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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**TURKEY**

**OPINION**

**ON THE AMENDMENTS TO THE CONSTITUTION  
ADOPTED BY THE GRAND NATIONAL ASSEMBLY  
ON 21 JANUARY 2017  
AND TO BE SUBMITTED TO A NATIONAL REFERENDUM  
ON 16 APRIL 2017**

**Adopted by the Venice Commission  
at its 110<sup>th</sup> Plenary Session  
(Venice, 10-11 March 2017)**

**On the basis of comments by**

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**TABLE OF CONTENTS**

I.	Introduction .....	3
II.	Background .....	3
A.	The failed coup of 15 July 2016 .....	3
B.	The constitutional reform process in Turkey .....	3
III.	Preliminary remarks .....	5
IV.	Analysis .....	5
A.	The procedure of adoption of the constitutional amendments .....	5
1.	The regularity of the parliamentary procedure .....	6
2.	The timing of adoption of the amendments: the effects of the state of emergency .....	7
B.	The choice of a presidential regime .....	11
C.	The separation of powers under the amended Constitution .....	12
1.	The President's elections and mandate .....	13
2.	The new powers of the President .....	15
a.	The power to appoint and dismiss Vice-presidents and ministers and the power to appoint and dismiss high level State officials .....	16
b.	The power to determine the national security policies and take the necessary measures .....	18
c.	The power to declare the state of emergency .....	18
d.	The legislative power .....	19
e.	The power to dissolve parliament .....	21
f.	The power to prepare the state budget .....	22
g.	The powers to veto laws and to address the TGNA .....	22
h.	The power to appoint members of the CJP and judges of the Constitutional Court .....	22
3.	The counter-powers of the Turkish Grand National Assembly .....	23
a.	The simultaneous elections of parliament and the President .....	23
b.	The parliamentary investigations .....	24
c.	The power to check presidential decrees .....	25
D.	The independence of the judiciary .....	25
1.	The Council of Judges and Prosecutors .....	26
2.	The Council of State .....	27
3.	The Constitutional Court .....	27
V.	Conclusions .....	28

## **I. Introduction**

1. By a letter dated 16 December 2016, the Chair of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe informed the Venice Commission of the Committee's decision on 14 December to request its opinion on the draft law on the amendments to the Constitution of Turkey at its earliest convenience.
2. Mr Richard Barrett, Ms Veronika Bilkova, Ms Sarah Cleveland, Mr Jean-Claude Scholsem, Ms Hanna Suchocka and Mr Kaarlo Tuori acted as rapporteurs.
3. On 3 February 2017, the Turkish authorities provided the Commission with the English translation of the constitutional amendments (CDL-REF(2017)005; see also CDL-REF(2017)003 and CDL-REF(2017)018). The rapporteurs prepared their comments on the basis of the text, which may not accurately reflect the original version on all points. Some of the issues raised may therefore find their cause in the translation rather than in the substance of the provisions concerned.
4. A delegation of the working group composed of Ms Hanna Suchocka and Mr Richard Barrett, accompanied by Mr Thomas Markert and Ms Simona Granata-Menghini, travelled to Ankara on 20-21 February 2017. They held meetings with members of the Presidential working group on the Constitution, the Constitutional Court, the political parties represented in parliament and with the Ministry of Justice. The Venice Commission wishes to thank the Turkish authorities for their availability and assistance. The delegation also met with representatives of civil society.
5. The Venice Commission also took note of the written Memorandum prepared by Turkish authorities for the visit of the rapporteurs to Ankara (CDL-REF(2017)015).
6. The present opinion was discussed at the meeting of the Sub-commission on democratic institutions on 9 March 2017 and was subsequently adopted by the Venice Commission at its 110<sup>th</sup> Plenary Session (Venice, 10-11 March 2017).

## **II. Background**

### **A. The failed coup of 15 July 2016**

7. Following the coup attempt on 15 July 2016, on 20 July the state of emergency was declared in Turkey. The state of emergency has been extended twice since the original declaration, most recently following the appalling New Year's Eve terrorist attacks that occurred in Turkey. The latest extension was for 90 days from 19 January 2017.
8. The Venice Commission strongly and resolutely condemns, once again, the ruthlessness of the conspirators, and expresses solidarity with the Turkish society which stood united against them. The official name of the Venice Commission is the "European Commission for Democracy through Law". A military coup against a democratic government, by definition, denies the values of democracy and the rule of law. Therefore, the Venice Commission will always oppose those who try to overthrow a democratically elected government by force.

### **B. The constitutional reform process in Turkey**

9. The current Constitution of the Republic of Turkey, approved by popular referendum in 1982 at the end of a period of military rule, has been amended almost 20 times; the amendments have concerned more than 110 of the 177 articles of the Constitution. In three instances, the

amendments were partly (1987) or fully (2007 and 2010) approved through a referendum.<sup>1</sup> Through the 2007 amendments, the role of the President has become increasingly important and scholars have described the system as a sort of “attenuated parliamentarism”.<sup>2</sup> This form of parliamentarism may be considered as one of the many forms of so-called semi-presidential regimes. The direct election of the President, introduced in 2007, is the main element of this trend towards semi-presidentialism.

10. The ruling Justice and Development Party, AKP, had made the executive presidency central to its campaign promises at the general elections of June 2015. The current set of 18 articles amending the Constitution was submitted to parliament by AKP and by the Nationalist Movement Party, MHP, on 10 December 2016.

11. A constitutional committee adopted the 18-article draft law amending the Constitution of Turkey on 30 December 2016. The Grand National Assembly of Turkey (hereinafter “TGNA”) started an article-by-article discussion of this text on 9 January 2017.

12. On 9 January 2017 a demonstration that had gathered in front of parliament to protest against the constitutional amendments was dispersed by the police. By a circular of 10 January 2017,<sup>3</sup> the Governor of Ankara, on the basis of Article 11 of the Emergency Law, prohibited for a period of 30 days “*any public manifestation in public places such as roads, squares, boulevard, street*”, “*any demonstration such as plays, representations, declarations or press releases*” and any “*opening of a stand*”. Similar bans or partial restrictions were put in place by other Governors.<sup>4</sup>

13. On 21 January 2017, TGNA adopted the constitutional amendments with 339 votes in favour, 142 votes against, 5 blank and 2 null votes. According to the Turkish Constitution, parliament needed a three-fifths majority (more than 330 votes) for the constitutional amendments to be submitted to a referendum for voters’ approval.

14. In the course of the parliamentary debates, physical fights occurred between lawmakers of the largest opposition party CHP and AKP, sparked by allegations by CHP that the secrecy of the voting procedure had been violated.

15. The text of the constitutional amendments was signed by the President on 10 February 2017. It will be submitted to a national referendum on 16 April 2017.

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<sup>1</sup> On the latter amendments and referendum, see Ergun Özbudun, Turkey’s Constitutional Reform and the 2010 Constitutional Referendum, online at IEMED ([http://www.iemed.org/observatori-en/arees-danalisi/arxius-adjunts/anuari/med.2011/Ozbudun\\_en.pdf](http://www.iemed.org/observatori-en/arees-danalisi/arxius-adjunts/anuari/med.2011/Ozbudun_en.pdf), accessed on 4 February 2017).

<sup>2</sup> Ergun Özbudun, cited by Levent Gönenç, Presidential Elements in Government: turkey, European Constitutional Law Review, 2008, p. 499.

<sup>3</sup> <http://www.ankara.gov.tr/2911-ve-2559-sayili-kanunlar-geregince-yasaklama> (Turkish)

<sup>4</sup> In Kahramanmaras, Sanliurfa, Afyonkarahisar, Artvin.

### III. Preliminary remarks

16. In recent years, constitutional reform has been very high on the Turkish agenda. The Venice Commission has expressed its support for a thorough constitutional reform that would replace the 1982 Constitution through a process as broad, open and inclusive as possible, including the opposition, civil society and the public opinion.<sup>5</sup> The Venice Commission has also expressed its readiness to assist the Turkish authorities in this respect if they so wished; the Turkish authorities, however, have not sought the Commission's assistance during the preparation of these constitutional amendments. Due to the circumstances pertaining in Turkey, the Commission nevertheless decided to issue its opinion before the referendum.

17. Attempts to launch a full constitutional reform process have, so far, not received the necessary political backing. However, the draft 18 articles under examination bring about a very extensive reform: through the modification of almost 50 constitutional provisions and the repeal of 21 other provisions, they aim at changing the Turkish polity to what the Turkish authorities have described as a "Turkish-style" Presidential system. This is not objectionable as such, but should be judged against the Turkish system as a whole, with a view to establishing in particular whether the fundamental principles of the separation of powers and of the need for checks and balances are respected. All these changes will be made by grafting new "presidential" provisions on an old constitution which was originally conceived as parliamentary. From a legal point of view, such a technique appears to be quite burdensome and will lead to many difficulties and uncertainties.

18. The multi-faceted nature of the proposed amendments makes detailed analysis of each reform beyond the scope of this Opinion. In this opinion, the Venice Commission will focus on three issues that are particularly important in the context of the rule of law, democracy and human rights: firstly, the timing and the regularity of the procedure of constitutional reform; secondly, whether the proposed reforms will enshrine a sufficiently strong separation of powers; thirdly, and as an aspect of the general separation of powers issue, whether the reforms will ensure sufficient independence to the judicial power.

### IV. Analysis

#### A. The procedure of adoption of the constitutional amendments

19. The Venice Commission has previously stressed that *"properly conducted amendment procedures, allowing time for public and institutional debate, may contribute significantly to the legitimacy and sense of ownership of the constitution and to the development and consolidation of democratic constitutional traditions over time. In contrast, if the rules and procedures on constitutional change are open to interpretation and controversy, or if they are applied too hastily or without democratic discourse, then this may undermine political stability and, ultimately, the legitimacy of the constitution itself. In this sense, the Commission has repeatedly stressed that a duly, open, informed and timely involvement of all political forces and civil society in the process of reform can strongly contribute to achieving consensus and securing the success of the constitutional revision even if this inevitably takes time and effort. For this to happen, states' positive obligations to ensure unhindered exercise of freedom of peaceful assembly, freedom of expression, as well as a fair, adequate and extensive broadcasting of the arguments by the media are equally relevant."*<sup>6</sup>

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<sup>5</sup> Venice Commission, Interim Opinion on the Draft Law on the High Council for judges and Prosecutors (of 27 September 2010) of Turkey, CDL-AD(2010)042, §§ 11,16; see also Opinion on the constitutional and legal provisions relevant to the prohibition of political parties in Turkey (CDL-AD(2009)006).

<sup>6</sup> Venice Commission, Report on constitutional amendment, CDL-AD(2010)001, §§ 204, 205.

## 1. The regularity of the parliamentary procedure

20. The parliamentary procedure of adoption of the constitutional amendments has presented some peculiarities and suffered from certain problems which raise concern.

21. First, the debates took place in the absence of a significant number of deputies from the opposition. Indeed, following a constitutional amendment enacted on 20 May 2016, published in the Official Journal on 8 June 2016 and entered into force the same day, the parliamentary immunity of several MPs was lifted. On 4 November 2016, the President of the second-largest opposition party HDP (Selahattin Demirtas) and 8 other HDP MPs were taken into detention on remand. There are currently 13 members of HDP who are still in detention, despite the Venice Commission's recommendation to restore parliamentary immunity in Turkey.<sup>7</sup>

22. Second, under Article 175 of the Constitution and Article 94 of the National Assembly's Rules of Procedure,<sup>8</sup> the voting had to take place by secret ballot. Indeed, Article 175 of the Constitution stipulates that "*the adoption of a proposal for an /constitutional/ amendment shall require a three-fifths majority of the total number of members of the Assembly by a secret ballot*". The Rules of Procedure of the Grand National Assembly of Turkey specify that for the purpose of a secret vote, "*three circular ballot papers, one white, one green and one red, are simultaneously given to each deputy. The circular ballot paper to be used in voting shall be placed into the related box. The other two are left at the indicated space*" (Article 148).

23. This rule was not fully respected during the parliamentary vote on the constitutional amendments in question. During the vote, several deputies voting for the amendments cast their votes openly, showing the white ballot paper before placing it into the box. The whole procedure was tele-recorded and shown on public media. It was made possible to see the stamp in some deputies' hand. Moreover, unused ballot papers were recollected after the vote and allegedly used to identify those who, especially among the AKP and MHP members, did not vote for the amendments.<sup>9</sup>

24. The modalities of the parliamentary debate on the constitutional amendments also raised criticism in Turkey. The daily debates lasted, virtually uninterrupted, from the afternoon till the following morning. Such lengthy sessions led to a very quick completion of the procedure: at both readings in the plenary, the amendments were discussed and adopted within twelve days (the debates within the constitutional committee had lasted nine days). However, after the deliberations were completed, the text was kept within parliament for thirteen days, and the President held it for fourteen more days. It is difficult to reconcile the rushed discussions in parliament with these delays.

25. Pursuant to the applicable legislation, the debates were broadcast live on TRT-3 TV channel and on the internet from 2 pm to 7 pm on Tuesdays, Wednesdays and Thursdays. According to the Turkish authorities, after 7 pm the debates were broadcast live on internet. Although these are the ordinary broadcasting rules for parliamentary debates, the time slot of

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<sup>7</sup> Opinion on the suspension of the second paragraph of Article 83 of the Constitution of Turkey (parliamentary inviolability), CDL-AD(2016)027, § 78 ff.

<sup>8</sup> [https://global.tbmm.gov.tr/docs/rules\\_of\\_procedure\\_en.pdf](https://global.tbmm.gov.tr/docs/rules_of_procedure_en.pdf)

<sup>9</sup> <http://www.hurriyetdailynews.com/secret-ballot-debate-grows-as-charter-talks-proceed.aspx?PageID=238&NID=108381&NewsCatID=338>. CHP announced that it would challenge the violation of the vote secrecy before the Constitutional Court (<http://www.birgun.net/haber-detay/turkey-s-chp-to-take-constitutional-amendments-to-supreme-court-144167.html>) but finally decided not to do so (<http://www.hurriyetdailynews.com/main-opposition-to-not-appeal-to-turkeys-top-court-over-constitution-change.aspx?pageID=238&nID=109739&NewsCatID=338>).

live TV broadcasting should have been extended due to the importance of the matter and to the continuation of the debates all night.

26. The Venice Commission is of the view that the breach of the secrecy of vote is a serious flaw of the procedure of constitutional amendment, as it casts a doubt on the genuine nature of the support for the reform and on the personal nature of the deputies' vote. It is also regrettable that the parliamentary procedure did not provide a genuine opportunity of open discussions with all the political forces present in parliament. At the time of the parliamentary vote, 11 members of parliament were in custody.

## **2. The timing of adoption of the amendments: the effects of the state of emergency**

27. The procedure of parliamentary discussion and adoption of the constitutional amendments has taken place during the state of emergency. The referendum is planned for 16 April 2017, when the state of emergency will have been in force for almost nine months consecutively.

28. The Venice Commission has repeatedly stressed that *"transparency, openness and inclusiveness, adequate timeframe and conditions allowing pluralism of views and proper debate of controversial issues, are key requirements of a democratic Constitution-making process"*.<sup>10</sup> The adoption of a new and good Constitution should be based on the widest consensus possible within society and [...] *"a wide and substantive debate involving the various political forces, non-government organisations and citizens associations, the academia and the media is an important prerequisite for adopting a sustainable text, acceptable for the whole of the society and in line with democratic standards. Too rigid time constraints should be avoided and the calendar of the adoption of the new Constitution should follow the progress made in its debate"*.<sup>11</sup> Open and free public discussions should take place *"in an atmosphere favouring such discussions"*.<sup>12</sup> *"Moreover, if and when a popular referendum is held, it is of great importance that this is done properly, in a way which ensures clarity and transparency, and which presents the electorate with clear and precise alternatives."*<sup>13</sup>

29. There is no formal rule in international law that prevents constitutional amendments during situations of emergency such as times of war, application of martial law, state of siege or extraordinary measures. Yet, such a prohibition is contained in several constitutions (Albania, Estonia, Georgia, Lithuania, Moldova, Montenegro, Poland, Portugal, Romania, Serbia, Spain, Ukraine).<sup>14</sup> For example, Article 228 § 6 of the Polish Constitution states clearly that: *"during the period of introduction of extraordinary measures, the following shall not be subject to change: the Constitution, the acts on elections to the Sejm, the Senate and organ of local government (...)"*. Similarly, Article 147(2) of the Constitution of Lithuania provides that *"During a state of emergency or martial law, amendments to the Constitution may not be made"* and Article 157 of the Constitution of Ukraine provides that *"The Constitution of Ukraine shall not be amended under the conditions of martial law or a state of emergency"*. There is no such provision under the Turkish Constitution.

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<sup>10</sup> Venice Commission, Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary, CDL-AD(2011)001.

<sup>11</sup> Venice Commission, Opinion on the draft New Constitution of Iceland, (CDL-AD(2013)010).

<sup>12</sup> Venice Commission, Opinion on the Procedure of Amending the Constitution of Ukraine, CDL-AD(2004)030. See also Opinion on the Draft Law on the Review of the Constitution of Romania, CDL-AD(2014)010; Opinion on the draft modifications to the Constitution of Azerbaijan submitted to the referendum of 26 September 2016, CDL-AD(2016)029.

<sup>13</sup> Venice Commission, Report on constitutional amendment, CDL-AD(2010)001, § 192.

<sup>14</sup> Venice Commission, Report on constitutional amendment, CDL-AD(2010)001.

30. This prohibition reflects the importance of protecting the fundamentals of the political system, notably the Constitution and the electoral system. It stems from the consideration that a state of emergency may entail limitations to the normal functioning of parliament (especially for the role of the opposition) as well as, very often, limited functioning of mass media and limitations on the exercise of political freedoms such as freedom of assembly. Under these conditions, the democratic process of constitutional amendment may not be fully guaranteed.

31. There is no formal rule in international law which would prevent States from holding elections or referendums during emergency situations either. Yet, under several constitutions an extraordinary situation will postpone, or provide an opportunity to postpone upcoming elections, for example by extending the term of parliament (Croatia,<sup>15</sup> Italy,<sup>16</sup> Germany,<sup>17</sup> Greece,<sup>18</sup> Poland,<sup>19</sup> Lithuania,<sup>20</sup> Slovenia,<sup>21</sup> Spain,<sup>22</sup> Hungary<sup>23</sup> and Canada<sup>24</sup>). Similarly, a situation of emergency may prohibit the dissolution of parliament (Germany,<sup>25</sup> Spain,<sup>26</sup> Portugal,<sup>27</sup> Poland,<sup>28</sup> Hungary,<sup>29</sup> Russia<sup>30</sup>). In Turkey, a declared state of war causes elections to be postponed (Article 78 of the Constitution).

32. This rule reflects the concern that during situations of emergency states may not be able to meet the constitutional and international standards on free and fair elections, including the standards which were codified by the Venice Commission in the Code of Good Practice on Referendums.<sup>31</sup> Under these standards, referendums have to be based on the principle of universal, equal, free and secret suffrage. The question(s) put to the referendum has(ve) to be clearly formulated. The referendum has to be organized by an independent body. The authorities must provide objective information and they must not influence the outcome of the vote by one-sided campaigns. The public media have to be neutral, in particular in news coverage. Fundamental human rights – especially freedom of expression, freedom of assembly, right to security – have to be fully respected.<sup>32</sup>

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<sup>15</sup> Article 77 of the Constitution.

<sup>16</sup> Article 60 of the Constitution.

<sup>17</sup> Article 115h of the Constitution.

<sup>18</sup> Article 53 of the Constitution.

<sup>19</sup> Article 228 of the Constitution.

<sup>20</sup> Article 143 of the Constitution.

<sup>21</sup> Article 81 of the Constitution.

<sup>22</sup> Article 53 of the Constitution.

<sup>23</sup> Article 48 of the Constitution.

<sup>24</sup> Article 4(2) of the Constitution.

<sup>25</sup> Article 115h of the Constitution.

<sup>26</sup> Article 116 of the Constitution.

<sup>27</sup> Article 172 of the Constitution.

<sup>28</sup> Article 228 of the Constitution.

<sup>29</sup> Article 48 of the Constitution.

<sup>30</sup> Article 109 of the Constitution.

<sup>31</sup> Venice Commission, Code of Good Practice on Referendums, CDL-AD(2007)008.

<sup>32</sup> See also Venice Commission, Opinion on the Compatibility of the Existing Legislation in Montenegro concerning the organisation of referendums with applicable international standards, CDL-AD(2005)041, and Opinion on “Whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea’s 1992 constitution is compatible with constitutional principles, CDL-AD(2014)002.

33. The Venice Commission has previously stressed that “*The holding of democratic elections and hence the very existence of democracy are impossible without respect for human rights, particularly the freedom of expression and of the press and the freedom of assembly and association for political purposes, including the creation of political parties. Respect for these freedoms is vital particularly during election campaigns. Restrictions on these fundamental rights must comply with the European Convention on Human Rights and, more generally, with the requirement that they have a basis in law, are in the general interest and respect the principle of proportionality*”.<sup>33</sup>

34. In the opinion of the Venice Commission, there is clearly a danger that democratic process will be encumbered when there are restrictions on the ‘normal’ rule of law processes. There is also a risk that fundamental electoral principles will be undermined during a state of emergency, in particular the principle of equality of opportunity. Similarly, it is axiomatic that derogation from individuals’ civil and political rights creates a risk that the results are not democratic.

35. Indeed, the Commission favourably considered a constitutional provision in Georgia which provided that there could be no elections during a state of emergency or period of martial law and no election could be held until 60 days had expired from the lifting of the state of emergency, because “*elections require a peaceful political atmosphere and the complete fruition of all the freedoms and human rights and a condition of full guarantee of public order and security*”.<sup>34</sup>

36. This analysis applies with, at least, equal force in respect of proposed constitutional referendums,<sup>35</sup> and in particular to referendums on the change of the political system,<sup>36</sup> although, admittedly, a complete collapse of the existing constitutional order might require a constitutional referendum during a state of emergency. Whether permanent constitutional change should occur during a state of emergency is dependent on whether the circumstances are such that democratic principles will prevail. The following paragraphs proceed on this basis.

37. With respect to the situation currently pertaining under the state of emergency in Turkey, the Venice Commission has already noted with concern the liquidation of several private media outlets<sup>37</sup> and the severe interference with the freedom of expression and the media caused by the emergency decree laws.<sup>38</sup> According to the figures provided by the Turkish authorities,<sup>39</sup> *in toto*, since July 2016, 190 media outlets (including publishing houses, newspapers and magazines, news agencies, TV stations and radios) were closed, but pursuant to Decree Laws 675 and 679, the closure of 23 of these media outlets was annulled. As was stressed by the Council of Europe Commissioner for Human Rights, “*more than 150 media outlets, including newspapers, television stations, radios and publishing houses, were closed and their assets liquidated by governmental decrees, in the absence of any judicial decision. In parallel, the*

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<sup>33</sup> Venice Commission, Code of Good Practice in Electoral Matters: Guidelines (19 October 2002) CDL-AD(2002)023, § 60

<sup>34</sup> Venice Commission, Opinion on a draft constitutional law on amendments to the Constitution of Georgia, CDL-AD(2009)030, § 5.

<sup>35</sup> Gross and Ní Aoláin, *Times of Crisis: Emergency Powers in Theory and Practice* (2011 Cambridge).

<sup>36</sup> See also Venice Commission, CDL-STD(1995)012, *Emergency Powers*, Report by Ergun Özbudun and Mehmet Turhan, Science and technique of democracy No. 12, 1995.

<sup>37</sup> Venice Commission, Opinion on Emergency Decree Laws Nos. 667-676 adopted following the failed coup of 15 July 2016, §§178 ff.

<sup>38</sup> Venice Commission, Opinion on the measures provided in the recent emergency decree laws with respect to freedom of the media in Turkey, CDL(2017)006.

<sup>39</sup> CDL-REF(2017)010.

number of journalists in jail which had reduced significantly in previous years, increased manifold, reportedly to 151 at the time of writing of this memorandum".<sup>40</sup> The Commissioner for Human Rights considers with the "utmost concern" that "the current situation is characterised by numerous, blatant violations of principles enshrined in the ECHR, the case-law of the European Court of Human Rights, standards of the Council of Europe, as well as other relevant international standards. These violations have created a distinct chilling effect manifesting itself not only in self-censorship in the remaining media which is not controlled by or sympathetic to the government and the ruling political party, but also among ordinary citizens. This has led to an extremely unfavourable environment for journalism and an increasingly impoverished and one-sided public debate."<sup>41</sup>

38. Moreover, Emergency Decree Law no. 687 of 9 February 2017 has removed the power of the Supreme Election Council to sanction private radio and television channels which make one-sided, biased broadcasts during election and referendum campaigns. This change, which does not have any genuine link with the state of emergency as such and instead has a clear relationship with the constitutional referendum campaign, has entered into force despite the spirit, if not the letter, of Article 67 of the Turkish Constitution, which provides that "*the amendments made in the electoral laws shall not be applied to the elections to be held within the year from when the amendments go into force*". While the exact meaning and impact of this provision go beyond the scope of analysis of this opinion, it is obvious that it has operated a modification of the ordinary rules of media coverage of election or referendum campaigns, with a notable impact on the principle of neutrality of the media.

39. As regards freedom of assembly, a general ban on assemblies was imposed in Ankara by the Governor under emergency legislation during the period surrounding the parliamentary debate of the amendments, and further bans have been imposed in other areas in Turkey.

40. It has been pointed out that Turkish parliamentary elections were held in 2002 when a state of emergency was ongoing and it seems that democratic principles were relatively well maintained. Similarly, presidential elections are currently ongoing in France despite a state of emergency being in place. These analogies are not pertinent. During Turkey's 2002 elections the state of emergency was limited to a specific geographic area unlike the current nationwide state of emergency, and it did not entail large-scale limitations of human rights applicable to the whole of the population of the country. In the case of the upcoming French presidential and parliamentary elections, the measures implemented under the state of emergency are significantly less obstructive as regards the functioning of the institutions and civil and political rights.

41. Following from all that precedes, and recalling that "*constitutional reform is a process which requires free and open public debate, and sufficient time for public opinion to consider the issues and influence the outcome*",<sup>42</sup> the Venice Commission considers that it is highly doubtful that the constitutional referendum scheduled for 16 April 2017 could and would meet the democratic principles of the European democratic tradition. In addition, even if these standards were respected, the credibility of the results of a referendum held during a state of emergency that has been declared to consolidate government power would be compromised.

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<sup>40</sup> Memorandum of the Commissioner for Human Rights on freedom of expression and media freedom in Turkey <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2961658&SecMode=1&DocId=2397056&Usage=2>.

<sup>41</sup> Memorandum of the Commissioner for Human Rights on freedom of expression and media freedom in Turkey, § 22. See also Venice Commission, Opinion on the measures provided in the recent emergency decree-laws with respect to freedom of the media in Turkey, CDL-AD(2017)007.

<sup>42</sup> Venice Commission, Report on constitutional amendment, CDL-AD(2010)001, § 245.

42. There are two possibilities which are in line with democratic standards: if a constitutional referendum must absolutely be held during a state of emergency, restrictions on political freedoms have to be lifted, or, if the restrictions may not be repealed, the constitutional referendum should be postponed until after the state of emergency or at least when the restrictions no longer apply.

### **B. The choice of a presidential regime**

43. The constitutional amendments under consideration aim at operating a change in the political regime of Turkey, adopting a “Turkish-style” presidential regime.

44. The Venice Commission has emphasised in the past that the fundamental choice between a presidential, a semi-presidential and a parliamentary regime is a political choice to be made by the country in question and that, in principle, all these regimes can be brought into harmony with democratic standards, provided *inter alia* that parliament have sufficient controlling powers with regard to the executive branch.<sup>43</sup> The Venice Commission has however repeatedly welcomed and supported constitutional reforms that aimed at decreasing the powers of the President and at increasing those of the parliament.<sup>44</sup> The fundamental principles of the rule of law, the separation of powers and the independence of the judiciary create the framework which legitimates various political systems and forms of government, as long as they remain democratic. Negligence of these fundamental rules could lead to the transformation (or, better, the degeneration) of the whole system into an authoritarian one. This danger is stronger in the case of introduction of a presidential system instead of a parliamentary one. In legal literature, presidentialism is often considered to be generally less conducive to democracy, especially in countries with deep political cleavages, in which more than two political parties compete for power and which do not have a long tradition of political compromises.<sup>45</sup> A presidential regime requires very strong checks and balances. In particular, a strong, independent judiciary is essential because the controversies which in a parliamentary regime are normally settled through political debate and negotiations, in a presidential regime often end up before the courts.

45. The United States is often cited as the example of democratic presidentialism, and has been used to support the transition to a presidential regime in Turkey. The Venice Commission has previously argued that *“Each constitution is the result of balancing various powers. If a power is given to one state body, other powers need to be able to effectively control the exercise of this power. The more power an institution has, the tighter control mechanisms need to be constructed. Comparative constitutional law cannot be reduced to identifying the existence of a provision the constitution of another country to justify its democratic credentials in the Constitution of one’s own country. Each constitution is a complex array of checks and*

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<sup>43</sup> Venice Commission, Interim Opinion on Constitutional reforms in the Republic of Armenia, CDL-AD(2004)044 § 42; the Commission warned in particular that *“In Armenia where the President, directly elected, is the real “engine” of the political system, it would be rather dangerous for the democratic life of the state to further increase his powers while at the same time not providing for the necessary strengthening of the role of the National Assembly.”*

<sup>44</sup> Amongst other, Opinion on the draft law amending the Constitution of Ukraine submitted by the President of Ukraine on 2 July 2014, CDL-AD(2014)037; Opinion on the Draft Constitution of the Kyrgyz Republic (version published on 21 May 2010), CDL-AD(2010)015; Final Opinion on Constitutional Reform in the Republic of Armenia, CDL-AD(2005)025; Opinion on the Draft Amendments to the Constitution of Georgia (CDL-AD(2004)008-e).

<sup>45</sup> Juan J. Linz, The Perils of Presidentialism, *Journal of Democracy*, Vol. 1, 1990, pp. 52-69; Donald L. Horowitz, Comparing Democratic Systems, *Journal of Democracy*, Vol. 1, 1990, pp. 73-79; Scott Mainwaring, Presidentialism, Multipart Systems, and Democracy: the Difficult Equation, *Kellogg Institute Working Paper No 144*, 1990; Juan J. Linz, Arturo Valenzuela (eds), *The Crisis of Presidential Democracy: The Latin American Evidence*, Baltimore: The Johns Hopkins University Press, 1994; Michael J. Mezey, *Presidentialism: Power in Comparative Perspective*, Rienner, 2013.

*balances and each provision needs to be examined in view of its merits for the balance of powers as a whole.*<sup>46</sup> There is very little resemblance between the constitutional amendments pending in Turkey and the political regime of the United States. As will be explained in more detail below, the draft Turkish constitutional amendments would confer substantially more power on the President, and include substantially fewer checks and balances between the executive, legislature, and judiciary, than the US constitutional system. Under the amended Turkish constitution, unlike under the American one, there would be no bicameralism, no federalism, no election of the Vice-president, no influence of parliament on appointments within the executive power, while the President would have the power to dissolve parliament at his or her will (though putting his or her own mandate at stake). Presidential elections would be held jointly with parliamentary elections every five years, while in the US the voters have the possibility to vote in mid-term elections every two years. There would not even be a strong, independent judiciary. It should be stressed in this respect that the lack of well rooted principles of the rule of law and the separation of powers has led to authoritarian rule in some US-inspired presidential regimes in South America, Asia or Africa.

### **C. The separation of powers under the amended Constitution**

46. The Turkish authorities explain the essence of the constitutional reform as follows: *“the most important feature of the constitutional amendment is that it lifts the dual authority in the executive power. Due to the election of the President by popular vote, he/she is politically responsible in the eyes of the nation. This amendment removes the potential of State crisis between the President on one side and the Prime Minister and the Council of Ministers on the other side which might arise from the broad executive authority of the President.(...) The essence of democracy is to take accountability as a basis. According to the current Constitution, the President has no responsibility even though he has many duties and authorities. Actually, title of article 105 of the Constitution is as 'accountability and non-accountability' and it is underlined that he/she is not accountable except for the 'treason'. By the amendment proposal, this article has been changed together with its title. Hereinafter, title of article 105 will be as 'Criminal Liability of the President'. If the Constitutional amendment is approved by the Nation, the President will be accountable not only for his executions, actions and operations, but also for his/her inaction.(...) According to the constitutional amendment, the executive power will only belong to the publicly-elected President.(...) The legislative power will only belong to the Assembly. The President will not be authorized to put forward a law proposal. A more suitable government system is envisaged with respect to the principle of "checks and balances" since the legislative power is completely separated from the executive power.(...) The President has political responsibility to the people who elect him/her.”*<sup>47</sup>

47. The analysis of the amendments, however, brings the Venice Commission to conclude that they lead to an excessive concentration of executive power in the hands of the President and the weakening of parliamentary control of that power. As regards in particular the accountability of the President, the Venice Commission does not find that it is ensured under the amendments. The democratic accountability of the President is virtually absent during the mandate; it only comes into play if the President runs for a second mandate. The fact that in normal conditions elections are only held every five years significantly reduces democratic accountability, compared for example to mid-term elections to U.S. Congress every two years. The TGNA may not hold a vote of confidence in the President. There is no possibility of interpellations. Only written questions are allowed and must be addressed to Vice-presidents and ministers (amended Article 98(5)). In addition, the President will benefit from a general immunity for any criminal act besides those committed in the exercise of the presidential

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<sup>46</sup> Venice Commission, Opinion on the Fourth amendment to the Fundamental Law of Hungary, CDL-AD(2013)012, § 139.

<sup>47</sup> CDL-REF(2017)015, p. 6

functions, for which he or she may be subject to a very complex procedure of impeachment with the final judgment being made by the Constitutional Court, whose members are appointed directly or indirectly by the President.

### **1. The President's elections and mandate**

48. Since 2007, the President of Turkey is elected through a direct vote (Article 101). The term of office is five years and the person may be re-elected once. This model is maintained under the amended Constitution. Any citizen of Turkey who is eligible to be a deputy, is over 40 years and has completed higher education may stand as a candidate.

49. Candidates may be nominated by political parties or groups of parties which have received more than five percent of the valid votes in sum alone or jointly in the latest parliamentary elections or by a hundred thousand electorates. The right to nominate candidates is extended to parties with 5-10% of the valid votes (previously, the bar was 10%) as well as to the general public. The Venice Commission welcomes that the general public should now also be entitled to nominate candidates. Yet, the bar is set relatively high<sup>48</sup> and it therefore remains to be seen to what extent this option will be used.

50. The draft amendments foresee that the number of candidates may be rather low or, in fact, that at the second round there could be only one candidate. In this case, as amended Article 101 stipulates, the elections would be turned into a referendum, in which the simple majority of votes would suffice for the single candidate to be elected. Though not illegitimate or unlawful per se, this regulation, which already exists under the current constitution, is highly unusual. After all, elections are based on the idea of competition and choice and cannot really serve their purpose in the absence thereof.

51. The current Constitution states that "*if the President-elect is a member of a party, his/her relationship with his party shall be severed and his/her membership of the Grand National Assembly of Turkey shall cease*" (Article 101). Whereas the latter requirement is maintained under the draft amendments, the former is not. This entails important consequences: the rule that, with one exception (see infra), presidential and parliamentary elections must take place simultaneously, and the removal of the prohibition on the President being a member of a political party, makes it probable that one party will dominate the executive and also have a majority or at least a very significant representation in the legislature. The President is likely to be and stay the leader of that party. Moreover, the danger of an overly close relationship between the executive and legislature is increased because the President is vested with the power to call the elections in the first place.

52. The Turkish President will not be a member of the legislature and there will be a formal separation of legislative and executive powers. However this separation is illusory. The President will have the power to appoint and dismiss ministers, choosing some of them from among members of the legislature (Article 106 § 4). This will give him or her an effective source of patronage over the legislature. This creates a danger of the President taking control of the legislative agenda. It might also be remembered that the legislature will have no power to approve or veto appointments, again in sharp contrast to the U.S. system. This significantly undermines the legislature's control over the executive.

53. At the same time, the President is expected to "*represent the Republic of Turkey and the unity of the Turkish nation*" and "*ensure implementation of the Constitution and the regular and harmonious functioning of the organs of the State*" (Article 104). The Venice Commission has

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<sup>48</sup> In France, for instance, candidates only need 500 signatures of elected officials to be nominated. Yet, it is not unusual to set the bar relatively high. For instance in Slovakia, 15.000 signatures are necessary, in the Czech Republic, the required number is 50.000.

doubts whether a person closely affiliated with a particular political party may assume, and be seen as assuming, this role. A symbolic, politically neutral presidency can hardly be reconciled with a politically engaged presidency (holding the whole of the executive power). The amended constitution has failed to make a choice between these two opposed visions.

54. According to the Turkish authorities, *“it is the natural consequence of the system that the President, who represents the executive organ, has a link with the political party. Since it is an obligatory consequence of the new system that the President who is beyond a symbolic figure, who has political responsibility and needs popular votes in the elections to be elected will act together with a political party. For example, in the United States and in France, links between the presidents representing the executive organ and their political parties remain. This situation should not be a problem in terms of democracy. As a matter of fact, the link with the party does not necessarily have to remain and, moreover, it's not a necessity to continue that link as a leader of the political party. As a requirement of democracy, this should be left to the political parties' own preference”*.<sup>49</sup>

55. It is true that the first Presidents of the Republic of Turkey, Mustafa Kemal Atatürk and İsmet İnönü were also closely affiliated to a political party (Republican People's Party in this case.) However this model was embraced in the period in which Turkey largely operated as a one-party country. Once a multi-party model was embraced, the requirement for the presidents-elect to sever the ties with their political party was introduced. The mere fact that this requirement is now abolished is a signal that political partisanship is desired. In addition, it should be noted that this provision is to enter into force immediately, while the changes to the distribution of powers will only enter into force after the elections of 2019. This shows that the immediate consequence of this amendment is to enable the current President to take up official functions in his party, although he was elected on a different basis. The Turkish authorities argue that the immediate lifting of the prohibition for the President to be a member of a political party responds to the fact that the current regime in Turkey is *de facto* closer to a semi-presidential system than to a parliamentary one, and in semi-presidential systems the President is a member of his or her party. However, for the Venice Commission it is difficult to see why this proposed change should not be postponed until after the next election as is being done for the other changes to the constitutional balance.

56. As a rule, the President may serve only two five-year terms (Article 101), which already allows for a quite long ten-year total mandate.<sup>50</sup> However, in case new elections have been decided by the Grand National Assembly during the second term of the President, he/she can run for the presidency once more (Article 116, see below). This would *de facto* give the President a third term, thus extending the total length of his or her mandate much longer than the original ten years. It cannot be excluded from the letter of Articles 101 and 116 that a further renewal of elections would not have the same effect, as the Turkish authorities argue. In such a case, the President could stay in office for a potentially unlimited period of time, which is clearly unacceptable. As Linz notes, in a presidential system, *“the power of the President is at once so concentrated and so extensive that it seems unsafe not to check it by limiting the number of times any one President can be elected”*.<sup>51</sup>

57. The Turkish authorities argue that *“There is no such thing as the extension of the second term of the President. However, in the event that the Assembly decides to renew the elections*

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<sup>49</sup> Ministry of Justice of Turkey, Directorate General for EU affairs, Information note on the issues to be handled in the visit of the Venice Commission regarding the constitutional amendments (20-21 February 2017), CDL-PI(2017)001, p. 36.

<sup>50</sup> The U.S. President is prohibited by the Constitution from being elected to more than 2 four-year terms as President. Congress has no power to extend the President's term (U.S. Constitution, Amendment XXII).

<sup>51</sup> Juan J. Linz, The Perils of Presidentialism, *Journal of Democracy*, Vol. 1, 1990, p. 66.

before the termination of President's second term in office, the President can once again be a candidate. It is not true to express it as an extension of the term of office. In other words, in the second term of the President, if the Grand National Assembly decides to renew the elections with a 3/5 majority (360 deputies) before the termination of second term of office, the President can only once again be a candidate. Here, in the case the Grand National Assembly decides to renew the elections in the second term of the President, it is aimed to give the current President the opportunity to be re-elected and therefore, that the public to check whether or not the Grand National Assembly exercise its power in an accurate manner and the public to confirm the democratic legitimacy.”<sup>52</sup> However, it should be underlined that pursuant to the amendments, the mandate of the President would not *have to be* of five years because there would be an express constitutional possibility to have early presidential elections. On the other hand, the decision of the TGNA to shorten the President's mandate is submitted to the public, because there are simultaneous parliamentary elections at which the TGNA may be sanctioned. In the Venice Commission's opinion, therefore, there is no justification for the possibility for the President to obtain a third mandate. The Venice Commission has previously stressed the importance of constitutional limitations on successive presidential terms as a means to limit the risk of negative consequences for democracy arising from the fact that a same person has the possibility of occupying the presidency for an excessive period of time.<sup>53</sup>

## 2. The new powers of the President

58. Amended Article 104 declares not only that the President is “*the head of the State*” but also that “*executive power belongs to the President*”. This provision is the most explicit one in the amendments to express the intended transition to a presidential form of government. The President thus has the double position of both head of state and head of government with no neat differentiation of these roles. “*In the former capacity, he symbolizes the unity of the nation and, along with other national symbols, evokes a sense of patriotism among citizens. As head of government, he is the political leader of the nation, charged with a leading role in the policy decision that the country takes.*”<sup>54</sup>

59. Article 104 lists the “*duties and powers*” of the President. This enumeration, however, is not exhaustive, as the President shall “*also exercise powers of election and appointment, and perform the other duties conferred on him/her by the Constitution and laws*” (Article 104(19)). Accordingly, certain competences which are not or no more listed in Article 104 appear elsewhere in the Constitution (for example, the power to renew parliamentary elections (Article 116); the declaration of the state of emergency (Article 119); the preparation of the budget and its submission to the TGNA (Article 161)). The competences of the President may even be extended by ordinary laws.<sup>55</sup> In times when the President would be the leader of the political party with the majority in the TGNA, his/her competences could thus become almost unlimited. In addition, some of the new competences of the President are drafted in vague terms, leaving large space for interpretation and discretion.

60. Under the amendments, the President is given several new powers. The Government (Council of Ministers) and the office of Prime Minister would be abolished and their powers

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<sup>52</sup> CDL-REF(2017)015, p. 35.

<sup>53</sup> Venice Commission, Opinion on the Draft Amendments to the Constitution of the Republic of Azerbaijan, CDL-AD(2009)010, § 14.

<sup>54</sup> Michael J. Mezey, *Presidentialism: Power in Comparative Perspective*, Rienner, 2013, p. 8.

<sup>55</sup> The Venice Commission has previously supported the removal of a similar provision in Georgia (Final Opinion on the draft constitutional law on amendments and changes to the constitution of Georgia, CDL-AD(2010)028, § 57).

would be transferred to the President. Furthermore, the President would be granted powers which the Council of Ministers did not possess, for example with regard to the armed forces.

**a. The power to appoint and dismiss Vice-presidents and ministers and the power to appoint and dismiss high level State officials**

61. Amended Article 104 stipulates that the President “*appoints and dismisses Vice-presidents and ministers*”. The President has the exclusive power to decide (Article 106) whether and how many Vice presidents and ministers will be established (although there must be at least one Vice-president, given that the Constitution attributes some powers to him/her). The distinction between Vice-presidents and ministers is unclear. Parliament cannot express its approval for the appointment, which is the case in democratic presidential systems. The only criterion fixed in the Constitution is that Vice-presidents and ministers shall be appointed from among those eligible to be elected as deputies (Article 106(4)). According to the explanations provided by the Turkish authorities, “*as a rule, it is not compulsory for Vice-presidents and ministers to be appointed from among deputies. Since a strict separation of powers is envisaged in the government system brought, it is accepted that, in that case deputies are appointed as Vice-presidents or ministers, their membership of the Assembly will terminate.*”<sup>56</sup>

62. This solution is problematic from two points of views. First, as stated above, the fact that the President may select his Vice-Presidents and ministers from among members of parliament gives the President an effective form of patronage over the legislature, thus putting the separation of powers between the legislative and the executive into jeopardy.

63. Second, despite not being members of parliament, Vice-presidents and ministers during the term of office enjoy parliamentary immunity as stipulated in Article 83 of the Constitution (Article 106(11)). The extension of parliamentary immunity to ministers who are not MPs already exists under the current Constitution. The very complex procedure of impeachment which will be examined below will be applicable to Vice-presidents and ministers only for “*task-related offences*” (Article 106(6)). The Venice Commission recalls that “*The concept of parliamentary immunity is an integral part of the European constitutional tradition, as demonstrated by the fact that all European countries have some form of rules on this, which often date back a long time in history. The main feature is that members of parliament (emphasis added) are given some degree of protection against civil or criminal legal rules that otherwise apply to all citizens. The basic idea is that the elected representatives of the people need certain guarantees in order to effectively fulfil their democratic mandate, without fear of harassment or undue charges from the executive, the courts or political opponents.*”<sup>57</sup> Granting parliamentary immunity to non-elected officials exercising executive functions, thus weakening their ordinary criminal liability (in order to prosecute them, it will be necessary either to lift the parliamentary immunity during their office or to wait until its expiry) entails a breach of the principle of equality which is not justified within the framework of a democratic presidential system.

64. The amended constitution does not fix any rules, nor establish a hierarchy between Vice-Presidents. The duties and responsibilities of Vice-presidents shall be determined by the President alone, who will therefore, at least at some stage, choose which one is to exercise the special competences reserved for the time of presidential vacancy or temporary absence of the President by under Article 106(2)-(3).

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<sup>56</sup> Ministry of Justice of Turkey, Directorate General for EU affairs, Information note on the issues to be handled in the visit of the Venice Commission regarding the constitutional amendments (20-21 February 2017), CDL-REF(2017)015.

<sup>57</sup> Venice Commission, Report on Report on the scope and lifting of parliamentary immunities, CDL-AD(2014)011, § 7.

65. The Venice Commission has previously expressed very strong criticism of the creation of a position of non-elected Vice-presidents exercising executive power in substitution for the President. *“Nothing in the presidential system guarantees that the country’s voters or political leaders would have selected the Vice-President to wield the powers they were willing to give to the /.../ president.”*<sup>58</sup> The Commission has said that *“If Vice-Presidents are going to govern, they should have an electoral mandate and not take office by appointment of the President. In addition, since Vice-Presidents may temporarily exercise the powers of the President pending new presidential elections, they will be in a privileged position to win these elections. The possibility for the President to designate a Vice-President therefore gives to the incumbent President a lot of influence on the choice of his or her successor. New Article 103-1 is therefore incompatible with democratic standards.”*<sup>59</sup>

66. Although the Vice-President is supposed to serve as the acting President on a temporary basis, there is no time-limit – except for the length of the mandate itself – imposed in case of temporary absence of the President (as opposed to the 45-day limit in case of vacancy). Moreover, having the most powerful, and largely uncontrolled and uncontrollable, position in the country occupied by a non-elected person is problematic even when this occupation is only temporary. That is why in the United States, the Vice-President is elected together with the President and it is known in advance, and determined by the people, who the holder of this office will be.<sup>60</sup> According to the Turkish authorities the amendments establish an *“appropriate [...] connection of the legitimacy of Vice-presidents with that of the President directly elected by the nation”*. In addition, they argue that the simultaneous election of the President and the Vice-president risks causing *“the emergence of a double legitimacy crisis”*. The Venice Commission cannot agree with these arguments. The President’s democratic legitimacy to exercise the executive power may not be considered as transferable, especially when there is no mechanism of democratic accountability of the “chosen” Vice-president. As regards the risk of a crisis of legitimacy between the President and the Vice-president, the Commission considers that the U.S. experience shows that the hierarchy established in the joint elections does not pose such a risk.

67. Vice-presidents and ministers are politically accountable only to the President; the TGNA can only address written questions to them (see below).

68. Under Article 104(8), the President *“appoints and dismisses high level State officials and regulates the procedures and principles relating to the appointment of these, by presidential decrees”*. Whereas the current text contains an enumerative list of those appointed and dismissed by the president, the draft amendments speak generally about *“high level state officials”*. It would be up to the President to determine which positions fall under the notion. If s/he opts for an extensive interpretation of the term, s/he would get an enormous power to decide upon who the holders of important posts in the country will be (and to dismiss these holders at her/his leisure). The President not only appoints these officials but s/he also, by his/her decrees, regulates the procedures and principles relating to their appointment. S/He is, in this case, both a “legislator” and executor at the same time.

69. It should be stressed that contrary to draft Article 104, the President of the United States does not have the power to unilaterally appoint cabinet or other executive branch officials or to regulate the procedures for their appointment. Article II, Section 2, clause 2 of the U.S.

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<sup>58</sup> Juan J. Linz, *The Perils of Presidentialism*, *Journal of Democracy*, Vol. 1, 1990, p. 66.

<sup>59</sup> Venice Commission, *Opinion on the draft modifications to the Constitution of Azerbaijan submitted to the Referendum of 26 September 2016*, CDL-AD(2016)029, §§ 70-72.

<sup>60</sup> Joel K. Goldstein, *The Modern American Vice Presidency*, Princeton University Press, 1982. In the U.S., Vice-Presidents run at the elections together with the Presidents, so they are “elected officials”. If a Vice-President resigns, both houses should confirm the appointment of the new Vice-president, hence she/he has democratic legitimacy.

Constitution provides that the President shall nominate officers of the United States with the advice and consent of the Senate. Pursuant to these provisions, not merely cabinet level positions (heads of departments), but over 1,200 top personnel in the U.S. executive branch must be nominated by the President and also approved by the Senate in order to be appointed. Under the same constitutional provision, the Congress controls whether or not to give the President or other actors power to solely appoint inferior officers. Thus, the legislature controls who may be appointed solely by the President, as well as the procedures by which such appointments may occur.

**b. The power to determine the national security policies and take the necessary measures**

70. The President would “*determine the national security policies and take the necessary measures*” (draft Article 104(13)). For these purposes, he appoints the Chief of the General Staff and he also appoints virtually all members of the National Security Council (draft Article 118), whose organization and duties should be regulated by presidential decrees. The President will have the power to decide on the use of the armed forces and security policy in general. In addition, the new provision about appointment by the President of high-level state officials (see para. 68 above) may also capture the appointment of senior officials within the intelligence agencies and the police.

71. The competence to declare the state of war is conferred on the Grand National Assembly (with the exception of sudden armed aggression occurring while the Assembly is not in session – Article 92), while the competence to declare the state of emergency falls on the President (Article 119).

72. In itself, securing civilian control of the armed forces may be deemed welcome.<sup>61</sup> However, the way the amendments would realise this aim would further contribute to the strengthening of the President’s power, which is not balanced by counter-weighting powers.

**c. The power to declare the state of emergency**

73. The President alone would decide on the declaration of a state emergency, as well as on the issuing of decrees “*on the matters necessitated by the state of emergency*”, having the force of law (Art. 119). The current Turkish Constitution provides for three types of states of emergency: the state of emergency proclaimed by the Council of Ministers under the chairmanship of the President (Article 119), the state of emergency in case of widespread acts of violence and serious deterioration of public order, also proclaimed by the Council of Ministers under the chairmanship of the President (Article 120) and martial law also proclaimed by the Council of Ministers under the chairmanship of the President (Article 122). These regulations of the Turkish Constitution on the state of emergency are in line with common European standards concerning the state of emergency. The differentiation of different kinds of states of emergency is a common solution in many countries, and a positive one: different types of states of emergency need the utilisation of different means..

74. The draft amendments do not operate any more a distinction between different states of emergency; they repeal articles 120, 121 and 122 and make it possible for the President to declare the state of emergency “*in the event of war, the emergence of a situation necessitating war, mobilization, uprising, strong and actual attempt against homeland and Republic, widespread acts of violence of internal or external origin threatening the indivisibility of the country and the nation, emergence of widespread acts of violence which are aimed at the destruction of the constitutional order or the fundamental rights and freedoms, severe*

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<sup>61</sup> Venice Commission, Report on the democratic oversight of the armed forces, CDL-AD(2008)004, §§ 128 ff.

*destruction of public order due to acts of violence, and emergence of natural disaster, dangerous pandemic disease or severe economic crises*” (Amended Article 119).

75. The President therefore would have exclusive powers to declare the state of emergency and will have the power to issue presidential decrees “*without the limitation set forth in the second sentence of the seventeenth paragraph of Article 104*”, that is fundamental rights and political rights and duties (Amended Article 119(6)).

76. It should be welcomed however that, contrary to the current Constitution, amended Article 119 explicitly provides that emergency presidential decrees that are not “*debated and concluded*” by the TGNA within three months shall *ex officio* cease to have effect.

#### **d. The legislative power**

77. Under the amendments, the President does not have the power of legislative initiative. However, by virtue of draft Article 104(17), the President may “*issue presidential decrees on matters relating to executive powers*”. This is a rather vague formulation, as there are hardly any matters which would not somehow “*relate*” to executive power. The draft provision specifies that the decrees may not be adopted with respect to issues that are to be regulated specifically by law (the Turkish authorities stressed that there are 82 constitutional provisions that reserve regulation to the law) or that are already explicitly regulated by law. The decrees, furthermore, may not regulate matters having to do with certain human rights enshrined in the Constitution. The draft amendments on the contrary specifically indicate certain issues which have to be regulated by presidential decrees (“*the formation, abolition, functions, powers and organisation, and formation of central and regional organisation of the ministries*” – Article 106(11), “*the functioning of the State Supervisory Council, the term of office of its members, and other matters relating to their status*” – Article 108(4), “*the organisation and duties of the General Secretariat of the National Security Council*” – Article 118).

78. In case of a conflict between a decree and a law “*due to differences in provisions on the same matter*”, the latter should prevail. The Turkish authorities have made clear that “*if there is controversy between them, the superior norms are deemed applicable and everyone has to abide by this provision in the state of law.*”<sup>62</sup>

79. The principle that legislation prevails over presidential decrees is to be welcomed, as it represents a check on the President’s legislative power. It will, however, have to be interpreted in conjunction with the provisions on which areas are to be regulated by law and which areas are to be regulated by presidential decree. In the – very important – areas to be regulated by decree only, it will not be possible for the TGNA to legislate and presidential decrees will prevail. Moreover, the draft amendments do not specify which organ would be competent to declare the presidential decree null and void. The Turkish authorities have explained that “*according to the envisaged regulation, it will be possible that the presidential decrees will be subject to judicial review by three different means. The first one is that, if the Presidential decree is considered to be unlawful, the decree should be reviewed by the Constitutional Court upon the demand of two political parties with the highest number of members in the TGNA, or at least 1/5 of total number of members. Again, pursuant to Article 152 of the Constitution, courts will be able to demand the Presidential decree to be reviewed by the Constitutional Court through concrete norm review. Finally, in case it is considered that decrees contradicting to laws have been implemented by the administration, those interested may demand judicial review of the administrative action. Moreover, if the courts decide that the law and Presidential decree contradicts in the resolution of a dispute, the enforcement of the provision of law is the*

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<sup>62</sup> CDL-REF(2017)015, p. 37.

*governing law. This governing law also applies to anyone who will implement the laws and the presidential decrees, notably the administration.*<sup>63</sup>

80. The Turkish authorities have therefore provided a solution to the problem which appears, at first sight, reasonable. The Venice Commission, however, has doubts that this solution is conducive to legal certainty. First, it assumes that the existence of a conflict is straightforward, while it is realistic to imagine that the overlap will be only partial, and arguably subject to interpretation; second, it assumes that the various courts' decisions will be consistent, which instead is far from being evident; third, it assumes that the conflict will be easily brought before the Constitutional Court and that the latter will decide rapidly, which is contradicted by the current work-load of this court; finally, it does not seem to take into account that pending an authoritative decision by the Constitutional Court the state administration will naturally have a tendency to implement the decisions of their Chief, the President. In addition, the Constitutional Court only has the power to examine the constitutionality of a presidential decree within sixty days of its publication in the Official Gazette (Amended Article 151), while a conflict may arise in respect of a later law. The Turkish authorities argue that in case of disagreement about a presidential decree, the TGNA may enact a law on the same subject, which will then prevail over the decree. The Venice Commission has doubts that this possibility would apply to the domains inherently reserved to the President's decrees.

81. Under these circumstances, the Venice Commission is not convinced that the principle of precedence of laws over presidential decrees is sufficiently established in practice. It should be underlined that the existing Turkish case-law refers to a parliamentary system and will need to be adjusted to a presidential one, which will require time.

82. The Turkish regulation is different from that in the US. Although the US President has the power to issue executive orders that have the force of law (Article II(1) and (3) of the Constitution, the right is considered implicit to the position of the President as the holder of the executive power), executive orders are inferior to the Constitution, statutes, and administrative regulations. As a result, the President cannot issue an executive order unless the matter being addressed falls within his or her exclusive constitutional authority or an authority that has been delegated to the President by statute by the Congress. An executive order also cannot otherwise be contrary to any constitutional provision, statute, or administrative regulation. So the legal scope of the President's ability to issue executive orders is quite narrowly circumscribed. The legality of such orders is also subject to close review by the courts. Yet, these orders have been repeatedly criticized<sup>64</sup> as running against the logic of the system and allowing the President to act, and legislate, unilaterally, with limited control. The same criticism could be made with respect to the draft Turkish amendments.

83. During the state of emergency, the President may issue presidential decrees with the force of law (draft Article 119). These decrees are not subject to the limitations foreseen by Article 104(17), so they can relate to any matter, including human rights. The guarantees enshrined in Article 15 would however apply here as well. The decrees with the force of law should be submitted to the TGNA, on the day of their publication, for approval. The Assembly should discuss and approve them within three months. If this does not happen, the decrees shall *ex officio* cease to have effect. This provision is clearer than the one on presidential decrees adopted outside the state of emergency.

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<sup>63</sup> CDL-REF(2017)015, p. 38.

<sup>64</sup> See Tara L. Branum, *President or King – The Use and Abuse of Executive Orders in Modern-Day America*, *Journal of Legislation*, Vol. 28, Issue 1, 2002, pp. 1-86; or Michael Eliot, *The Legality of Obama's Executive Orders (And Why You Should Care)*, *Berkeley Political Review*, 11 May 2016.

### e. The power to dissolve parliament

84. In purely presidential republics, the power to dissolve the legislature is quite rare, as it would undermine the principle of the separation of powers as classically understood.<sup>65</sup>

85. Under the amendments, the former power of the President “*to renew elections for the Grand National Assembly of Turkey*” has been removed from Article 104. This power related to the dissolution by the President, in consultation with the Speaker of parliament, of the TGNA in cases where the Council of Ministers failed to receive a vote of confidence, or fell due to a vote of non-confidence, or where it could not be formed or failed to receive a vote of confidence. Following the abolition of the Council of Ministers, this provision (current Article 116 § 1) will be abolished.

86. The President has however been given a power to dissolve, on any grounds whatsoever, the TGNA which is symmetrical to the power of the TGNA to dissolve itself (on any grounds whatsoever, but with a majority of 3/5); the Turkish authorities refer to this as a “bilateral” renewal of the elections, because in both cases, the result is the renewal of both the presidential and the parliamentary elections. The President is free to decide whether and when to dissolve parliament, which is undoubtedly a means of pressure on the TGNA. However, dissolution would also entail the end of the President’s mandate, so that it may only be used as an extreme measure, which moreover the President is extremely unlikely to use during his or her second mandate, as he or she will not be allowed to run again, in contrast with the case in which dissolution is decided by the TGNA itself.

87. The Turkish authorities have underlined that “*The bilateral renewal of the elections is a check and balance mechanism. While the first dimension of the instrument is that the President can renew the elections of the legislative power, the second conjuncture reveals that the legislative power can renew the presidential elections. The renewal of elections will be possible upon the three-fifths majority of the total number of deputies in the Turkish Grand National Assembly or upon the decision of the President. Where the TGNA decides to renew the presidential elections, the parliamentary elections will also be renewed. Likewise, the presidential elections will be simultaneously renewed where the President decides to renew the parliamentary elections.*”<sup>66</sup>

88. In the Commission’s view, it is true that the simultaneous anticipated elections both for the presidency and parliament could be an effective means to resolve deadlock situations with the President and parliament blocking each other’s initiatives.<sup>67</sup> However, under the amendments there is a general rule that presidential and parliamentary elections must *always* be held at the same time (Article 77). This entails the consequence, due to a phenomenon of “attraction” of the parliamentary elections under the presidential campaign, which is far more personal and nation-wide, that parliament will most likely represent the same political party as the President, even if the Turkish authorities stress that there is a possibility that the candidate elected as President in the second round is not a member of the party that wins the majority of seats in the parliament. The TGNA needs a majority of 3/5 to decide to renew its elections. This, coupled

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<sup>65</sup> The U.S. President does not have power to dissolve the legislature. There are, however, some exceptions. In Ecuador (art. 148), for example, the President “may dissolve the National Assembly when, in his/her opinion, it has taken up duties that do not pertain to it under the Constitution, upon prior favourable ruling by the Constitutional Court; or if it repeatedly without justification obstructs implementation of the National Development Plan or because [of] a severe political crisis and domestic unrest.” This wide-ranging power gives the President the power to enforce his or her will on the legislature by threat of dissolution.

<sup>66</sup> CDL-REF(2017)015

<sup>67</sup> See J. Linz, Political and social consequences of the choice between a presidential and a parliamentary system, in Constitution making as an instrument of democratic transition, Science and Technique of Democracy no. 3, [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD\(1992\)003-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1992)003-e)

with the President's powers of patronage over the parliament (see above), will mean that in practice parliament is not likely to be a hurdle to the President's action. Instead, under these conditions the power of the TGNA to dissolve itself during the President's second mandate, thus provoking anticipated presidential elections in which the President may run, effectively opens the way for the President to obtain a third mandate.

89. On the other hand, should the President and parliament represent opposing political forces, during a second presidential mandate the President will likely refrain to call for renewed elections as s/he would lose his or her mandate, while the TGNA will likely hesitate because it would risk offering the President an additional mandate.

#### **f. The power to prepare the state budget**

90. Under Article 161, the President has the power to submit central government budget bill to the TGNA. This bill is examined by the Committee on Budget of the TGNA. The budget adopted by the Committee is examined by the Plenary. In order to ensure continuity of the state action, if the budget "*cannot be put in force in time*" a provisional budget is adopted, and if this is not possible then the budget of the previous year is applied, subject to a re-evaluation rate.<sup>68</sup>

91. Amended Article 161 is silent about the consequences of a refusal (as opposed to a delay) by the TGNA to adopt the budget proposed by the President. This means that the President would in any event eventually dispose of the re-evaluated budget of the previous year. This deprives the TGNA of an important check on the President. According to the authorities, if the TGNA does not approve the budget, it can dissolve itself and cause new presidential elections. This "nuclear option" however, does not seem to be a realistic tool of negotiation in the hands of the parliament.

#### **g. The powers to veto laws and to address the TGNA**

92. Draft Article 89 grants the President an important veto power. If the President sends a law back to the Assembly for reconsideration, the law can only be adopted with the absolute majority of the total number of members of the Assembly. Such a majority is not required under the current Constitution. It is true that similar or significantly higher majorities for overriding the presidential veto are foreseen in other countries with the presidential or semi-presidential system as well (absolute majority of all members – Portugal, two-thirds majority in both chambers – the U.S., two-third majority – Ukraine). Yet, in most of these countries, the President does not have the autonomous power to legislate and when s/he does, as in the United States, this power is subject to strict judicial control. Such would arguably not be the case in Turkey. The veto power thus gives the President a significant legislative tool. The exclusive power to initiate referendums for laws amending the constitution might also be used by a President against an unsupportive parliament.

93. The proposed Article 104 grants the President the power to give "*message to the Assembly about domestic and foreign policy*", which further increases the President's influence over the legislature.

#### **h. The power to appoint members of the CJP and judges of the Constitutional Court**

94. In addition to the already existing power to appoint some of the judges of the Constitutional Court and ¼ of the judges of the Council of State, under the amendments the President will be empowered to appoint four out of thirteen members of the Council of Judges and Prosecutors,

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<sup>68</sup> Defined by Article 298 of the 2013 Law on taxation.

in addition to the Minister of Justice who presides the CJP. The Undersecretary who also sits on the CJP is presumably also one of the high officials to be appointed by the President. It should be stressed in this context that under the amendments the President will no longer be required to act as a *pouvoir neutre*, with the consequence that there is an actual risk that these appointments will be partisan. The change in the role of the President should have had as a consequence to reduce his or her role in respect to the appointment of judges. Instead, this role has been maintained for the Constitutional Court and Council of State and increased for the CJP.

95. The effects of this power of the President on the independence of the Turkish judiciary will be examined below. For the sake of comparison, it should be noted that the President of the United States does not have the power to unilaterally appoint Supreme Court or other federal judges. All Supreme Court justices, and indeed all judges of the federal judiciary, must be nominated by the President and approved with the advice and consent of the U.S. Senate. (U.S. Const., art. II, sec. 2, cl. 2). Under current Senate debate rules, this in practice means that approval of a supermajority of at least 60 members of the U.S. Senate is required.

### **3. The counter-powers of the Turkish Grand National Assembly**

96. The TGNA is the holder of the legislative power in Turkey. In a presidential system, the legislative and executive powers should be kept separate and the system of checks and balances should be put in place to guarantee that neither of the two will become too dominant in the country. Faced with the impressive list and extent of new powers of the President, the TGNA should be given as important counter powers.

97. The Grand National Assembly would have 600 members instead of the current 550. This is a return to the situation which existed in Turkey under the 1961 Constitution. Yet, at that time, the parliament was bicameral, composed of the National Assembly and the Senate of the Republic. A return to bicameralism would not be surprising, provided that countries with a presidential (the U.S., Mexico, Brazil or Chile) or semi-presidential system (France, Romania or the Russian Federation) often have two chambers, the upper chamber usually possessing special powers to control the executive.<sup>69</sup> The re-introduction of bicameralism is however not envisaged in Turkey.<sup>70</sup>

#### **a. The simultaneous elections of parliament and the President**

98. The elections of deputies of the TGNA and of the President are to be held on the same day (amended Article 77). This will mean in practice that usually the President will also control the parliamentary majority. This is motivated by the need to avoid conflicts between President and parliament, which are a characteristic feature of presidential systems. But this goes against the very logic of a presidential system which is based on the separation of powers and therefore on the possibility of conflicts among these powers. To be meaningful, separation of powers requires that the different powers are constituted in a way which prevents a uniformity of approach of the various powers. Holding elections simultaneously makes it unlikely that there will be a meaningful separation of powers. If the draft is based on the systematic holding of simultaneous elections to the presidency and parliament, this shows that it does not follow the model of democratic presidential systems based on separation of powers. It rather follows a concept of unity of power which is characteristic for not so democratic systems.

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<sup>69</sup> See also Betty Drexhage, *Bicameral Legislators. An International Comparison*, Ministry of the Interior, The Hague, 2015.

<sup>70</sup> Turkey would become the only country with the presidential system and a unicameral parliament in Europe, with the exception of Cyprus. It would join three countries with a semi-presidential system and a unicameral parliament (Lithuania, Portugal, Ukraine).

99. There is only one exception: if the Presidency becomes vacant more than one year prior to the end of the mandate, in which case presidential elections are held alone and the newly elected President completes the mandate of the previous president. It is the only case in which a cohabitation appears possible, but it represents a rare exception.

#### **b. The parliamentary investigations**

100. The TGNA has no role in the appointment of the President or his cabinet. It cannot hold confirmation hearings or exercise virtually any supervisory power over the President and the cabinet. There is no possibility of interpellations. Only written questions can be addressed to Vice-presidents and ministers (amended Article 98(5)). The TGNA may not hold a vote of confidence. Draft Article 106(6) confirms that members of the cabinet are accountable to the president, not to parliament.

101. With respect to the President's function of appointing top judges and members of the Cabinet, the comparison with the United States is, once again, interesting. It is important to note that the Senate is an upper chamber of the U.S. legislature, which does not simply represent a majority of the electorate in the country. Each State is represented equally in the Senate by two Senators. The Senate thus is specifically designed to represent U.S. federalism concerns and to place a federalism check on the powers of the President. In practice, the Senate approval process for executive branch officials and judges plays a very important role in constraining the President. This power not only allows the Senate to exercise influence on the personnel who occupy these positions, it also allows the Senate to use the appointments process to discipline the President and the executive branch and to express disapproval of any Presidential policies and practices with which the Senate does not agree, through the refusal to confirm appointments.

102. The TGNA may launch a parliamentary investigation into the alleged criminal responsibility of the President, Vice-presidents and ministers. Although draft Article 98(4) defines this investigation as "*an investigation about the Vice-Presidents and the Ministers conducted according to the fifth, sixth, seventh paragraphs of Article 106*", draft Article 105 makes investigations possible also with respect to the President. Investigations may be requested by "*an absolute majority of the total number of members of the Grand National Assembly*" (draft Articles 105(1) and 106(6)). The opening of the investigation requires three-fifths majority. These are high bars which it will be difficult to meet, especially if a large part of deputies would belong to the same political party as the President and members of the cabinet. In any case, investigations are limited to "*task-related crimes*" of the respective office holders, which should be rare. By contrast, there is no possibility for the TGNA to investigate dysfunctions within the executive power. Investigation thus is an impeachment procedure, not a procedure to ensure political accountability.

103. The investigation is conducted by a committee of 15 members, representing various political parties present in the Assembly. The committee should submit its report within two or, maximally, three months. The report is debated in the Plenary which may decide, by two-thirds majority, to refer the case to the Supreme Court for the impeachment procedure. The procedure should not last more than three, or maximally six, months and may result in the removal of the President, Vice-president or minister from office.

104. The draft amendments do not specify which offences may lead to impeachment. Amended Article 106 speaks about "*task-related crimes*" committed by Vice-presidents or ministers, both Amended Articles 105 and 106 also invoke crimes that would prevent the President, Vice-president or ministers from being elected. The range of such crimes seems to be rather extensive, especially when compared to the current regulation, where impeachment was only available for cases of high-treason by the President (Article 105(3)). Article 76(2), listing those who may not be elected as deputies (and, consequently, by virtue of Amended

Articles 101(1) and 106(4), may not stand as candidates for President or be appointed as Vice-presidents or ministers), includes, among others: *“those who have been sentenced to a prison term totalling one year or more excluding involuntary offences, or to a heavy imprisonment; those who have been convicted for dishonourable offences such as embezzlement, corruption, bribery, theft, fraud, forgery, breach of trust, fraudulent bankruptcy; and persons convicted of smuggling, conspiracy in official bidding or purchasing, of offences related to the disclosure of state secrets, of involvement in acts of terrorism, or incitement and encouragement of such activities”*.

105. The impeachment procedure foreseen by the draft amendments is therefore quite broad in terms of the potential reasons for removal it covers but, at the same time, very difficult to put in motion and proceed with, due to the high majorities required. This makes the new regulation similar to that used in other countries with the presidential systems, such as the U.S., and it confirms that *“impeachment is a very uncertain and time-consuming process, especially compared with the simple parliamentary vote of no confidence”*.<sup>71</sup> Such procedure, to be applied only in extreme circumstances, cannot really serve as a common supervisory mechanism in day-to-day operation of the State.

106. In addition, the fact that the President would be tried by the Constitutional Court, when the President is likely to have appointed some of its members (see below), may affect the independence and impartiality of the decision.

### **c. The power to check presidential decrees**

107. The Assembly has no power to ratify presidential decrees, except for those adopted in the state of emergency, although it can bring an annulment action before the Constitutional Court against them. The President does not need an empowering law to issue Presidential decrees. Instead, the President has the power to veto any laws he or she considers unsuitable, and parliament needs an absolute majority of all MPs to overcome the veto (see above).

108. While the amendments enshrine the welcome principle that laws prevail over presidential decrees and that no presidential decrees may be issued in the areas reserved to legislation by the Constitution, in practice there are serious doubts that the mechanisms to prevent the President from invading the legislative domain of the TGNA would function in practice.

109. In the light of the above, the Grand National Assembly's counter-powers in respect of the President's new powers are insufficient: it is unlikely that the TGNA may stand as a balancing counter-weight to the President.

### **D. The independence of the judiciary**

110. In Article 9, impartiality would be added to independence as a basic characteristic of judiciary. Impartiality is already implied by independence; indeed, guaranteeing impartiality is a central ratio of independence. In constitutions impartiality is not usually explicitly mentioned alongside independence. Making a distinction between independence and impartiality should not lead to use the latter as a justification for curtailing independence.

111. In a presidential system, important supervisory and control powers fall on the judiciary. The judiciary has to be fully independent from the legislative and, especially, from the executive power and has to be able to check, and if necessary strike down, acts adopted by the parliament and the president. The draft amendments do not seem to be conducive to such a situation.

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<sup>71</sup> Juan J. Linz, *The Perils of Presidentialism*, *Journal of Democracy*, Vol. 1, 1990, p. 65.

112. On the one hand, the Venice Commission welcomes that the draft amendments aim at abolishing the system of military courts (Article 145). Although the abolition is not absolute, with draft Article 142(2) stating that “*no military courts shall be formed other than disciplinary courts. However, in state of war, military courts shall be formed with jurisdiction to try offences committed by military personnel related to their duties*”, the draft amendments transfer most of the competences of military courts to civil courts, which is certainly a step in the right direction.<sup>72</sup>

113. On the other hand, the draft amendments introduce new provisions which run contrary to European standards and curtail the independence of the judiciary vis-à-vis the president.

### **1. The Council of Judges and Prosecutors**

114. Under the current constitution, the President only appoints 3 out of 22 members of the HCJP. Pursuant to the amendments, the President will have the right to appoint 4 members, that is almost a third of the members of the Council of Judges and Prosecutors (CJP), whose number is also to be decreased, from 22 regular (+ 12 substitute) to 13 regular members. Two other members of the CJP, the minister of justice and his/her undersecretary, would also now be appointed by the President (minister and undersecretary as a high official). This President will therefore appoint almost half of the members of the CJP. The remaining 7 members would be appointed by the Grand National Assembly.

115. According to the Turkish authorities, “*The aim of the change in the structure and electoral process of the HCJP is to remove the politicization occurred in the judiciary, to prevent the re-seizure of the mentioned institution by organizations like FETO which has secret aims, to make the Assembly, which is a reflection of public sovereignty, effective in the selection of the Council of Judges and Prosecutors (CJP) in accordance with the recommendation of the Venice Commission in 2010 in the interim opinion on the draft law on HCJP.*”<sup>73</sup>

116. The Venice Commission recalls that according to European standards, at least a substantive part of the members of a High Judicial Council should be *judges appointed by their peers*. The Committee of Ministers of the Council of Europe in its Recommendation CM/Rec(2010)12 stated that: “*Not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary.*” [...] “*The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers.*”<sup>74</sup>

117. The Venice Commission has stated that: “*As regards the existing practice related to the composition of judicial councils, “a basic rule appears to be that a large proportion of its membership should be made up of members of the judiciary and that a fair balance should be struck between members of the judiciary and other ex officio or elected members.” Thus, a substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself. In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualification taking into account possible conflicts of interest.*”<sup>75</sup> In its Rule of Law Checklist, the Venice

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<sup>72</sup> See Eugene R. Fidell, Dwight H. Sullivan (eds), *Evolving Military Justice*, Annapolis: Naval Institute Press, 2002; Federico Andreu-Gazmán, *Military jurisdiction and international law*, Geneva: International Commission of Jurists, 2004.

<sup>73</sup> CDL-REF(2017)015, p. 39.

<sup>74</sup> Recommendation CM/Rec(2010)12, paragraphs 27 and 46.

<sup>75</sup> Venice Commission, Report on Judicial Appointments, CDL-AD(2007)028, paragraph 29; see also the Report on the independence of the judicial system, Part I: the independence of judges, CDL-AD(2010)004, § 32.

Commission has reiterated the need for “adequate representation of judges [elected by the judiciary itself] as well as lawyers and the public” on the Judicial Council.<sup>76</sup>

118. The Venice Commission had found that the manner of appointment of the HCJP under the current Constitution largely meets the applicable European standards, although it had recommended some involvement of parliament.<sup>77</sup>

119. The Commission finds that the proposed composition of the CJP is extremely problematic. Almost half of its members (4+2=6 out of 13) will be appointed by the President. It is important to stress once again in this respect that the President will no more be a *pouvoir neutre*, but will be engaged in party politics: his choice of the members of the CJP will not have to be politically neutral. The remaining 7 members would be appointed by the Grand National Assembly. If the party of the President has a three-fifths majority in the Assembly, it will be able to fill all positions in the Council. If it has, as is almost guaranteed under the system of simultaneous elections, at least two-fifths of the seats, it will be able to obtain several seats, forming a majority together with the presidential appointees. That would place the independence of the judiciary in serious jeopardy, because the CJP is the main self-governing body overseeing appointment, promotion, transfer, disciplining and dismissal of judges and public prosecutors. Getting control over this body thus means getting control over judges and public prosecutors, especially in a country where the dismissal of judges has become frequent and where transfers of judges are a common practice. In this context it seems significant that the draft amendments provide for elections to the CJP within 30 days following the entry into force of the amendments<sup>78</sup> and that the political forces supporting the amendments control more than three-fifths of the seats in the TGNA, enabling them to fill all seats in the CJP.

## **2. The Council of State**

120. The competence of the Council of State to examine draft legislation proposed by the Council of ministers has, logically, been removed, together with its competence to review draft regulations, which according to the explanations provided to the Commission’s delegation have ceased to be enacted decades ago. The Council of State has not been given the competence to give its opinion on presidential decrees, allegedly in order to avoid a possible conflict with a later finding by the Constitutional Court that the decree is unconstitutional. This reason, however, does not appear convincing, insofar as also government bills could later be appealed to the constitutional court. The likelihood of conflicts between laws and presidential decrees(see above) would have made such a consultative function desirable.

## **3. The Constitutional Court**

121. The changes regarding the manner of appointment of the members of the CJP will have repercussions on the Constitutional Court. The CJP is responsible for the elections of the members of the Court of Cassation and the Council of State. Both courts are entitled to choose two members of the Constitutional Court by sending three nominees for each position to the President, who makes the appointments. The influence of the Executive over the Constitutional Court is therefore increased.

122. The Constitutional Court will instead lose the possibility of controlling, as it does now, laws empowering the Council of Ministers to issue decrees having force of law. The President under

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<sup>76</sup> Venice Commission, Rule of Law Checklist, E.1.a (viii) and footnote 68, CDL-AD(2016)007.

<sup>77</sup> Venice Commission, Interim Opinion on the draft law on the high council for judges and prosecutors (of 27 September 2010) of Turkey, CDL-AD(2010)042.

<sup>78</sup> Provisional Article 21c.

the amendments will not need an empowering law. While the amendments define limits to the Presidential legislative activity with a formal prevalence of laws over decrees, the Constitutional Court has not been given the express power to decide over the conflicts which will inevitably arise in this respect.

123. The amendments therefore have an impact on the Constitutional Court that goes beyond the formal amendment in Article 146 that is the reduction in the number of justices from 17 to 15 following the abolition of the High Military Court of Appeals and the High Military Administrative Court.

## **V. Conclusions**

124. Every State has the right to choose its own political system, be it presidential or parliamentary, or a mixed system. This right is not unconditional, however. The principles of the separation of powers and of the rule of law must be respected, and this requires that sufficient checks and balances be inbuilt in the designed political system. Each constitution is a complex array of checks and balances and each provision, including those that already exist in the constitution of another country, needs to be examined in view of its merits for the balance of powers as a whole.

125. When a presidential system is chosen, as is the case in Turkey under the proposed constitutional amendments adopted by the Turkish Grand National Assembly on 21 January 2017 and to be submitted to a national referendum on 16 April 2017, particular caution is called for, as presidentialism carries an intrinsic danger of degenerating into an authoritarian rule. In a presidential system, the executive and the legislative powers both derive their powers and legitimacy from the people, through elections held at fixed intervals. The two powers are rigidly separate, so that conflicts between the two inevitably arise. Governing requires mediation of these conflicts. To be meaningful, separation of powers requires therefore that the different powers should be constituted in a way which also allows for divergent approaches and political emphases.

126. The proposed constitutional amendments aim to establish what the Turkish authorities have described as a "Turkish-style" presidential system, although they in no way reflect the well-rooted tradition of parliamentarism in Turkey but would constitute a decisive break in the constitutional history of the country. They are not based on the logic of separation of powers, which is characteristic for democratic presidential systems. Presidential and parliamentary elections would be systematically held together to avoid possible conflicts between the executive and the legislative powers. Their formal separation therefore risks being meaningless in practice and the role of the weaker power, parliament, risks becoming marginal. The political accountability of the President would be limited to elections, which would take place only every five years.

127. The following features of the proposed regime raise particular concern with regard to separation of powers:

- The new President would exercise executive power alone, with an unsupervised power to appoint and dismiss ministers, who do not form a collegiate government, and to appoint and dismiss all the high officials on the basis of criteria determined by him or her alone.
- The President would be empowered to choose one or more Vice-presidents; one of them, without any democratic legitimacy and without validation by parliament, would be called to exercise presidential functions in case of vacancy or temporary absence of the presidential position.

- The President, Vice-presidents and ministers would be accountable only by the procedure of impeachment, which is a very weak tool of parliamentary supervision;
- The President would be allowed to be a member and even the leader of his or her political party, which would give him or her influence over the legislature.
- The principle of compulsory synchronization of presidential and parliamentary elections would be introduced.
- The President would be given the power to dissolve parliament on any grounds whatsoever, which is fundamentally alien to democratic presidential systems, while being obliged to call in this case also early presidential elections. This way of resolving political problems is, at best, rudimentary.
- The President would have the opportunity to obtain a third mandate, if parliament decides to renew elections during his or her second mandate. This is an unjustified exception to the limitation to two presidential mandates provided in the Turkish constitution and also corresponding to good European practice.
- The President would also have an extensive power to issue presidential decrees without the need for an empowering law which the Constitutional Court could review; although in principle laws would prevail over presidential decrees, the amendments fail to introduce effective mechanisms to ensure such prevalence in practice.
- The President would be given the exclusive power to declare a state of emergency and could issue presidential decrees without any limitation during the state of emergency.

128. In a presidential regime, a strong, independent judiciary is essential to settle the conflicts between the executive and the legislative powers. However, the proposed amendments weaken, instead of strengthen the Turkish judiciary. The Council of Judges and Prosecutors, whose current composition largely meets international standards, would be immediately reformed by providing that six of the thirteen members are appointed by the President, who would no more be a *pouvoir neutre*, while seven members would be chosen by the Grand National Assembly, over which the President would have influence and which, due to the synchronization of elections, would very probably represent the same political forces as the President. No member of the Council would be elected by peer judges anymore. On account of the Council's important functions of overseeing appointment, promotion, transfer, disciplining and dismissal of judges and public prosecutors, the President's control over the Council would extend to all the judiciary. Control over the Council of Judges and Prosecutors would also indirectly enhance the President's control over the Constitutional Court.

129. The enhanced executive control over the judiciary and prosecutors which the constitutional amendments would bring about would be even more problematic, in the context in which there have already been longstanding concerns regarding the lack of independence of the Turkish judiciary. The amendments would weaken an already inadequate system of judicial oversight of the executive.

130. In the light of the above, the Venice Commission finds that the proposed constitutional amendments would introduce in Turkey a presidential regime which lacks the necessary checks and balances required to safeguard against becoming an authoritarian one. The welcome abolition of the military courts and the provision that Presidential emergency decrees automatically lose their validity if they are not approved by the Grand National Assembly do not suffice to change this conclusion.

131. In addition, the process of parliamentary debate and adoption of the constitutional amendments took place in a context where several deputies from the second largest opposition party were in jail. The breach of the secrecy of vote cast a doubt on the genuine nature of the support for the reform and on the personal nature of the deputies' vote. Regrettably, the parliamentary procedure did not provide a genuine opportunity of open discussions with all the political forces present in parliament.

132. The whole process of parliamentary adoption and submission for approval by referendum of the constitutional amendments is taking place during the state of emergency, when very substantive limitations on freedom of expression and freedom of assembly are in force. In particular the extremely unfavourable environment for journalism and the increasingly impoverished and one-sided public debate that prevail in Turkey at this point question the very possibility of holding a meaningful, inclusive democratic referendum campaign about the desirability of the amendments.

133. In conclusion, the Venice Commission is of the view that the substance of the proposed constitutional amendments represents a dangerous step backwards in the constitutional democratic tradition of Turkey. The Venice Commission wishes to stress the dangers of degeneration of the proposed system towards an authoritarian and personal regime. In addition, the timing is most unfortunate and is itself cause of concern: the current state of emergency does not provide for the due democratic setting for a constitutional referendum.

134. The Venice Commission remains at the disposal of the Turkish authorities for any further assistance.