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

**OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS**  
**(OSCE/ODIHR)**

**TURKEY**

**JOINT OPINION**

**ON AMENDMENTS TO THE ELECTORAL LEGISLATION AND  
RELATED “HARMONISATION LAWS” ADOPTED IN  
MARCH AND APRIL 2018**

**Adopted by the Council for Democratic Elections  
at its 64th meeting (Venice, 13 December 2018)  
and by the Venice Commission  
at its 117th Plenary Session (Venice, 14-15 December 2018)**

**on the basis of comments by**

**Mr Eirik HOLMØYVIK (Substitute Member, Norway)**  
**Mr Oliver KASK (Member, Estonia)**  
**Mr Pere VILANOVA TRIAS (Member, Andorra)**  
**Ms Marla MORRY (ODIHR Legal Expert)**

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## **I. Introduction**

1. On 4 May 2018, Sir Roger Gale, 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 on the amendments to the electoral legislation and related "harmonisation laws" adopted in March and April 2018 in Turkey to assess their compliance with international human rights standards and OSCE commitments.
2. Messrs Eirik Holmøyvik (substitute member, Norway), Oliver Kask (member, Estonia) and Pere Vilanova Trias (member, Andorra) were appointed as rapporteurs for the Venice Commission. Ms Marla Morry was appointed as legal expert for the OSCE Office for Democratic Institutions and Human Rights (ODIHR).
3. A delegation of the Venice Commission and ODIHR, composed of Messrs Holmøyvik and Kask, and Mr Pierre Garrone from the Venice Commission's secretariat, as well as Ms Morry and M. Vladimir Misev from ODIHR, visited Ankara on 16-17 November 2018 to meet 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 into account the information obtained during the above-mentioned visit.
4. Following an exchange of views with Mr Ömer Yılmaz, Rapporteur Judge, Human Rights Department, Ministry of Justice, the present Joint Opinion was adopted by the Council for Democratic Elections at its 64th meeting (Venice, 13 December 2018) and by the Venice Commission at its 117th Plenary Session (Venice, 14-15 December 2018).

## **II. Scope of the Joint Opinion**

5. The scope of this Joint Opinion covers only the amendments submitted for review and the legislation that they are amending. Thus limited, the Joint Opinion does not constitute a full and comprehensive review of the entire legal framework governing elections in Turkey. ODIHR and the Venice Commission would like to note that this Joint Opinion does not prevent them from formulating additional written or oral recommendations or comments on the respective legal acts or related legislation in Turkey in the future.
6. The two sets of amendments are to be found in:
  1. Law No. 7102, The Law Amending some Provisions of the Law on Basic Provisions on Elections and Voter Registers and some Other Laws, 13 March 2018
  2. Law No. 7140, The Law Amending some Provisions of the Law on Basic Provisions on Elections and Voter Registers and some Other laws, 25 April 2018.
7. They pertain to the following laws:

Law No. 298 on Basic Provisions on Elections and Voter Registers (CDL-REF(2018)031);  
Law No. 2839 on Parliamentary Elections (CDL-REF(2018)033);  
Law No. 6271 on Presidential Elections (CDL-REF(2018)034);  
Law No. 2820 on Political Parties (CDL-REF(2018)032).
8. As part of the review, the Venice Commission and ODIHR were asked to consider election-related "harmonisation laws", which refer to legislation adopted to implement the 2017 constitutional reform, replacing the former parliamentary system with a presidential system in Turkey. As a result, these comments will also consider the effects of the 2017 constitutional reform on the existing electoral legislation. The March amendments can be described as

primarily substantive in nature and unrelated to the 2017 constitutional reforms, while the April amendments are essentially technical.

9. This Joint Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses more on areas that require amendments or improvements than on the positive aspects of the draft amendments. The ensuing recommendations are based on relevant Council of Europe and other international human rights standards and obligations, OSCE commitments, and good national practices, and on previous ODIHR and Venice Commission recommendations where relevant.

10. This Joint Opinion is based on an unofficial English translation of the draft amendments, as commissioned by ODIHR on 29 May 2018. Errors from translation may result.

11. These comments will not discuss other problematic issues concerning the Turkish legal framework for elections unrelated to the March and April amendments. In particular, three important issues mentioned by other Council of Europe bodies such as the Parliamentary Assembly (PACE), the European Court of Human Rights (ECtHR) and ODIHR remain unaddressed by Turkey. One such issue is the lack of judicial review of the decisions of the Supreme Board of Elections (SBE), including final election results, contrary to the Code of Good Practice in Electoral Matters<sup>1</sup> and paragraph 5.10 of the 1990 OSCE Copenhagen Document. Another issue is the blanket ban on prisoners voting rights and those deemed legally incapable - contrary to the ECtHR's case-law -, as well as other restrictions to the right to vote, concerning in particular citizens doing military service, or to the right to be elected, such as for persons who have not graduated from primary school.<sup>2</sup> A third issue, mentioned by PACE and ODIHR, is the system of seat allocation to constituencies, which results in a significant differential in the number of votes per parliamentary seat, so that it is inconsistent with the principle of the equality of the vote.<sup>3</sup>

12. The observation of the 24 June 2018 elections led PACE and ODIHR to provide for a number of recommendations concerning the legal framework relating to campaigning and campaign finance. For example, ODIHR recommended to ensure a clear separation between state and party to prevent candidates from using the advantage of their office for electoral purposes; to ensure effective sanctioning of the abuse of administrative resources; to bring the legal framework in line with legal obligations on freedom of expression and media freedom; to ensure conditions for an equitable campaign environment; to introduce an expenditure ceiling; to enhance the effectiveness of the oversight of electoral campaign finance; to allow explicitly for international and citizen observation.<sup>4</sup> These recommendations are still valid.

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<sup>1</sup> Articles 131 and 132 of the Law on Basic Provisions on Elections and Voter Registers. See Code of Good Practice in Electoral Matters, II.3.3 and its Explanatory Report, par. 93. See also PACE Doc. 14608, Observation of the early presidential and parliamentary elections in Turkey (24 June 2018), par. 26. Whereas in many Venice Commission member states a judicial remedy against the decisions of the highest election commission is not provided at least for all decisions, a complaint mechanism to an independent body against the decisions on certification of election results and distribution of seats is a requisite of Article 3 of the First Protocol and in conjunction with Article 13 of the ECHR.

<sup>2</sup> Articles 7 and 8 of the Law on Basic Provisions on Elections and Voter Registers; Article 11 of the Law on Parliamentary Elections; see ECtHR *Söyler v. Turkey*, 17 September 2003, No. 29411/07, and *Murat Vural v. Turkey*, 21 October 2014, No. 9540/07; Code of Good Practice in Electoral Matters, I.1.1; par. 24 of the 1990 OSCE Copenhagen Document.

<sup>3</sup> See Law on Parliamentary Elections, Article 4; see PACE Doc. 14608, Observation of the early presidential and parliamentary elections in Turkey (24 June 2018), par. 26; Code of Good Practice in Electoral Matters, I.2.2; par. 7.3 of the 1990 OSCE Copenhagen Document; ODIHR Mission final report, p. 2.

<sup>4</sup> See for example the ODIHR EOM final report on the 24 June 2018 early presidential and parliamentary elections, recommendations 7, 8, 21, 22, 23 and 28; PACE Doc. 14608, Observation of the early presidential and parliamentary elections in Turkey (24 June 2018), par. 26, 54-55, 80.

### **III. Executive Summary**

13. As a preliminary remark, it should be noted that successful electoral reform should be built on at least the following three elements: 1) clear and comprehensive legislation that meets international obligations and standards and addresses prior recommendations; 2) adoption of legislation by broad consensus after extensive public consultations with all relevant stakeholders;<sup>5</sup> and 3) political commitment to fully implement the electoral legislation in good faith. In particular, the Venice Commission and ODIHR stress that an open and transparent process of consultation and preparation of the amendments increases the confidence and trust in the adopted legislation and in the state institutions in general.

14. The Venice Commission and ODIHR consider it problematic that, contrary to international standards, late amendments were made to the electoral legislation, including its fundamental elements, just a few weeks before elections, in a hasty and non-inclusive way.<sup>6</sup>

15. The amendments include some positive steps that address prior recommendations, such as reducing the minimum age for standing for election to the Parliament, allowing independent presidential candidates to run and providing voting with mobile ballot box.

16. In order to further improve the compliance of the legislation with international human rights standards and OSCE commitments, the Venice Commission and ODIHR make the following key recommendations related to the amendments:

- A. Reconsider the composition of the electoral administration, in particular the Ballot Box Committees, in order to better ensure its impartiality;
- B. Reconsider the electoral threshold for the election of Parliament; while the effect of the threshold is somewhat mitigated by the possibility to form alliances introduced by the amendments, it remains extremely high;
- C. Reconsider the possibility for any voter to give notice to the law enforcement personnel and the respective obligation for the police to come into the polling station;
- D. Submit relocation of polling stations on security grounds to strict, clear, and objective parameters for its application with the aim to ensure that the right to vote is not unduly restricted.

17. Furthermore, the Venice Commission and ODIHR recommend to:

- A. Adopt legislative provisions ensuring respect for the obligation to stamp ballots as a safeguard of the validity of the poll;
- B. Stipulate again in the legislation the principle of equality in the size of polling stations, and providing for a maximum number of voters per polling station;
- C. Reconsider the provision allowing voters in the same building to be assigned to different polling stations;
- D. Require a deposit from independent presidential candidates only when the criteria for registration are satisfied;
- E. Respect the constitutional ban on late amendments to fundamental aspects of electoral legislation.

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<sup>5</sup> See paragraph 5.8 of the 1990 OSCE Copenhagen Document which commits participating States to guarantee "legislation, adopted at the end of a public procedure...").

<sup>6</sup> See for example ODIHR EOM final report on the 24 June 2018 early presidential and parliamentary elections.

18. The Venice Commission and ODIHR do not address here other recommendations which could improve the conformity of the electoral legislation with international standards, but which do not relate to provisions addressed in the amendments submitted for their opinion.

#### **IV. Analysis and Recommendations**

##### **A. Electoral reform process**

19. The amendments assessed in this Joint Opinion were adopted on 13 March and 25 April 2018 and were initiated by the governing Justice and Development Party (AKP) and the supporting Nationalist Movement Party (MHP). This means that the amendments were adopted 14 and 8 weeks respectively before the early presidential and parliamentary elections held on 24 June 2018. Moreover, the last set of amendments was adopted after the elections were called on 18 April 2018. In addition, amendments to the Law on Basic Provisions on Elections and Voter Registers were made on 30 November 2017, less than seven months before the elections.

20. These late amendments in relation to the elections raise four concerns. One is that late amendments to electoral legislation may undermine the legislation's function as a fair and stable framework for holding elections and providing the parties with an equal playing ground. Second, late amendments, in particular if they are rushed, may be detrimental to a thorough and inclusive legislative process.<sup>7</sup> Third, and as a consequence, late changes might be perceived, rightly or wrongly, as politically biased, that is as intended to (dis)advantage some political parties and candidates, and, as such, undermine trust in the electoral process and results. Fourth, late amendments diminish the opportunity for election administration bodies, political participants, voters and the media to become informed with the new electoral rules, and limit the needed time for administrative preparations, including training and voter education.

21. ODIHR and the Venice Commission emphasised the importance of stability in electoral legislation and presented the European standards as the following:<sup>8</sup>

“17. The stability of the electoral law is a prerequisite for implementing the principles underlying Europe's electoral heritage and is vital to the credibility of an electoral process. To this effect, the Venice Commission's Code of Good Practice in Electoral Matters states that “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”.<sup>9</sup> Stability is particularly important regarding the fundamental elements of the electoral law since these aspects are more likely to influence the outcome of an election.

18. It must be added that the Venice Commission does not consider the one-year restriction as preventing a state from bringing its electoral law in accordance with the standards of Europe's electoral heritage or the implementation of recommendations by international organisations.<sup>10</sup> Indeed, some of the late amendments to the Electoral Code address concerns previously raised by the Venice Commission and the ODIHR. If new provisions affecting fundamental elements of electoral law are

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<sup>7</sup> Cf. para 5.8 of the Copenhagen Document.

<sup>8</sup> See CDL-AD(2017)016, Bulgaria - Joint Opinion on Amendments to the Electoral Code, par. 17-18.

<sup>9</sup> Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), item II 2b; see also the OSCE/ODIHR Review of Electoral Legislation and Practice in OSCE Participating States, Warsaw, 15 October 2013, p. 6ff.

<sup>10</sup> Interpretative Declaration on the Stability of the Electoral Law (CDL-AD (2005)043), item II 2.

adopted within one year before an election, such amendments should only take effect after the forthcoming election.<sup>11</sup>

22. The importance of stability in electoral legislation is also recognised by the Constitution of Turkey (Article 67.6): “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.” However, the 2017 constitutional reform added a provisional Article 21 H to the Constitution which suspended Article 67.6 for the 2018 parliamentary and presidential elections.<sup>12</sup> Similar suspensions of the constitutional ban on late amendments to electoral legislation had been adopted on previous occasions (Provision of the Act No. 4709 of October 3, 2001 Provisional Article A, Provision of the Act No. 4777 of December 27, 2002, Provisional Article 1). As it is, the Turkish constitutional ban on late amendments to electoral legislation appears to have little effect in practice.

23. Provisional Article 21(B) of the amended Constitution provided that the harmonisation legislation was to be adopted within six months; the related amendments to the electoral legislation significantly exceeded this deadline. Moreover, while the implementation of the 2017 constitutional reform may have required certain technical amendments to the electoral legislation to harmonise it with the new presidential system and other changes impacting the electoral system, this concerns primarily the April amendments. The vast majority of the March amendments cannot be considered strictly required by the need to bring the election legislation in line with the constitutional changes. Of particular concern and contrary to the Code of Good Practice in Electoral Matters are the late amendments to fundamental elements of the electoral system.<sup>13</sup>

24. One is the March amendment to the Law on Parliamentary Elections which introduced electoral alliances (Article 12/A). This amendment allows parties in electoral alliances to be considered together in relation to the 10% electoral threshold (Article 33). This amendment impacts a fundamental element of the electoral system as it regulates the transformation of votes into seats (see IV.B below). This amendment partly mitigates the very high electoral threshold in Turkey, and may thus be seen as bringing Turkey’s electoral law more in line with the principles of equality and proportionality. Late amendments of electoral law, even of its fundamental elements, can be justified if the purpose is to bring the legislation in line with European standards.<sup>14</sup> However, at the time of its adoption, it must have been clear for the different stakeholders that this particular amendment could have a significant impact on the election results. Such amendments shortly before an election are highly problematic. Indeed, the amendment turned out to have a direct impact on the election results as it allowed the junior partner in the opposition coalition, the Good Party (İyi), to meet the threshold and thus be represented in Parliament.

25. Second, the March amendments to the Law on the Basic Provisions on Elections and Voter Registers changed the composition and leadership of the Ballot Box Committees (BBC). This amendment changed the composition of BBCs by introducing civil servants, one of which will be the president of the BBC (Article 22, see 4 below), while previously party-nominees were BBC presidents. These are changes relating to the membership of electoral commissions, which the Code of Good Practice in Electoral Matters considers as fundamental elements of electoral law.

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<sup>11</sup> Code of Good Practice in Electoral Matters, Explanatory Report, par. 66.

<sup>12</sup> The provisional Article 21 H to the Constitution of Turkey reads: “Last paragraph of Article 67 of the Constitution shall not apply regarding the first mutual parliamentary and Presidential elections which will be held following the date of entry into force of law.”

<sup>13</sup> See Code of Good Practice in Electoral Matters, Interpretative Declaration, par. II.4.

<sup>14</sup> See Code of Good Practice in Electoral Matters, Interpretative Declaration, par. II.2.

26. Third, the 2017 constitutional reform, which is a prerequisite for the timing of the amendments as it provisionally lifted the constitutional ban on changes to electoral law within one year before the election, may also have significant effects for the independence of the Supreme Board of Elections and lower-level election boards (see IV.C below).

27. Finally, several important safeguards for transparency and election security were affected by the March amendments to the Law on Basic Provisions on Elections and Voter Registers, which may undermine the integrity of the elections. This includes allowing ballots that have not been stamped by the BBCs to be considered valid, a practice which was criticised in the 2017 constitutional referendum (Article 98); the possibility for governors and presidents of Provincial Election Boards to request moving or merging polling stations based on security considerations (Article 14.15); the possibility for voters living in the same building address to be assigned to different polling stations (Article 5); the possibility of any voter to request law-enforcement presence in polling stations, in violation of the recommendations in the Code of Good Practice in Electoral Matters (Article 82); and the increased access for law-enforcement personnel to buildings housing polling stations (Article 82).

28. Adding to the concerns over the timing of the amendments, it is problematic that the March and April amendments were adopted in a hasty manner without a proper consultation of the relevant stakeholders, including the opposition parties and civil society.<sup>15</sup> In numerous opinions, the Venice Commission and ODIHR have stressed the importance of a comprehensive and inclusive public consultation when adopting legal frameworks on issues of major importance for society, such as major amendments to electoral law.<sup>16</sup> In the current case, the amendments were moreover made in a State of Emergency, limiting the space for democratic debate and the free expression of a plurality of views.<sup>17</sup> While some amendments are technical, several amendments may have significant consequences for the exercise of suffrage rights (passive and active), the electoral result or the administration of elections. As emphasised by ODIHR and the Venice Commission on previous occasions, considering the importance of these amendments, as well as the 2017 constitutional reform's effect on the existing electoral system (see 3 and 4 below), it is vital that they take place following an inclusive and thorough process of public consultation.<sup>18</sup> Hasty and non-inclusive amendments to fundamental elements of the electoral law such as in the 2018 amendments, challenge the very legitimacy of the Turkish electoral system.

29. Taken together, significant changes to the electoral legislation were made very close to election day without meaningful public consultation. These amendments appear to have been initiated and finally adopted at a time when the same majority in the Parliament which initiated the amendments, also considered calling for early elections. The most significant amendments were also largely unrelated to the implementation of the 2017 constitutional reform. Based on this sequence of events as well as their content, the application of the March amendments for the 2018 parliamentary and presidential elections is clearly problematic and runs counter to the Code of Good Practice in Electoral Matters. Regardless of the actual motive behind the amendments, their timing and process challenge the legitimacy of Turkish electoral legislation.

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<sup>15</sup> See PACE Doc. 14608, Observation of the early presidential and parliamentary elections in Turkey (24 June 2018), par. 24; ODIHR, Republic of Turkey, Early Presidential and parliamentary Elections 24 June 2018, p. 6-7.

<sup>16</sup> See CDL-AD(2018)21 Romania Opinion on Draft Amendments to the Criminal Code and the Criminal Procedure Code, par. 39; CDL-PI(2018)007 Romania Preliminary Opinion on Draft Amendments to Law No. 303/2004 on the Statute of Judges and Prosecutors, Law No. 304/2004 on Judicial Organization, and Law No. 317/2004 on the Superior Council for Magistracy, par.. 30-31; Opinion on the Draft Law on the Review of the Constitution of Romania, par.. 25-30; CDL-AD(2013)010, Opinion on the draft New Constitution of Iceland, par. 17, CDL-AD(2014)010; CDL-AD(2011)001, Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary, par.. 15-19. See also CDL-AD(2011)003rev Report on the Rule of Law, par. 41.

<sup>17</sup> See PACE Doc. 14608, Observation of the early presidential and parliamentary elections in Turkey (24 June 2018), par. 12-13; ODIHR EOM final report on the 24 June 2018 early presidential and parliamentary elections.

<sup>18</sup> See CDL-AD(2017)012, Republic of Moldova - Joint Opinion on the Draft Laws on Amending Certain Legislative Acts (Electoral System for the Election of the Parliament), par. 39.



*The Venice Commission and ODIHR recommend the Turkish authorities to respect the constitutional safeguard prohibiting the application of amendments to election legislation to elections within one year from the adoption. This constitutional prohibition is in line with international good practice and should not again be suspended. Any amendments to the legal framework should be adopted in an inclusive manner including public consultation.*

## **B. Threshold**

30. The revised version of Article 33 of the Law on Parliamentary Elections maintains the threshold for parliamentary elections in Turkey at 10% of the valid votes cast on a national basis, or in all of the by-election constituencies in case of a by-election.

31. However, the introduction of electoral alliances by the March amendments affects the threshold (Law on Parliamentary Elections Article 12/A). For parties participating in an electoral alliance, the threshold applies to the votes received by the alliance as a whole and not to the individual parties (amendment of 13 March 2018 to the Law on Parliamentary Elections Article 33). This rule partly mitigates the effect of the 10% threshold by allowing smaller parties to meet the threshold by grouping together or aligning themselves with a larger party.<sup>19</sup>

32. There is no European standard on electoral thresholds. 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. Within the member states of the Council of Europe, thresholds vary from no threshold to Turkey's 10% threshold, though few European states have national thresholds higher than 5%.<sup>20</sup> The European Court of Human Rights has in its case law allowed the states a wide margin of appreciation in this matter in relation to Protocol 1 Article 3 of the ECHR,<sup>21</sup> and the Venice Commission has not criticised thresholds as such.<sup>22</sup>

33. In the *Yumak and Sadak* case from 2007, the ECtHR found that the 10% threshold in Turkey did not violate Article 3 of Protocol 1 of the ECHR.<sup>23</sup> While the ECtHR concluded that "in general a 10% electoral threshold appears excessive" and recommended it to be lowered, it nonetheless found that in the specific case "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 to the applicants by Article 3 of Protocol No. 1."<sup>24</sup>

34. It follows from the *Yumak and Sadak* case that the proportionality of a given threshold depends on both the political history and context in the country as well as on other features of the electoral system. Changes in the legal or political context may therefore affect the proportionality of an existing electoral threshold. In recent opinions, the Venice Commission too has stressed the importance of considering the combined effects of measures in the electoral

<sup>19</sup> For the 2018 parliamentary election, the introduction of electoral alliances benefitted the junior partner in the opposition coalition, the İYİ Party, which received 9.96% of the votes. This party still met the 10% threshold by forming an electoral alliance with the Republican People's Party, which received 22.64% of the votes.

<sup>20</sup> See CDL-AD(2010)007, Report on Thresholds and Other Features of Electoral Systems Which Bar Parties from Access to Parliament, par. 20-23.

<sup>21</sup> See a summary in *Strack and Richter v. Germany* (dec.), 5 July 2016, nos. 28811/12 and 50303/12, par. 33.

<sup>22</sup> See Report on Thresholds and Other Features of Electoral Systems Which Bar Parties from Access to Parliament, par. 32. See also in recent opinions, CDL-AD(2017)013, *Georgia, Opinion on the Draft Revised Constitution*, par. 28; CDL-AD(2018)008, *Republic of Moldova Joint Opinion on the Draft Laws on Amending and Completing Certain Legislative Acts*, par. 25.

<sup>23</sup> See *Yumak and Sadak v. Turkey* [GC], 8 July 2008, No. 10226/03.

<sup>24</sup> See *Yumak and Sadak v. Turkey* [GC], No. 10226/03, par. 147.

legislation, such as thresholds, on the voter's right to equal suffrage.<sup>25</sup> The March amendments to the Law on Parliamentary Elections, by the introduction of electoral alliances, diminished to a certain extent the negative effect of the threshold – since the threshold applies to the alliance and not to each individual party within the alliance. However, for parties which for political reasons are not eager or unable to join an electoral alliance with other parties, the threshold is still exceptionally high among the member states of the Council of Europe. Moreover, it is necessary to consider the threshold in light of other amendments to the electoral system and the new constitutional context following the 2017 constitutional reform.

35. In the *Yumak and Sadak* case, Turkey argued that the 10% threshold was required in order to produce stable governments.<sup>26</sup> It also argued that a high national threshold was justified in order to preserve the unitary structure of the state by preventing regional or local interests from dominating Parliament. While the latter grounds for a high threshold may still be valid (subject to respect for the principle of proportionality), under the new presidential system a threshold for Parliament is no longer required to produce stable governments. Under the previous parliamentary system until 2017, governments (the Council of Ministers) required a vote of confidence in the Parliament to be formed and could be dismissed by a vote of no confidence.<sup>27</sup> As a result, the composition of Parliament directly affected the stability of governments. After the 2017 constitutional reform, the Parliament has no role in the appointment of the President or his cabinet. The President is the head of the executive branch and is elected directly and separately of the Parliament.<sup>28</sup> The President appoints and dismisses vice presidents and government ministers, and these are accountable to the President only.<sup>29</sup> The change to a presidential system means that a major justification for the current high electoral threshold for the election of Parliament is no longer present. Indeed, a greater plurality of views in Parliament appears ever more important under the new presidential system, given the enhanced powers vested in the executive following the 2017 constitutional reform.<sup>30</sup>

36. Though it is not for the Venice Commission to pronounce on the interpretation and application of the ECHR, it is noteworthy that the ECtHR in the *Yumak and Sadak* case found the Turkish 10% threshold generally excessive but accepted it in that particular case due to the specific political context in Turkey. The new regulation of electoral alliances mitigates some of the effects of the threshold, but not for parties which for political reasons choose or are left to stand for election alone. In light of the significant changes in the relevant constitutional and political context following the transition to a presidential system, *the Venice Commission and ODIHR recommend the current electoral threshold for the election of Parliament to be reconsidered.*

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<sup>25</sup> See CDL-AD(2018)008, Republic of Moldova - Joint Opinion on the Draft Laws on Amending and Completing Certain Legislative Acts, par. 24-25; CDL-AD(2017)013, Georgia - Opinion on the Draft Revised Constitution, par. 42; CDL-AD(2017)023, Opinion on the draft revised Constitution as adopted by the Parliament of Georgia at the second reading on 23 June 2017, par. 19-21, 27.

<sup>26</sup> See *Yumak and Sadak v. Turkey* [GC], no. 10226/03, par. 92.

<sup>27</sup> See the Constitution of Turkey, before the revision on 21 January 2017, Articles 110-111 and 99.

<sup>28</sup> See the Constitution of Turkey, Article 104.

<sup>29</sup> See the Constitution of Turkey, Article 106.

<sup>30</sup> See CDL-AD(2017)005, Turkey - Opinion on the Amendments to the Constitution Adopted by the Grand National Assembly on 21 January 2017 and to be Submitted to a National Referendum on 16 April 2017.

### C. Election administration

37. The March amendments to the Law on the Basic Provisions on Elections and Voter Registers changed the composition and leadership of the BBCs. Under the previous legislation, presidents of BBCs were drawn by lot among candidates proposed by the political parties. Article 22 of the amended law abolished the appointment of political party nominees, and the president of the BBC is instead a civil servant in the district chosen by the president of the relevant District Electoral Board (DEB). Moreover, the amendments abolished the appointment of one member from the aldermen council of the village or the district, and replaced this member with a civil servant chosen by the president of the DEB (Article 23). As per the previous legislation, the remaining five members of the BBCs are appointed by the five parties with the greatest number of votes in the last general parliamentary elections in the district. As a result of the amendments, the president and a total of two out of seven members of the BBCs are civil servants, who are fundamentally subject to the authority of the executive branch of power and are thereby, on the basis of the amended Article 104 of the Constitution, under the authority of the President of Turkey. With this background and due to the perceived lack of independence of Turkey's civil service from the political powers, it is hard to see how the civil servants in the BBCs can be considered impartial, as required by the Code of Good Practice in Electoral Matters.<sup>31</sup> While political parties are not impartial when taken individually, objective impartiality can nonetheless be achieved by a broad and balanced composition of electoral administration bodies. Concerns with the competence of party-appointed BBC presidents, as noted by the authorities as a justification for the new composition, can be addressed by establishing minimum professional requirements. Moreover, the president of the DEB appoints "the presidents from those who do not have any obstacle"; the term "obstacle" is not defined and could lead to the exclusion from the post of president of BBCs on arbitrary grounds. Overall, the lack of criteria for appointees leaves the process vulnerable to abuse and lacking transparency. Introducing civil servants to BBCs while reducing pluralism represented by the political parties, appears problematic vis-à-vis the above-mentioned impartiality requirement and the country's particular political reality.<sup>32</sup> *The Venice Commission and ODIHR recommend reconsidering the amendments regarding the composition and leadership of BBCs.*

38. In addition to the March amendments to the Law on the Basic Provisions on Elections and Voter Registers concerning the BBCs, the new constitutional context that preceded the March and April amendments to the electoral legislation also affects the Supreme Board of Elections (SBE). The SBE is a powerful state organ which, in addition to organising elections, also makes final decisions in electoral disputes and on the electoral result without possibility of judicial review (Constitution Article 79.2).

39. As for the SBE, the March amendments did not affect its organisation as such. However, the new constitutional context after the 2017 constitutional reform may have consequences for the independence of the SBE and lower electoral boards. The composition of the SBE is entrenched in the Constitution (Article 79) and has not been changed by the amendments to the electoral legislation. According to Article 79 of the Constitution and Law 7062 of 30 November 2017, the SBE has 7 members and 4 alternate members. Of these full and alternate members, serving six year terms, 6 are elected by the Court of Cassation and 5 are elected by the Council of State. In addition, the Law on the Basic Provisions on Elections and Voter Registers (Article 17) provides that the four political parties which received the highest number of votes in the last parliamentary elections and/or political parties which have groups in the Parliament, may each assign one representative and one alternate representative to the

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<sup>31</sup> See the Code of Good Practice in Electoral Matters, II.3.1.a. "An impartial body must be in charge of applying electoral law". Also, see UN Human Rights Committee's General Comment 25 on the International Covenant on Civil and Political Rights.

<sup>32</sup> "Where there is no longstanding tradition of administrative authorities' independence from those holding political power, independent, impartial electoral commissions must be set up at all levels, from the national level to polling station level": Code of Good Practice in Electoral Matters, II.3.1.b.

SBE. These representatives of the political parties may participate in the meetings of the SBE, but crucially, do not have the right to vote.

40. While the Code of Good Practice in Electoral Matters suggests a broad and pluralistic composition of central election commissions in order to secure their independence, the SBE's composition of full members from the two highest judicial bodies in civil and administrative cases appears to place particular emphasis on its independence from the executive as well as from any political party in Parliament.<sup>33</sup> This is essential for the confidence in the electoral process. However, as the full members of the SBE are exclusively judicial officials, its independence is contingent on the independence of its judges as such.

41. The 2017 Venice Commission opinion on the Turkish constitutional reform raised serious concerns as to the independence of judges in Turkey after the constitutional revision that year.<sup>34</sup> A particular source of concern was the new composition of the Council of Judges and Prosecutors, which has the power to appoint, dismiss, transfer, promote and adopt disciplinary measures against judges. For the Council of State, Article 155 of the Turkish Constitution provides that the Council of Judges and Prosecutors shall appoint  $\frac{3}{4}$  of the members, while the remaining  $\frac{1}{4}$  shall be appointed by the President of the Republic. The 2017 opinion found that the changes to the Council of Judges and Prosecutors' composition were "extremely problematic", as the President of the Republic would in effect control the appointments to and thus the composition of the Council.<sup>35</sup> The opinion noted that according to Article 159 of the Turkish Constitution, the President appoints 6 of the Council's 13 members, while the remaining 7 members are appointed by the Grand National Assembly. Since parliamentary and presidential elections are held simultaneously, the Venice Commission found it highly likely that the President through his or her party will exert considerable influence over the Grand National Assembly's choice of the remaining members of the Council of Judges and Prosecutors.

42. In this new constitutional context, the current composition of the SBE is problematic. Insofar as the independence of the Council of Judges and Prosecutors can be questioned, so can the independence of the SBE. Indirectly, the Council of Judges and Prosecutors controls the appointments of the SBE's members.

43. Similar concerns may be raised for the Provincial Electoral Boards, which are composed of three judges serving two-year terms. Here too, the board's representatives of the political parties have no voting rights (Law on the Basic Provisions on Elections and Voter Registers, Article 17). It is noteworthy that the law, in accordance with the Code of Good Practice in Electoral Matters, prescribes a broader composition of the DEBs. While these bodies are also led by a judge, representatives from the political parties and civil servants are also full members with voting rights (Law on the Basic Provisions on Elections and Voter Registers, Article 19). The judge, as president of the DEB, has tie-breaking power in all decisions of the board, so his/her independence is particularly important.

44. *The Venice Commission and ODIHR recommend reconsidering the composition of the electoral administration in order to ensure its impartiality.*

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<sup>33</sup> See Code of Good Practice in Electoral Matters, II.3.1; CCPR General Comment No. 25, par. 20

<sup>34</sup> See CDL-AD(2017)005, par. 110-123.

<sup>35</sup> See CDL-AD(2017)005, par. 119.

## D. Voting day

45. The introduction of mobile ballot boxes in the March amendments, in addition to facilitating the right to vote for persons unable to be physically present at polling stations, has a positive effect on the political participation of persons with disabilities (Law on Basic Provisions on Elections and Voter Registers, Article 14.17). The Venice Commission and ODIHR welcome this amendment, in principle. However, the law does not specify how mobile ballot boxes are to function and what safeguards are required. Instead, the law delegates to the SBE the power to develop the legal framework for mobile ballot boxes. The Code of Good Practice in Electoral Matters provides that “mobile ballot boxes should only be allowed under strict conditions, avoiding all risks of fraud”.<sup>36</sup> However, as was noted by the Office of the United Nations High Commissioner on Human Rights (OHCHR) in 2011, “[a]lternative ways of voting should be used only in cases where it is not possible, or it is extremely difficult, for persons with disabilities to vote in polling stations like everyone else... General reliance on voting assistance and alternative voting as a way to ensure the political participation of persons with disabilities would not be consistent with the general obligations undertaken by States Parties under articles 4 and 29 of the Convention [the CRPD].”<sup>37</sup> The Turkish authorities informed the Venice Commission and ODIHR that Circular no. 135/2 Regulating Duties and Authorities of the Domestic Ballot Box Committees adopted by the Supreme Board of Elections on 8 May 2018 regulates the functioning of mobile ballot boxes. *It would be preferable to define such conditions in the legislation to provide for greater legal stability, as the voting outside polling stations would be predictable to a higher extent and, due to the transparency and restricted margin of appreciation for the BBCs, more trustful.*

46. Chapter 3 of the Law on Parliamentary Elections on the procedures for voting day concerning the newly introduced electoral alliances is quite complicated and could be simplified.

47. Each member of the polling station committee as well as all voters can call for law enforcement officers to come to the polling station, the latter authority introduced in the March amendments (Law on Basic Provisions on Elections and Voter Registers, Article 82.5). Extending this right to voters contains a potential for disrupting the voting process by repeated and unwarranted calls for security forces; a high level of unreasoned presence of police officers in the polling stations could hamper a smooth voting free from intimidation. The Code of Good Practice in Electoral Matters expressly warns of extending the right to call security forces to anyone else than the president of the polling station.<sup>38</sup> *The Venice Commission and ODIHR recommend reconsidering the possibility for any voter to give notice to the law enforcement institutions and the respective obligation for the police to come into polling stations.*

48. The definition of the ballot box area in the Law on Basic Provisions on Elections and Voter Registers (Article 81) is also amended so that this area is restricted to the “room, section or place” in which the ballot box is placed. Before the amendment, the ballot box area also included a 100 metre radius around the polling station. Although the amendment eliminates the issue of a specific place being the ballot box area for many polling stations and thus under supervision by more than one BBC, the significance of this amendment is that narrowing the ballot box area defined in Article 81 also narrows the restrictions on the presence of security forces regulated in Article 82. In other words, it appears that the law now allows a stronger presence of security forces in the immediate vicinity of the polling station, including in hallways of the buildings that house polling stations where voters are queuing, which could have an

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<sup>36</sup> See Code of Good Practice in Electoral Matters, I.3.2.vi.

<sup>37</sup> Paragraphs 58 and 74, Thematic Study of the UN High Commissioner for Human Rights on Participation in Political and Public Life by Persons with Disabilities, 2011. Available at: [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-36\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-36_en.pdf).

<sup>38</sup> See Code of Good Practice in Electoral Matters, Explanatory Report, II.3.6. The issue was also raised in the 2018 ODIHR observation report, p. 24.

intimidating effect. *The Venice Commission and ODIHR recommend reconsidering the amendment that narrows the ballot box area.*

49. Another potentially problematic issue concerning the voting process is the BBC's approval of unstamped ballots (those not bearing the BBC stamp.) The voting material (ballots and envelopes) should be homogeneous, including a clear specification of what is an invalid vote. The approval of unstamped ballots was a contested issue during the 2017 constitutional referendum; at that time, the legislation mandated the invalidation of unstamped ballots, while the SBE decided to count the unstamped ballots contrary to the requirements in the law. This increases the risk of ballot (envelope) stuffing and violations during election day since other safeguard measures such as the watermark on ballots are not a replacement for the BBC stamp as they are not a guarantee that the ballot was not brought in from outside the polling station. This undermines the right of voters to an accurate assessment of the results of the ballot.<sup>39</sup> Stamping of the ballots or envelopes is a common practice in Venice Commission member states and is an additional safeguard that one person is not able to put more than one ballot into the ballot box simultaneously, by ensuring that additional ballots cannot be brought into a polling station, i.e. stamped with another polling station's stamp or not stamped with a polling station stamp. Following the March amendments, the Law on the Basic Provisions on Elections and Voter Registers (Article 98), now requires that unstamped envelopes are to be approved. Article 77 still requires BBCs to stamp all ballots, while Article 68 requires the SBE to provide, *inter alia*, stamps for BBCs in order to ensure that the votes are not declared null and void. The new paragraph added in March to Article 101 if interpreted literally, states that ballot papers sent by the authorised electoral boards and having water marks of the SBE but that are not stamped on their back due to the neglect of the BBCs are to be considered invalid; however, practice seems to interpret it as allowing the counting of these ballots. Moreover, the legal framework does not include any provisions establishing a procedure and clear and objective criteria for the determination of whether an unstamped ballot was unstamped due to negligence or some other reason such as fraud, leaving room for arbitrary application. *The Venice Commission and ODIHR recommend that the legislation ensure respect for the obligation in national law to stamp ballots and envelopes.*

## **E. Other issues**

### *Right to be elected*

50. The minimum age for standing for election to the Parliament is reduced from 25 years to 18 years (Law on Parliamentary Elections Article 10). This is a positive development as it enlarges the suffrage. In the same vein, the Law on Presidential Elections (Article 7) now allows independent candidates to run for President, which is in line with international standards, Paragraph 7.5 of the OSCE Copenhagen Document, and previous ODIHR recommendations. Both of these legislative amendments follow from the 2017 constitutional reforms.

51. As part of the March amendments, candidates in the lists of political parties may not be nominated from among the members of other political parties without written consent of the political party the candidate belongs to (Article 16.3 of the Law on Parliamentary Elections). This restriction should be reconsidered. The decision to stand for election is in this context an individual right, though it may be subject to restrictions, not a party right.<sup>40</sup> The political party should not decide on the right of its members to stand for parliamentary elections. Although the members of the political parties are free to step out of the party, this requirement does not serve

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<sup>39</sup> Cf. Code of Good Practice in Electoral Matters, par. 26.

<sup>40</sup> See Code of Good Practice in Electoral Matters, I.1.1. While not identical to the present case, it should be noted that the ECtHR has been negative to political parties deciding on the mandates of elected representatives, see *Paunovic and Milivojevic v. Serbia*, 24 August 2016, No. 41683/06, par. 63-65.

any wider public interest. The membership in political parties should not lead to such restriction in the right to stand for election. Rather it should be up to the political party to decide on the membership once its member has been nominated as a candidate in another political party's candidate list.

### *Polling stations*

52. Under the March amendments, it is possible, based on a request by the governor or president of the provincial election board, for the SBE to relocate or merge polling stations based on security concerns up to one month before the elections (Law on Basic Provisions on Elections and Voter Registers Article 14.16).<sup>41</sup> The involvement of governors, who are high level civil servants, raises additional concerns about impartiality in the election administration. In addition, the legislation does not include strict, clear, objective parameters for its application with the aim to ensure that the right to vote is not unduly restricted. The term "if it is deemed necessary in terms of the election security" leaves room for a wide margin of appreciation, which could be abused, and lacks the transparency necessary to maintain stakeholder confidence in the process. In addition, there is no requirement that voters be notified of the new polling location. The relocation of a polling station may make it difficult for voters to exercise their right to vote. This provision was extensively used in the 2018 elections, with some opposition parties and civil society claiming the relocations were used to limit access to the vote of the Kurdish population, and numerous formal complaints were lodged challenging relocations.<sup>42</sup> *The Venice Commission and ODIHR recommend that this provision to relocate or merge polling stations based on security concerns be reconsidered, to establish strict, clear, objective criteria in the legislation for its application with the aim to ensure that the right to vote is not unduly restricted.*

53. The law no longer provides for a number of voters per polling station (Article 5 of the Law on Basic Provisions on Elections and Voter Registers) and Article 14.15 now provides that the SBE is to determine the number of voters per polling station for each type of election. This discretion should be reconsidered since, in the absence of specific requirements, it may lead to overcrowding or discrepancies between polling stations, denying in practice the right to vote in some areas. In practice, it may lead to accusations of politically based division of polling stations. It may give advantages to majority political parties if more polling stations are set up in the regions with wider support for them, while fewer polling stations are set up in regions where the support is wider among opposition parties. Moreover, voters should be informed well in advance of elections on the polling station where they have to vote. The Supreme Board of Elections informed the delegation of the Venice Commission and ODIHR that it had to issue a decision establishing a limit before each election; however, it would be preferable to address this issue in the legislation as a matter of legal stability. When allocating polling stations, distance and transport means should be considered. The size of polling stations in rural and urban areas could also differ; a possible way of addressing this issue could be to introduce minimum criteria for the ratio of staff in relation with the number of registered voters of the polling station. *The Venice Commission and ODIHR recommend the principle of equality in the size of polling stations to be stipulated again in the legislation, providing a maximum number of voters per polling station.*

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<sup>41</sup> The SBE decided in 2015 that the relocation of polling stations on security grounds was unconstitutional and inconsistent with international standards on voting rights, noting the state is responsible for providing security at assigned voting places.

<sup>42</sup> The ODIHR final report on the 2018 early presidential and parliamentary elections notes that the SBE did not publish the number and location of the BBCs that were relocated, the number of voters affected, or the justification for the decisions. The SBE informed the ODIHR that 120,000 voters were affected in the east and southeast, while the HDP claimed 320,000 voters were affected.

54. Article 5 of the Law on Basic Provisions on Elections and Voter Registers now includes a provision that: “Voters who live in the same building might be registered in the different polling station zones, provided that the integrity of the households is preserved, and they remain in the same electoral constituency.” The authorities justify this provision in the name of protecting the secrecy of the vote. This was a controversial issue in the 2018 elections as stakeholders were concerned that the new provision was aimed at allowing fraudulent voting to take place (e.g. deceased voters to be registered) combined with the difficulty for parties, voters and observers to control the voter lists, if voters from the same building were split up. Other concerns raised were the distance of voters from the polling stations if buildings were split up. On the face of it, the provision is not problematic, but there is room for the provision to be misused for political gain. If there is public mistrust, there should be strict, clear and objective legal criteria for its application, and the procedure and criteria for the decision to divide a building’s residents into different polling stations should be transparent. *The Venice Commission and ODIHR recommend that this provision be reconsidered and voters who live in the same building be registered only in the same polling station zone.*

#### *Presidential elections*

55. Article 4.2 of the Law on Presidential Elections provides that, “if one of the candidates who are entitled to participate in the second round does not participate to the election for any reason, in the second round, the vacant seat is substituted according to the result of the first round. However, substitution may be made until 5 pm on the day following the announcement of the temporary results.” 5 pm is a short time; a minimum of 24 hours after the provisional (temporary) results would be preferable.

56. Article 8A(2)b provides for a deposit equal to ten monthly salaries of the highest-ranking civil servant for a self-nominated candidate for presidential elections. The requirement of a deposit aims at avoiding the nomination of many candidates without a realistic chance to be elected and/or without any notable support. The amount of the deposit is however high and requires the candidate to collect financial support or donations before the campaign starts. The provision also requires that the money be deposited even before the 100,000 signature-collection process is carried out so that the aspirant must pay the money before he/she knows whether or not he/she has sufficient voter support. The deposit is only returned if the person collects enough signatures and is registered to run (or in case of death). *The Venice Commission and ODIHR recommend requiring a deposit from independent presidential candidates only when the criteria for registration are satisfied.*

57. According to Article 8A(4), voters may only support one presidential nominee. Paragraph 77 of the 2010 OSCEODIHR and Council of Europe Venice Commission Guidelines on Political Party Regulation<sup>43</sup> states that “in order to enhance pluralism and freedom of association, legislation should not limit a citizen to signing a supporting list for only one party”. *The Venice Commission and ODIHR recommend allowing voters to sign in support of more than one candidate for presidential elections.*

58. Article 8A(5) requires the voters to give support signatures for the nomination of presidential candidates only in person at district election boards. Such a requirement is burdensome and potentially dissuasive. Many voters might find themselves intimidated to sign for a candidate publicly in front of the DEC members. Even if the support signatures are public and the members of the DEC can verify the signatures afterwards, the voters are usually more comfortable and feel freer when they can sign for any candidate outside the DEC premises. *The Venice Commission and ODIHR recommend providing for a signature verification system with the possibility for the voters to sign for the candidates in other facilities or political party events.*

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<sup>43</sup> CDL-AD(2010)024.



59. The Law on Presidential Elections (Article 3(2)) follows Article 116 of the revised Constitution by allowing the president to run for a third term in the event of an early parliamentary election being called before the expiry of his or her second term. In its 2017 opinion on the constitutional reform in Turkey, the Venice Commission criticised the possibility of a third term, pointing to the importance of constitutional limitations to successive presidential terms as a means to limit the risk of negative consequences for democracy.<sup>44</sup> This point should be reiterated. *It is once again recommended reconsidering the possibility for the President to be elected for a third mandate in case of early elections; this would imply a constitutional revision.*

#### *Legislation on political parties*

60. Amendments to the Law on Political Parties, by lifting one restriction to their activities (Article 90), are a step in the right direction, but do little to address the previous recommendations by electoral observation missions and shortcomings or contradictions with international standards concerning limitations on freedom of association and expression, funding of political parties and campaigns, or transparency and auditing of the financial reports.<sup>45</sup> The amendments allow political parties to support other political parties in elections previously forbidden by Article 90, and in line with the amendment to the Law on Parliamentary Elections (Article 12/A) that permits parties to agree on election alliances. This amendment is in line with previous recommendations of international organisations. However, the legislation prohibits electoral alliances to use joint lists or logos. This could be reconsidered.

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<sup>44</sup> See CDL-AD(2017)005, par. 56-57. See also the UN Secretary-General report on “Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization”, [A/72/260](#), p. 2.

<sup>45</sup> See for example ODIHR EOM final report on the 24 June 2018 early presidential and parliamentary elections, recommendations 22 and 23.