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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS

(OSCE/ODIHR)

TÜRKİYE

JOINT OPINION

ON THE AMENDMENTS TO THE ELECTORAL LEGISLATION BY LAW NO. 7393 OF 31 MARCH 2022

Approved by the Council for Democratic Elections at its 73rd meeting (Venice, 16 June 2022) and adopted by the Venice Commission at its 131st Plenary Session (Venice, 17-18 June 2022)

on the basis of comments by

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Contents

I. Introduction

1. By letter of 1 April 2022, Mr Piero Fassino, Chairman of the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) of the Parliamentary Assembly, sent to the European Commission for Democracy through Law of the Council of Europe (hereinafter "Venice Commission") a request for an opinion of the Venice Commission on the Law Amending the Law on Parliamentary Elections and Certain Laws (Law No. 7393 of 5 April 2022, see CDL-REF(2022)016-cor). According to the established practice, the opinion was prepared jointly by the Venice Commission and ODIHR.

2. Ms Veronika Bilkova, Mr Srdjan Darmanović and Ms Katharina Pabel acted as rapporteurs for this opinion. Ms Elena Kovalyova was appointed as expert for ODIHR.

3. On 10-11 May 2022, a joint delegation composed of Ms Bilkova for the Venice Commission and Ms Kovalyova for ODIHR, accompanied by Mr Pierre Garrone, Secretary of the Council for Democratic Elections and Ms Keara Castaldo from the Secretariat of ODIHR, visited Ankara and had meetings with the Ministry of Justice, the Supreme Board of Elections, the parties represented in Parliament, the Union of Bar Associations, and non-governmental organisations (NGOs). This joint opinion takes account of the information obtained during the above-mentioned visit. The Venice Commission and ODIHR are grateful to the Turkish authorities for the excellent organisation of this visit.

4. This opinion was prepared in reliance on the English translation of the electoral legislation. The translation may not accurately reflect the original version on all points.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the meetings on 10-11 May 2022. It was approved by the Council for Democratic Elections at its 73rd meeting (Venice, 16 June 2022), and, following an exchange of views with Mr. Ömer Yılmaz, Deputy Head of Department, Department for Human Rights, Ministry of Justice of Türkiye, it was adopted by the Venice Commission at its 131st Plenary Session (Venice, 17-18 June 2022).

II. Background and scope of the joint opinion

Background

6. The Constitution of the Republic of Türkiye was adopted in 1982 and amended several times since then, the last time in 2017. In its Article 67, as amended in 1987, 1995 and 2001, the Constitution grants citizens *"the right to vote, to be elected, to engage in political activities independently or in a political party, and to take part in a referendum"* (para. 1). The same provision states that *"elections and referenda shall be held under the direction and supervision of the judiciary, in accordance with the principles of free, equal, secret, direct, universal suffrage, and public counting of the votes"* (para. 2), that *"electoral laws shall be drawn up so as to reconcile the principles of fair representation and stability of government"* (para. 6) and that *"amendments to the electoral laws shall not apply to the elections to be held within one year from the entry into force date of the amendments"* (para. 7).

7. Changes to the electoral legislation of Türkiye have been long expected as they are direct consequence of the transition from the parliamentary to the presidential system of government enshrined in the Turkish Constitution in 2017. *Law No. 7393 Amending the Law on Parliamentary Elections and Certain Laws* containing these changes, *i.e.* amendments to the electoral rules, was adopted by the Turkish Parliament on March 31, 2022 and formally published in the Turkish Official Gazette on April 6 this year, when it officially entered into force. The Law amends several provisions of *Law No. 2839 on Parliamentary Elections, Law No. 298 on General Principles of Elections and Electoral Rolls,* and *Law No. 2820 on Political Parties.*

Scope

8. The scope of this opinion covers the provisions of Law No. 7393 Amending the Law on Parliamentary Elections and Certain Laws of the Republic of Türkiye, entered into force on 6 April 2022 (hereinafter Law No 7393), and the legislation amended with its entry into force. Therefore, the opinion does not constitute a comprehensive review of the election-related legal framework of Türkiye.

9. This Joint Opinion focuses on the conformity of the amendments with international standards, norms and practices, as for example set out in the United Nations' International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR) and its additional protocols, the Council of Europe Code of Good Practice in Electoral Matters, drafted by the Venice Commission,[1] as well as relevant OSCE human dimension commitments. Where appropriate, it will also refer to other reference documents and sources, including the Constitution of Türkiye, as well as to relevant recommendations made in previous legal opinions and election observation reports published by the Venice Commission, the Parliamentary Assembly of the Council of Europe and/or ODIHR. The opinion also aims at identifying the potential impact on the national legal framework and its implementation as a result of the amendments.

10. Law No. 7393 amends rules on the eligibility of contestants for parliamentary elections and their registration, the allocation of parliamentary mandates, the formation of electoral administration bodies, as well as some aspects pertaining to voter registration and misuse of administrative resources in election campaigns.

11. According to the information obtained during the visit to Ankara, an executive act ("circular") that would implement and further elaborate on some of the provisions of Law No. 7393 will be adopted. Such an act may address some of the concerns raised and dispel some of the uncertainties expressed in this opinion. By virtue of Article 14(5) of the Law No. 298, a Circular was issued by the Supreme Board of Elections on 13 April 2022. The Circular sets the details related to the identification of judges to be commissioned in the provincial and district election board, the determination of the chairperson and members of the provincial election board and of the district election board and the procedures to be applied in case of vacancies after the formation of the boards.

12. The Venice Commission and ODIHR have already examined the Turkish electoral legislation in several instances, namely in the *Opinion on the 2017 amendments to the Constitution*,[2] *the Joint Opinion of the Venice Commission and ODIHR on Amendments to the electoral legislation and related "harmonisation laws*" adopted in 2018[3] and the *Opinion on the replacement of elected candidates and mayors* adopted in 2020.[4] The implementation of these previous opinions does not fall into the scope of the present one. Nor will this opinion deal with the implementation of recommendations of the Parliamentary Assembly of the Council of Europe's and ODIHR's election observation missions on issues not addressed in the amendments.[5]

[1] Venice Commission, CDL-AD(2002)023rev2-cor, Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report.
[2] Venice Commission, CDL-AD(2017)005, Türkiye – 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.
[3] Venice Commission and ODIHR, CDL-AD(2018)031, Türkiye – Joint Opinion on Amendments to the electoral legislation and related "harmonisation laws" adopted in March and April 2018.
[4] Venice Commission, CDL-AD(2020)011, Türkiye – Opinion on the Replacement of Elected Candidates and Mayors.
[5] See for example the 2018 ODIHR EOM Final Report on early presidential and parliamentary elections and the Report on the Observation of the early parliamentary and presidential elections in Türkiye (24 June 2018) by the Parliamentary Assembly of the Council of Europe.

III. Executive summary

13. The Venice Commission and ODIHR acknowledge that, especially since the shift from the parliamentary to the presidential form of government in 2018, Türkiye has needed certain amendments to its electoral legislation. Some of the amendments adopted on 31 March 2022 and in force since 6 April 2022 respond to this need. However, the Venice Commission and ODIHR note that these amendments were adopted within a few weeks in a process that was not fully inclusive as the involvement of the opposition was limited and civil society was excluded from the process. Most of the amendments will not come into effect until one year after the law enters into force; an exception was introduced for the earlier introduction of changes to how the election administration bodies are composed which will come into effect in July 2022.

14. The Venice Commission and ODIHR welcome certain positive steps: the decrease of the election threshold from 10% to 7% as well as a new arrangement facilitating the participation of visually impaired persons in elections. The two changes both correspond to recommendations made in previous opinions and ODIHR election observation reports. The election threshold remains, however, among the highest in Europe even after its decrease.

15. The Venice Commission and ODIHR make the following key recommendations:

A. Making clear that the law does not introduce changes to the conditions for eligibility of political parties to participate in the elections that *de facto* are not possible to meet in the time between adoption of the amendments and the next election and therefore potentially make some parties ineligible;
B. Reconsidering the modifications in the system for composing district and provincial electoral boards that replace the system of automatic appointment based on seniority with a lottery system, because the new system lacks safeguards against pressure on judges meeting the new eligibility criteria;
C. Adding references to the President in Articles 65, 66 or 155 of Law No. 298, where previously there were references to the Prime Minister.
D. Reconsidering whether, with the 7% election threshold, the balance between the principles of fair representation and of stability of government is struck in the right way, further to the introduction of a presidential form of government.

16. It would also be advisable for the Turkish authorities to reconsider the change in the application of the seat allocation model, *i.e*., the replacement of a two-stage allocation with a single-stage allocation, still using the d'Hondt method, which disfavours smaller political parties even when part of an electoral alliance.

17. Additional recommendations are included throughout the text of this Joint Opinion.

18. The Venice Commission and ODIHR remain at the disposal of the Turkish authorities and the Parliamentary Assembly for further assistance in this matter.

IV. Analysis and recommendations

19. *Law No. 7393 Amending the Law on Parliamentary Elections and Certain Laws* introduces several changes to the electoral legislation of Türkiye. The main changes consist in the lowering of the election threshold from 10% to 7%, the change in the application of the seat allocation method, the changes in the conditions for political parties to run in elections, and the modifications in the composition of the provincial and district level electoral boards that supervise the administration of voting. This opinion will first address the procedure of adoption of the law and then its various provisions.

A. The adoption procedure

20. The Venice Commission has consistently expressed the view that any successful changes to electoral legislation should be built on at least the following three essential elements: 1) clear and comprehensive legislation that meets international obligations and standards and addresses prior recommendations; 2) the adoption of legislation by broad consensus after extensive public consultations with all relevant stakeholders; and 3) the political commitment to fully implement such legislation in good faith, with adequate procedural and judicial safeguards and means by which to timely evaluate any alleged failure to do so. Relevant stakeholders include the opposition, civil society, academics and experts. An open and transparent process of consultation and preparation of such amendments increases confidence and trust in the adopted legislation and in the State institutions in general. The recommendations and outcomes of such consultations should be meaningfully addressed by the Parliament when drafting the legislation.[6]

21. If the process of changing the electoral rules is not sufficiently inclusive and transparent, that is if all relevant stakeholders are not involved in the proper way, new electoral rules risk being seen as intended more at favouring incumbents than at improving the electoral system.

22. An inclusive process is particularly important when fundamental elements of electoral law are at stake, including the electoral system and membership of election commissions,[7] which were both modified by law No. 7393. A speedy adoption of amendments to electoral laws not leaving sufficient opportunities for an inclusive discussion of such amendments within Parliament as well as with the general public would be at odds with such recommendations and OSCE commitments.

23. The draft amendments to the electoral legislation were presented to the Parliament by the AKP (Justice and Development Party) and MHP (Nationalist Movement Party) and adopted a few weeks later on 31 March 2022, following a three-day parliamentary debate, to enter into force on 6 April 2022, in line with Article 13 of the amendments.[8] In the discussions held in Ankara, the Turkish authorities explained this speed by the relatively limited number of changes Law No. 7393 had introduced into the Turkish legal order and by the fact that informal discussions about possible amendments had purportedly been going on for more than a year prior to the submission of the draft to Parliament. The representatives of the opposition and of the civil society however considered that, in the absence of comprehensive information on the content of such possible amendments, their involvement in the discussion was not meaningful or efficient, and informed the Venice Commission and ODIHR that no public consultation took place in the elaboration of the draft or after the submission of the draft to Parliament.

24. The brevity of the debates in the plenary session of Parliament and the statements by representatives of opposition parties that most of their proposals to the bill were not taken into consideration indicate that the Law does not represent a political consensus. Interlocutors also noted a pattern of amending the electoral legislation prior to each electoral cycle, without due procedural safeguards, which could undermine the credibility of the electoral process and the stability of the legal framework.[9]

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[6] See Paragraph 5.8 of the 1990 OSCE Copenhagen Document, which commits participating States to ensure that "legislation (is) adopted at the end of a public procedure"; Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, II.A.5.iii-iv.

[7] Venice , Commission, CDL-AD(2002)023rev2-cor, Code of Good Practice in Electoral Matters, II.2.b, and CDL-AD(2005)043, Interpretative Declaration on the Stability of the Electoral Law.

[8] Official Gazette No. 31801 of 6 April 2022.

[9] Paragraph 63 of the Explanatory Report to the Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev2-cor) states that "Stability of the law is crucial to credibility of the electoral process, which is itself vital to consolidating democracy.[...] Above all, voters may conclude, rightly or wrongly, that electoral law is simply a tool in the hands of the powerful, and that their own votes have little weight in deciding the results of elections."

25. The Venice Commission and ODIHR were moreover informed that members of the Republican People´s Party (CHP) have submitted a complaint to the Constitutional Court of the Republic of Türkiye, asking the Court to consider the compliance with the Constitution of several provisions of Law No. 7393 (Articles 5, 6, 11 and 12). No decision in this matter has been taken by the Court by mid-May 2022.

26. In view of Article 67(7) of the Constitution, the amendments would not affect any elections held before 6 April 2023. They shall however be fully applicable during the next general (presidential and parliamentary) elections, which are scheduled to take place on 18 June 2023. The revision of electoral legislation one year before elections is still in line with the recommendation enshrined in the Venice Commission *Code of Good Practice in Electoral Matters,* according to which *"the fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, should not be open to amendment less than one year before an election, or should be written in the constitution or at a level higher than ordinary law".*[10]

B. Substantive issues

1. The election threshold

27. A positive change brought about by the amendments is the lowering of the election threshold necessary at the national level for a political party to enter Parliament, foreseen in Article 33 of Law No. 2839, from 10% to 7% (Article 1 of Law No. 7393). The threshold does not apply to independent candidates. Türkiye had before the last elections the highest election threshold within the Council of Europe and the OSCE (10%) and it keeps one of the highest ones with 7%.[11]

28. The two main principles underpinning the electoral system in Türkiye are the principles of fair representation and of stability of government.[12] The Information Note[13] states that these principles *"are extremely difficult to fulfil at the same time and rate and (…) different in terms of purpose"* (para. 4). While this may be at instances true, States must always seek to find a reasonable balance between the two principles and may not disproportionately favour one at the expense of the other.

29. The Venice Commission and ODIHR recall that the European Court of Human Rights has recognised in its case law that States have a wide margin of appreciation in this matter. The 10% electoral threshold as provided by the Turkish electoral system was considered by the ECtHR in its decision in the case of *Yumak and Sadak* (2007)[14] and found compatible with Article 3 of Protocol 1 to the ECHR. The ECtHR noted that *"in general a 10% electoral threshold appears*

[10] Venice Commission, CDL-AD(2002)023rev2-cor, Code of Good Practice in Electoral Matters, II.2.b, and CDL-AD(2005)043, Interpretative Declaration on the Stability of the Electoral Law. See also para. 1.1.2 of the 2016 ODIHR and Venice Commission Joint Guidelines on Preventing and responding to the misuse of administrative resources during electoral processes (CDL-AD(2016)004) that states that "Stability of the law is a crucial element for the credibility of electoral processes. It is therefore important that stability of electoral law be ensured in order to protect it against political manipulation".

[11] Information on national legislation on thresholds may be found in the VOTA database, managed by the Venice Commission and the Mexican *Tribunal electoral del poder judicial de la Federación.* Cf. Venice Commission, CDL-AD(2008)037, Comparative Report on Thresholds and Other Features of Electoral Systems Which Bar Parties From Access to Parliament; Report on Thresholds And Other Features of Electoral Systems Which Bar Parties From Access to Parliament (II), CDL-AD(2010)007.

[12] Article 67 of the Constitution.

[13] Information Note on amendments introduced to electoral laws by Law No. 7393 provided by the authorities of Türkiye to the Venice Commission and ODIHR.

[14] ECtHR, *Yumak and Sadak v. Türkiye,* Application No. 10226/03, Judgment (Grand Chamber), 8 July 2008.

excessive"[15] and should be lowered. According to the Court, *"[i]n the present case, however, the Court is not persuaded that, when assessed in the light of the specific political context of the elections in question, and attended as it is by correctives and other guarantees which have limited its effects in practice, the threshold has had the effect of impairing in their essence the rights secured (….) by Article 3 of Protocol No. 1."*[16]

30. In their 2018 joint opinion, the Venice Commission and ODIHR recalled that *"there is no European standard on electoral thresholds"* and that *"electoral thresholds are used as a mechanism to balance fair representation of views in the Parliament with effectiveness in the Parliament and capacity to form stable governments. How this balance is struck and how thresholds are used to this aim differs between countries and electoral systems".*[17] However, they stressed that the assessment of the electoral threshold is subject to a proportionality test and that this test needs to take account of the political history and the context of a country as well as of other features of the electoral system.[18]

31. According to Article 67(5) of the Turkish Constitution, *"(…) The electoral laws shall be drawn up in such a way as to reconcile the principles of fair representation and consistency in administration"*. The unusually high threshold applied in Türkiye was justified by the needs to produce stable governments and to preserve the unitary structure of the State by preventing regional or local interests from dominating the Parliament. Concerning the former justifications, as long as a parliamentary system of government was applied, the threshold constituted a legitimate aim under Article 3 of Protocol 1 and its determination fell within the margin of appreciation of the State under the ECHR standard.[19] With the transition to a presidential system, the strength of this argument has decreased, since the constitution of the government does not depend any more on the majority in Parliament, even if the existence of a consistent majority for voting legislation may appear suitable. As for the latter justification (the unitary structure of the State), it might be acceptable as long as it is not used to exclude the representation of national minorities in Parliament, which would go against the principle of proportionality.[20]

32. The 2018 amendments to Law No. 2839 partly met international recommendations by mitigating the effects of the high electoral threshold since they enabled political parties to establish electoral alliances that would be subject to the same threshold. This arrangement was indeed used in the 2018 elections, in which two main alliances, the pro-government People's Alliance and the opposition Nation Alliance, took part. Three parties participated in the elections on their own and only one of them, the Peoples' Democratic Party (HDP) surpassed the threshold, further supporting that the system made it difficult for individual political parties, not entering the elections in alliance with any major party, to get over the required threshold.

33. It is true that with respect to electoral thresholds, *"the wide variety of national provisions makes the development of European standards other than very general ones extremely*

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[15] ECtHR, *Yumak and Sadak v. Türkiye,* Application No. 10226/03, Judgment (Grand Chamber), 8 July 2008, para. 147.
[16] *Ibid*.
[17] Venice Commission and ODIHR, CDL-AD(2018)031, Türkiye – Joint Opinion on Amendments to the electoral legislation and related "harmonisation laws" adopted in March and April 2018, para. 32.
[18] Venice Commission and ODIHR, CDL-AD(2018)031, Türkiye – Joint Opinion on Amendments to the electoral legislation and related "harmonisation laws" adopted in March and April 2018, paras 34ff. See also ODIHR election observation mission reports in 2004, 2007 and 2008 and Council of Europe Parliamentary Assembly Resolution 1380 (2004) on the honouring of obligations and commitments by Türkiye.
[19] See paragraphs 110-113 of the ECtHR judgment in the case of *Yumak & Sadak v. Türkiye* [GC] (cited above).
[20] See the 2018 ODIHR EOM Final Report on early presidential and parliamentary elections which states that "the application of the threshold on a national basis [...] may impede regional representation including of ethnic communities which are geographically concentrated". The Venice Commission Report on thresholds and other features of electoral systems which bar parties from access to Parliament (II) (CDL-AD(2010)007) states in paragraph 19: "At most it might be argued that national thresholds are acceptable in countries where there is no real national minority problem, or where there are specific measures to deal with it, but they must be used with care, and even replaced by local thresholds where this is necessary."

difficult",[21] and therefore the Venice Commission and ODIHR do not recommend a specific maximum threshold.[22] Nevertheless, compared with the practice in member states of the Council of Europe and among participating States of the OSCE, the threshold remains exceptionally high for individual parties.[23] Most European countries using the proportional system in elections either do not have any legal threshold at all (*e.g*. Finland, Ireland, Portugal or Switzerland) or set it at the maximum of 5% (*e.g.* the Czech Republic, Germany, Poland or Romania). It has to be added that in Türkiye, where seats are allocated at the constituency level and the vast majority of constituencies have fewer than ten seats, the natural threshold has a considerable impact and makes it difficult for small parties to achieve parliamentary representation proportional to their level of support, even if they pass the national threshold of 7 per cent.

34. In their 2018 opinion, the Venice Commission and ODIHR recommended *"the current electoral threshold for the election of Parliament to be reconsidered"*.[24] Article 1 of Law No. 7393, lowering the electoral threshold from 10% to 7%, is a step in the right direction and has to be welcomed. The Venice Commission and ODIHR encourage the Turkish authorities to consider, after an extensive public debate, the possibility of decreasing the threshold even further.

2. The seat allocation method

35. Law No. 7393 amends the application of the d'Hondt seat allocation method to electoral alliances. Prior to the adoption of the amendments, a two-stage allocation system was used. First, seats in electoral districts were allocated, using the d'Hondt method, between alliances that surpassed the threshold, parties that stood for election outside an alliance and had surpassed the threshold, and independent candidates. Second, another allocation was made among the members of the alliances to distribute the seats allocated to an alliance in the first step.

36. Law No. 7393 has changed this system, replacing the two-stage allocation with a single-stage allocation, in which the seats are distributed among all parties regardless of whether they are part of any electoral alliance, and independent candidates using again the d'Hondt method. As the Briefing of the European Parliament rightly notes, *"the 'd'Hondt method' is a mathematical formula used widely in proportional representation systems, although it leads to less proportional results than other systems for seat allocation (…). Moreover, it tends to increase the advantage for the electoral lists which gain most votes to the detriment of those with fewer votes"*.[25] With electoral alliances no longer being considered as a single subject for the application of the d'Hondt method, alliances will not any more benefit from the advantage given to lists with most votes, nor will parties belonging to them take profit from votes lost in the allocation by other partners of the alliance. Although all methods of seat allocation result in a certain number of votes being wasted, the use of a single-stage allocation, when combined with the high electoral threshold, risks operating in clear disfavour of smaller parties belonging to an electoral alliance, thus limiting the impact of the creation of this alliance.

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[21] Venice Commission, CDL(2010)030, PACE Recommendation 1898(2010) on the "Thresholds and Other Features of Electoral Systems Which Have An Impact On Representativity of Parliaments in Council of Europe Member States" - Comments in View of the Reply of the Committee of Ministers, para. 7.

[22] The Council of Europe Parliamentary Assembly Resolution 1547(2007) states that "In well-established democracies, there should be no thresholds higher than 3% during the parliamentary elections. It should thus be possible to express a maximum number of opinions. Excluding numerous groups of people from the right to be represented is detrimental to a democratic system. In well-established democracies, a balance has to be found between fair representation of views in the community and effectiveness in Parliament and government" (para. 57).

[23] Only Liechtenstein has 8%. Information on national legislation on thresholds may be found in the VOTA database, managed by the Venice Commission and the Mexican *Tribunal electoral del poder judicial de la Federación.* See already Venice Commission, CDL-AD(2008)037, Comparative Report on Thresholds and Other Features of Electoral Systems Which Bar Parties From Access to Parliament, Report on Thresholds And Other Features of Electoral Systems Which Bar Parties From Access to Parliament (II), CDL-AD(2010)007.

[24] Venice Commission and ODIHR, CDL-AD(2018)031, Türkiye – Joint Opinion on Amendments to the electoral legislation and related "harmonisation laws" adopted in March and April 2018, para. 36.

[25] Silvia Kotanidis, Understanding the d'Hondt method - Allocation of parliamentary seats and leadership positions, *European Parliament Briefing,* June 2019.

37. The Venice Commission and ODIHR reiterate that a common standard for the application of a specific seat allocation method in electoral law does not exist. Therefore, States are free to determine the method by which the votes cast in the election are transformed into seats in Parliament. Nevertheless, they recall that the choice of the seat allocation method and the way in which such a method is applied are not neutral but have a direct bearing on the distribution of seats. This choice is not devoid of political impact. Against the background of the principle of equal opportunity, which is one of the fundamental principles of electoral law, the Venice Commission and ODIHR encourage the Turkish authorities to observe the effects of the application of the amended allocation method with a specific focus on smaller parties.

3. The conditions for political parties to run in elections

38. Turkish electoral legislation has so far set two requirements for political parties in order to qualify to stand for elections: a) having set up their organisation in at least half (41) of the provinces at least six months prior to election day and having held party congresses; or b) having a group in the Grand National Assembly of Türkiye, that is at least 20 MPs.[26] The amendments (Articles 3 and 4 of Law No. 7393) have eliminated the second option, subjecting all political parties to a single condition - the first one. This condition has been modified to be even more rigid, by providing that *'in the event that the party entitled to run in elections has not held its district, provincial and grand congresses for two consequent times within the time periods stipulated in this Law and set forth in the party's by-law (…), it shall lose its right to stand for elections".* The frequency of the congresses is determined by the party by-laws.

39. The Venice Commission and ODIHR consider that political parties aspiring to accede to Parliament and to decide on important issues for their citizens have to develop their organisational capabilities and to demonstrate that they are able to democratically elect their officials and would-be leaders of the States. It is nevertheless questionable to what extent the State may interfere in the internal party life as long as political parties remain faithful to the Constitution of the country, adhere to the rules of democratic society, and operate within the principles of a pluralistic and competitive system.[27]

40. The Information Note explains this change by *"the political unethical consequences in the past"* (para. 9), to which the use of the original model allegedly led and where *"MPs representing the people in democracies are instrumentalised"* (para. 38). During the meetings in Ankara, the Turkish authorities and the representatives of the governing parties (AKP and MHP) drew the attention of the Venice Commission and ODIHR to a case when some MPs representing CHP had been, apparently without being consulted, transferred to another party, the Good Party (İYİ), to make it possible for this latter party to meet the second condition then foreseen in Law No. 2820 and to be able to run in the elections. This has been confirmed in the meetings with other interlocutors. The Venice Commission and ODIHR find this occurrence unfortunate. They also share the view expressed in the Information Note that *"the political parties which aspire to decide on the future of the country"* can be expected to *"have fully built their organization, especially the election of the decision making authorities within the party"* (para. 39).

41. At the same time, the Venice Commission and ODIHR note that the single condition favours larger and well-established political parties, while on the contrary making it difficult for smaller and newer parties to establish themselves and find their way to the Parliament.

42. The revised law appears to require two party congresses to have taken place at national, provincial and district levels to allow a party to take part in the next parliamentary elections *to*

[26] See Article 95 of the Constitution and Article 36 of Law No. 2820, in the version prior to the amendments.
[27] ODIHR and Venice Commission, CDL-AD(2020)032, Guidelines on political party regulation – 2nd edition, Principle 9 and paras 151ff.

take place the year after the entry into force of the revised legislation. This is an excessive burden.[28] The detrimental effect of the provision on the electoral participation of newly created parties cannot be assessed as satisfying the requirement of necessity in a democratic society to comply with the limitation criteria for Articles 11 of the ECHR and Article 3 of Protocol 1 to the ECHR, as developed in the ECtHR case-law.[29] Therefore, the provision appears to entail a discriminatory effect with respect to the freedom of association and participation in political life, contrary to international standards, as well as to prior ODIHR recommendations.[30]

43. The condition appears disproportionately restrictive as the failure to conduct a congress of a smaller branch of a party may deprive it of the right to participate in nationwide elections, in particular provided that in line with Article 80 of the Constitution, MPs "shall not represent their own constituencies or constituents, but the nation as a whole".

44. The Venice Commission and ODIHR express their concern due to the impact that the change in the conditions for running in elections may have on part of the opposition, now organised in the HDP party. On 7 June 2021, the Turkish Prosecutor General's office submitted an application to the Constitutional Court of Türkiye, seeking the dissolution of HDP on account of its alleged cooperation with and support of the Kurdish Workers Party (PKK) – considered as a terrorist organisation, *inter alia,* by the European Union - and of its alleged activities directed against the unity of Türkiye.[31] On 21 June 2021, the Constitutional Court accepted the application and it is expected to render its decision in the upcoming months.[32] Should the decision result in the dissolution of HDP, it would be nearly impossible for its members and supporters to establish a new political party that would be able to meet the single condition foreseen in Law No. 2820 and to run in the upcoming 2023 elections.[33]

45. The Turkish authorities however informed the Venice Commission and ODIHR that the amended law does not impose on political parties to hold two (grand) congresses between the entry into force of the law and the next elections, but just one at least 6 months before the voting day. This interpretation would be welcomed but is far from being the most obvious one. The requirement of just one congress before the next elections should appear explicitly in the law.

46. The Venice Commission and ODIHR therefore recommend that the law makes clear that it does not introduce changes to the conditions for eligibility of political parties to participate in the elections that *de facto* are not possible to meet in the time between adoption of the amendments and the next election and therefore potentially make some parties ineligible.

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[28] ODIHR has previously criticised similar preconditions as overly restrictive: See the Final Report of the 2018 ODIHR Election Assessment Mission to Latvia.

[29] See *inter alia* ECHR, *Gorzelik and Others v. Poland,* application no. 44158/98, 17 December 2004, para. 95. Paragraph 56 of the 2020 ODIHR and Venice Commission Joint Guidelines on Political party regulation (2nd edition, CDL-AD(2020)032) states that "State authorities shall treat political parties on an equal basis and, as such, remain impartial with regard to the establishment, registration and activities of political parties. Authorities should refrain from any measures that could be seen as intended to privilege some favoured political parties and disadvantage others. [...] All political parties should be given opportunities to participate in elections free from distinction or unequal treatment by authorities." See also paragraphs 50-52 of the Joint Guidelines on Political Party Regulation.

[30] Paragraph 7.6 of the 1990 OSCE Copenhagen Document states that "Participating States will respect the right of individuals and groups to establish, in full freedom, their own political parties or other political organisations and provide such political parties and organisations with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law and by the authorities." See also Articles 22 and 25 of the 1966 International Covenant on Civil and Political Rights (ICCPR) and Article 3 of the Protocol 1 of the European Convention for Human Rights. See also the Final Report of the 2018 ODIHR EOM to the early presidential and parliamentary elections.

[31] Daren Butler, Ece Toksabay, Top Turkish prosecutor files case to close pro-Kurdish HDP, *Reuters,* 17 March 2021.

[32] Türkiye's supreme court accepts indictment seeking ban of HDP, *ANews,* 21 June 2021.

[33] See also Call from 46 organisations across the world on HDP closure case, *MedyaNews,* 1 April 2022.

4. The composition of electoral boards

47. By means of its Articles 5 and 6, Law No. 7393 has changed the rules contained in Law No. 298, pertaining to the establishment of provincial and district-level electoral boards that supervise the administration of voting. In compliance with Article 67 of the Constitution, stipulating that *"elections (….) shall be held under the direction and supervision of the judiciary"* (para. 2), the boards have always included judges. Prior to the amendments, the three most senior judges in the province were automatically appointed as members of provincial boards, whereas the most senior judge in a district was automatically appointed the chair of the respective district-level board.

48. The amendments have replaced this seniority system with a lottery system, under which judicial members of the boards shall be determined "*by drawing lots*" from eligible judges. The pool of the eligible candidates includes *"judges who perform duties in the provincial centre, who have not received reprimand or a more severe disciplinary penalty and who have been reserved for first category and have not lost the qualifications for reservation in the first category"* (Article 15(1) of Law No. 298 as revised by Article 5 of Law No. 7393). The lots are cast by the Judicial Justice Commissions, consisting of the chief public prosecutor of the place and two judges selected by the Council of Judges and Prosecutors (HSK). The procedure of the selection is regulated in more detail by the decision of the Supreme Board of Elections of 14 April 2022.

49. The selection should take place every second year in the last week of January. Yet, by means of Article 12 of Law No. 7393, a provisional Article 24 has been introduced into Law No. 298 and by means of it, *"the chairpersons and members of the provincial election boards and the chairpersons of the district election boards shall be re-determined within three months as from the entry into force of this article (…)."*

50. During the discussions held in Ankara, representatives of the opposition parties and of non-governmental organisations considered the changes brought about by Articles 5, 6 and 12 as the most problematic part of the amendments. The complaint submitted to the Constitutional Court by CHP relates to these very provisions.

51. The Information Note indicates that *"prior to the amendments, some problems could be experienced by the most senior judge in the conduct of chairpersonship of provincial and district election boards such as health issues or increased age"* (para. 52). An identical justification for the change was indicated by the Turkish authorities during the meetings in Ankara. The explanation of the authorities that the change in the appointment system was necessitated by a high drop-out rate of senior judges due to health concerns is not substantiated by the findings of previous ODIHR election observation missions to Türkiye and a number of ODIHR and Venice Commission interlocutors stated that it was not supported by evidence. Moreover, even prior to the amendments, it had been possible for judges unable to perform their duties due to health or other issues, to exclude themselves from provincial electoral boards.[34] According to para I(h) of the Circular issued by the Supreme Board of Elections (SBE) on 14 April 2022, judges may present their excuses based on health conditions to the SBE and ask not to be assigned in the Boards. The SBE may accept or decline these excuses. No further details on this procedure are provided in the Circular. It would seem that the voluntary exclusion of those unable to perform their duties would solve the problem described in the Information Note, without requiring formal changes in the legal framework.

52. In light of the limited safeguards in the judicial appointment system to ensure the independence of judges, as underlined in prior Venice Commission assessments, as well as of the large-scale dismissal of judges that followed the attempted coup in 2016 and the deficiencies in the administration of lottery procedures for selecting civil servants for ballot box committees

[34] Article 15(2) of Law No. 298.

identified by the ODIHR election observation mission in 2018, the newly established system does not appear to improve the integrity of the election administration, compared to its previous composition. The system's foreseeability has deteriorated, and potentially makes appointment more susceptible to political pressure and manipulation.[35]

53. Article 7 of Law No. 7393 amends Article 23 of Law No. 298, dealing with membership of *ballot box committees.* The amendments add a paragraph stipulating that *"a party entitled to nominate members to the ballot box committee cannot nominate a member of another party as a ballot box committee member without his/her consent"* (Article 7 of Law No. 7393). During the visit to Ankara, the Venice Commission and ODIHR were informed about cases in which members of a certain party had been nominated to a ballot box committee in a different locality by a different political party without their consent and even without their knowledge, which had prevented them from exercising their right to vote in their home locality.

54. Such cases are certainly unfortunate. It is obvious that any nomination of a person should only take place with the knowledge and consent of that person. At the same time, the modalities of expressing consent should be specified. Unfortunately, as the Union of the Turkish Bar Associations notes in its Opinions and evaluations of the amendments kindly supplied to the Venice Commission and ODIHR, *"how this consent will be proven and whether a separate declaration document will be required while creating the lists, has not been regulated clearly enough".*[36] Such regulation should be included in the executive act that shall be adopted to implement Law No. 7393. The Turkish authorities informed the Venice Commission and ODIHR that this could be the case.

55. Most interlocutors who met in Ankara considered that the previous system, which had been applied since 1950, was satisfactory and had never led to criticism, while they were very diffident about the new system they considered as potentially biased. The *Information Note* casts no light on the reasons for an urgent change in the composition of electoral boards, as provided for in Article 12 of Law No. 7393. According to the information obtained in Ankara, the members of such boards were selected at the end of January of this year and would normally remain in office till the end of January 2024. The Venice Commission and ODIHR were informed that the appeal brought by the CHP before the Constitutional Court disputes the compatibility of this replacement with Article 67(6) of the Constitution on stability of electoral law.

5. Other changes brought about by the amendments

Measures to facilitate the participation of visually impaired voters

56. Article 4 of Law No. 7393 aims at making it easier for visually impaired voters to take part in elections. In the past, such persons had to rely on their relatives or other persons to be able to understand the ballot and cast their votes. The amendments have expanded the tasks of the Supreme Board of Elections by adding the task of providing voters, in addition to print issues of

[35] See Venice Commission, CDL-AD(2017)005, 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: the amendments were not conducive to ensure independence of the judiciary vis-a-vis the executive and the legislative, ran "contrary to European standards and curtail[ed] the independence of the judiciary vis-à-vis the President" (paragraphs 111 and 113). See also Venice Commission, CDL-AD(2010)042, Interim Opinion of the Venice Commission on the draft law on the High Council for judges and prosecutors of Türkiye, which underlined that "wide powers of supervision and inspection of the judiciary" were not relaxed in the result of the constitutional reform (para. 25). See the 2018 ODIHR EOM Final Report, p. 9 on the failure of establishing polling boards via lottery. The 2021 GRECO Second Interim Report on the 4th Evaluation Round underlined the remaining necessity to ensure judicial independence, including of the High Council of Judges and Prosecutors (GrecoRC4(2020)18, paras 38, 46, 54). See the 2019 Report of the Council of Europe Commissioner for Human Rights Dunja Mijatovic following her visit to Türkiye in 2019, Strasbourg, 19 February 2020 (CommDH(2020)1).

[36] *Opinions and Evaluations of the Union of Turkish Bar Associations on Some Amendments Regarding the "Law on the Amendment of the Law on Election of Members of Parliaments and on Certain Laws",* Ankara, 10 May 2022, p. 15.

forms, documents and lists, *"templates suitable for ballots by the use of visually impaired voters".* This change is certainly to be welcomed and is in line with previous Venice Commission and ODIHR recommendations.[37] Consideration should be given to taking additional measures to facilitating the access of persons with all types of disabilities to electoral processes, with a view to ensuring their effective and autonomous participation.[38]

Voter registration

57. Articles 8 to 10 of Law No. 7393 amend Articles 33, 36 and 40 of Law No. 298 which all concern *voter registration.*

58. In the *Code of Good Practice in Electoral Matters,* the Venice Commission identified several principles that should govern the operation of voters' .[39] These principles include, *inter alia,* permanency of such registers as well as their regular updates, carried out at least once a year. Moreover, *"there should be an administrative procedure – subject to judicial control – or a judicial procedure enabling electors not on the register to have their names included".*[40] In line with these electoral standards, a similar procedure should make it possible to have inaccurate and erroneous entries in the register corrected.[41]

59. The three provisions all aim at ensuring that the number of voters unable to exercise their right to vote due to inaccuracies of, or doubts about, voter registers, remains limited. During the visit to Ankara, the Venice Commission and ODIHR were informed that in the previous elections, the number of such voters had amounted to more than 500.000 persons. The measures aimed at redressing this situation are to be welcomed. Such measures must however strike a reasonable balance between the interest in the stability of voters' registers on the one hand and the need to accept that voters may for various reasons want to vote in an area other than their usual place of residence on the other hand.

60. According to the new paragraph added to Article 33, *"in the local administration elections (…), the updating procedures shall be carried out on the voter registers created three months before the start date of the election according to the residential address"* (Article 8 of Law No. 7393). The authorities explained that such a provision shall prevent instrumental changes of addresses in the last months preceding the elections that could contribute to the distortion of the electoral results in certain localities.[42] Even if this could in practice disenfranchise some voters who have moved far away from their former place of residence, this would not go against international standards.[43] The precise timing of this period, with respect to the update of

[37] See the 2018 ODIHR election observation final report in Türkiye; see, more generally, the Venice Commission's Revised interpretative declaration to the code of good practice in electoral matters on the participation of people with disabilities in elections, CDL-AD(2011)045, II.1.3. See also Venice Commission, CDL-AD(2020)026, Montenegro - Urgent Joint Opinion on the Draft Law on Elections of Members of Parliament and Councillors, para. 71.
[38] Besides the Braille template for ballot papers introduced by Law No. 7393, the Law on General Principles prescribes assisted and mobile voting for people with disabilities, as well as some preferential measures of treatment at polling stations (See Articles 14, 90 and 93). On international standards, see Articles 9 and 12 of the 2006 UN Convention on the Rights of Persons with Disabilities that requires equal, full and independent participation in political and public life through appropriately designed "physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas". See also Article 15 of the 1996 Council of Europe Revised European Social Charter (ETS No.163), Recommendation CM/Rec(2009)8 of the Committee of Ministers to member states on achieving full participation through Universal Design, as well as the Venice Commission's Revised interpretative declaration to the code of good practice in electoral matters on the participation of people with disabilities in elections (CDL-AD(2011)045).
[39] Venice Commission, CDL-AD(2002)023rev2-cor, Code of Good Practice in Electoral Matters, I.1.2.
[40] *Ibid,* I.1.2.iv.
[41] *Ibid,* I.1.2.v.
[42] *Information note*, para. 66.
[43] Venice Commission, CDL-AD(2002)023rev2-cor, Code of Good Practice in Electoral Matters, I.1.1.c.iii-iv.

the register and submission of extracts to local election management bodies, should however be clarified.[44]

61. By means of the amended Article 36(1) of Law No. 298, *"voters cannot be deprived of their right to vote in any way due to the arrangement of the register. Those whose addresses are not visible in the address registration system as their addresses have been closed shall be registered in the electoral roll within the scope of the last valid address registration information which is available in the address registration system of the Directorate General of Population and Citizenship Affairs"* (Article 9 of Law No. 7393). This is a supplementary safeguard against disenfranchisement due to administrative deficiencies, which is welcomed. However, Article 34 of the Law on Basic Provisions retains the rule that, in case a voter's registration information contains deficiencies, the voter shall not be included into the polling board voter list and shall not be allowed to vote, unless the information is corrected. While the legislation expressly provides for "the completion of deficiencies", the amendments do not appear to provide a mechanism for preventing the exclusion of voters when registration mistakes relate to data other than the address. It would be beneficial for the law to provide a foreseeable and comprehensive mechanism preventing disenfranchisement due to technical deficiencies in the voter registration process.

62. Article 40 of Law No. 298 has been amended to indicate that *"pursuant to the review and examination to be carried out ex officio by the chairperson of the district election board - upon objection or ex officio up reaching the conclusion that the request for change of address is a suspicious attempt - regarding a voter's request for change of address made from one electoral zone to another within the display period of the registered voters' lists of the headmanship zone, if the request for change of address is not accepted, the voter's registration shall not be frozen and shall continue at the previous registered address"* (Article 10 of Law No. 7393).

63. Thus, district electoral board chairpersons become entitled to reject a request for changing the registration address from one constituency to another during the period of public scrutiny, if they consider that the request to change the registration is "suspicious". Such a conclusion can be reached by the chairperson *ex officio* or upon a complaint. The law does not detail what criteria shall be applied towards such applications and what a "suspicious application" may encompass, which might lead to arbitrary or inconsistent decisions.[45] The Turkish authorities provided the information that the procedure applied, for a long time, in accepting the request for change of address is to accept such requests where the requester submits the document in respect of the change of address and other relevant documents demonstrating that he/she resides in the new address, such as electric bill. The Venice Commission and ODIHR however recommend amending the law to make it more precise, or providing for such rule in secondary legislation. A rejected request to change the address will not freeze the voter's record, as was previously the case, but the voters will retain their previous constituency of registration, which is a positive feature.

Misuse of office in election campaigns

64. The last modification consists in the deletion from Articles 65, 66 and 155 of Law No. 298 of references to the *Prime Minister*, by Article 11 of Law No. 7393. These provisions impose restrictions on the participation in electoral campaigns of ministers and public officials and foresee sanctions for those who would disrespect such restrictions. The deletion of references to the Prime Minister reflects the shift from the parliamentary to the presidential form of government by

[44] See Article 8 of Law No. 7393 and Article 43 of the Law on Basic Provisions; the use of the term "the start date of the election" could be interpreted as the start of the election campaign or election day. The regulation in Article 8 of the Law on local elections provides a clear definition, defining two separate deadlines.

[45] The revised legal framework grants wide regulatory and administrative powers to the Supreme Electoral Board with respect to voter registration (Article 32 and 33(2) of the Law on General Principles).

the 2017 constitutional revision, which included the abolition of the position of the Prime Minister. The government is now headed directly by the President who has thus assumed the position previously held by the Prime Minister in some way, and who may retain a leadership position in a political party. The references to the Prime Minister in Articles 65, 66 and 155 of Law No. 298 have not been replaced by references to the President.

65. The information Note suggests that the President is already subject to the restrictions foreseen by these provisions, as such restrictions allegedly stem from Article 13 of Law 6271 on Presidential Elections. This provision stipulates that *"during the propaganda period, for the other issues regarding propaganda including provisions related to bans in relation to the Prime Minister, ministers, and members of Parliament, the provisions of the Law No. 298 shall be implemented comparatively"* (para. 4). Rather than imposing any restrictions on the President, however, Article 13 seems to merely indicate that the restrictions imposed on ministers apply in presidential elections as well.

66. The rationale behind Articles 65, 66 and 155 of Law No. 298 is to ensure that all political parties and candidates can benefit from equal opportunities and that some of them would not be favoured by having public resources (official vehicles, official banquets; welcoming and protocol meetings, etc.) used in their support. Since the President does not stand outside the party system but, rather, is part of it,[46] there is no reason why s/he should not be subject to the restrictions in the same ways as other high public officials to prevent conflicts of interest and misuse of administrative resources.[47] The Venice Commission and ODIHR therefore recommend including the reference to the President explicitly in Articles 65, 66 and 155 of Law No. 298.

[46] As a result of the 2017 constitutional changes, the President may retain a leadership position in a political party.
[47] See, for example, Venice Commission and ODIHR, CDL-AD(2016)004, Joint Guidelines on Preventing and responding to the misuse of administrative resources during electoral processes that prescribes, *inter alia*, that electoral legal frameworks should ensure equality of opportunity to contestants, neutrality of civil service in election campaigns, as well as safeguards against potential conflicts of interests.