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The worsening situation of opposition politicians in Turkey: what can be done to protect their fundamental rights in a Council of Europe member State?

Report¹

Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee)

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Summary

The Monitoring Committee recalls that political opposition in and outside parliament is an essential component of a well-functioning democracy. In that context, it is concerned about the deterioration of the situation of rule of law, democracy and human rights in Turkey, including the stripping of immunity of 154 parliamentarians in 2016, restricted freedom of expression and media, reduced checks and balances in the new presidential system or unfair election processes – which have increasingly diminished, obstructed or undermined the ability of opposition politicians to exercise their rights and fulfil their democratic roles, and resulted in (former) opposition deputies being prosecuted, detained or convicted.

The committee highlights the clear existence of strong prerequisites for democracy in Turkish society, including the citizens' aspirations for genuine choices between candidates, parties and political programmes. The Assembly should therefore call on the Turkish authorities to respect fully the rights and fundamental freedoms of opposition politicians, in particular to guarantee parliamentary immunity, amend the legislation and constitution in line with the Venice Commission recommendations, lower the 10% electoral threshold, upgrade freedom of expression and media, implement the judgments of the European Court of Human Rights, and further co-operate on these issues with the Council of Europe and the Parliamentary Assembly in the framework of its ongoing monitoring procedure.

1. Reference to committee: Bureau decision, Reference 4426 of 21 January 2019.



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A. Draft resolution²

1. The Parliamentary Assembly reiterates that a political opposition in and outside parliament is an essential component of a well-functioning democracy, and that freedom of expression of members of parliament is an essential part of democracy. It also recalls that parliamentary immunity – in accordance with Assembly [Resolution 1601 \(2008\)](#) on procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament, and the standards of the European Commission for Democracy through Law (the Venice Commission) – is a fundamental protection for the parliamentary institution and an equally fundamental guarantee of the independence of elected representatives, which is necessary for them to exercise their democratic functions without fear of interference from the executive or judiciary.
2. The Assembly recalls the widespread concerns expressed over recent developments in the democratic situation in Turkey and the deterioration of the situation of rule of law, democracy and human rights as reflected in Assembly [Resolution 2121 \(2016\)](#) and [Resolution 2156 \(2017\)](#) on the functioning of democratic institutions in Turkey which resulted in the reopening of the monitoring procedure.
3. The Assembly has notably expressed its concern over 154 parliamentarians being stripped of their immunity in May 2016 which has affected disproportionately the Peoples' Democratic Party (HDP); the impact on freedoms of expression, assembly and association, the media and local democracy of decree-laws passed under the state of emergency between July 2016 to July 2018; the constitutional reforms of 2017; the hasty organisation of early presidential and parliamentary elections in June 2018 and the reform of the electoral law that immediately preceded them, as well as perennial challenges to freedom of expression including the anti-terror law and its broad interpretation and Articles 299 and 301 of the Penal Code.
4. The Assembly recalls that the very essence of parliamentary work is to address all issues of public importance, including those which are sensitive or controversial but need to be addressed. In that context, the Assembly expresses its concern about the detention and imprisonment of opposition parliamentarians and former parliamentarians in Turkey, including former deputy and former HDP co-chair Selahattin Demirtaş, deputy Leyla Güven, who is also a former member of the Council of Europe Congress of Local and Regional Authorities, and former deputy and Assembly member Ertuğrul Kürkçü. In particular, the Assembly is very concerned that detained MP Leyla Güven has been on indefinite hunger strike since 8 November 2018 and deeply regrets that politicians are forced to resort to such ultimate means to draw attention to their plight in the absence of genuine political debate and dialogue.
5. The Assembly's concern about Mr Demirtaş' detention has been confirmed by the Chamber of the European Court of Human Rights which, in its November 2018 ruling (not final), found that it had been established beyond reasonable doubt that the extension of Mr Demirtaş's detention, especially during two crucial campaigns, namely the referendum and the presidential election, had pursued the "predominant ulterior purpose of stifling pluralism and limiting freedom of political debate, which was at the very core of the concept of a democratic society."
6. The Assembly thus considers that these developments, taken together, have increasingly diminished, obstructed or undermined the ability of opposition politicians to exercise their rights and fulfil their democratic roles both inside and outside parliament. The action undertaken by the authorities to render oppositional parties inoperative, especially during election campaigns, has further undermined their capacity to take part in the democratic debate.
7. In addition, the Assembly reiterates its concerns about the restriction of the rights of opposition politicians at local level, in particular those connected to the Kurdish question, notably the replacement of over 90 elected mayors from the HDP or its sister party by government-appointed trustees, in contravention of the European Charter of Local Self-Government (ETS No. 122). This has seriously undermined the functioning of local democracy, especially in south-east Turkey. The Assembly calls on the Turkish authorities to co-operate with the Congress to resolve these issues and implement Congress [Resolution 416 \(2017\)](#) and [Recommendation 397 \(2017\)](#).
8. It should be noted that the worsening of the situation of opposition politicians takes place in a context marked by continuous restrictive measures introduced by the authorities with a view to silencing notably journalists, judges, prosecutors, lawyers, academics and other dissenting voices,

2. Draft resolution adopted unanimously by the committee on 22 January 2019.

9. The Assembly is nevertheless confident that certain fundamental prerequisites for democracy remain strong, including a diversity of opinions in different components of society, Turkish citizens' willingness to mobilise for their democracy and their aspiration for genuine choices between candidates, parties and political programmes. It hopes that Turkey can maintain and build upon these foundations in the tradition of the pluralistic democracy that prevailed for most of the almost one hundred years since the republic was established.

10. The Assembly welcomes the Turkish authorities' continuing constructive engagement with the Council of Europe, notably through the informal Working Group between the Council of Europe and the Turkish Ministry of Justice. It is, however, disappointed and concerned at President Erdoğan's assertion that Turkey was not bound by the Chamber judgment of the European Court of Human Rights in the case of Mr Demirtaş, despite the obligation to implement Court judgments set out in Article 46 of the European Convention on Human Rights (ETS No. 5).

11. The Assembly therefore calls on the Turkish authorities to:

11.1. respect fully the rights of opposition politicians in a democracy, including the freedoms of expression, association and assembly, and in particular to:

11.1.1. protect and respect parliamentary immunity, in accordance with Assembly [Resolution 1601 \(2008\)](#) on procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament as well as with the standards of the Venice Commission;

11.1.2. release Leyla Güven due to her parliamentary immunity until the end of her mandate, in the light of the recent decision rendered by the Supreme Court of Cassation with respect to the detention of deputy Enis Berberoğlu;

11.1.3. release MPs and former MPs whose immunity was stripped in 2016 in violation of the Council of Europe standards until the completion of the review of their legal case;

11.1.4. amend the anti-terror law so as to ensure that its implementation and interpretation comply with the Convention, as interpreted by the European Court of Human Rights;

11.1.5. to repeal Article 299 and further amend Article 301 of the Penal Code, in accordance with the recommendations of the Venice Commission;

11.1.6. fully implement the judgment of the European Court of Human Rights in the case of *Demirtaş v. Turkey* (No. 2);

11.2. revise the electoral legislation in accordance with the recommendations of the Venice Commission to ensure that elections can be not only free, but also fair and conducted in an environment conducive to freedom of expression and freedom of the media;

11.3. in that context, lower the 10% electoral threshold, which impedes the ability of the opposition to be represented in parliament and undermines its pluralistic nature;

11.4. co-operate with the Assembly in organising visits by its authorised representatives to detained and imprisoned current and former parliamentarians;

11.5. in close co-operation with the Council of Europe and strict compliance with Council of Europe standards:

11.5.1. finalise and implement the judicial reform strategy so as to ensure the full independence of the judiciary, including through reform of the Council of Judges and Prosecutors;

11.5.2. finalise and implement a new Human Rights Action Plan so as to ensure effective protection of Convention rights and freedoms, as interpreted by the Court, and prompt and full implementation of Court judgments.

11.6. review the constitutional reforms of 2017 with a view to restoring proper balance of and effective separation between the executive, legislative and judicial branches of power, on the basis of the analysis set out in the opinion of the Venice Commission.

12. The Assembly calls on the Turkish authorities to address the above concerns as a matter of priority and resolves to follow the progress in the framework of the ongoing monitoring procedure. It stands ready to co-operate with the Turkish delegation and authorities on the implementation of all its recommendations, in the framework of its monitoring procedure.

B. Explanatory memorandum by Ms Marianne Mikko and Mr Nigel Evans, co-rapporteurs

1. Introduction

“A political opposition in and outside parliament is an essential component of a well-functioning democracy.”³

1. The present report derives from a request for an urgent debate tabled by Mr Tiny Kox (Netherlands, UEL) on behalf the UEL political group. The request referred specifically to the cases of Mr Selahattin Demirtaş, Ms Leyla Güven and other hunger striking prisoners, and Mr Ertuğrul Kürkçü, proposing that “the Assembly should discuss the worsening situation of oppositional politicians in Turkey and consider how to protect their fundamental rights in a Council of Europe member State”.

2. Following the Parliamentary Assembly’s decision to hold an urgent debate on this topic and its referral for report to the Committee on Honouring of Obligations and Commitments by Council of Europe member States (Monitoring Committee), as co-rapporteurs on Turkey and in accordance with the established practice, we were appointed as rapporteurs for this report under urgent procedure by the committee at its meeting on 22 January 2019.

3. Since the urgent procedure does not permit original fact-finding, this report will rely on existing authoritative sources of information, including [Resolution 2121 \(2016\)](#) and [Resolution 2156 \(2017\)](#) on the functioning of democratic institutions in Turkey of the Parliamentary Assembly and opinions and reports of the European Commission for Democracy through Law (Venice Commission) and reports from international non-governmental organisations (NGOs) and national civil society organisations.

2. Democracy, parliament and the opposition – general principles

4. As the Venice Commission has recalled, “the most important element for ensuring good parliamentary democracy is a tolerant and mature political tradition and culture, under which the governing faction does not abuse its power in order to suppress the opposition, and the opposition for its part engages actively and constructively in the political process”.⁴

5. In a presidential system – such as, following the 2017 constitutional amendments, that of Turkey – the Venice Commission has stated that “the legislative and executive powers should be kept separate and the system of checks and balances should be put in place to guarantee that neither of the two will become too dominant in the country... The very logic of a presidential system ... is based on the separation of powers and therefore on the possibility of conflicts among these powers. To be meaningful, separation of powers requires that the different powers are constituted in a way which prevents a uniformity of approach of the various powers”.⁵ In order to ensure proper balance between the executive and the legislative, the latter should properly reflect the political diversity of the whole country.

6. An important issue for this report is that of parliamentary immunity. The Assembly has noted that “the primary purpose of parliamentary immunity ... lies in the fundamental protection of the parliamentary institution and in the equally fundamental guarantee of the independence of elected representatives, which is necessary for them to exercise their democratic functions effectively without fear of interference from the executive or judiciary”.⁶

7. As regards parliamentarians’ freedom of expression, “[o]ne cannot blame a member of parliament for defending ideas that go against the government’s official policy or that are not well received by a majority of the population... National parliaments of the Council of Europe member States shall acknowledge the following rights in relation to the opposition or parliamentary minority: freedom of expression and freedom of opinion; members of the opposition shall enjoy freedom of speech; they must be able to express their ideas

3. Assembly [Resolution 1601 \(2008\)](#) on procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament.

4. “Report on the role of the opposition in a democratic parliament”, CDL-AD(2010)025, 15 November 2010.

5. “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”, CDL-AD(2017)005, 13 March 2017.

6. [Resolution 2127 \(2016\)](#) “Parliamentary immunity: challenges to the scope of the privileges and immunities enjoyed by members of the Parliamentary Assembly”.

freely”.⁷ The Venice Commission has also noted that “[f]reedom of expression of Members of Parliament is an essential part of democracy. Their freedom of speech has to be a wide one and should be protected also when they speak outside Parliament”.⁸

3. Recent evolution of the democratic situation in Turkey

8. The recent evolution of the democratic situation in Turkey, especially since 2015, has given rise to various issues of cumulative concern. A series of events and developments have increasingly complicated, obstructed or undermined the ability of opposition politicians to exercise their rights and fulfil their democratic roles both inside and outside parliament.

9. The Assembly’s observation report on the 7 June 2015 parliamentary elections recalled that “[t]he 1982 Constitution, which was adopted under military rule, concentrates on bans and prohibitions rather than broad guarantees of fundamental rights and freedoms, as it entrenches undue limitations on the freedoms of association, assembly and expression, as well as on electoral rights”. It then noted that “the [electoral] campaign was tainted by a high number of attacks on party offices and serious incidents of physical attacks, some resulting in fatalities ... Undue restrictions remain and media critical of the ruling party faced increasing pressure and intimidation by public figures and political actors during the election period. Media coverage was polarised along partisan lines, including the public television broadcaster, displaying a significant bias in favour of the ruling party. The President enjoyed extensive television coverage which benefited the ruling party”.⁹

10. Similarly, the Assembly’s observation report on the early parliamentary elections of 1 November 2015 “[regretted] that the election campaign was tarnished by a challenging security environment, in particular in the south-east of the country, and a high number of violent incidents, including attacks against party members and campaign staff, as well as on party premises, which hindered contestants’ ability to campaign freely”. It further “concluded that the electoral campaign was characterised by unfairness, given the serious restrictions on freedom of the media, the criminalisation of dissenting voices ..., and the context of fear prevailing in the country following the resumption of terrorist attacks and the renewed fight against terrorism”. The head of the Parliamentary Assembly delegation of the Organization for Security and Co-operation in Europe (OSCE) focused on the situation in south-eastern Turkey, noting that “[t]he violence in the largely Kurdish southeast of the country had a significant impact on the elections, and the recent attacks and arrests of members and activists, predominantly from the HDP, are of concern, as they hindered their ability to campaign.”¹⁰

11. In May 2016, parliament stripped 154 of its members of their immunity through what the Venice Commission described as a “‘one shot’, *ad homines* measure”, derogating from the constitutional regime of immunity “for specific cases concerning identifiable individuals while using general language. This is a misuse of the constitutional amendment procedure”.¹¹ The Assembly concluded, “with great concern, that such lifting of immunity has seriously undermined the democratic functioning and position of the parliament. In addition, this decision has disproportionately affected the opposition parties and in particular the HDP, with 55 out of 59 ... of its members stripped of their immunity”.¹²

12. On 15 July 2016, Turkey experienced an attempted *coup d’état* during which hundreds of people lost their lives. In response, a state of emergency was introduced, under which the government adopted 31 emergency decree-laws covering a very wide range of issues, including the dissolution of over 1 500 associations and foundations and the closure of over 170 media outlets; in addition, over 150 journalists and media workers were imprisoned during the state of emergency.¹³ A report of the Assembly’s Committee on Legal Affairs and Human Rights found that although the state of emergency was, at least initially, intended to eliminate the “FETÖ terrorist organisation” considered responsible for the failed coup, the emergency measures had a particular impact on Kurds, Kurdish organisations and academics advocating a peaceful settlement of the Kurdish issue.¹⁴ It also found that “decree-law 674 concerning local democracy has ... mainly affected the HDP, with a “vast majority” of dismissed mayors being members of, or close to, the HDP.

7. [Resolution 1601 \(2008\)](#).

8. “Opinion on the Suspension of the Second Paragraph of Article 83 of the Constitution (Parliamentary Inviolability)”, CDL-AD(2016)027, 14 October 2016.

9. “Observation of the parliamentary elections in Turkey (7 June 2015)”, [Doc. 13822](#), 22 June 2015.

10. “Observation of the early parliamentary elections in Turkey (1 November 2015)”, [Doc. 13922](#), 20 November 2015.

11. CDL-AD(2016)027.

12. Assembly [Resolution 2156 \(2017\)](#) on the functioning of democratic institutions in Turkey.

13. “The State of Emergency has ended but urgent measures are now needed to reverse the roll back of human rights”, Amnesty International, 18 July 2018.

These mayors have reportedly been replaced by persons who are members of or close to the ruling AK Party. Previous waves of arrests and dismissals of mayors in south-eastern Turkey were also ‘connected to the Kurdish question’ and raised ‘serious questions with respect to Turkey’s commitment to local democracy’”. In the related [Resolution 2209 \(2018\)](#) “State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights”, the Assembly found that the measures taken under the state of emergency were “disproportionate on numerous grounds”.

13. On 21 January 2017, whilst the state of emergency was still in force, the parliament adopted amendments to the Constitution intended to replace the parliamentary system established under Atatürk with an executive presidency. The amendments were submitted to a national referendum on 16 April 2017. The Monitoring Committee noted “with concern that the adoption procedure in parliament was speedy ... and marked by tense debates, infringement of the secrecy of votes, no continuous broadcasting of all parliamentary debates on television, and no public consultation on the proposed changes”. It also reiterated “its deep concern about the lack of media freedom, the large number of journalists currently in detention ..., significant political influence exerted on the media, insufficient editorial independence of the public radio and TV broadcaster, problematic interpretation of the penal code and the anti-terror law provisions and the chilling effect and pressure on journalists and human rights defenders, which are seriously impeding freedom of expression ... The high number of NGOs, associations, foundations and media closed after the publication of 19 emergency decree-laws has further undermined the possibilities for debate, in a safe environment, on the complex issues raised by the constitutional amendments”. In addition, “[t]he stripping of the immunity of 154 parliamentarians in May 2016, the current detention of 11 parliamentarians, all belonging to the opposition party Peoples’ Democratic Party (HDP), has had a deterrent effect and will lead to serious restrictions to democratic debate in the run up to the referendum”.¹⁵ The referendum went ahead and the constitutional amendments were approved by 51% to 49%, a result tainted by additional serious concerns over ballot papers and other irregularities.¹⁶

14. The Venice Commission had also examined the content of these constitutional amendments. In relation to parliament and the separation of powers, it noted that “[t]he elections of deputies of the [Turkish Grand National Assembly] and of the President are to be held on the same day ... This will mean in practice that usually the President will also control the parliamentary majority ... Holding elections simultaneously makes it unlikely that there will be a meaningful separation of powers ... [It] does not follow the model of democratic presidential systems based on separation of powers. It rather follows a concept of unity of power which is characteristic for not so democratic systems ... In the light of the above, the Grand National Assembly’s counter-powers in respect of the President’s new powers are insufficient: it is unlikely that the [Turkish Grand National Assembly] may stand as a balancing counter-weight to the President”.¹⁷

15. The Venice Commission also addressed the impact of the constitutional amendments on the judicial system, noting that they “introduce new provisions which run contrary to European standards and curtail the independence of the judiciary vis-à-vis the president ... The proposed composition of the [Council of Judges and Prosecutors, CJP] is extremely problematic [and] would place the independence of the judiciary in serious jeopardy ... The changes regarding the manner of appointment of the members of the CJP will have repercussions on the Constitutional Court ... The influence of the Executive over the Constitutional Court is therefore increased”.¹⁸

16. On 18 April 2018, President Erdoğan announced that the parliamentary and presidential elections that should have taken place in November 2019 would be brought forward to 24 June 2018. In response, the Monitoring Committee was “deeply concerned that [the] adverse context will impede the conduct and organisation of genuinely democratic elections, and confirms that, at the end of the process, the overall legitimacy of these elections is at stake ... It also recalls that these elections will be crucial; this will be the final step for the shift to an executive presidential system, which will grant extensive powers to the President of the Republic while limiting checks and balances. All these factors combined seriously challenge the democratic nature of the elections. The Committee thus recommends the Turkish authorities to postpone the elections”.¹⁹

14. [Doc. 14506](#), “State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights”.

15. “Statement on the proposed constitutional reform in Turkey”, Monitoring Committee, 26 January 2017.

16. See “Observation of the referendum on the constitutional amendments in Turkey (16 April 2017)”, Bureau of the Assembly, [Doc. 14327](#), 29 May 2017.

17. “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”, CDL-AD(2017)005, 13 March 2017.

18. CDL-AD(2017)005.

19. “Statement on the organisation of early presidential and parliamentary elections in Turkey adopted by the Monitoring Committee of the Parliamentary Assembly on 24 April 2018”.

The elections nevertheless went ahead: President Erdoğan was re-elected, becoming Turkey's first executive president; and his party, the AK Party, obtained 295 of the 600 seats in parliament, with the MHP obtaining a further nine, giving their alliance a majority.

17. Around the time that the early elections were announced, the Turkish parliament adopted two sets of amendments to the electoral law. In its aforementioned statement, the Monitoring Committee noted that “[t]hese amendments substantially change the rules for elections and the election campaign ... The extremely short period between the adoption of these new rules and the upcoming elections leaves too little time for political parties to adjust and complete their preparations for the elections”.²⁰ The Venice Commission and the Office for Democratic Institutions and Human Rights (ODIHR) subsequently stated that “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 ... 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”.²¹

18. The Venice Commission and ODIHR also had concerns about the content of the amendments to the electoral law. These concerns included that the 10% electoral threshold for election of a party's candidates to parliament was maintained, despite its effect having been “somewhat mitigated by the possibility to form alliances introduced by the amendments”; that “it is hard to see how the [three] civil servants in the [seven-member Ballot Box Committees] can be considered impartial, as required by the Code of Good Practice in Electoral Matters”; and that “Insofar as the independence of the Council of Judges and Prosecutors [CJP] can be questioned, so can the independence of the [Supreme Board of Elections, the appointment of whose members is under the CJP's indirect control]”.²²

19. The Assembly's election observation mission noted that “[t]hese early elections took place under the state of emergency ... [The] way in which the state of emergency has been implemented in Turkey has greatly limited the space for democratic debate and the expression of pluralism, let alone political dissent ... Candidates did not have equal opportunities to campaign and to put their message across, in terms of either resources or media coverage ... The delegation was informed about misuse of administrative resources by the ruling party during the campaign, which is contrary to the commitment to ensure separation between State and party and international good practice ... Media outlets, including the public broadcaster, did not present voters with balanced information about the candidates ... Restrictions to fundamental freedoms and the absence of a level playing field have had an impact on these elections”.²³

20. We would like to stress in particular that the persisting 10% electoral threshold remains a restriction to the possibility for political parties from the opposition to be represented in parliament. For the past fifteen years, the Parliamentary Assembly has repeatedly asked the Turkish authorities to lower this threshold, which is the highest in Europe and which does not match a mature democracy.

21. The state of emergency first declared in 2016 came to an end on 19 July 2018. All emergency decrees had by then been approved by parliament and so remained in effect. On 25 July 2018, the parliament adopted a new anti-terrorism law perpetuating certain provisions of the state of emergency, including the power for provincial governors to restrict freedom of assembly.²⁴

22. Finally, a perennial concern in relation to freedom of expression in Turkey relates to anti-terror law and its interpretation, which is not in compliance with the case law of the European Court of Human Rights. This issue was repeatedly raised both by the Council of Europe and the European Union. Other concerns, which impact the ability of politicians to express views and opinions, relate to Articles 299 (insulting the President of the Republic) and 301 (degrading the Turkish Nation, the State of the Turkish Republic, the Organs and Institutions of the State) of the Penal Code. The Venice Commission has stated that “[Article 299] fails to take into account the European consensus which indicates that States should either decriminalise defamation of the Head of State or limit this offence to the most serious forms of verbal attacks against them, at the same

20. “Statement on the proposed constitutional reform in Turkey”, Monitoring Committee, 26 January 2017.

21. “Joint Opinion on amendments to the electoral legislation and related “harmonisation laws” adopted in March and April 2018”, CDL/AD(2018)031, 17 December 2018.

22. CDL/AD(2018)031.

23. “Observation of the early presidential and parliamentary elections in Turkey (24 June 2018)”, Doc. 14608, 3 September 2018.

24. “Turkish parliament passes security law to replace emergency rule”, Reuters, 25 July 2018.

time restricting the range of sanctions to those not involving imprisonment. Having regard to the excessive and growing use of this Article, the Commission considers that, in the Turkish context, the only solution to avoid further violations of the freedom of expression is to completely repeal this Article and to ensure that application of the general provision on insult is consistent with these criteria ... With respect to Article 301 (Degrading Turkish Nation, State of Turkish Republic, the Organs and Institutions of the State), the problem of vague wording, despite the amendments made in 2008, has persisted. It is recommended that the provision be redrafted and further amended with the aim of making all the notions used in it clear and specific. Further, the application of this provision should be limited to statements inciting to violence and hatred".²⁵ The number of prosecutions under Article 299 rose from 132 in 2014 to more than 6 000 in 2017.²⁶

23. In this context, opposition members, due to their critical stance, face increased risk of prosecution and detention. Concerning deputies and former deputies of the main opposition party, the Republican People's Party (CHP), we recall that we followed with great concern the prosecution and conviction of the deputy (and former journalist) Enis Berberoğlu who was sentenced to five years in prison for disclosing information about the possible involvement of Turkey in the Syrian conflict and released in September 2018 due to parliamentary immunity (see below). We have also been informed that Eren Erdem, a former CHP deputy and former editor-in-chief of the (now closed) *Karşı* newspaper, faces a prison sentence of up to 22 years for "publishing illegal wiretapping carried out by FETÖ" and "helping a terrorist organisation albeit not being a member of the organisation".²⁷ He was released on 7 January 2019 after spending six months in detention – and re-arrested on 8 January 2019.²⁸

24. There are nevertheless positive elements to the state of democracy in Turkey. As noted in the observation report on the June 2018 elections, "Turkish citizens are willing to mobilise for their democracy. They are willing to take to the streets, go to rallies, campaign, supervise the integrity of the election process and vote, in great numbers... Turkish citizens had a genuine choice between presidential candidates and parties expressing different views and belonging to different political affiliations... The election administration worked efficiently and under great pressure of time to finalise the preparations of the early elections ... The [election observation mission] assessed voting positively or very positively in 94% of polling stations".

25. There is also a welcome willingness on the part of the Turkish authorities to discuss problems. The informal Working Group between the Council of Europe and the Turkish Ministry of Justice was set up with the general aim of addressing the main issues identified in judgments of the Court and thereby reducing the number of cases. The Working Group has worked on various issues mentioned in the present report, including pretrial detention, freedom of expression and mitigation of the lasting consequences of the state of emergency, with some results. Work on a Judicial Reform Strategy may be particularly promising, especially if it reinforces judicial independence, as may the drafting of a new Human Rights Action Plan. The Assembly should support this process.

4. The cases mentioned in the request for an urgent debate

26. Selahattin Demirtaş, along with his HDP co-chair Figen Yuksekdag and other parliamentarians, having been stripped of their parliamentary immunity in May 2016 (see above), were arrested and charged with a variety of terrorism-related offences in November 2016. The Assembly's Monitoring Committee described this development as "extremely worrisome and jeopardis[ing] the functioning of democracy", and called for their immediate release.²⁹ Assembly President Liliane Maury Pasquier described the imprisonment of Mr Demirtaş and former HDP parliamentarian Sirri Süreyya Önder in September 2018 as being "of particular concern to me, as is the situation of other parliamentarians and former opposition parliamentarians in detention or under prosecution for 'terrorist' acts".³⁰ On 4 December 2018, the sentences against Mr Demirtaş and Mr Önder were confirmed on appeal.

27. In its judgment on his case,³¹ the Chamber of the European Court of Human Rights ("the Court") found "that the judicial authorities extended [Mr Demirtaş' pretrial] detention on grounds that cannot be regarded as 'sufficient' to justify its duration." Furthermore, "the fact that it was impossible for him to take part in the

25. "Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey", CDL/AD(2016)002, 15 March 2016.

26. "Turkey: End Prosecutions For 'Insulting President'", Human Rights Watch, 17 October 2018.

27. www.hurriyetdailynews.com/warrant-issued-for-former-chp-deputy-eren-erdem-shortly-after-his-release-140336.

28. "Journalist and Former MP Eren Erdem Detained for his Work as Editor-in-chief", Alert of 8 January 2019 on the Council of Europe Platform to promote the protection of journalism and the safety of journalists.

29. "Turkey: the arrest of HDP parliamentarians jeopardises the functioning of democracy", 9 November 2016.

30. "Turkey: 'the place of parliamentarians is not in prison'", 12 September 2018.

31. At the time of the writing of this report, the judgment of the Court Chamber was not yet final.

activities of the National Assembly on account of his pretrial detention constitutes an unjustified interference with the free expression of the opinion of the people and with the applicant's right to be elected and to sit in Parliament".

28. Exceptionally, and therefore perhaps most significantly, the Court found that "it has been established beyond reasonable doubt that the extensions of the applicant's detention, especially during two crucial campaigns, namely the referendum and the presidential election, pursued the predominant ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society ... There has therefore been a violation of Article 18 of the European Convention on Human Rights, which prohibits the application of restrictions to Convention rights for any purpose other than those for which they have been prescribed". The Court therefore called on Turkey to release Mr Demirtaş "at the earliest possible date, unless new grounds and evidence justifying his continued detention are put forward."

29. In response to this, President Erdoğan challenged the judgment and vowed to undertake "a countermove to finish the job". The detention of Mr Demirtaş was not immediately ended, as the Ankara 19th Heavy Criminal Court requested guidance from the Ministry of Justice, since the Chamber judgment had not yet been finalised.

30. Leyla Güven was elected to the Turkish Parliament for the HDP in June 2018, whilst already in pretrial detention. She had previously twice been elected mayor (she was then a member of the Congress of Local and Regional Authorities) and was previously a member of parliament from June to November 2015. In January 2018, she was arrested on charges relating to her criticism of the Turkish military intervention in Afrin, Syria. She has been detained in a high security prison ever since and faces up to 31 years in prison if convicted. Despite her election and parliamentary immunity, she remains in detention. At the same time, CHP deputy Enis Berberoğlu, who had been convicted to five years of prison, was released in September 2018 due to parliamentary immunity – until the end of his parliamentary mandate – following the decision of the Supreme Court of Cassation, which was welcomed by the President of the Parliamentary Assembly.³² We deeply regret that opposition politicians have to resort to ultimate means, ie hunger strikes, in order to bring issues, may they be sensitive or unpopular, to public debate.

31. On 22 November 2018, Leyla Güven began an indefinite hunger strike in protest at the isolation imposed on Abdullah Öcalan, leader and founder of the PKK, in İmralı prison. On 15 January 2019, it was reported that she had lost 10 kilos and was suffering from low blood pressure, insomnia, nausea and fever, heightened sensitivity to light, smell and sound, and difficulty taking liquids, with her symptoms worsening.³³ A number of other prisoners went on hunger strike in solidarity with Ms Güven; various figures have been given, ranging from 162 to 226.³⁴

32. Ertuğrul Kürkçü, then HDP MP for Izmir, was charged with "spreading propaganda for a terrorist organisation" following a speech he gave during the 2016 Newroz (Spring) celebrations in which he claimed that the Turkish security forces had committed human rights violations in the south-east of the country. This speech was reportedly identical to one he had given in parliament. He was one of those parliamentarians whose immunity was lifted in May 2016, following which he was convicted in December 2016 and sentenced to two years in prison. He was also a member of the Parliamentary Assembly from 28 September 2015 to 7 October 2018, covering the period of his prosecution, conviction and imprisonment and became an Honorary member of this Assembly in October 2018. He is currently facing further charges relating to three speeches he made in 2012 and 2015-16.³⁵ On 20 December 2018, we expressed our deep concern at the conviction of honorary Parliamentary Assembly member Ertuğrul Kürkçü and expected the Turkish authorities to ensure Mr Kürkçü's freedom of expression is duly guaranteed by the Turkish justice system. We will therefore follow with great attention Mr Kürkçü's appeal trial.³⁶

33. In addition to Mr Demirtaş, Ms Yuksekdag, Mr Önder, Ms Güven and Mr Kürkçü, another seven former HDP parliamentarians are currently in prison: Idris Baluken (convicted), Gulser Yildirim (pretrial detention), Caglar Demirel (pretrial detention), Ferhat Encu (convicted), Burcu Celik Ozkan (convicted), Abdullah Zeydan (convicted) and Selma Irmak (pretrial detention).

32. "PACE President welcomes the release of Turkish MP Enis Berberoğlu due to parliamentary immunity", [22 September 2018](#)

33. "Leyla Güven: Don't expect us to end the hunger strike", *ANF News*, 15 January 2019.

34. See respectively "Kurdish Party: 162 Inmates on Hunger Strike in Turkey", *Associated Press*, 9 January 2019, quoting an HDP source, and "Leyla Güven: Don't expect us to end the hunger strike", *ANF News*, 15 January 2019.

35. "HDP Honorary Chair Ertuğrul Kürkçü Sentenced to 2 Years in Prison", *Bianet*, 18 January 2018.

36. "PACE monitors express concern at conviction in Turkey of honorary PACE member", 20 December 2018.

5. Conclusions and recommendations

34. The issues described in section 4 above give rise to cumulative concern about the situation and, more generally, the role and rights of opposition politicians in Turkey. The 2015 elections, especially those of November, were characterised by unfairness and hindrances on the ability to campaign, particularly in the south-east of the country. The resulting parliament stripped 154 of its members of their immunity, including 93% of those from the HDP; eleven current or former HDP parliamentarians are currently in detention (see below). The state of emergency introduced later in 2016 further limited the activities of independent civil society and media and removed many HDP mayors from office in south-eastern Turkey. Against this background, and with inadequate parliamentary scrutiny and a lack of media freedom contributing to serious restrictions on democratic debate, constitutional amendments were adopted in 2017, transforming Turkey from a parliamentary system to an executive presidency and, amongst other things, curtailing judicial independence. At the same time as the electoral legislation was being revised, reducing the independence of administrative and supervisory bodies, parliamentary and presidential elections were brought forward from November 2019 to June 2018. These elections took place in an atmosphere of limited space for pluralistic, democratic debate, unequal campaigning opportunities and media coverage, and misuse of administrative resources. As a result, Turkey now has an executive president with very extensive powers, a parliament with insufficient powers as a counter-weight, whose majority comes from the President's party and its ally, and a judiciary whose independence has been curtailed. Freedom of expression, assembly and association is restricted, and independent media and civil society are under severe pressure. The scope for opposition politicians to play a meaningful role in public life, whether inside or outside parliament, has become extremely limited.

35. The Assembly should take the opportunity of the present report to reaffirm its position on the rights and role of opposition politicians in a democracy and its stance on recent developments in the democratic situation in Turkey, especially in relation to parliamentary immunity, fairness of the election processes, detention and imprisonment of opposition politicians for expressing legitimate, peaceful opinions, whilst acknowledging those areas where democracy remains vibrant and encouraging democratic reform.

36. We call on the Turkish authorities to address these concerns as a matter of priority and implement the Assembly's recommendations in the framework of the ongoing monitoring procedure. These recommendations seek to ensure the protection of the democratic rights of the opposition – and to ensure that the pluralism of ideas and opinions which exists in Turkish society is also guaranteed in the public sphere and reflected in a democratic expression and representation.