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(VENICE COMMISSION)

COMMENTS

ON THE DRAFT LAW ON JUDGES AND PROSECUTORS

OF TURKEY

by

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1. The draft law aims to adapt the law on Judges and Prosecutors law of February 1983 to the recent constitutional changes as well as to the law on the High Council for Judges and Prosecutors. Most parts of the 1983-law remain unchanged. In introductory remarks to the Venice Commission the Turkish authorities justify this restriction with the heavy workload of the Turkish parliament before the upcoming general elections.

The draft law does not indicate the preliminary nature of the provisions of the law or contain an evaluation clause for the time after enactment. It is open whether the newly elected parliament will deal with further revisions. I guess, it will be most likely that the law, once adopted by parliament, will remain unchanged for a longer time. This premise forms one of the backgrounds of the following comments.

2. My remarks are restricted to the regulations on judges (not those on prosecutors) with a special focus on the protection of judicial independence and on risks which may derive from the provisions of the draft law. I will not go into detail of every provision, but will focus my analysis on main risks entailed in the provisions.

3. The draft law is not a reaction on a critical evaluation, whether the 1983-law is fully suited to a modern democracy governed by the rule of law and whether the regulations are inspired by the European Convention on Human Rights and by the standards of protection in other European countries. The 1983-law will remain unchanged in most parts. The draft law is not designed as a new codification, it does not follow a new "philosophy" of regulation and it does not entail new ways of protecting the judicial independence as far as regulations on appointments, promotion, supervision, inspection and disciplinary sanctions are concerned. Most amendments are restricted to reactions on the new structure and competences of the High Council for Judges and Prosecutors (HSYK) and on the new role of the Ministry. Here the draft law adapts the provisions to the recent constitutional changes.

4. The Venice Commission (VC) has already adopted several Opinions etc. related to Turkey, e.g. concerning the constitutional reform and recently the draft law on the High Council for Judges and Prosecutors (Interim Opinion No. 600/2010). There are no signs that the preliminary draft Law on Judges and Prosecutors has been drafted in a way that is based on the evaluations by the Venice Commission, especially in its Opinion No. 600/2010, which contained several critical remarks. These critical remarks were based on earlier comments by individual rapporteurs of the Venice Commission as well as by Bert Maan (for the Legal and Human Rights Capacity Building Department of the Directorate General of Human Rights and Legal Affairs). The original reaction of the Ministry of Justice to these remarks had led to minor changes of the draft Law on the High Council of Judges and Prosecutors, but the Ministry mainly denied any need to react on the essentials of the critique, especially by saying that the existing regulations, including those of the Constitution, were sufficient.
The same attitude seems to be followed with regard to the new draft Law on Judges and Prosecutors. At least I cannot see any signs that the suggestions of the Venice Commission in its Interim Opinion (No. 600/2010) have had any substantial influence on the draft Law which has to be evaluated now.

5. The independence of the judges and the courts is guaranteed by the Turkish Constitution, especially in 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 (Study No. 494/2008) the Venice Commission has outlined 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/her rights and freedoms determined by an independent judge (No. 6). In this report the VC has outlined the existing standards as well as relevant aspects of judicial independence in Europe. It has especially highlighted the need to protect judicial activities against external influences and also to protect the independence within the judiciary. The independence can be violated by direct

interferences as well as by acts which indirectly interfere into judicial activities. The need for protection therefore is not restricted to activities of judges resp. courts in direct relation to judicial decisions, but it extends to those other actions, which may have an indirect effect on judicial activities. It must be ensured that judges make their judicial decisions only on the basis of legal norms according to their conviction of the facts of the case and the content of norms.

6. For this it is welcomed that the 1983-law in Article 4 (which has not been changed) provides that no organ, authority, office or individual may give orders or instructions to courts or judges, send them circulars, make recommendations or suggestions. This provision also refers to the relevance of the personal conviction of judges concerning the Law that has to be the basis of their decision making.

7. On the other hand such a principle is in itself not sufficient to protect the independence, since it does not deal with indirect and/or subtle influences on judicial decision making. Therefore the draft Law has to be examined as to whether its detailed regulations – for instance on promotion, supervision, inspection and disciplinary sanctions – provide for sufficient guarantees of 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 stimulated to keep their decisions in line with the expectations of other actors. Though 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 can lead to a kind of a repressive climate that endangers the ability of the judges to decide in accordance with their conviction of the content of the laws and facts alone.

8. By 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, 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." The Venice Commission refers to "a certain tradition for politicising the administration and controlling the judiciary". 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." (No. 18)
The reform of the High Council is a step in the right direction – though not a guarantee – to overcome the tradition of politicising the administration and controlling the judiciary, but it is in itself not a sufficient safeguard against temptations to streamline the attitudes and judicial activities of judges in a centralised system. The risks are strong, since the overall structure of controlling and supervision of judges has not been changed.

9. Especially crucial for the risks related to the protection of independence is the right of supervision and inspection, dealt with in Article 5 and further provisions. The Law does not make clear what the term “supervision” includes and how the right of inspection (see for instance Article 99) is related to supervision. Besides this, it is difficult to draw a line between the different competences for supervision, dealt with in the first and second paragraph of Article 5 (related to the Courts of Cassation etc., heads of courts) and the supervision by the High Council, dealt with in paragraph 3.

Usually, higher courts like those mentioned in paragraph 1 are entitled and restricted 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 a revision outside the appeal's process. In its interim Opinion (No. 600/2010), the Venice Commission has 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 judgements rendered will be channelled more generally through appeals through the ordinary system instead of as complaints to a central authority in the Capital" (paragraph 86). The draft Law should clarify, that the right of supervision and monitoring by higher courts cannot be used in relation to the content of court decisions outside of an appeal process.
The right of supervision over judges by the heads of courts (Article 5, paragraph 2) also has to be restricted. It must be made clear that the term "proper functioning of the exercise of jurisdiction" is restricted to problems not related to the content of court decisions, directly or indirectly.

On the other hand: supervision as a matter of self-regulation of courts (not necessarily only entrusted to their heads) is – in principle – an adequate instrument in order to make sure that the official duties are exercised properly and promptly. An effective self-regulation related to the execution of the official duties seems to be preferable to a system which heavily relies on external supervision and disciplinary sanctions.

As far as the Turkish court system is concerned, there seems to be a lack of reliance on such self-regulation. This may be – *inter alia* - due to the fact that the Turkish system consists of many small courts and – as the VC has been told - the understanding in most parts of the judiciary that each judge is his own "president". It might be suggested to provide for (larger) court houses with “real” presidents and structures of internal self-regulation instead.

10. Article 5, paragraph 3, first sentence, tries to draw a line for the competence of supervision, excluding its exercise in relation to judicial powers. The wording is unclear, presumably due to the translation into English. Ali Bilen (Ministry of Justice, Turkey) has explained to the Secretary of the Venice Commission that the exclusion of supervision is related to the use of judicial powers, which he 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 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 must also be directed against supervisory activities based on Article 5, part 2

11. Article 5 paragraph 3, second sentence, refers the competence of supervision to the Ministry with regard to administrative tasks of persons who have the status of judges, but do not act in the function of a judge. There are no objections against such a provision. As far as international courts are concerned, this supervisory power must also be restricted to administrative tasks. The wording (maybe: due to the translation) is not clear.

12. Article 3 (c) of the draft Law defines the term of a "judge" in a broad manner. As far as the application of the Law is concerned, the term is not restricted to persons, who act in the function of a judge, but it is extended to those who have been appointed being a judge, but are employed in administration positions at the High Council, at 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 does not help to draw a line in order to distinguish between those judicial functions, which require absolute protection of independence, and other (especially administrative) functions. With the exception of Article 5 paragraph 3, second sentence, such a distinction is not contained in the regulations on supervision, inspection, disciplinary sanctions etc.

13. Limitations of the scope of the relevant powers are especially important as far as disciplinary sanctions are concerned. Chapter 6 of the draft Law defines the disciplinary sanctions as well as the circumstances which allow such sanctions. The preconditions for

disciplinary sanctions have not been changed by the draft Law. They must be interpreted in a way that does not endanger the protection of the independence of the exercise of judicial power. Though 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 a risk that the disciplinary power can be used to sanction a judge whose judicial decisions are disliked, without explicitly referring to such a motive,. There are many ways to impose disciplinary sanctions, for instance by applying the following terms of the Law: improper conduct, harming respect and trust required by the official position, dressing inappropriately, jeopardising the harmony of the service etc.
The risk has been reduced by the fact that the final decision on disciplinary sanction is now made by the High Council, but there still remains such a risk. It is highly recommended to revise the regulations on disciplinary sanctions in order to reduce the reasons for such sanctions, to secure for proportionality and to restrict disciplinary sanctions to severe violations of the duties of a judge (cf. Interim Opinion, No. 57)

14. The draft Law maintains the regulations on recruitment, appointment and promotion of the 1983-law, though there have been some amendments.
It is to be welcomed that the Law defines the requirements for recruitment, appointment and promotion. On the other hand, it has to be secured that the use of these regulations does not indirectly impair the judicial independence.
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, 3). Council inspectors and judicial inspectors shall prepare performance evaluation and development forms, which shall be sent to the Council Inspection Board (Article 24). Performance and success forms shall be filed by certain presidents of courts (Article 23). Such evaluations are the basis for decisions of the High Council who categorise judges whether they will receive a promotion (Article 29). The inspectors' evaluation is also important as far as the allocation of First Class and the evaluation of works of First Class Judges is concerned (cf. Article33: it will be checked by the High Council, whether the inspectors' evaluation and development forms have been taken into consideration by the judges). This system of permanent evaluations and of decisions on promotion etc. carries the 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 High Council even in relation to the contents of judicial decisions.

15. Chapter 8 deals with "inspection", without clearly defining 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, by-laws 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 High Council without regulating all concrete details. I cannot see any substantial effort in Article 99 of the draft Law to react on the recommendation of the Venice Commission.
Though Article 99 has to be interpreted in light of Article 5 paragraph 3, there are no sufficient safeguards against interferences into judicial independence. It is recommended to expressly state that inspecting proceedings concerning judges, on whether they perform their duties in accordance with the laws, regulations, by-laws and circulars, does not refer to laws etc. which are related to court decisions themselves, but solely to general provisions which provide for the proper functioning of courts. The same restriction has to be enacted as far as inspection rights

are related to the "behaviours and conducts", enquiring whether they are "compatible with the requirements of their profession and status".

16. In its Interim Opinion (No. 600/2010), the Venice Commission has already criticised that the draft Law on HSYK entails 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 (No. 55 – see also the report on the Independence of the Judicial System of March 2010, No. 43 and No. 82, 6). I have not found a reaction on this recommendation in the draft Law.
It has to be welcomed that the right of defence (Article 71) will be regulated in a more detailed manner, increasing the protection of the judge concerned. On the other hand, such procedural safeguards in the disciplinary proceeding are not a sufficient substitute for legal remedies against decisions which interfere with subjective rights of judges.
The need for provisions allowing an appeal to a court should not be restricted to disciplinary sanctions, but must be extended to other acts with negative effects on the status or the activities of judges, for instance: the denial of a promotion, the inclusion of certain (negative) contents into files, class allocations, changes of location etc. I do not know whether this is 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.

17. Finally, I would like to make a suggestion related to Article 60: it is to be welcomed that several data will be kept in open records (I understand: open to other judges and – may be also to the public). On the other hand, the right of personality has to be protected. Therefore, I do not think it is 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.