



Strasbourg, 18 June 2020

CDL-AD(2020)011

Opinion No. 979/2019

Or. Engl.

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

**TURKEY**

**OPINION**

**ON**

**THE REPLACEMENT OF ELECTED CANDIDATES AND MAYORS**

**Approved by the Council for Democratic Elections  
at its 68<sup>th</sup> meeting (online, 15 June 2020)  
and adopted by the Venice Commission on 18 June 2020  
by a written procedure replacing the 123<sup>rd</sup> Plenary Session**

**on the basis of comments by**

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## I. Introduction

1. By letter of 17 December 2019, the Secretary General of the Congress of Local and Regional Authorities of the Council of Europe, Mr Andreas Kiefer, requested an opinion of the Venice Commission on a number of decisions regarding elected candidates and mayors taken after the 31 March 2019 local elections in the south-east of Turkey. These decisions denied a number of successful candidates a mayoral mandate and removed from office the mayors of the metropolitan cities of Diyarbakır, Mardin and Van and replaced them with Governors of each region as “trustees”.
2. Mr Bußjäger, Mr Carozza, Mr Castellà Andreu and Mr Otty acted as rapporteurs for this opinion.
3. On 6-7 February 2020, a delegation of the Commission composed of Mr Carozza, Mr Castellà Andreu and Mr Otty, accompanied by Mr Janssen from the Secretariat, visited Ankara to meet with representatives of the Ministry of Justice, the Constitutional Court, the Ministry of the Interior, the Supreme Election Council, the major political parties represented in Parliament, as well as with representatives of civil society.
4. This opinion was drafted on the basis of comments by the rapporteurs and the results of the visit to Ankara. It was adopted by the Council for Democratic Elections at a virtual meeting held on 15 June 2020 and by the Venice Commission on 18 June 2020, through a written procedure which replaced the 123rd Plenary session in Venice, due to the COVID-19 disease.

## II. Background

5. Local elections in Turkey took place on 31 March 2019 and a re-run of the metropolitan mayoral election in Istanbul took place on 23 June 2019. The elections were held to elect Provincial and Municipal Councillors, Mayors of regular municipalities as well as Metropolitan municipalities, including Istanbul, Ankara and other large cities, as well as Mukhtars and members of Alderman Councils in villages and city neighbourhoods. The elections were observed by the Congress of Local and Regional Authorities of the Council of Europe (hereafter: the Congress).<sup>1</sup>
6. Unlike the presidential and parliamentary elections held in June 2018, the 2019 local elections were not conducted under the state of emergency first declared after the July 2016 failed coup attempt and which had ceased after the elections in 2018. That said, as the Congress noted in its election observation report, “mass arrests and prosecution of more than 100,000 persons, including many journalists among others, and dismissals of more than 150,000 civil servants<sup>2</sup> by emergency decrees were still resonating in the society, affecting especially the judiciary where about one third of civil servants had been dismissed. Last but not least, many of the measures adopted during the state of emergency had, in the meantime, been made regular laws and thus relevant provisions became applicable also in the 2019 local elections.”<sup>3</sup>
7. The Congress report also stated “of special concern for the Congress were the concrete impacts of the state-of-emergency measures on the local self-government in Turkey. Dozens of local elected Mayors and Councillors (mostly from the HDP<sup>4</sup>) in more than fifty towns, especially in the south-east of the country, were placed in pre-trial detention on grounds of accusations of

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<sup>1</sup> See the Congress election observation report of 31 October 2019, CG37(2019)14:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680981fcf> .

<sup>2</sup> In their comments on the draft opinion, the Turkish authorities indicated that the correct number of dismissed civil servants was 125.678.

<sup>3</sup> Ibid., paragraph 8.

<sup>4</sup> Peoples' Democratic Party

terrorist links and were replaced with trustees appointed by the central authorities.”<sup>5</sup> According to the Congress report, “around 125,000 persons were not eligible to run in the local elections on grounds of having been dismissed from office by state-of-emergency decrees, mostly due to terrorism-related charges.”<sup>6</sup>

8. The Congress report also includes statements on several developments during the post-election period, including those which are the subject of the present opinion.

9. The first development was that on 11 April 2019, the Supreme Election Council (SEC) decided (by a majority) to deny the mayoral mandates of six successful HDP candidates in the district municipalities of Diyarbakır, Erzurum, Kars and Van. The SEC ordered that, instead, candidates that came second, all of them from the ruling AK Party,<sup>7</sup> should take up these mandates. These decisions were said to be justified on the basis that these HDP candidates had been dismissed from public office in 2016 during the state of emergency by virtue of several decree laws asserting that they were associated with the failed coup attempt / terrorism<sup>8</sup> (in addition to the six HDP mayors at least<sup>9</sup> 62 HDP municipal and provincial councillors were also denied their mandates after being elected in the local elections).

10. According to the information available to the rapporteurs, the SEC decisions for the six different candidates are virtually identical,<sup>10</sup> and they include two dissenting opinions.<sup>11</sup> During the meetings in Ankara it was explained to the rapporteurs that in some of those cases, the respective District Elections Boards (DEB) which are normally competent to hand over the election certificates had doubts about the legal situation and therefore referred the cases to the SEC; in some other cases, the decisions of the respective DEBs to recognise the HDP candidates as elected mayors were appealed by the AK Party to the SEC.

11. The HDP filed appeals against the SEC decisions to the SEC – which dismissed them – and to the Constitutional Court – which considered that it had no jurisdiction to hear such appeals. Appeals were then made by elected mayoral candidates individually, which are pending at the Constitutional Court. Representatives of the Court informed the rapporteurs that a decision on the admissibility of the latter appeals had not yet been made. It is to be noted that pursuant to Article 79, paragraph 2(2) of the Constitution “no appeal shall be made to any authority against the decisions of the Supreme Election Council”. The Constitutional Court had previously stated that SEC decisions could therefore not be subject to an individual application to the Court. There is accordingly at least a real prospect that the Constitutional Court will in due course reject these appeals as also falling outside its jurisdiction. The rapporteurs were informed that for that reason, one of the candidates for municipal councillor whose mandate was also denied by the SEC had submitted an application direct to the European Court of Human Rights where the case is currently pending.<sup>12</sup>

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<sup>5</sup> CG37(2019)14, paragraph 9.

<sup>6</sup> Ibid., paragraph 35.

<sup>7</sup> Justice and Development Party

<sup>8</sup> The relevant provisions of the different decree laws are identical.

<sup>9</sup> The exact number of councillors concerned could not be clarified as the rapporteurs were provided with conflicting information.

<sup>10</sup> See the reference document CDL-REF(2020)020 which reproduces one of the six SEC decisions.

<sup>11</sup> According to the dissenting opinions, the decision by the majority conflicted, inter alia, with the requirement of legal certainty and legal security as the law did not clearly provide, prior to the elections, that previous dismissal from public service by emergency decree law would result in ineligibility; in their view, the elections in the districts concerned should be repeated.

<sup>12</sup> According to the case law of the ECtHR Article 3 of the First Additional Protocol to the ECHR is in principle not applicable to elections for local authorities. The applicant therefore referred to other Articles of the Convention and argued that as a result of the decision by the SEC, he was barred from standing in any elections for life. In his view, this was equivalent to a criminal charge in the meaning of Article 6 of the ECHR and that those restrictions on his professional life also violated his right to respect for his private life. He claimed a violation of Articles 6, 8, in conjunction with Articles 14 and 18, and 13 of the ECHR. It will be up to the Court to decide on this matter (if it considers the application admissible).

12. The Congress President stated that the decisions of the SEC were “contrary to the principle of fairness in elections where rules that applied prior to the Election Day must also apply after the E-Day. Candidates who were [...] admitted to running in elections must also have the effective right to carry out their mandate if elected.”<sup>13</sup> Concerns were also expressed by the Secretary General of the Council of Europe,<sup>14</sup> with respect to rule of law standards and the general principles of democracy, and by the European Commission in its 2019 Report on Turkey. The latter stated that the decisions by the SEC “are a source of serious concern regarding the respect of the legality and integrity of the electoral process and the institution’s independence from political pressure. They go against the core aim of a democratic electoral process – that is to ensure that the will of the people prevails.”<sup>15</sup>

13. The second development was that on 19 August 2019 elected mayors of the three metropolitan cities Diyarbakır, Mardin and Van (all of them from HDP) – i.e. the most populous cities in the southeast and eastern provinces, and the only metropolitan cities with HDP mayors – were suspended from office by order of the Ministry of the Interior and replaced by the governors of those regions as “trustees”.<sup>16</sup> These decisions were said to be based on the fact that terrorism-related criminal investigations and prosecutions had been launched against the mayors. The Ministry of the Interior referred to Article 127 of the Constitution and to Articles 45 and 47 of the Municipality Law No. 5393; relevant provisions of the Emergency Decree Law No. 674 allowing for such replacements had been incorporated in Article 45 of the Municipality Law in November 2016. The Ministry published a statement which includes the text of the decisions of 19 August 2019.<sup>17</sup> The mayors concerned filed appeals to the local administrative courts where they are still pending. As for the criminal proceedings, one of the three mayors concerned – the mayor of the metropolitan city Mardin – was acquitted by court decision of 14 February 2020 of some charges that had led to his suspension but at the time of finalisation of this report he had not yet been reinstated to office; in their comments on the draft opinion the Turkish Government indicated that part of the investigation and prosecution against him was still ongoing. By court decision of 9 March 2020, the mayor of the metropolitan city Diyarbakır was sentenced to imprisonment of 9 years, 4 months and 15 days.

14. In its Recommendation 439 (2019), the Congress invited the authorities of Turkey to make sure that “candidates admitted to run must be able to assume mandate if elected”.<sup>18</sup>

15. It should be noted that suspension of mayors and municipal and provincial councillors in the southeast and eastern regions of Turkey and their replacement by trustees had begun in 2016 under the state of emergency. Altogether 94 mayors have been removed from office.

16. The HDP won the majority of municipal offices affected by the trustee regime in the south-east of Turkey. Following the elections, replacement of elected mayors by trustees resumed with the decision of the Ministry of the Interior of 19 August 2019 referred to above. From then on a total of 32 HDP mayors – out of 65 – have been removed due to terrorism-related charges, such as alleged links to the armed PKK<sup>19</sup> (e.g. with reference to the offence of “making propaganda for a terrorist organisation”). According to the information available to the rapporteurs, the trustees appointed did not convene the local councils, an omission which was criticised by civil society

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<sup>13</sup> See the Congress election observation report of 31 October 2019, CG37(2019)14, page 21.

<sup>14</sup> Letter from the Secretary General of the Council of Europe to the President of the SEC, of 15 April 2019. See <https://rm.coe.int/image2019-04-16-171615-letter-addressed-to-mr-sadi-guven-president-of-/168093fe38>.

<sup>15</sup> Commission staff document SWD(2019) 220, p. 5. See <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-turkey-report.pdf>.

<sup>16</sup> In some documents, the term “curators” is used.

<sup>17</sup> See the reference document CDL-REF(2020)020.

<sup>18</sup> Recommendation 439(2019), paragraph 16.I. See: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680981f1cf>.

<sup>19</sup> The PKK is recognised as terrorist organisation by, inter alia, the EU and the USA.

organisations as preventing the councils from functioning.<sup>20</sup> It is understood that 23 of the suspended mayors remain in pre-trial detention, including the mayor of the metropolitan city Diyarbakır.

17. While the present opinion takes into account the context described above, it focuses in its analytical part on the decisions of 11 April and 19 August 2019 concerning the replacement of respectively six elected mayoral candidates and of three mayors, as the opinion request by the Congress was confined to those specific decisions.

### III. Standards

18. The Venice Commission has assessed the decisions by the SEC (11 April 2019) and the Ministry of the Interior (19 August 2019) in the light of relevant European and international standards, in particular:

- the European Charter for Local Self-Government<sup>21</sup> (ECLSG) which was ratified by Turkey on 9 December 1992;<sup>22</sup>
- the International Covenant on Civil and Political Rights<sup>23</sup> (ICCPR) which was ratified by Turkey in 2003. It includes the right to vote and be elected (Article 25), see also the corresponding General Comment 25 of the UN Committee on Human Rights<sup>24</sup> which makes it clear inter alia that any restrictions to the right to stand for election “must be justifiable on objective and reasonable criteria”. This article is applicable to local elections;<sup>25</sup>
- the European Convention on Human Rights<sup>26</sup> (ECHR); however, it must be noted that according to the European Court of Human Rights (ECtHR) Article 3 of the First Additional Protocol to the ECHR is in principle not applicable to elections for local authorities;<sup>27</sup>
- the Venice Commission’s Code of Good Practice in Electoral Matters;<sup>28</sup>
- the Venice Commission’s Rule of Law Checklist.<sup>29</sup>

19. Other documents published by the Venice Commission are also referred to, including the Opinion on the Provisions of the Emergency Decree-Law N° 674 of 1 September 2016 which concern the exercise of Local Democracy in Turkey.<sup>30</sup>

20. Reference is also made to the Constitution of Turkey.<sup>31</sup> As indicated above, however, the decisions by the SEC have been challenged before the Constitutional Court (with a decision as to admissibility awaited) and the Commission does not purport to assess the substantive effect of Turkish law, confining its analysis, instead, to general principles of international law.

<sup>20</sup> See e.g. Human Rights Watch, 7 February 2019: <https://www.hrw.org/news/2020/02/07/turkey-kurdish-mayors-removal-violates-voters-rights>.

<sup>21</sup> See <https://rm.coe.int/16807198a3>.

<sup>22</sup> Turkey ratified the Charter on 9 December 1992. The Charter entered into force in respect of Turkey on 1 April 1993. Upon ratification, Turkey made the following declaration: “In accordance with Article 12, paragraph 2 of the Charter, the Republic of Turkey declares to consider herself bound by the following Articles and paragraphs : - Article 2 - Article 3, paragraphs 1 and 2 - Article 4, paragraphs 1, 2, 3, 4 and 5 - Article 5 - Article 6, paragraph 2 - Article 7, paragraphs 1 and 2 - Article 8, paragraphs 1 and 2 - Article 9, paragraphs 1, 2, 3, 5 and 8 - Article 10, paragraph 1.”

<sup>23</sup> See <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

<sup>24</sup> See <https://www.osce.org/odihr/elections/19154?download=true>.

<sup>25</sup> See e.g. UN Committee for Human Rights (HRC), *Antonina Ignatane v. Latvia*, no. 884/1999, 31 July 2001: <https://juris.ohchr.org/Search/Details/933>.

<sup>26</sup> See [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>27</sup> See ECtHR, *Cherepkov v. Russia*, no. 51501/99, 25 January 2000.

<sup>28</sup> CDL-AD(2002)023rev2-cor, see [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)023rev2-cor-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev2-cor-e).

<sup>29</sup> CDL-AD(2016)007, see [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e).

<sup>30</sup> CDL-AD(2017)021, see: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)021-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)021-e).

See also the Opinion on the Emergency Decree Laws Nos. 667-676 adopted following the failed coup attempt of 15 July 2016, CDL-AD(2016)037: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)037-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)037-e).

<sup>31</sup> English version available in CODICES, see

<http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm> <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>

## IV. Analysis

### A. The decisions by the SEC (11 April 2019)

21. The Venice Commission has examined whether the decisions by the SEC to deny the mayoral mandates of six successful HDP candidates and to assign those mandates to second placed election candidates were in conformity with basic standards of democracy and the rule of law reflected in international law and previous Venice Commission guidance.

#### 1. The principle of free suffrage

22. Representative democracy is exercised through elections which, according to Article 25(b) of the ICCPR and other international standards must guarantee the free expression of the will of the electors.<sup>32</sup> The candidates which were replaced by the SEC had been admitted to registration and elected in conformity with the law, which provides that “the candidate taking majority of the votes is elected as mayor”,<sup>33</sup> and is an expression of the principle of free suffrage. The purpose of elections is, of course, to let the people choose their representatives. The decisions by the majority of the SEC not to recognise the six successful mayoral candidates and to declare the second placed candidates (all belonging to another political party) deprived the people of their right to choose and were in clear contradiction with the expressed will of the people.

23. International standards<sup>34</sup> make it clear that a failure to comply with electoral law (including with respect to decisions made before the elections, inter alia in connection with the right to stand for election and the validity of candidacies) must be open to challenge before an appeal body,<sup>35</sup> and that in cases where irregularities may have affected the outcome the appeal body must have authority to annul elections (entirely or partly, in the electoral zones affected). These standards do not, however, sanction measures such as those in issue in the present context, namely the direct replacement of the winning candidates with the second placed candidates.

24. The Venice Commission is aware of the terrorist threat in the South-Eastern part of Turkey. Such a threat may justify unusual measures, including the removal of elected officials, who might use their office to favour terrorist activities. Any such measures must, however, respect the relevant legal provisions, be based on evidence and be proportionate to the aim pursued. This aim can in the Commission’s view never justify simply replacing the elected candidates by candidates who have lost the election and it is notable that one of the dissenting opinions to the SEC decisions contended that fresh elections should be held.

25. The Venice Commission agrees with the above-mentioned statement of the then Secretary General of the Council of Europe<sup>36</sup> according to which the decision to recognise as the winners of the elections those who have received the second highest number of votes “goes against the general principles of democracy”, and that the aim of electoral legislation in a democracy is “that the will of the people is respected and not thwarted”.

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<sup>32</sup> See also e.g. Article 3 of the First Additional Protocol to the ECHR.

<sup>33</sup> Article 22.1 of the law on elections of local administrations and neighbourhood mukhtars and board of eldersmen.

<sup>34</sup> See in particular the Code of Good Practice in Electoral Matters, section II.3.3 and paragraphs 92ff. of the Explanatory Report.

<sup>35</sup> See also the Amicus curiae brief for the European Court of Human Rights in the case of *Mugemangango v. Belgium* on procedural safeguards that a State must provide in the framework of a procedure for contesting the outcome of an election or the distribution of seats, CDL-AD(2019)021: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)021-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)021-e).

<sup>36</sup> Letter from the Secretary General of the Council of Europe to the President of the SEC, of 15 April 2019.

## 2. The principle of rule of law

26. The rule of law is a concept of universal validity which was endorsed *inter alia* by all Member States of the United Nations in the 2005 Outcome Document of the World Summit<sup>37</sup> (§ 134) and which is mentioned in the Preamble to the Statute of the Council of Europe<sup>38</sup> as one of the three “principles which form the basis of all genuine democracy”, together with individual freedom and political liberty. The rule of law has been consistently referred to in the major political documents of the Council of Europe, as well as in numerous Conventions and Recommendations, and is mentioned as an element of common heritage in the Preamble to the ECHR. Likewise, Article 2 of the Constitution of Turkey declares that Turkey is a state governed by the rule of law.

27. The Rule of Law Checklist, drafted by the Venice Commission, is now established as the primary reference document of the Council of Europe in the field and it details the various conditions necessary for the implementation of the rule of law. One of the basic elements of this concept is legality, which includes the principles of supremacy of the law and compliance with the law: “State action must be in accordance with and authorised by the law” and it is required “that the powers of the public authorities are defined by law.”<sup>39</sup> Furthermore, the rule of law requires legal certainty, which includes the principle of foreseeability of the laws: the law must “be proclaimed in advance of implementation” and “be formulated with sufficient precision and clarity to enable legal subjects to regulate their conduct in conformity with it.”<sup>40</sup> Legal certainty also requires consistency of law and respect for the principle of legitimate expectations.<sup>41</sup>

28. The two-fold decisions by the SEC are assessed below in light of these standards.

### a. Denial of the mayoral mandates of six successful HDP candidates

29. The SEC in its decisions of 11 April 2019 invokes the ineligibility of the elected candidates, due to their previous prohibition from public service by decree law. This raises questions about the legal basis for such *ex post* decisions, about the eligibility of the six candidates, and about the foreseeability of the decisions made.

#### *Legal basis for denying mayoral mandates*

30. As a starting point, it should be noted that there is no provision in Turkish law which would explicitly give the election commissions or the SEC the competence not to hand over the election certificate to an elected candidate in cases where ineligibility is invoked after the elections.<sup>42</sup> Article 22 of the Law on Local Elections<sup>43</sup> regulates the determination of mayors and states that “minutes on mayor elections sent by ballot box committees are combined by the District Election Board<sup>44</sup> and the candidate taking the majority of the votes is elected as mayor” (paragraph 1). The law does not provide for any exception to this rule. Annulment of election results in an electoral district – and repeat elections in that district – is possible under Articles 25 and 29 of the Law on Local Elections, but only in situations where irregularities occur during the election process. The situation is different in the present case where an initial ineligibility said to have

<sup>37</sup> See

[https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_60\\_1.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf).

<sup>38</sup> See <https://rm.coe.int/1680306052>.

<sup>39</sup> CDL-AD(2016)007, paragraphs 44f. with further references.

<sup>40</sup> *Ibid.*, paragraph 58 with further references.

<sup>41</sup> *Ibid.*, paragraphs 60f. with further references.

<sup>42</sup> In their comments on the draft opinion, the Turkish Government referred in this respect to the general administrative law of Turkey according to which “the authority carrying out an administrative act is also authorised to lift, modify or revoke the same act.”

<sup>43</sup> Law No. 2972 on Election of local administrations and neighbourhood mukhtars and board of eldersmen (hereafter: Law on Local Elections).

<sup>44</sup> “DEB”

existed *prior* to the commencement of the electoral process has been invoked. For cases of ineligibility, the legal framework regulates the following two situations.

31. First, prior to elections the DEBs check the candidacies, and objections to candidacies can be raised to the DEBs within two days following the provisional announcement of candidacies. In case of deficiencies being detected, political parties and independent candidates are given the opportunity to remedy them, see Articles 14ff. of the Law on Local Elections. Pursuant to Article 125, paragraph 4 of the Law No. 298 on Basic Provisions on Elections and Voter Registers (hereafter: Law on Basic Provisions), objections to the decisions of the relevant election boards can be addressed to their superior boards whose decisions are final. Article 130, paragraph 6 of that law makes it clear that once the candidacy is finalised, it is not possible to raise an objection, excluding the cases claiming that the candidate is not a Turkish citizen, or s/he is younger than the age stated by law, or s/he is illiterate, or s/he has convictions that result in the loss of eligibility for elections.” In the case of the six HDP mayors, no objections had been raised to their candidacies before the elections and they were approved by the DEBs.”

32. Second, if an elected mayor at a later moment loses his/her eligibility for election, he or she shall lose his/her office by decision of the Council of State upon an application by the Ministry of Interior.<sup>45</sup> Again the situation is different in the present case where the SEC made the decision on the grounds of initial *prior* ineligibility of the candidates.

33. The Venice Commission understands that the above provisions constitute an exhaustive legal framework and no other relevant provisions have been drawn to its attention. The SEC in its decisions of 11 April 2019 points out that under Article 79, paragraph 1 of the Constitution it has the general competence to “execute all the functions to ensure the fair and orderly conduct of the elections from the beginning to the end of polling, carry out investigations and take final decisions on all irregularities, complaints, and objections concerning the elections during and after the polling, and verify the election returns of the members of the Turkish Grand National Assembly.” However, paragraph 2 of that Article states that “the functions and powers of the Supreme Election Council and other election councils shall be determined by law”, and it is highly questionable whether the general competence under paragraph 1 gives the SEC the power to make decisions – such as not to hand over election certificates to elected candidates – which are not envisaged in the otherwise exhaustive legal framework. This would in itself raise serious concerns with respect to basic rule of law requirements such as legality, legal certainty and foreseeability of the laws. In addition, it should be noted that Article 79 of the Constitution is part of the chapter on the National Parliament and it therefore seems doubtful whether it addresses questions of competencies relating to local elections.

#### *The question of ineligibility*

34. The next question to be assessed is whether the Turkish legal framework provides for a clear basis to conclude that the mayoral candidates were indeed ineligible. The SEC in its decision of 11 April 2019 refers to Article 76 of the Constitution, according to which, *inter alia*, persons who are banned from public service or have been convicted for specified crimes – including terrorism-related crimes – shall not be elected as a deputy (local elections are not mentioned in this Article). As far as ordinary legislation is concerned, Articles 9 and 31 of Law on Local Elections refers to Article 11 of Law on Parliamentary Elections<sup>46</sup> which provides for ineligibility *inter alia* of “those who are sentenced for committing a felony for a year or more” and also of “those who are prohibited from public services”.

35. In the matter at hand, the six HDP candidates had not been the subject of any final criminal conviction – according to the information available to the rapporteurs, one of the six mayoral

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<sup>45</sup> See Article 44, paragraph 2 of the Municipality Law No. 5393.

<sup>46</sup> Law No. 2839, see CDL-REF(2018)033.

candidates had been criminally convicted in the first instance but the appeal was pending at the court at the time of the local elections – but had (along with many thousands of other individuals) instead been prohibited by decree law from being employed in a public service. On one reading of Article 76 of the Constitution this could be considered sufficient to establish ineligibility. However, during the meetings held by the rapporteurs in Ankara all relevant interlocutors – including SEC representatives – consistently indicated that the terms “banned from public service” in the meaning of the above ineligibility provisions presupposed an individual criminal conviction and an individual decision by a court and could not be interpreted as extending to individuals listed, alongside many others, in a government decree and barred from public office by generalised assertions alone. For that reason, on 28 May 2018 the SEC had unanimously rejected objections against several candidates for parliamentary elections who had equally been prohibited from being employed in a public service by emergency decree law, due to terrorism-related charges.<sup>47</sup> Subsequently 10 such candidates have been elected and are currently deputies in the National Parliament.

36. Nevertheless, in its decisions of 11 April 2019 regarding local elections the SEC changed its position and treated the prohibition from being employed in a public service by decree law as a ground for ineligibility, even though this is not expressly included in the law (a fact that was highlighted by the dissenting opinions) and the legal ineligibility conditions for the election of MPs and local officials are the same. It seems that the SEC based this position directly on the relevant decree laws<sup>48</sup> and not on the above-mentioned eligibility provisions. In this connection, it referred to a decision made by the Council of State in 2017<sup>49</sup> – i.e. prior to its own, contrary decision of 2018 concerning MPs – according to which the prohibition of a municipal council member from public service due to terrorism-related charges led to the loss of eligibility.<sup>50</sup>

37. In the contrary decisions of 28 May 2018 referred to above the SEC had also concluded that the terms of the prohibition from public service by virtue of the emergency decree laws – according to which those dismissed from public services shall no longer be “employed in a public service”<sup>51</sup> – did not cover the situation of MPs, as they were not employed in public services with administrative functions. The author of one of the dissenting opinions included in the SEC decisions of 11 April 2019 argued that the Council of State had set a precedent not only for MPs but also for mayors, who are likewise elected by the people and not employed in a public service (in the absence of an employer). It seems that this question is subject to discussion in Turkey, among practitioners and academics.

38. While it is not for the Venice Commission to decide on these details of the national legislation, it is seriously concerned that a decision of fundamental importance – which interferes with the candidates’ right to be elected and the respect of the will expressed by the voters – is taken on such an uncertain legal basis. This is a matter of concern with respect to rule of law requirements such as legality, legal certainty and foreseeability of the laws.

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<sup>47</sup> SEC Decisions No. 613, 614 and 615 of 28 May 2018. In their comments on the draft opinion, the Turkish Government stated that the diverging SEC decision in the case of local elections was justified by the “principle of the integrity of the administration and status of local administration explained in Articles 123, 127 and 128 of the Constitution” and by the established jurisprudence of the Council of State according to which “the mayors and municipal council memberships are listed among the ‘public service providers’ while no such qualification is attributed to the members of parliament in the decisions of the Council of State or the SEC.”

<sup>48</sup> See e.g. Article 1, paragraph 2 of the Decree law No. 701: “[...] those dismissed from public services [...] shall not anymore be [...] employed in a public service [...]”.

<sup>49</sup> Decision No. 2017/7088 of 12 October 2017.

<sup>50</sup> It should be noted that Article 29 of the Municipality Law, on which the decision by the Council of State was based, concerns a different situation than in the present case: namely, it concerns membership in the municipal council and not the office of mayor; and it regulates loss of eligibility of a member in office, not initial ineligibility. Moreover, it is to be noted that under Article 29 of the Municipality Law the Council of State – and not the SEC – is competent to take a decision, upon notification by the governor.

<sup>51</sup> See e.g. Article 1, paragraph 2 of the Decree law No. 701.

39. In this context, the Venice Commission also draws attention to international standards on ineligibility. The Code of Good Practice in Electoral Matters (section I.1.d.) clearly states that deprivation of the right to vote and to be elected should be subject to several cumulative conditions. Amongst other matters it must be based on mental incapacity or a criminal conviction for a serious offence and must be imposed by express decision by a court of law. Neither of these conditions is satisfied in the present case: As mentioned earlier, it seems that the candidates in question had not been criminally convicted, and there has not been an express decision<sup>52</sup> – before the elections – that they would be ineligible; the decree laws prohibiting them from public service did not include an express decision on the question of eligibility (and as seen above, they did not hinder other persons concerned by the prohibition from being elected as MPs).

40. As for Article 25 of the ICCPR, this provision makes it clear that any restrictions to the right to stand for election “must be justifiable on objective and reasonable criteria” and “persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation.”<sup>53</sup> Regarding Article 3 of the First Additional Protocol to the ECHR, even if it is not directly applicable to elections for local authorities, the general principles on the right to be elected as developed by the ECtHR are noteworthy and capable of providing at least analogous guidance: any interference with this right constitutes a violation unless it satisfies the requirements of lawfulness, pursues a legitimate aim and is proportionate.<sup>54</sup>

41. In the matter at hand the aforementioned conditions for restricting the right to be elected have not been respected, in light of the fact that a) there was no clear legal basis for concluding on ineligibility of the candidates; b) the candidacies had been validated before the elections; c) no final decision of courts had been reached on the criminal charges against the six mayoral candidates; and d) the ground for ineligibility invoked *ex post* by the SEC had been the prohibition from public service by decree law: the Venice Commission<sup>55</sup> and a number of other bodies had also expressed serious concerns about the dismissals of civil servants through the emergency decree laws, which also formed the basis for their life-long prohibition from public service.

42. These concerns were inter alia related to the fact that the Government had taken permanent measures, which went beyond a temporary state of emergency: civil servants were dismissed, not merely suspended, and they were prohibited from public service for the rest of their life; tens of thousands of public servants had been dismissed – and prohibited from public service – collectively on the basis of the lists appended to the emergency decree laws which were not individualised, i.e. they did not refer to verifiable evidence related to each individual and described in the decisions; basic rights of administrative due process of the public servants dismissed by the decree laws or on their basis had not been respected. Finally, doubts had been expressed about the access to justice for those public servants who had been dismissed directly by the decree laws.<sup>56</sup>

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<sup>52</sup> As for the criterion “by a court of law”, the Venice Commission has later declared that following the recent case-law of the ECtHR, this passage should not be taken literally, as imposing a specific judgment in each case. See the Report on exclusion of offenders from Parliament, [CDL-AD\(2015\)036](#), paragraph 24.

<sup>53</sup> See General Comment 25 of the UN HRC, paragraph 15. According to the case law of the UN HRC if conviction for an offence is a basis for suspending the right to stand for office, “such restriction must be proportionate to the offence and the sentence”, and the judicial proceedings resulting in the conviction must not violate the right to a fair trial. See e.g. *Andrés Felipe Arias Leiva v. Columbia*, no. 2537/2015, 27 July 2015 (paragraph 11.6).

<sup>54</sup> See e.g. ECtHR, *Selahattin Demirtaş v. Turkey* (no. 2), no. 14307/17, 20 November 2018 (paragraph 233); *Paksas v. Lithuania* [GC], no. 34932/04, 6 January 2011 (paragraph 97); ECtHR, *Podkolzina v. Latvia*, no. 46726/99, 9 April 2002 (paragraph 35).

<sup>55</sup> See Opinion on the Emergency Decree Laws Nos. 667-676 adopted following the failed coup attempt of 15 July 2016, CDL-AD(2016)037 (paragraphs 227f.). See also Opinion on the Provisions of the Emergency Decree-Law N° 674 of 1 September 2016 which concern the exercise of Local Democracy in Turkey, CDL-AD(2017)021.

<sup>56</sup> It must be noted, however, that following the adoption of the Venice Commission’s opinions, the State of Emergency Inquiry Commission was established in order to provide for access to justice. The Commission was recognised as a domestic remedy to be exhausted by the ECtHR (cf. the case of *Köksal v. Turkey*, Application no.70478/16). During the meetings in Ankara, the rapporteurs’ attention was drawn to substantial delays involved in applications to the Inquiry

43. Given the preceding paragraphs, the Venice Commission is of the view that it should be made clear in the law that ineligibility of an election candidate on the grounds of prohibition from public service requires a final individual criminal conviction by a court for a serious offence as well as an express decision on the candidate's ineligibility prior to the elections.

*The problem of contradictory announcements and decisions*

44. Finally, it is highly problematic that the decisions to deny the mayoral mandates and their confirmation by the SEC were contrary to the preceding decisions to admit the candidates for election. As has been mentioned earlier, the Law on Local Elections provides that prior to elections the DEBs check the candidacies, and objections against candidacies can be raised to the DEBs within two days following the provisional announcement of candidacies.<sup>57</sup> In the absence of any objections in the present case, the candidacies became final. This procedure should ensure that only eligible candidates are registered and that both the candidates and the electorate can rely on this.

45. The *ex post* decision by the SEC conflicts with major rule of law requirements including legality, legal certainty and foreseeability of the laws, and the principle of legitimate expectations. According to the latter, "those who act in good faith on the basis of law as it is, should not be frustrated in their legitimate expectations. However, new situations may justify legislative changes ... frustrating legitimate expectations in exceptional cases. This doctrine applies not only to legislation but also to individual decisions by public authorities."<sup>58</sup>

46. In the current situation, the mayoral candidates – as well as their parties and the electorate – had the legitimate expectation that once admitted to the election they would become mayors if they gained the majority of votes, given that their candidacies had been checked and validated. Moreover, the candidates were aware of the fact that other persons prohibited from public service had been elected to the National Parliament. In addition, the rapporteurs were informed that during the period of candidacy for the local election, the SEC had not raised this issue, i.e. the prohibition from public service by decree law as a ground for ineligibility. On the contrary, on 15 January 2019 it announced the conditions and documentation to be submitted to prove the eligibility for standing in local elections.<sup>59</sup> These included e.g. a criminal record to verify any previous conviction of a person but no documentation to verify whether a person had been subjected to a sanction by emergency decrees. Finally, it must be stressed that no change in the legal situation occurred after the validation of the candidates which might have justified a deviation from the principle of legitimate expectations.

47. In this context, it is also important to note that in case of deficiencies detected during the process of candidate verification by DEBs prior to elections, political parties and independent candidates are given the opportunity to remedy them.<sup>60</sup> This opportunity was not provided in the present case where alleged deficiencies were only declared by the DEBs and the SEC after the elections.

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Commission to overturn dismissals. By contrast, the Turkish Government stressed that as of 7 May 2020, the Commission had delivered 106.060 decisions (i.e. in 85% of the 126.300 cases referred to it). The Turkish Government furthermore indicated that it was possible to file a lawsuit in the judiciary against the decisions of the Inquiry Commission and that individual applications could be submitted to the Constitutional Court.

<sup>57</sup> See Articles 14ff. of the Law on Local Elections. See also Article 125, paragraph 4 of the Law on Basic Provisions, according to which objections against the decisions of the relevant election boards can be made to their superior boards whose decisions are final. Finally, according to Article 130, paragraph 6 of that law, once the candidacy is finalised it is not possible to raise an objection, except for certain enumerated cases which do not include ineligibility due to ban from public service.

<sup>58</sup> Rule of Law Checklist, CDL-AD(2016)007, paragraph 61 with further references.

<sup>59</sup> SEC decision No. 2019/116 of 15 January 2019.

<sup>60</sup> See Articles 14f. of the Law on Local Elections.

48. In the same vein the Commission notes the above-mentioned statement of the Congress President according to which the decision of the SEC was “contrary to the principle of fairness in elections where rules that applied prior to the Election Day must also apply after the E-Day. Candidates who were [...] admitted to running in elections must also have the effective right to carry out their mandate if elected.”<sup>61</sup> This principle of fairness in elections is reflected both in international and national standards and provisions outlined below.

49. First, General Comment 25 of the UN Human Rights Committee (HRC)<sup>62</sup> makes it clear that in conformity with Article 25(b) of the ICCPR, “elections must be conducted fairly and freely”, and that “an independent electoral authority should be established [...] to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant.”<sup>63</sup> Second, one of the dissenting opinions included in the SEC decision also mentions the principle of fairness in elections by reference to the Constitution of Turkey. Namely, Article 67, paragraph 5 states that “[...] the electoral laws shall be drawn up in such a way as to reconcile the principles of fair representation”, and Article 79, paragraph 2 stipulates that the SEC is “to ensure the fair and orderly conduct of the elections [...]”. Consistently with the dissenting opinion’s reading of the principle of fairness in elections under the Constitution of Turkey, the Venice Commission regards the international standards of “fairness” in the Covenant as requiring that in the absence of a clear regulation prior to the elections, and bearing in mind that no opportunity was given to political parties to change their candidates, the competent electoral authorities should have either recognised the elected candidates or annulled and repeated the elections in the electoral zones concerned.

b. Assignment of the mayoral mandates to AK Party candidates

50. As with the denial of the mayoral mandates of successful candidates, there is no provision in Turkish law which would explicitly give the SEC the competence to assign those mandates to second placed candidates. The law only provides for repeat elections – in electoral zones affected by irregularities during the election process<sup>64</sup> - and for election by the municipal council of a new mayor, in case the office of mayor falls vacant at a later moment.<sup>65</sup>

51. The majority of the SEC grounded its decisions of 11 April 2019 on Article 16 of the Law on Local Elections, by way of analogy. This Article concerns the resignation of a candidate and stipulates that “after the announcement of candidacies, resignation from candidacy will not be taken into account until the end of elections. But in case these candidates are elected, their resignations are considered as verdicts and the ones following them are considered elected. In case of death, the same method is applied.”

52. The Venice Commission considers that as a matter of general principle consistent with legal certainty this kind of reasoning by analogy is only permissible if a situation has unintentionally not been regulated by the legislator and the relevant situation is comparable to the situation dealt with in the purportedly analogous provision. This is highly doubtful in the present case. As already indicated the rationale behind the relevant election legislation seems to be that deficiencies in candidacies should be dealt with prior to elections, whereas irregularities during the voting process should be remedied thereafter. This seems to be a consistent and

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<sup>61</sup> See the Congress election observation report of 31 October 2019, CG37(2019)14, page 21.

<sup>62</sup> See paragraphs 19 and 20.

<sup>63</sup> See also the case law of the ECtHR, according to which “the procedure for ruling a candidate ineligible must be such as to guarantee a fair and objective decision”: *Podkolzina v. Latvia*, no. 46726/99, 9 April 2002 (paragraph 35).

<sup>64</sup> See Articles 25 and 29 of the Law on Local Elections.

<sup>65</sup> See Article 45 of the Municipality Law. A different procedure has been introduced by Emergency Decree Law No. 674 for cases where an acting mayor, deputy mayor or council member is suspended from duty or detained or banned from public service or his/her position as a mayor or member of council terminates due to the offences of aiding and abetting terrorism and terrorist organisations: a new mayor, deputy mayor or council member shall then be assigned by specified authorities.

exhaustive approach. Moreover, in the present context the suggested need to identify a mayor different from the winner of the elections does not relate to the person of the candidate (such as resignation or death) but it is instead brought about by the contradictory decisions of the relevant election bodies (first in permitting a candidate to stand for election and secondly in refusing then to certify his/her status following success in the election). Grounding such a far-reaching decision – which is contrary to the basic democratic principle that the candidate with the highest number of votes is considered elected and which interferes with the rights and interests of the candidates, of their parties and of the electorate – on such a questionable legal analogy raises serious concerns with respect to the internationally recognised rule of law principle in terms of legality, legal certainty and foreseeability.<sup>66</sup>

53. The majority of the SEC also refers to two previous decisions, of 1963 and 2014.<sup>67</sup> In those decisions, the SEC had already taken the view that if the election of a mayoral candidate is annulled upon objection for reasons having their root in the pre-election period, the candidate with the second highest number of votes shall be deemed to have been elected. The Venice Commission does not however consider that those decisions can be said to provide a sufficiently clear legal basis and the Commission has serious doubts as to whether these earlier decisions were themselves compatible with international standards of democracy and the rule of law for similar reasons to those explained in the present opinion. In addition, it is emphasised that the present case is specific in the sense that the election bodies had first validated the candidacies and later annulled them for reasons which were already publicly known before the elections and at the time of approval of candidacy.

54. In view of the preceding paragraphs, the Venice Commission recommends the recognition of the election of the six mayoral candidates who had received the highest number of votes during the local elections of 31 March 2019 in the district municipalities of Diyarbakır, Erzurum, Kars and Van but who had been denied the mayoral mandate by SEC decision of 11 April 2019.

### **B. The decisions by the Ministry of the Interior (19 August 2019)**

55. The Ministry of the Interior has based its decision to remove from office the elected mayors of the three metropolitan cities Diyarbakır, Mardin, and Van on the following provisions.

- Article 127, paragraph 4 of the Constitution:  
*“Loss of status and objections regarding the acquisition of the status of elected organs of local administrations shall be decided by judiciary. However, as a provisional measure until the final court judgment, the Minister of the Interior may remove from office those organs of local administration or their members against whom an investigation or prosecution has been initiated on grounds of offences related to their duties. [...]”*

Article 47, paragraph 1 of the Municipality Law:

*“Municipal organs or members thereof in respect of which or whom an investigation or prosecution is initiated on account of an offence connected with their duties may be suspended from office by the Minister of the Interior pending the final judgment.”<sup>68</sup>*

<sup>66</sup> See e.g. the Rule of Law Checklist, CDL-AD(2016)007, paragraphs 44ff. with further references.

<sup>67</sup> SEC decision no.2014/1167 of 8 April 2014 and decision no. 1963/226 of 9 November 1963.

<sup>68</sup> Paragraphs 2 to 4 of that Article read as follows:

*“The decision of suspension from office shall be reviewed every two months. If the continuation of suspension from office no longer serves the public interest, it shall be lifted.*

*The decision on suspension from office shall be lifted in the cases where no prosecution is initiated, or the public case is dismissed or ends in acquittal, or lapses due to general amnesty, or ends in a conviction for an offence which does not require removal from office.*

*A suspended mayor shall receive two thirds of his/her monthly allowance for the period of suspension from office and continue to enjoy his/her other social rights and benefits.”*

56. The decision to assign the mayoral mandates to trustees is based on Article 45, paragraph 1 in conjunction with Article 46 of the Municipality Law. The following passage was added to this paragraph in 2016 during the state of emergency by Decree Law No. 674,<sup>69</sup> in order to provide for a special procedure for the assignment of mayors, deputy mayors and council members.

- Where a mayor or a deputy mayor or a local council member “*is suspended from duty or detained or banned from public service or his/her position is terminated due to the offences of aiding and abetting terrorism and terrorist organisations*”, it will not be up to the municipal council to elect a mayor or deputy mayor, as normally required by the preceding text of that paragraph in case of a vacancy.
- According to the new text, in that specific case the mayor or deputy mayor or the council member shall be assigned by the authorities listed in Article 46 i.e. the Minister of the Interior (in the greater cities and provincial municipalities) or the provincial governor (in other municipalities). The only condition that the new text lays down is that the person to be assigned to one of these positions should be eligible for that position.

### **1. Concerns about the legal framework expressed in previous opinions**

57. With respect to this legal framework, the Venice Commission refers to its previous relevant opinions, in particular the Opinion on the Provisions of the Emergency Decree-Law N° 674 of 1 September 2016 which concern the exercise of Local Democracy in Turkey<sup>70</sup> and the Opinion on the Emergency Decree Laws Nos. 667-676 adopted following the failed coup attempt of 15 July 2016.<sup>71</sup> The main concerns expressed therein with respect to international and national standards which are relevant for the present opinion are summarised below. As far as conformity with the Constitution of Turkey is concerned, the rapporteurs were informed that the Constitutional Court has rejected appeals against several emergency decree laws (No. 667, 668, 669, 670 and 671) and stated that it was not competent to decide on the constitutionality of such decree laws.<sup>72</sup> Following the adoption of their provisions by Parliament, norm review by the Court would in principle be possible<sup>73</sup> but no such application has been made to date with respect to the amendments to Article 45 of the Municipality Law.

#### **a. Legislative procedure**

58. The above-mentioned changes to Article 45 of the Municipality Law and some other provisions had been introduced by Decree-Law N° 674 issued on 1 September 2016. Pursuant to Article 121, paragraph 3 of the Constitution in conjunction with Article 128 of the Rules of Procedure of the National Parliament, the decree laws should be decided upon (approved or rejected) by Parliament within 30 days at the latest. According to the Turkish authorities, Decree-Law N° 674 was immediately submitted to Parliament for approval, but was only approved on 10 November 2016, 70 days after its enactment. The Commission stated that this was “a matter of great concern”, as it “has allowed the Government to legislate through the emergency decree laws without any parliamentary control for a period of over two months.”<sup>74</sup>

#### **b. Necessity and proportionality of the legislative changes**

59. The Venice Commission had noted that under Article 15 of the ECHR, any extraordinary limitations of human rights are permissible only “*to the extent strictly required by the exigencies*

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<sup>69</sup> The amendments were later approved by Parliament, in November 2016.

<sup>70</sup> CDL-AD(2017)021.

<sup>71</sup> CDL-AD(2016)037.

<sup>72</sup> See also the references in ECtHR, *Köksal v. Turkey*, no. 70478/16, 6 June 2017 (paragraph 12).

<sup>73</sup> Either through annulment action (abstract norm review) or contention of constitutionality (concrete norm review).

<sup>74</sup> CDL-AD(2016)037, paragraph 51; CDL-AD(2017)021, paragraph 47.

of the situation”<sup>75</sup> and that the measures issued by Decree-Law N° 674 had to be necessary, temporary and proportionate.<sup>76</sup> The same requirements for state of emergency measures are set by Article 4 of the ICCPR.<sup>77</sup> The Commission failed to see why the provisions in Article 45 of the Municipality Law in their original version – which provided inter alia for election by the municipal council of a deputy mayor, in case of suspension of a mayor – could not be deemed sufficient to fight terrorism, and “how suppressing the elective nature of organs of local authorities (with an impact on the people’s right to vote to elect their local representatives) is necessitated by the state of emergency”.<sup>78</sup>

60. In addition the Commission had stressed<sup>79</sup> that by introducing new rules for filling vacant positions inter alia of mayors, the Decree Law provided for structural (general) measures, which went “beyond the period and the purpose of the state of emergency”; “the *ex post* approval of the emergency decree laws by Parliament should not lead to the permanent legitimation of the measures authorised by the decrees, as the emergency situation is not adapted for enacting permanent rules.”<sup>80</sup> The proportionality of the new system also appeared questionable “as the assignment of a new mayor/deputy mayor/council member seems to have definitive effects, no reinstatement being foreseen in the Decree Law in case the charges of aiding or abetting terrorism and terrorist organisations do not lead to a criminal conviction” – whereas Article 127 of the Turkish Constitution only enables the Minister of the Interior to take a provisional measure until the final court judgment.<sup>81</sup>

61. In this regard the Venice Commission takes due note of the fact that in its decisions of 19 August 2019, the Ministry of the Interior declared that the suspension of the three mayors was an interim precautionary measure and that the three trustees were appointed as *acting* mayors. During the meetings in Ankara representatives of the Ministry indicated that in case the charges of aiding or abetting terrorism and terrorist organisations did not lead to a criminal conviction, the suspended mayors would be reinstated on the basis of article 47, paragraph 3 of the Municipality Law. However, the Venice Commission is concerned that the suspension may *de facto* well have definitive effects, given the uncertain timescale of the criminal proceedings and given the fact that none of the mayors suspended due to terrorism-related charges since October 2016 has been reinstated to date on that legal basis.<sup>82</sup>

62. The Commission had also underlined<sup>83</sup> that under the new regime a trustee can be appointed as soon as a mayor, a deputy mayor or a council member is suspended “for the sole reason that the person has allegedly committed the offences of aiding and abetting terrorism and terrorist organisations.”<sup>84</sup> As the Venice Commission has noted when examining the decree-laws

<sup>75</sup> Similarly, Article 121, paragraph 3 of the Constitution allowed the Government to legislate through decree laws “*on matters necessitated by the state of emergency*”. In the meantime, this provision was repealed by amendments of 21 January 2017.

<sup>76</sup> See CDL-AD(2017)021, paragraphs 56ff.

<sup>77</sup> See also the corresponding General Comment 25 of the UN HRC, available at: <https://www.refworld.org/docid/453883fd1f.html>.

<sup>78</sup> In this respect, the Turkish Government stressed during the preparation of the present opinion that “according to the Constitution, elected local administration organs can only lose their status by judicial decision.” They also referred to the fact that Article 45 of the Municipality Law (in its amended form) requires eligibility of the trustee, that Article 46 of that law provided for appointment of replacement mayors already before the reform and that suspension from duty under Article 47 was only a temporary measure.

<sup>79</sup> See CDL-AD(2017)021, paragraphs 64ff.

<sup>80</sup> See also CDL-AD(2016)037, paragraph 90.

<sup>81</sup> *Ibid.*, paragraph 34.

<sup>82</sup> In their comments on the draft opinion, the Turkish Government indicated that since the 31 March 2019 local elections, five municipal council members had been reinstated to their office after non-prosecution or acquittal decisions in their ongoing investigation/prosecution proceedings and 18 of the 46 mayors who were suspended from duty had filed an annulment case whose review was still ongoing.

<sup>83</sup> *Ibid.*, paragraph 12.

<sup>84</sup> In the present situation, the rapporteurs noted with concern statements by officials, inter alia from the Ministry of the Interior, that the suspended mayors were associated with terrorism (and so were guilty of the matters alleged against them).

on the state of emergency, criminal cases have been initiated on the basis of a list of very vague and wide criteria. In its Opinion on the Emergency Decree Laws, the Commission emphasized that ‘the evidentiary threshold for arresting a person (‘reasonable suspicion’) and, *a fortiori*, for convicting him or her (‘beyond reasonable doubt’) should be much higher’ (§ 176). It is evident that, as the measures taken on the basis of the Decree Law n° 674 are conditioned by investigations and prosecutions against local elected representatives, the way in which such investigations and prosecutions are conducted has an impact on the measures provided for in the Decree Law, both in terms of necessity and proportionality.”<sup>85</sup>

63. Concerning terrorist activities in the south-eastern part of Turkey, the European Court of Human Rights has noted that the offence of “disseminating propaganda in favour of a terrorist organisation” and its interpretation were not clear and that this provision should at any rate be interpreted restrictively in order to be in conformity with freedom of expression as enshrined in Article 10 ECHR, while national jurisdictions had interpreted it broadly in some cases; the Court insisted in particular on incitement to violence as an essential element of a legitimate restriction to this right.<sup>86</sup> Furthermore, the Venice Commission has stated on previous occasions that the conditions under which the powers of a local elected official can be suspended and the verification procedure “should be established in a clear and precise manner, and consistently with the principle that the dismissal of an elected representative is an exceptional measure to be applied only in case of serious failures”.<sup>87</sup>

64. Each of these concerns applies in the context of the decisions by the Ministry of the Interior of 19 August 2019. During the meetings held by the rapporteurs in Ankara, several representatives of opposition parties and of civil society claimed that the criminal investigations referred to relied either in whole or in part a) on obviously non-criminal conduct such as provision of medical services and participation in civil society, and in 16 out of 22 investigations on the generalised allegation of “making propaganda for a terrorist organisation”; and b) on the testimony of a single individual who stood to obtain immediate release from custody in exchange for providing evidence.<sup>88</sup> While the rapporteurs were not able to verify this information, it is noteworthy that one of the three mayors concerned – the mayor of the metropolitan city Mardin – was acquitted by court decision of 14 February 2020 of the charges that had led to his suspension, due to the absence of criminal elements. In any case, it is worrying that the legal framework does not provide for clear safeguards to prevent such possible instances, such as a clear definition of the offences of aiding and abetting terrorism and terrorist organisations and of the evidentiary threshold.

### c. Interference with local self-government

65. The Venice Commission has previously explained<sup>89</sup> that according to Article 127 of the Turkish Constitution local administration organs are elected by the electorate, and that by replacing free elections by people with appointments made by state authorities (cf. Article 45, paragraph 1 of the Municipality Law as amended), Decree-Law N° 674 altered, in respect of the concerned local communities, “the very nature of local authorities as representative of the will and the choice of the local population, and the legitimacy of their action.” The above-mentioned lack of proportionality resulted in a breach of Article 3, paragraph 1 of the European Charter for

<sup>85</sup> Ibid., paragraph 12.

<sup>86</sup> There is extensive case law of the ECtHR on violation by Turkey of Article 10 of the ECHR (freedom of expression) in relation to different versions of section 7(2) of Law No. 3713 (making propaganda for a terrorist organisation). See e.g. the case of *Özer v. Turkey* (No. 3), no. 69270/12, 11 February 2020, (with further references) and in particular *Belge v. Turkey* (n. [50171/09](#), 6 December 2016) and *Gül and other v. Turkey* (no. [4870/02](#), 8 June 2010).

<sup>87</sup> See the Opinion on the Draft Law on additions to the Law on the status of municipalities of the Republic of Azerbaijan, CDL-AD(2009)049, paragraph 27:

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2009\)049-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)049-e).

<sup>88</sup> Such claims have also been made in different reports, see e.g. Human Rights Watch, 7 February 2019, quoted above, which includes detailed information on such instances.

<sup>89</sup> See CDL-AD(2017)021, paragraphs 80ff.

Local Self-Government (ECLSG), as it undermined “the right and the ability” of elected local authorities, “to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population”.

66. In the present situation, all the aforementioned concerns are relevant since they are related to the legal provisions on which the decisions by the Ministry of the Interior of 19 August 2019 were based. While the Commission is not in a position to examine in detail the individual decisions taken, it is highly concerned that they were grounded on legislation whose adoption procedure and content seem not to have a sound basis in the Turkish Constitution and to conflict with international standards concerning the state of emergency (see in particular Article 15 of the ECHR) and local self-government. Several Articles of the ECLSG need to be mentioned here: in addition to Article 3, paragraph 1 already referred to above, in particular Article 3, paragraph 2 – according to which the rights of self-government must be exercised by democratically constituted authorities,<sup>90</sup> Article 4, paragraph 4 – according to which “powers given to local authorities shall normally be full and exclusive” – and Article 7, paragraph 1 – according to which “the conditions of office of local elected representatives shall provide for free exercise of their functions”. As a result of all those concerns about the legal framework, the decisions by the Ministry of the Interior are also highly problematic with respect to the rule of law in terms of legality.<sup>91</sup>

## **2. Additional concerns about the application of the law in the context of the 2019 local elections**

67. Article 127, paragraph 4 of the Constitution and Article 47, paragraph 1 of the Municipality Law foresee suspension of mayors only in case of an investigation or prosecution initiated on grounds of offences “related to their duties” as mayors. In this respect, the Venice Commission takes note of the fact that at least several investigations or prosecutions against the three suspended mayors, which the Ministry of the Interior referred to in its decisions of 19 August 2019, had already been launched prior to the local elections of 31 March 2019. During the meetings held in Ankara representatives of the Ministry of the Interior indicated that in practice, the decisive criterion for suspension of mayors was the repetitiveness and continuity of criminal activity including after the elections. The rapporteurs did not get clear information enabling them to confirm that the three mayors had indeed been investigated and prosecuted for offences clearly relating to their mayoral duties. This question needs to be assessed by the relevant courts to which the mayors have appealed.

68. In any case, it seems problematic that at least part of the investigations and prosecutions had already been ongoing at the time of the elections – and that the candidates concerned had nevertheless first been considered eligible but were suspended from their mayoral office a few months later for continuing their alleged criminal activity. This raises serious questions relating to rule of law requirements, in particular the foreseeability of the laws, consistency of law and the fair use by the authorities of their discretionary power.<sup>92</sup> Moreover, such a practice seems to conflict with the free expression of the will of the voters, as the candidates elected were practically prevented from exercising their office although the situation had not significantly changed after the elections. In case a sentence for some criminal activity is indeed pronounced after assuming the mayor’s function, new procedures, if provided for by the law, may be initiated against the mayor concerned.

69. In light of the analysis contained in this chapter (IV.B.), the Venice Commission considers that either the mayors of the three metropolitan cities Diyarbakır, Mardin, and Van who had been

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<sup>90</sup> Cf. Explanatory Report to the ECLSG, page 44. This implies that local government expresses, directly or indirectly, the will of local population.

<sup>91</sup> CDL-AD(2016)007, paragraphs 44ff.

<sup>92</sup> Cf. CDL-AD(2016)007, paragraphs 58f., 60, 64ff.

suspended by decision of the Ministry of the Interior of 19 August 2019 should be reinstated or alternatively a different solution which respects the will of the voters should be adopted. One option in this regard would be to allow the respective municipal councils to choose a replacement mayor and another would be to arrange for repeat elections in the electoral zones concerned. The Commission also recommends the repeal of the amendments to Article 45, paragraph 1 of the Municipality Law which had first been introduced by Decree Law No. 674 and had been approved by Parliament in November 2016, thus restoring the capacity of the municipal councils to choose a replacement mayor in case the office of mayor falls vacant for any reason.

## V. Conclusion

70. The Venice Commission is aware of the terrorist threat in the South-Eastern part of Turkey. Such a threat may justify unusual measures, including the removal of elected officials who might use their office to favour terrorist activities. Any such measures have, however, to respect the relevant legal provisions, be based on evidence, and be proportionate to the aim pursued.

71. The Venice Commission also acknowledges, as it already did on previous occasions, that in the immediate aftermath of the failed coup attempt of 15 July 2016, when the Turkish authorities were confronted with a dangerous armed conspiracy which in the terms of the Government “posed an existential threat to the life of the Nation”, certain extraordinary measures may have been required in Turkey. That said, the state of emergency ended in 2018. It is a matter of concern that based on the framework of the emergency regime changes of a structural nature to the system of local government in place in Turkey have been introduced on a permanent basis. The necessity for these changes appeared doubtful even during the state of emergency. That concern is of course all the greater now that the state of emergency period is at an end.

72. Both the decisions by the Supreme Election Council of 11 April 2019 and by the Ministry of the Interior of 19 August 2019 on the replacement of elected candidates and mayors are linked to the measures taken under the state of emergency. In the first situation, candidates banned from public service by virtue of emergency decree law were *ex post* considered ineligible, although their candidacies had been validated; in the second situation, mayors were suspended because of terrorism-related charges, on the basis of legal amendments introduced by emergency decree law, although they had been considered eligible at the time of elections when many of the investigations or charges against them had already been initiated.

73. These ongoing effects of the previous emergency regime give rise to serious concerns. In addition, both sets of decisions are in the Commission’s opinion incompatible with basic principles of democracy – the respect for the free expression of the will of the voters and the rights of elected officials – and of the rule of law – including legality, legal certainty, and foreseeability of the law.

74. The decisions by the Supreme Election Council are not consistent with international norms and standards and should be reversed. It is crucial for the proper functioning of democracy that the candidates who received the highest number of votes are deemed elected, and not second placed candidates from other political parties. Moreover, it needs to be ensured that the ineligibility criteria are aligned with international standards. While the removal of elected officials may exceptionally be justified by the need to prevent them from abusing their office to favour terrorist activities, replacing elected officials by candidates who lost the election, without fresh elections, cannot be justified on this basis.

75. The decisions by the Ministry of the Interior are based on state of emergency-rooted legislation, which allows for replacement of elected mayors by government officials. They undermine the very nature of local self-government and should be repealed. The Commission also considers that it is a matter of grave concern that suspensions for an extended period of time can be based on allegations of terrorism-related offences which appear to be interpreted extremely broadly, *inter alia*, with regard to the offence of making propaganda for a terrorist

organisation; such a broad interpretation was repeatedly considered by the European Court of Human Rights as going against the Convention. In the present cases, where most of the allegations had already been made before the candidacies for election had been validated, it needs to be ensured that the choice of the local population is respected. This could be achieved either by reinstating the suspended mayors or by other means such as determination of replacement mayors by the elected municipal councils or by organising repeat elections in the electoral zones concerned.

76. The Venice Commission formulates the following recommendations:

- A. Make it clear in the law that ineligibility of an election candidate on the grounds of prohibition from public service requires a final criminal conviction by a court for a serious offence as well as an express decision on the candidate's ineligibility prior to the elections [paragraph 43];
- B. Recognise as elected the six mayoral candidates who had received the highest number of votes during the local elections of 31 March 2019 in the district municipalities of Diyarbakır, Erzurum, Kars and Van but had been denied the mayoral mandate by decision of the Supreme Election Council of 11 April 2019 [paragraph 54];
- C. Reinstatement the mayors of the three metropolitan cities Diyarbakır, Mardin, and Van who had been suspended by decision of the Ministry of the Interior of 19 August 2019; or implement an alternative solution which respects the will of the voters, such as allowing the respective municipal councils to choose a replacement mayor or providing for repeat elections in the electoral zones concerned [paragraph 69];
- D. Repeal the amendments to Article 45, paragraph 1 of the Municipality Law which had first been introduced by Decree Law No. 674 and had been approved by Parliament in November 2016 [paragraph 69].

77. The Venice Commission remains at the disposal of the Turkish authorities and the Congress of Local and Regional Authorities for further assistance in this matter.