 9 (3) of the Draft Law the Third Chamber of the High Council has the duty “to have the Inspection Board inspect as to whether judges and prosecutors perform their duties in compliance with laws, regulations, by-laws and circulars“. The composition and duties of the Inspection Board are dealt with in Art. 14 of the Draft Law.

Rendering decisions upon an investigation as to whether the judges and prosecutors have committed an offence in connection with or during the exercise of their duties etc. lies within the competence of the Second Chamber of the High Council.

Both Chambers have also competences in relation to offences committed in connection with or during the exercise of duties or whether the manners and acts of judges or prosecutors are in compliance with the requirements of their capacities and duties.

These provisions do not refer to administrative activities, since inspection activities on this subject are referred to the Ministry, not the High Council.

The following remarks are restricted to judicial activities in the narrow sense. These are covered by the guarantee of judicial independence (see Art. 9 and 159 § 1 of the Constitution), at least as far as judges are concerned, but also as far as prosecutors are covered by this guarantee. Whether and how far this is the case according to Turkish law, is outside the scope of this comment. It deals with all judicial activities as far as they are covered by the guarantee of judicial independence.

b. Provisions concerning the inspection, examination, investigation and prosecution regarding judicial activities of judges and prosecutors

The guarantee of judicial independence is justified by the need to enable the judiciary to fulfil its specific role as guardians of the rights and freedoms of the people (for more details and dimensions see: Venice Commission, Report on the Independence of the Judicial System. Part I: The Independence of Judges, CDL-AD(2010)004, March 16, 2010).

As history shows, non-judicial state organs are sometimes tempted to interfere directly or indirectly into judicial activities. Though the protection of independence is mainly directed against interferences by non-judicial powers, the guarantee extends to internal interferences, either by other judges or by special organs of judicial self regulation, like the High Council. Internal independence ensures that a judge takes decisions only on the basis of legal norms and not on the basis of instructions or interventions by other persons or organs who act within the Judiciary. Mistakes by judges or courts in applying laws may be corrected via legal remedies of the parties concerned, not via interventions of higher ranking judges or other persons or organs. Judges benefit from a functional immunity. The remedy for judicial errors should lie in an appropriate system of appeals

Therefore it seems to be very problematic to install an Inspection Board to inspect whether the judicial duties have been performed in compliance with laws etc. and further to refer a duty to a Chamber of the High Council to examine notices and complaints about the judicial activities of the personnel of the judiciary (Art. 9 § 3 of the Draft Law). These provisions have to be removed from the draft or modified in a very restrictive way, ensuring that there will be no interference with activities covered by the guarantee of independence.

c. Provisions related to criminal offenses as well as manners and acts in compliance with capacities and duties

There will be no violation of the guarantee of judicial independence if norms deal with criminal offenses – insofar the judiciary does not benefit from immunity and may be prosecuted according to criminal law. Also intentional violations of duties may be sanctioned – in other countries such violations use to be addressed in special disciplinary proceedings. An independent High Council may have a relevant role here. But even then the sanctioning powers must be restricted to severe violations of duties. It especially seems to be far too broad to relate disciplinary powers in general terms to the “manners” and “acts” of the judicial personnel, checking the “compliance with the requirements of the capacities and duties” of these persons (cf. Art. 9 §§ 2c, 3c of the Draft Law).

It is strongly recommended to revise these norms and to restrict their scope in accordance with European standards. In this connection it should also be examined why the language of the draft is different to (possibly broader than that of) the Constitution (e.g.: “behaviour and conduct” vs. “manner and acts”; “status and duties” vs. “capacities and duties”).

2. Provisions concerning the investigation and prosecution of members of the High Council

Art. 34, 35 of the Draft Law confine the legal status of members of the High Council and Art. 36-39 refer to the investigation and prosecution of members. The provisions are detailed and seem to rest on the premise that there must be strong sanctioning powers against the members of the High Council.

For an outside observer this seems to be strange. The High council consists of members selected and elected in a rather formal way with many safeguards in regard to the competence of the members. The members usually do not act individually: they are part of a Council

consisting of 22 members and they are members of three chambers, each with seven regular members. The working methods are defined in Art. 29-33 of the Draft Law. In such an environment the risk of violations of duties, of criminal offenses etc. may exist but should not be high at all.

To enact very detailed provisions on disciplinary punishments and execution, on investigation and prosecution etc. seems to be an expression of distrust. Since I am not familiar with the judicial history of Turkey, I do not know whether there are good reasons to distrust the potential members of the High Council. If this is the case preference should be given to other safeguards like rules on the composition of the Council, on the election of members, on transparency as far as the election procedure and the working methods is concerned etc. than on detailed rules on sanctions etc.