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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

TURKEY

OPINION

**ON THE PROVISIONS
OF THE EMERGENCY DECREE LAW N° 674
OF 1 SEPTEMBER 2016**

**WHICH CONCERN THE EXERCISE OF LOCAL DEMOCRACY
IN TURKEY**

**Adopted by the Venice Commission
at its 112th Plenary Session
(Venice, 6-7 October 2017)**

on the basis of comments by

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I. Introduction

1. By letter of 13 April 2017, the Congress of Local and Regional Authorities of the Council of Europe requested the Venice Commission to prepare an opinion on the measures in the Emergency Decree Law n° 674 of 1 September 2016 which concern the exercise of local democracy in Turkey (CDL-REF(2016)061), hereinafter the “Decree Law”.
2. The Commission invited Mr Richard Clayton, Ms Regina Kiener and Mr Jan Velaers, to act as rapporteurs for this opinion.
3. The present Opinion was prepared on the basis of contributions by the rapporteurs and on the basis on the English translation of the Decree Law as provided by the Turkish authorities to the Council of Europe. Inaccuracies may occur in this Opinion as a result of incorrect translations.
4. Given that it was not possible to conduct a visit to Turkey to hold exchanges with the Turkish authorities and other interested stakeholders, the rapporteurs mainly relied, for the factual information, on reports by other Council of Europe bodies, in particular the Congress of Local and Regional Authorities.
5. This opinion was adopted by the Venice Commission at its 112th Plenary Session (Venice, 6-7 October 2017).

A. Background

6. Following the failed *coup d'état* of 15 July 2016, which was immediately condemned by the President of the Venice Commission, the Turkish Government declared the state of emergency and started legislating through emergency decree laws. The duration of the emergency regime has been extended four times.¹ The primary aim of the emergency decree laws was to dismantle the “Gülenist network”, referred to by the authorities as “Fetullahist Terrorist Organization/Parallel State Structures” or “FETÖ/PDY”), having secretly penetrated into the State apparatus and to which the Turkish authorities attributed the organisation of the attempted coup. The emergency decrees, however, also enable the authorities *inter alia* to take further action against other terrorist groups, in particular PKK. A detailed description of those measures can be found in the Venice Commission’s Opinion on the Emergency Decree Laws Nos. 667 – 676 adopted following the failed coup of 15 July 2016 (hereinafter, the Opinion on the Emergency Decree Laws).²
7. The Venice Commission was asked to give an opinion on the provisions in the Decree Law n° 674 which concern the exercise of local democracy in Turkey. The Decree, issued by the Government on 1 September 2016, was adopted by the Parliament and became a law on 10 November 2016. Three articles of this Decree Law - Articles 38, 39 and 40 - are related to local democracy in Turkey and introduce amendments to Law n° 5393 on Municipalities.³ These provisions provide for the replacement of mayors, deputy mayors or council members having been suspended, detained or banned from public service in relation to offenses of aiding and abetting terrorism and terrorist organizations, by trustees appointed by the state authorities (Articles 38 and 40). Furthermore, they allow interference by state authorities in the effective exercise of local self-government in certain municipalities in the context of the fight against terrorism (Articles 38 and 39).

¹ At the date of the adoption of the present Opinion, the state of emergency is still in force in Turkey (the last Decision related to the extension of the state of emergency for further three months is dated 17 July 2017). So far, 28 emergency decree laws have been enacted (Nos. 667 - 694, the last being adopted on 15. 08.2017).

² See CDL-AD(2016)037, §§ 180-182 and §§ 51-152.

³ See Municipality Law, Law No: 5393 of 3/7/2005, published in the Official Gazette on 13/7/2005 Issue: 25874 (see at: <http://www.lawsturkey.com/law/municipality-law-5393>).

8. In its Recommendation 397 and its Resolution 416 adopted on 29 March 2017, the Congress of Local and Regional Authorities of the Council of Europe (hereinafter the “Congress”) stressed (§ 7f of the recommendation) that the Emergency Decree no. 674 was incompatible with the European Charter of Local Self-Government (hereinafter the “Charter”). In the view of the Congress, this decree can be used as a means of restricting local self-government and actually contribute to a “recentralisation” move in Turkey. A fact-finding mission, aiming at assessing the situation of local elected representatives, had been conducted to Turkey by the Congress’ Rapporteurs prior to the adoption of the above-mentioned texts.

9. According to the information available to the Venice Commission, since the adoption of the Decree Law, trustees, persons who are - reportedly - close to, or are members of, the ruling party have been appointed in many municipalities on vacant positions left by mayors, deputy mayors or council members having been suspended, dismissed or arrested for terrorism - related offences. In addition, many staff members of the local administration in these municipalities have been suspended or dismissed and replaced by staff - reportedly - close to the ruling party.

10. As noted by the Congress in its Fact finding report, although there are several dismissals of mayors from other parties, the vast majority of the dismissed mayors are members of, or close to, DBP, a sister party to HDP or the “People’s Democratic Party”, which largely represents voters of Kurdish ethnicity, in spite of the - significant - extension of its electorate to other groups since the parliamentary elections in June 2015. The Congress further notes that the dismissals are based on the Turkish Anti-Terror Law No. 3713 of 12 April 1991, and are linked to the fight against terrorism in general rather than to accusations of involvement in the attempted coup. It appears that many such measures were taken before the attempted coup.⁴

11. The Venice Commission considers it important to make it clear that it has only been asked to give an opinion on the provisions concerning local authorities in the Decree Law n° 674. It does not have the competence, nor is it possible for the Commission to examine the decisions (of suspension/termination of office) that were taken in individual cases.

12. Yet, the Commission wishes to underline that Article 38 of the Decree Law and subsequent measures can be applied as soon as a mayor, a deputy mayor or a council member is suspended for the sole reason that the person has allegedly committed the offenses of aiding and abetting terrorism and terrorist organizations. As the Venice Commission has experienced when examining the decree-laws on the state of emergency, criminal cases have been initiated on the basis of a list of very vague and wide criteria. In its Opinion on the Emergency Decree Laws, the Commission emphasized that “the evidentiary threshold for arresting a person (“reasonable suspicion”) and, *a fortiori*, for convicting him or her (“beyond reasonable doubt”) should be much higher” (§ 176). It is evident that, as the measures taken on the basis of the Decree Law n° 674 are conditioned by investigations and prosecutions against local elected representatives, the way in which such investigations and prosecutions are conducted has an impact on the measures provided for in the Decree Law, both in terms of necessity and proportionality.

⁴ See CG32(2017)13, §§ 18-20,

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806fbf0d>. See also <http://gazetekarınca.com/2017/04/dbp-83-belediyeve-kayyum-atandi-89-esbaskan-tutuklu-toplumsal-muhendislik-yapiliyor/>) - A report published by the Democratic Regions Party (DBP) in April 2017 indicates that, on 27 March 2017, trustees had been appointed in 83 of the 103 municipalities won by the DBP at the last local elections of 30 March 2014. According to the same report, the authorities started to appoint trustees to DBP’s municipalities as from 11 September 2016. According to a more recent report (published on 18 September 2017), until 31 August 2017, 94 mayors (4 from AKP mayors, 1 from MHP (Nationalist Action Party), 89 from DBP) have been replaced by trustees. See <http://bianet.org/bianet/insan-haklari/189932-28-khk-ile-ohal-uygulamaları-ve-duzenlemeleri>.

B. Standards

13. The Venice Commission has assessed the provisions of the Decree Law which have been submitted to its examination in the light of the European and international standards applicable to the state and emergency and to the functioning of local self-government in a democracy, taking due account, at the same time, of the rule of law requirements.

14. While reference is made to the Constitution of Turkey, this Opinion does not aim to assess the constitutionality of these provisions, as such an assessment is not within its mandate. The Venice Commission is aware that the measures adopted in the framework of the Decree Law N° 674 have been challenged before the Constitutional Court. It belongs to the Constitutional Court of Turkey to take a position on the matter.

State of emergency

15. The Venice Commission outlined in its Opinion on the Emergency Decree Laws, the existing normative framework of the state of emergency, both internationally and in Turkey (see paragraphs 20 to 34).

16. Concerning the international rules applicable to the state of emergency, the Commission noted that (see paragraph 33 of the Opinion), if the mechanism of derogation allows the Turkish authorities to temporarily reduce the scope of its obligations under treaty-based human rights instruments,

“there are certain conditions for the exercise of the derogation powers under the ECHR and the ICCPR:⁵

- *the right to derogate can be invoked only in emergency situations (time of war or other public emergency threatening the life of the nation);*
- *the State availing itself of this right of derogation has to comply with certain procedural conditions (see Article 15 § 3 of the ECHR, Article 4 § 3 of the ICCPR),⁶ like the proclamation and notification requirements, as well as its national law;*
- *the State may take measures derogating from its obligations “only to the extent strictly required by the exigencies of the situation”, both with respect to scope and duration, and the necessity and proportionality of those measures are subject to supervision by the European Court of Human Rights (ECtHR) and monitoring by the Human Rights Committee (HRC);⁷*
- *certain rights do not allow any derogation;*
- *the derogation may not be discriminatory or inconsistent with the State’s other obligations under international law;*
- *the predominant objective must be the restoration of a state of normalcy where full respect for human rights can again be secured.⁸*

⁵ This list should not be seen as exhaustive; it focuses on such elements which the Venice Commission sees as important and pertinent in the particular situation under examination.

⁶ Article 15 § 3 at the ECHR requires a State availing itself of the right of derogation to keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons for them. Article 4 § 3 of the ICCPR imposes an obligation to inform the Secretary General of the United Nations “of the provisions from which it has derogated and of the reasons by which it was actuated”.

⁷ In the *Rule of Law Checklist* the Venice Commission defined the notion “proportionate” as limited to the extent strictly required by the “exigencies of the situation”, in circumstance, scope and duration. See CDL-AD(2016)007, no. 31, ii. See also R. Higgins, “Derogations under Human Rights Treaties”, BYBIL 48, (1976-1977), 282-283; see also A. Mokhtar, “Human Rights Obligations v. Derogations. Article 15 of the European Convention on Human Rights”, IJHR, vol. 8, 2004, 70.

⁸ CCPR, General Comment No. 29, para. 1.

17. The Commission stresses that it ultimately belongs to the ECtHR to assess compatibility of the emergency measures with the ECHR.

Local self-government

18. The Venice Commission took into account, for the present analysis, the local self-government standards laid down in the European Charter for Local Self-Government. Turkey is a Party⁹ to the Charter, which contains inter alia the following provisions:

“Article 3 - Concept of local self-government

“1. Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population.

2. This right shall be exercised by councils or assemblies composed of members freely elected by secret ballot on the basis of direct, equal, universal suffrage, and which may possess executive organs responsible to them. This provision shall in no way affect recourse to assemblies of citizens, referendums or any other form of direct citizen participation where it is permitted by statute.”

Article 4 - Scope of local self-government

“4. Powers given to local authorities shall normally be full and exclusive. They may not be undermined or limited by another, central or regional, authority except as provided for by the law”.

Article 7 - Conditions under which responsibilities at local level are exercised

“1. The conditions of office of local elected representatives shall provide for free exercise of their functions.”

Article 8 - Administrative supervision of local authorities' activities

“2. Any administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles. Administrative supervision may however be exercised with regard to expediency by higher-level authorities in respect of tasks the execution of which is delegated to local authorities.

3. Administrative supervision of local authorities shall be exercised in such a way as to ensure that the intervention of the controlling authority is kept in proportion to the importance of the interests which it is intended to protect.”

Article 9 - Financial resources of local authorities

“1. Local authorities shall be entitled, within national economic policy, to adequate financial resources of their own, of which they may dispose freely within the framework of their powers.”

⁹ Turkey ratified the Charter on 9 December 1992. The Charter entered into force in respect of Turkey on 1 April 1993. Upon ratification, Turkey made the following declaration:

“In accordance with Article 12, paragraph 2 of the Charter, the Republic of Turkey declares to consider herself bound by the following Articles and paragraphs :

- Article 2

- Article 3, paragraphs 1 and 2

- Article 4, paragraphs 1, 2, 3, 4 and 5

- Article 5

- Article 6, paragraph 2

- Article 7, paragraphs 1 and 2

- Article 8, paragraphs 1 and 2

- Article 9, paragraphs 1, 2, 3, 5 and 8

- Article 10, paragraph 1.”

Rule of Law

19. Specific attention has also been given, in the assessment of the new rules introduced by the Decree Law, to the criteria and principles contained in the Venice Commission's Rule of Law Checklist.¹⁰

20. After stating that "*all state action must be in accordance with and authorised by the law*" (§ 44), the Rule of Law Checklist further elaborates on this core principle: "*A basic requirement of the Rule of Law is that the powers of the public authorities are defined by law; in so far as legality addresses the actions of public officials, it also requires that they have authorisation to act and that they subsequently act within the limits of the powers that have been conferred upon them, and consequently respect both procedural and substantive law.*" (§ 45)

21. While acknowledging that that these general principles can be relativized in emergency situations, the Venice Commission notes that "*emergency powers have been abused by authoritarian governments to stay in power, to silence the opposition and to restrict human rights in general.*" It therefore concludes that "*[s]trict limits on the duration, circumstance and scope of such powers is therefore essential. State security and public safety can only be effectively secured in a democracy which fully respects the Rule of Law. This requires parliamentary control and judicial review of the existence and duration of a declared emergency situation in order to avoid abuse.*"¹¹

C. Constitutional and legislative framework

State of emergency

22. As regards the **national framework for emergency situations**, the Commission noted in its Opinion on the Emergency Decree Laws:¹²

"Articles 15, 120 and 121 of the Constitution set the following limits to the Government's emergency powers:

- *the Government may receive and use emergency powers only in the event 'of widespread acts of violence aimed at the destruction of the free democratic order established by the Constitution or of fundamental rights and freedoms';*
- *the Government should follow a particular procedure for declaring the state of emergency and enacting decree laws (including prompt approval by the Grand National Assembly);*
- *certain basic rights should not be affected;*
- *limitations to other rights should be necessary and proportionate ('to the extent required [...]') and be temporary in character ('during the state of emergency');*
- *the international obligations of the State should be respected;*
- *the Government should act in compliance with the law on the state of emergency."*

Local self-government

23. Specific guarantees are provided, in respect of **local authorities and elected local representatives**, by Article 127 of the Turkish Constitution.¹³ This article contains three guarantees of relevance for the assessment of Articles 38 - 40 of the Decree Law n° 674:

¹⁰ CDL-AD(2016)007, *Rule of Law Checklist*, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016)

¹¹ See CDL-AD(2016)007, § 51

¹² See CDL-AD(2016)037, § 26.

¹³ "*Local administrations are public corporate bodies established to meet the common local needs of the inhabitants of provinces, municipal districts and villages, whose principles of constitution and decision-making organs elected by the electorate are determined by law.*"

- local administration organs are elected by the electorate;
- they can only lose their status on the basis of a judicial decision;
- the Minister of Internal Affairs may, as a provisional measure until the final court decision, remove from office those organs of local administration or their members against whom an investigation or prosecution has been initiated on grounds of offences related to their duties.

24. Concerning the second guarantee, it has to be added that, if a mayor is convicted under terrorism laws and the Court of Cassation upholds the conviction, then under Article 53 of the Penal Code he or she will automatically lose the right to hold elected office as mayor. According to the information available to the Venice Commission, up to March 2017, no mayor elected in the March 2014 local elections had received such a final sentence.¹⁴

25. Article 127 of the Constitution further establishes that the formation, duties and powers of the local administrations “shall be regulated by law”, in accordance with the *principle of local administration*. This provision further states that the central administration has the power of *administrative tutelage* over the local administrations, as a way to ensure the functioning of local services in conformity with the principle of the integrity of the administration, to secure uniform public service and meet local needs properly. The Venice Commission has noted the Congress’ repeated calls for the abolition of administrative tutelage and a genuine decentralisation in Turkey.¹⁵

26. Several articles of the **Municipality Law** (Law n° 5393 of 3 July 2005) further elaborate and complete these provisions.

27. Article 3 confirms that *municipalities have powers of “self-government (autonomous) both administratively and financially”*.

28. Article 45 sets out the standard procedure in case that the office of mayor falls vacant. In such a case, the provincial governor shall ensure that the municipal council convenes within ten days in order to elect “a) a mayor if the office of mayor has fallen vacant or if the penalty of disqualification from public office has been imposed for a period extending beyond the date of the next election; b) a deputy mayor if the mayor has been suspended from office or has been arrested or has incurred the penalty of disqualification from public office for a period not extending beyond the date of the next election.” The mayor or the deputy mayor shall be elected among the members of the Municipal Council by way of balloting.

29. Article 46 provides that, if it is not possible to hold an election for a new mayor, the Minister of Interior (in metropolitan municipalities) or the provincial governor (in other municipalities) shall appoint a person to the office of mayor until elections. It is mandatory for the person so appointed to be eligible for election as a mayor.

The formation, duties and powers of the local administrations shall be regulated by law in accordance with the principle of local administration.

The elections for local administrations shall be held every five years in accordance with the principles set forth in Article 67 [...].

Loss of status and objections regarding the acquisition of the status of elected organs of local administrations shall be decided by judiciary. However, as a provisional measure until the final court judgment, the Minister of Internal Affairs may remove from office those organs of local administration or their members against whom an investigation or prosecution has been initiated on grounds of offences related to their duties.

The central administration has the power of administrative tutelage over the local administrations in the framework of principles and procedures set forth by law with the objective of ensuring the functioning of local services in conformity with the principle of the integrity of the administration, securing uniform public service, safeguarding the public interest and meeting local needs properly.”

¹⁴ Human Rights Watch, Turkey: Crackdown on Kurdish Opposition, 20 March 2017.

¹⁵ See CG32(2017)13final, 29 March 2017, *Fact-finding mission on the situation of local elected representatives in Turkey, Explanatory Memorandum*, paragraphs 46-48 referring to Congress Recommendation 301 (2011) and Explanatory memorandum on the situation of local and regional democracy in Turkey, CG20(6).

30. Article 47 allows, following the constitutional provisions, suspension from office of local administration organs or their members, subject to investigation or prosecution due to an occupational offense, as a precautionary measure until the final judgment. This measure is to be re-assessed every two months and, when it does not appear to be useful in terms of public interest, shall be lifted (article 47 § 2). The suspension shall also be lifted when: no permission is given for investigation or court decision is obtained not to prosecute, or in case of abatement of public action, or acquittal; or declaration of amnesty, or conviction of an offense not requiring suspension from office (article 47 § 3).

31. Article 57 deals with the cases where, upon request of the Ministry of Interior, a justice of the peace establishes that municipality's services are seriously failing, adversely affecting the public interest. In this case, "the Minister of the Interior shall ask, and allow reasonable time to, the mayor to remedy the failure in service provision". If the failure cannot be remedied, the Minister shall request the governor of the province concerned to provide the service in question. The municipality is entitled to appeal against these decisions.

II. Analysis

A. New regulations on local government introduced by Decree Law n° 674

32. The new rules introduced by the Decree Law allow for the replacement of suspended holders of local elected positions (mayors, deputy mayors or council members) by appointees, as well as for an enhanced supervision of municipalities.

33. **Article 38 of the Decree Law** adds a paragraph to article 45 of the Municipality Law (and provides for a special procedure for the assignment of mayors, deputy mayors and council members. Where a mayor or a deputy mayor or a local council member "*is suspended from duty or detained or banned from public service or his/her position is terminated due to the offences of aiding and abetting terrorism and terrorist organizations*", it will not be up to the municipal council to elect a mayor or deputy mayor, as required by the previous text of Article 45. According to Article 38, in that case, the mayor or deputy mayor or the council member shall be assigned by the Minister of Internal Affairs (in the greater cities and provincial municipalities), or the Governor (in other municipalities).¹⁶ This procedure is extended to the case of member of the municipal council who has been suspended from duty or detained, and resigns. The only condition that Article 38 lays down is that the person to be assigned to one of these positions should be eligible for that position.¹⁷

34. Article 38 of the Decree Law, derogating from article 127 of the Constitution, thus enables the Minister of Internal Affairs/the Governor to take a permanent, and not a temporal measure against a suspended or arrested mayor, deputy mayor or council member, as the assignment of the new mayor, deputy mayor or council member seems to be definite. No mention is made in the Decree Law of the situations when no final court judgment confirms the loss of the status. It is recalled that, under Article 127 of the Constitution, the removal from office "*shall be decided by judiciary*" and is only allowed, as a provisional measure until the final court judgment, for members of local administration "*against whom an investigation or prosecution has been initiated on grounds of offences related to their duties*".

35. Article 38 further provides that, in municipalities to which a mayor or a deputy mayor is assigned, the municipal council shall not convene without mayor's call, duties and powers of municipal councils, committees and commissions shall be exercised by members of the

¹⁶ See Municipality Law, Article 46

¹⁷ For factual information on appointments made on the basis of Article 38, see the Congress' Fact-finding mission on the situation of located representatives in Turkey, CG32(2017)13Final, 29 March 2017.

municipal committee,¹⁸ and the budget and accounting works and proceedings can be carried out by the revenue office or revenue department upon approval of the governorship.

36. **Article 39 of the Decree Law** adds several paragraphs to Article 57 of the Municipality Law dealing with *negligence in services* (under Chapter 4 of the Municipality Law - Inspection of municipalities), containing rules and procedures applicable to cases of *disruption of the service in a municipality* which, according to the governorship (no specific criteria to assess the *disruption* are contained in the decree), affects or will affect the fight against terrorism or violent activities. The new rules, considerably affecting the autonomy of the municipalities, enable performance of municipal services by other public institutions or organizations, the confiscation of municipal movable properties and the suspension and reinstatement of personnel of the municipalities.

37. **Article 40 of the Decree Law** amends the transitional provisions of the Municipality Law with a new Article 9, providing retroactively for the application of the procedure set out in the new paragraph added by the Decree Law to Article 45 (allowing replacement by appointees of mayors, deputy mayors or council members who has been suspended, before the entry into force of the Decree Law, for the same reasons mentioned in the new paragraph added to Article 45, i.e. offences of aiding and abetting terrorism and terrorist organizations).¹⁹ Appointees shall replace investigated/prosecuted mayors, deputy mayors or members of municipal council within 15 days.

38. As indicated by the Congress in its Explanatory memorandum to Resolution 416 (2017),²⁰ “*the persons replacing elected representatives in their duties are one of the categories of “temporary administrators” who may be appointed to replace those usually in charge which were established under the Turkish Criminal Procedure Code, Law No. 5271 of 4 December 2004 in connection with combating terrorism.*”

39. As far as can be seen from the provisions of Decree Law n° 674, the other provisions of the Municipality Law remain unchanged. Yet, since the specific rules provided by the Decree Law for terrorism-related situations are introduced by way of exception to the general rules contained by the Municipality Law (“However, ...”), it is not clear whether the safeguards contained in this Law remain applicable (see comments in section C below).

B. Compliance with the rules pertaining to the state of emergency

40. Following the failed *coup d'état* of 15 July 2016, the Turkish Government declared the state of emergency and started legislating through emergency decree laws.

41. As it already did in its Opinion on the Emergency Decree Laws, the Venice Commission condemns the attempted coup and acknowledges the right of a democratically elected government to defend itself.²¹ The Commission has indeed found that the original decision to declare a state of emergency could be justified under the terms of Article 120 of the Turkish Constitution, Article 15 of the ECHR and Article 4 of the ICCPR. It recalls that, in Turkey's notification of the state of emergency to the Secretary General of the Council of Europe, the following was stated: “*The coup attempt and its aftermath together with other terrorist acts have*

¹⁸ A mixed body, composed both of elected members (among the members of the municipality council), and appointed members (appointed by the Mayor from among the heads of units and among the chief of financial services). See Articles 31 and 33 of the Municipality Law.

¹⁹ This article applies *inter alia* to the mayors that had already been suspended since July 2015, when the armed conflict restarted in the South-East of Turkey.

²⁰ See Congress of Local and Regional Authorities of the Council of Europe, CG32(2017)13final, 29 March 2017, *Fact-finding mission on the situation of local elected representatives in Turkey, Explanatory Memorandum*, paragraph 5.

²¹ See §§ 7, 38, 39 and 225 of CDL-AD(2016)037

posed severe dangers to public Turkish democracy and the Turkish state, a swift and decisive reaction to that threat was both natural and necessary." The Commission is furthermore aware that, after the adoption of Opinion on the Emergency Decree Laws in December 2016, several other terrorist attacks have been committed on the territory of Turkey, which may justify certain measures with exceptional character taken as part of the Turkey's effort to protect itself against such attacks.

42. At the same time, as already indicated in a subsequent opinion adopted in respect of Turkey,²² the Commission is not convinced that the further prolongation of the state of emergency was/remains necessary. In its view, *"the longer the situation persists, the lesser justification there is for treating a situation as exceptional in nature with the consequence that it cannot be addressed by application of normal legal tools."*²³ *"This matter may ultimately be assessed by the competent judicial bodies at the national and international levels, in particular by the ECtHR."*²⁴

43. That being said, the recommendations made by the Commission in its Opinion on the Emergency Decree Laws are still relevant. The Commission has itself summarized these recommendations as follows:²⁵ *"1. During the emergency regime the government should take only such measures which are connected to the reasons and goals behind the state of emergency."*²⁶ *This is of particular importance given the fact that the criteria used to assess the links of concerned individuals and legal entities to the "FETÖ/PDY" (or other organisations which allegedly represent a threat to national security) have not been made public, at least not officially."*²⁷ *The "connections" with "terrorist organisations" are loosely defined and not individually substantiated."*²⁸ *So far it has not been possible to effectively challenge this lack of verifiable evidence of such "connections" in individual cases before the domestic courts."*²⁹

44. The following recommendations are of particular relevance for the purposes of the present opinion:

- that structural (general) measures or individual measures with a permanent effect should as a rule be introduced and discussed in a normal manner, and not by means of adopting emergency decree laws;³⁰
- that there must always be a strict and genuine link between the reasons justifying the state of emergency and the measures taken through the emergency decree laws.

1. Compliance with the procedural rules pertaining to the state of emergency

45. According to Article 121 § 3 of the Turkish Constitution in conjunction with Article 128 of the Rules of Procedure of the Grand National Assembly of Turkey, the decree laws should be decided upon (approved or rejected) by Parliament within 30 days at the latest.

46. The Decree Law N° 674 was issued, published in the Official Gazette and notified to the Secretary General of the Council of Europe on 1 September 2016. According to the Turkish authorities, it was immediately submitted to Parliament for approval, but was only approved on 10 November 2016, 70 days after its enactment.

²² Turkey, *Opinion on the Measures provided in the recent Emergency Decree Laws with respect to Freedom of the Media*, Venice, 10-11 March 2017, CDL-AD(2017)007

²³ See § 41 of CDL-AD(2016)037

²⁴ See § 43 of CDL-AD(2016)037

²⁵ See CDL-AD(2017)007, § 13

²⁶ *Ibid.*, §§ 79-80, 85

²⁷ *Ibid.*, § 129

²⁸ *Ibid.*, §§ 128-131, §§ 134-140

²⁹ *Ibid.*, §§ 80, 203-205, 214-216, 220-223, and 227

³⁰ See § 43 of CDL-AD(2016)037, §§ 89-90, and § 227

47. The Venice Commission took note, in its Opinion on the Emergency Decree Laws, of the view of the Turkish authorities that, since from 1 July until 1 October 2016 the Parliament was on summer recess, the 30-day period set in the Rules of Procedure starts running from the moment when Parliament returned from the summer recess. However, the Commission is of the view that this interpretation is not in accordance with the Constitution and the Rules of Procedure and it constitutes “a matter of great concern”, as it “has allowed the Government to legislate through the emergency decree laws without any parliamentary control for a period of over two months.” (§§ 45-46). As stressed by the Commission, the Speaker or the President could have summoned Parliament during the recess (Article 93 of the Constitution; Article 7 of the Rules).

48. Furthermore, as previously underlined by the Commission for all concerned emergency decrees,³¹ the lack of timely control of the Decree Law is all the more problematic as judicial review was not possible before its approval in Parliament, given that the Constitutional Court may review the emergency decree laws *in abstracto* only once they have been approved by the law. Detailed comments on the position of the Turkish Constitutional Court on the matter and the evolution of its related case-law may be found in Section F of the Opinion on the Emergency Decree Laws. From a more practical perspective, it is important to note that the Court - contrary to its prior jurisdiction (Constitutional Court judgement of 10 January 1991, Registry n° 1990/25, Decision 1991/1) - has already rejected appeals against the emergency decree laws no. 667, 668, 669, 670 and 671.³²

49. Yet, even before its approval in November 2016, the Decree Law has produced its first effects, since, following the suspension or dismissal of local elected representatives in relation to alleged involvement in terrorism-related activities,³³ trustees have been appointed to replace them.³⁴

50. Several individual complaints have been lodged to the Constitutional Court to annul the appointment of trustees. These cases are still pending.³⁵

2. Compliance with the substantive rules on the state of emergency

51. As already indicated, the limits to the Government’s emergency powers are set out in Article 15 of the Constitution, article 15 ECHR and article 4 ICCPR. For the assessment of the measures in the Decree Law 674, the compliance with the following derogation conditions has to be examined :

- a. the Government shall act in compliance with the law on State of Emergency which has to regulate, *inter alia*, “*what kind of changes shall be made in the status of officials*” (Article 121, § 2 Constitution);
- b. the decrees are necessitated by the state of emergency (Article 121, § 3 Constitution), and measures derogating from the human rights guaranteed in the ECHR, the ICCPR and the Turkish Constitution have to be (proportionate) “strictly required by the exigencies of the situation”;
- c. the decrees may not violate the obligations under international law.

³¹ See § 53 of CDL-AD(2016)037

³² See also Constitutional Court’s Decision dated 12/12/2016 Reg. No. 2016/166, Dec. No. 2016/159 and the Decision dated 12/12/2016 Reg. No. 2016/167 Dec. No. 2016/160 which stipulates that action for annulment cannot be filed against the state of emergency decree laws.

³³ See for the position of the Turkish Government in this regard, *Appointments to Municipalities Due to Terror*, <http://www.mia.gov.tr/kurumlar/en.diab/Upload/Belediyeler.pdf>;

³⁴ See <http://bianet.org/bianet/siyaset/182431-ohal-de-belediyelere-yonelik-kayyim-islemleri>, indicating the municipalities to which a trustee was appointed until 25 December 2016. In 34 out of 53 cases, trustees had been appointed before the Decree Law 674 was adopted by the parliament.

³⁵ <http://www.haberturk.com/gundem/haber/1301945-dbpden-anayasa-mahkemesine-kayyum-asvurusu> (in Turkish)

a. *Compliance with the Law on the State of Emergency*

52. Pursuant to Article 121 § 2 of the Constitution, the scope of the Government's emergency powers is defined in the Law on the State of Emergency. Article 121 § 2 more precisely provides inter alia that "*what kind of changes shall be made in the status of officials [...] shall be regulated by the Law on State of Emergency*".

53. Articles 9 ("measures to be taken"), 10 ("obligations and measures to be taken in the event of serious economic crises") and 11 ("measures to be taken in the case of violence") of the Law n° 2935 "on the state of emergency" of October 1983 (the 1983 Law) contain closed lists of measures which may be taken by the Government.³⁶ None of the measures concerning the exercise of local democracy laid down in the Decree Law N° 674 appear in these lists.

54. The Turkish authorities argue that "*it is not possible to [speak] about a monopoly established by the provisions of the Law n° 2935 with regard to the measures that might be taken within the state of emergency periods*".³⁷ In their view, the decree laws have the same legal force as the 1983 Law itself and therefore can also determine the measures that can be taken during a state of emergency. In its Opinion on the emergency decree laws the Venice Commission has already rejected this approach, as it "*would make Article 121 § 2 redundant. The rationale behind this constitutional provision (that certain vital issues pertaining to states of emergency should be regulated in advance by a law) would be nullified if the Government could by its decrees - even those having the force of law - deviate from this law.*" (§ 70)

55. That being said, it will be up to the Constitutional Court of Turkey and/or other domestic judicial instances to assess the compliance of the measures authorising the replacement of suspended local elected representatives by trustees, not mentioned in the 1983 Law, with Article 121 of the Constitution,³⁸ as well as the question whether the subsequent approval of the Decree Law by Parliament may be seen as "legitimizing" the measures which are not provided for in the 1983 Law.

b. *Compliance with the condition that the derogatory measures have to be necessary, temporary and proportionate*

56. Under Article 15 ECHR, any extraordinary limitations of human rights are permissible only "*to the extent strictly required by the exigencies of the situation*". Similarly, Article 121 § 3 of the Turkish Constitution allows the Government to legislate through decree laws "*on matters necessitated by the state of emergency*". The Venice Commission recalls in this respect the position of the Turkish Constitutional Court expressed in its above-mentioned judgment of 10 January 1991. In that judgment the Court observed that "*the scope of the regulation of [emergency] decree laws is limited to 'the issues that are necessitated by the state of emergency or by the state of martial law' [...]. The issues that are necessitated by the state of emergency are limited to the reasons and goals behind the state of emergency*" (emphasis added).³⁹ In other words, any emergency measure taken through the emergency decree laws

³⁶ The lists of 1983 were adapted by decree 3076 of 14 November 1984 and by decree 3432 of 21 April 1988.

³⁷ Memorandum submitted by the Turkish authorities to the Venice Commission in relation to the Opinion on the Emergency Decree Laws, p. 45: "*The inclusion of certain restrictions that might be applied, the certain measures that might be taken and the certain powers that might be granted to the public officials within the state of emergency periods in the Law no 2935 does not eliminate the opportunity to make a legal regulation related to the other necessary and mandatory measures. In other words, it is not possible to [speak] about a monopoly established by the provisions of the Law no 2935 with regard to the measures that might be taken within the state of emergency periods*".

³⁸ See § 77, CDL-AD(2016)037.

³⁹ Constitutional Court 10 January 1991, Registry n° 1990/25, Decision 1991/1.

should have a sufficiently close *nexus* to the situation which gave rise to the declaration of a state of emergency.

57. The measures issued do not only have to be *necessary*, they also have to be *temporary* and *proportionate*.

58. In its previous opinions, the Venice Commission underlined, with reference to relevant international norms and principles, that the most important characteristic of any emergency regime is its *temporary character*⁴⁰. What is justified in the immediate aftermath of a major public crisis may not be considered as necessary several months later. Moreover, permanent changes to the national legislation must be introduced in the framework of the normal democratic political process, by ordinary laws, carefully prepared and properly deliberated in Parliament before adoption.⁴¹

59. In addition, as required by the general principle of the rule of law,⁴² the measures have to be *proportionate*. As stated by the Commission in its Opinion on the Emergency Decree Laws, “[t]he Constitution may give to the Government very large emergency powers. However, those powers cannot be limitless - otherwise the Constitution would contain a mechanism of self-destruction, and the regime of the separation of powers would be replaced with the unfettered rule of the executive.” (§29) In the same vein, the Parliamentary Assembly in its Resolution 2090(2016) warned against the risk that “counter-terrorism measures may introduce disproportionate restrictions or sap democratic control and thus violate fundamental freedoms and the rule of law, in the name of safeguarding State security”.⁴³

60. Seen from the perspective of these principles, the rules pertaining to local authorities contained in the Decree Law n° 674 raise serious questions, which require close consideration.

i. Necessity of the new rules introduced by the Decree Law

61. Concerning the necessity of the new rules, the Venice Commission observes that the Decree Law does not provide any explanation as to the reasons why the provisions in Article 45 § 1 of the Municipality Law cannot be deemed sufficient to fight terrorism. According to these provisions, when a mayor has been suspended or arrested, the municipal council convenes, on the initiative of the provincial governor, to elect a deputy mayor. The Commission fails to see how suppressing the elective nature of organs of local authorities (with an impact on the people’s right to vote to elect their local representatives) is necessitated by the state of emergency declared in July 2016 and is “strictly required” by its exigencies, so as to justify regulation through an emergency decree law. The suppression of democratic local government institutions calls for stringent and cogent justification which the Commission has been unable to identify.

62. It seems clear that, as noted by the Congress,⁴⁴ the decree laws introduced following the failed military coup on 15 July 2016 have “*enabled new measures to be taken, primarily to deal with the consequences of the attempted coup and prosecute those responsible for this attempt,*

See also A.R. Coban, *Comparing Constitutional Adjudication. A Summer School on Comparative Interpretation of European Constitutional Jurisprudence. 4th Edition, 2009. States of emergency and fundamental rights. Turkey. Fundamental Rights during States of emergency in Turkey*, p. 9.

⁴⁰ See Opinion on the Emergency Decree Laws, § 78

⁴¹ See CDL-AD(2017)007, § 17

⁴² See *Rule of Law Checklist*; See also CDL-AD(2011)049, Opinion on the draft law on the legal regime of the state of emergency of Armenia, § 44: “even in a state of public emergency the fundamental principle of the rule of law must prevail”; see also ECtHR (GC), *Dulimi and Montana Management Inc. v. Switzerland* ECtHR no. 5809/08, 21 June 2016, § 145: “One of the fundamental components of European public order is the principle of the rule of law, and arbitrariness constitutes the negation of that principle.”

⁴³ Resolution 2090(2016), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.as?fileid=22481&lang=en>

⁴⁴ CG32(2017)13final, § 3

which must be condemned, but also to strengthen the existing anti-terror measures in general.” This may be understandable in view of the situation created in Turkey in relation to the failed coup, and taking into account terrorist attacks and threats facing Turkey also after July 2016. This being said, in view of their impact of the exercise of local democracy in Turkey, it may still be questioned whether the rules introduced by the Decree Law 674 are necessary to address such threats. The Commission notes in this respect that, in view of the Congress,⁴⁵ *“the practice in most European States, including Turkey prior to September 2016, whereby elected mayors who are legitimately removed from office are replaced by a new mayor elected by the municipal council, is a sufficient safeguard against unlawful activity and deserves to be retained”*.

63. The Decree Law also fails to justify the link between the other measures allowed by Articles 38 in fine and 39 of the Decree Law, entailing severe limitations of the effective enjoyment of local self-government in the concerned municipalities (enabling other public institutions or organizations, under the coordination and approval of the governorship, to provide municipal services, transfers of financial resources, confiscations of properties etc.), and the reasons having led to the state of emergency, as stated by the Turkish authorities when notifying the state of emergency to the Secretary General of the Council of Europe (see comments under the Section C below). The Information Note on the Decree Law by the Turkish authorities in the framework of the communication with the Secretary General⁴⁶ only contains a description of the measures introduced by the Decree, without providing information on their reasons justifying these measures.

ii. Proportionality and temporary nature of the rules introduced by the Decree Law

64. By introducing new rules for filling vacant positions of mayors, deputy mayors or local councillors, although limited to the vacancies resulting from (suspicion of) terrorist-related actions of the previous holders, the Decree Law provides for structural (general) measures, which go beyond the period and the purpose of the state of emergency.

65. The Decree Law, indeed, does not indicate that these rules will cease to apply after the end of the emergency period. Furthermore, it lacks any indication as to how the new rules interrelate with the other - unchanged - provisions of the Municipality Law.

66. The Venice Commission recalls that, as stated in its Opinion on the Emergency Decree Laws (§ 80) *“the provisions of emergency decree laws should lose their legal effect with the expiry of the state of emergency. Permanent changes to legislation should not be introduced through such decree laws, but must be left to ordinary legislation. This is particularly important for the existence of effective remedies: aspects of the procedures for providing remedies may be altered, but effective remedies may not be completely abolished. The Government should not be allowed to exclude judicial review of its own actions or to change procedural rules so as to make this review ineffective. Equally, the Government should not be able to enact such rules that weaken the position of other independent State institutions, change their composition, principles of functioning [...]”* The Commission furthermore reiterates that, in its view, the *ex post* approval of the emergency decree laws by Parliament should not lead to the permanent legitimation of the measures authorized by the decrees, as the emergency situation is not adapted for enacting permanent rules. Any structural changes should be introduced and discussed according to ordinary rules and procedures, as provided by the Constitution, once the state of emergency has ceased.⁴⁷

⁴⁵ Recommendation 397 (2017), 29 March 2017, (see Document CG32(2017)13, explanatory memorandum), co-rapporteurs: Anders KNAPE, Sweden (L, EPP/CCE) and Leendert VERBEEK, Netherlands (R, SOC)

⁴⁶ See <https://rm.coe.int/16806a2e3c>

⁴⁷ See Opinion on the Emergency Decrees Law, § 90.

67. The introduction of permanent changes to the Municipal Law through emergency decree is all the more questionable as the Venice Commission was informed that an amendment to enable the central government to appoint bureaucrats to replace elected mayors had already been on the agenda of government by 19 August 2016, as part of Omnibus Bill n° 411. However, the amendment was removed from the Bill due to the strong opposition it raised within the parliament.⁴⁸ Such information supports the perception that the measures allowed by the Decree Law are actually designed and/or used to address (also) more general problems facing the Turkish authorities as they see it, not necessarily having a link to the management of the state of emergency.

68. The proportionality of the system put in place by Article 38 is moreover questionable as the assignment of a new mayor/deputy mayor/council member seems to have definitive effects, no reinstatement being foreseen in the Decree Law in case the charges of aiding or abetting terrorism and terrorist organizations do not lead to a criminal conviction. According to the Turkish Government's comments on the draft Opinion (submitted to the Venice Commission on 3 October 2017), in practice, *"reinstatement has been done for 8 members of municipal council for whom there isn't any criminal conviction for aiding and abetting terrorism"*.

69. According to Article 45, § 1 of the Municipality Law before the amendment, the new holders of the vacant positions should remain in office, pending a final court judgment, for a limited period of time, closely related to the term of office of the previous holder: for the newly elected mayor - until the end of the term of the former mayor; for the deputy mayor - until the election of a new mayor, or "until the mayor who is suspended or dismissed from office, or arrested [...] returns to office". Article 47 of the Municipality Law specifically requires that the suspension, as a precautionary measure, be re-assessed regularly and be lifted *"in case no permission is given for investigation or court decision is obtained not to prosecute, or in case of abatement of public action, or acquittal [...]"*. In any event, under the Municipality Law, the new local elections will put an end to the office of these positions' new holders.

70. The Decree Law is silent on both aspects: a/ what happens to the suspended local representative if the terrorism-related charges are not confirmed in court; b/ what happens when the term of the office of the previous holder comes to an end and new elections are to be held. In fact, the relation between the new paragraph 2 added by the Decree Law to Article 45 of the Municipality Law and existing paragraph 1 of Article 45, as well as other relevant provisions of this law, is not addressed.

71. In view of the above, the Commission cannot but conclude that the new rule is a measure with far-reaching impact and raises the question as to whether it is envisaged that, in the future, in all cases of terrorism-related vacancies of local elected positions, such positions will have to be filled by persons appointed by the state authorities, for a duration which is left to their discretion. Should this be the actual purpose of the new rules, this will clearly be in serious breach of the principles of local self-government. (see more specific comments below)

72. Finally, Article 40 of the Decree Law gives the greatest cause for concern on account of its retroactive effect, as it introduces on a temporary basis a provision to the Municipality Law-Transitional Article 9 - enabling replacement of elected representatives already suspended before it came into force (and who had been replaced under ordinary law by an elected member of the municipal council) by appointed officials. It is recalled, in this respect, that, in the assessment of the Venice Commission, non-retroactivity is part of the Rule of Law principle: *"People must be informed in advance of the consequences of their behaviour. This implies foreseeability (above II.B.3) and non-retroactivity especially of criminal legislation. In civil and administrative law, retroactivity may negatively affect rights and legal interests. However,*

⁴⁸ See *inter alia* Union of South-eastern Anatolia Region Municipalities (GABB), "Report on local Governments and Appointments of Trustees to Municipalities", 29 November 2016, p. 9.

*outside the criminal field, a retroactive limitation of the rights of individuals or imposition of new duties may be permissible, but only if in the public interest and in conformity with the principle of proportionality (including temporally). The legislator should not interfere with the application of existing legislation by courts.*⁴⁹

c. *Compliance with the international obligations*

73. As stated in Article 15 of the Turkish Constitution, during the state of emergency, the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures derogating the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated.

74. Since the new rules introduced by the Decree Law have a substantial impact on the democratic functioning of local democracy in Turkey, it is essential to examine the compliance of the relevant provisions in the Decree with the obligation undertaken by Turkey in the field of local self-government, and more particularly in the framework of the European Charter on Local Self-Government.

C. Compliance with international obligations in the sphere of local self-government

75. As already mentioned, Turkey is a Party to the European Charter of Local Self-Government. The Charter does not contain a clause permitting derogations from its provisions in times of emergency. Turkey is thus expected, as all other Parties to the Charter, to properly implement, including during the state of emergency, the Charter's provisions that it has ratified.

76. The Turkish Constitution contains important guarantees in this field, while maintaining also the principle of the administrative tutelage by the central administration over the local administrations, *"with the objective of ensuring the functioning of local services in conformity with the principle of the integrity of the administration, securing uniform public service, safeguarding the public interest and meeting local needs properly."*(Article 127)

77. Article 3 of the Municipality Law, following Article 2 of the Charter, states that municipalities have *"powers of self-government (autonomous) both administratively and financially"*.

78. As explained in Article 3 of the Charter, the concept of local self-government relies on the right and ability of local authorities, exercised by councils or assemblies composed of members freely elected by secret ballot on the basis of direct, equal, universal suffrage, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population. In more concrete terms, this means:

a/ that the local authorities should be elected by the people and, as a pre-requirement, the people should enjoy the right to freely elect the local leadership;

b/ that elected local authorities should enjoy the legal and practical possibility of regulating and managing, on their own, the public affairs of the local community.

79. The new rules introduced by the Decree Law 674 affect the situation of local self-government in Turkey with regard to both aspects of Article 3 of the Charter, particularly if their non-temporary nature is taken into account.

⁴⁹ See CDL-AD(2016)007, *Rule of Law Checklist*, § 62.

1. Elected nature of local authorities

80. The Venice Commission recalls that one of the principles deriving from Article 127 of the Turkish Constitution is that local administration organs are elected by the electorate. By replacing free elections by people (as a way to designate local representatives and form local authorities), with appointments made by state authorities, Article 38 of the Decree Law alters, in respect of the concerned local communities, the very nature of local authorities as representative of the will and the choice of the local population, and the legitimacy of their action. This raises also issues of accountability, towards the local community/population, of those who fill the vacant position by way of appointment.

81. It is important to note that the Decree Law will not only affect those (potentially) responsible of terrorism-related offences, but will have, and has already had, practical consequences on the actual operation of local elected councils and their members who are free from such suspicion.

82. As provided by Article 38, *“the municipal council shall not convene without mayor’s call in these municipalities. Duties and powers of municipal councils, committees and commissions shall be exercised by members of committee laid down in Article 31”* of the Municipality Law, namely the “municipal committee”, a mixed body, composed both of elected members (among the members of the municipality council) and appointed members (appointed by the Mayor from among the heads of units and among the chief of financial services). Under this new regime, little remains in practice from the principle of local affairs being managed by locally elected authorities. The Commission also wishes to stress that, as noted by the Council of Europe Commissioner for Human Rights, *“[t]his poses fundamental problems vis-à-vis principles of local democracy and is likely to create resentment in the local populations concerned, as it can be perceived as a collective sanction.”*⁵⁰

Political life and political rights of local elected representatives and of their constituents

83. The measures allowed by the Decree Law will also have an impact on the political life of the local communities to which these measures have been/will be applied, with direct consequences on the way the political decisions are taken within their framework. The issue was brought up by the rapporteurs of the Congress in the above-mentioned report on the “Fact-finding mission on the situation of local elected representatives in Turkey”. In particular, the report notes that *“the replacement of municipal councillors in certain municipalities in the south-east had altered the majority within the councils.”*⁵¹

84. It seems also obvious that the new rules, enabling a drastic change of the method of formation of local authorities (appointment instead of election), also affect the effective exercise of the individual electoral rights of mayors and other local elected representatives, and of their constituents.

85. According to the ECtHR case-law, Article 3 of the First Additional Protocol to the ECHR is in principle not applicable to elections for local authorities;⁵² therefore this issue may not be addressed under the ECHR protection system. Also, the *“right to vote, to be elected and to engage in political activity”* enshrined in Article 67 of the Turkish Constitution is not among the non-derogable rights listed in Article 15 of the Constitution. The Turkish authorities thus enjoy a large margin of appreciation when assessing the necessity of emergency measures that infringe upon the political rights of elected representatives and of their constituents.

⁵⁰ Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey, by Nils Muižnieks, Council of Europe Commissioner for Human Rights, The Commissioner - CommDH(2016)35 / 7 October 2016

⁵¹ See CG32(2017)13, 29 March 2017, § 42

⁵² See *Cherepkov v. Russia* (dec.), no. 51501/99, ECHR 2000-I, 25 January 2000

86. It may indeed be conceived that, in the exceptional circumstances characterizing the state of emergency, limitations to these rights be deemed necessary as part of the measures taken to properly manage the situation having led to/resulted from the declaration of the state of emergency. However, the Constitution in Article 121, § 3 makes it clear that the scope of the emergency decrees is limited to “matters necessitated by the state of emergency”, and under Article 15, § 1 of the Constitution, suspension of constitutional rights is only permitted “to the extent required by the situation”. These measures must therefore meet a proportionality test.⁵³ Taking into account the observations made in this opinion with regard to the necessity of the new rules and their non-temporary nature, the Commission must express a concern as to whether, despite the large margin of appreciation the Turkish authorities have in this respect, the ensuing consequences on the exercise of political rights at the local level meet the proportionality test required by the Constitution of Turkey. In the end, this lack of proportionality brings to a breach of article 3 of the Charter, as it undermines the “the right and the ability” of elected local authorities, “to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population”.

2. Powers of local authorities. Supervision of local authorities

87. The Decree Law moreover organizes the management of local affairs in municipalities found to directly or indirectly “affect negatively” the fight against terrorism or violent activities, in such a way that it can amount to a takeover of these municipalities by the central authorities (see Article 38 last part and Article 39). The services concerned by the “disruption” noted shall either be performed by the governorship or, under his/her guidance and approval, through different state institutions and organisations. This applies also to financial matters and it may lead to the confiscation of a municipality’s resources, if the governorship establishes that they were used to provide support to terrorism and violent activities. Article 39 further enables the state authorities to dismiss and reinstate the staff concerned.

88. The Commission must question whether this approach to local government is respectful of the requirements of Article 4 of the Charter, binding for Turkey as a Part to the Charter. According to Article 4, § 4, “*powers given to local authorities should normally be full and exclusive*” and may not be undermined by other authority, if this is not provided by the law. Also, under Article 4, § 1, local authorities, within the limits of the law, shall have “full discretion” to freely exercise (as required by Article 7 of the Charter) the powers falling under their responsibility. In addition, the Venice Commission has already expressed its strong reservations as to the introduction of such limitations by the way of emergency decrees. Moreover, the Commission recalls the Preamble to the Charter itself, in particular the clause that “local authorities are one of the main foundations of any democratic regime”, which means that an effective role must be defined for them in the structure of the state and citizens must be able to take part in their administration.⁵⁴ It is doubtful whether elected local authorities can, under the rules introduced by the Decree Law, ensure “effective” management of their communities.

89. It seems also evident from the above that, for the municipalities operating under the framework laid down in Articles 38 and 39 of the Decree Law, the supervision of local authorities will go beyond the mere *legality and constitutional control* of their activities, as required by Article 8, § 2 of the Charter. Moreover, it is questionable whether the new rules, introduced by emergency decree law, may be considered as compliant with Article 8, § 1 of the Charter, according to which supervision of local authorities “*may only be exercised according to such procedures and in such cases as are provided for by the constitution or by statute*”. Article

⁵³ See Venice Commission, CDL-AD(2015)036, referring to the Congress’ Recommendation 375 (2015), paragraph 19(vi). See also Congress’ Report on Criteria for standing in local and regional elections, G/2015(28)7FINAL, 26 March 2015.

⁵⁴ See CG32(2017)13final, § 52.

8, § 3 of the Charter also states that the intervention of the supervisory authority should be proportionate to the importance of the interest to be protected.⁵⁵

90. A further source of concern derives from the rule, under Article 39 of the Decree Law, that the decision whether there has been *disruption* of service in a municipality which affects or will affect negatively the fight against terrorism or violent activities, belongs to the “governorship” alone, in the absence - in the Decree law - of any criteria to be used for taking such a decision.

91. Article 57 of the Municipality Law, to which Article 39 of the Decree Law adds the above rule, requires a decision of the “justice of the peace” to determine, upon request of the Ministry of Interior, whether there has been gross negligence in the service of the municipality, before authorising the governor to eliminate the shortcomings noted by use of the equipment, personnel and other resources of the municipality. No such an intervention of the “justice of the peace” is foreseen by Article 39 of the Decree Law, nor any judicial review of the governor’s decision (under Article 57, the municipality may file a petition to the civil court of first instance against the decision of the “justice of the peace” given upon request of the Minister of Interior). Although, upon ratification of the Charter, Turkey has not considered itself bound by the obligation, in Article 11 of the Charter, to ensure legal protection of local self-government - i.e. the right of local authorities to a judicial remedy in order to secure free exercise of their powers and respect of the constitutionally and legally protected guarantees for local self-government - such legal protection is provided by Article 57 of the Municipality Law. Since the rule in Article 39 is introduced to the Municipality Law as an exception, it seems that the legal protection available under the general rules is not applicable. According to the Turkish Government’s comments on the draft Opinion, legal protection is guaranteed by Article 125 of the Constitution, providing that “[r]ecourse to judicial review shall be available against all actions and acts of administration”. However, as stipulated by article 125 of the Constitution, the judicial review “is limited to the review of the legality of administrative actions and acts, and in no case may it be used as a review of expediency”, which means that, in the absence of any criteria in the decree law, it is at the “governorship” discretion to decide whether or not there has been disruption in a municipality.

92. In the view of the Venice Commission, such an enhanced control by the governorship amounts to a far-reaching, discretionary power of the state representatives over the municipality, its elected authorities, staff and resources. Moreover, this power, although instituted only in relation with suspected terrorism-related activities, is not limited to the exceptional situations characterizing the state of emergency. Thus, the changes introduced by the Decree law to the Municipality Law may indeed be seen, as noted by the Congress, as the reflection of a more general move, going beyond the exigencies of the state of emergency, towards a new sort of “recentralisation” of Turkey’s local public administration.⁵⁶ This is problematic both from the perspective of the international and national rules on the state of emergency and that of Turkey’s commitments in terms of local self-government under the European Charter of local Self-Government.

III. Conclusion

93. The Venice Commission acknowledges, as it already did on previous occasions, that in the immediate aftermath of the failed coup of 15 July 2016, when the Turkish authorities were confronted with a dangerous armed conspiracy, certain extraordinary measures may have been required in Turkey. As a consequence, there were good reasons to declare a state of emergency.

⁵⁵ It is recalled that Turkey only took commitments under Articles 8 § 1 and 8 § 2 of the Charter (see footnote 9).

⁵⁶ See also Congress, CG32(2017)13, 29 March 2017, § 52.

94. The Commission nevertheless recalls that the main purpose of an emergency regime is to restore the democratic legal order and that the emergency regime itself should remain within the limits established by the Constitution and domestic and international obligations of the State. This means, in particular, that only such measures should be taken which are required to deal with the threat which made it necessary to declare the state of emergency, and for the duration of the state of emergency.

95. In its 2016 Opinion on the Emergency Decree Laws, the Commission concluded, however, that the Government had interpreted its extraordinary powers too extensively and had taken measures that went beyond what is permitted by the Turkish Constitution and by international law.

96. The provisions pertaining to the functioning of local democracy in Decree Law N° 674 raise similar concerns, both in terms of compliance with the procedural and substantial rules on the state of emergency and with the local self-government principles enshrined in the European Charter of Local Self-Government, to which Turkey is a Party.

97. It is particularly worrying that, through emergency legislation, the central authorities are enabled, in the framework of the fight against terrorism, to appoint unelected mayors, vice-mayors and members of local councils, and exercise, without judicial control, discretionary control over the functioning of the concerned municipalities.

98. This is all the more problematic as the new rules, whose necessity appears doubtful even in the framework of the emergency regime, are introducing changes of structural nature, which are not limited in time, to the system of local government in place in Turkey, based on the election of local authorities by the local population.

99. The Venice Commission recalls that local authorities are one of the main foundations of a democratic society and their election by the local population is key to ensuring the people's participation in the political process. Furthermore, the adequate implementation of the principles of local self-government is instrumental to ensuring a democratic, effective and responsible management of public affairs at the local level.

100. The Venice Commission, therefore, calls the Turkish authorities to:

- repeal the provisions introduced by the Decree Law N° 674 which are not strictly necessitated by the state of emergency, in particular concerning the rules enabling the filling of vacancies in the positions of mayor, vice-mayor, local council member, by the way of appointments;
- ensure that the application of the rules introduced by the Decree Law N° 674 is limited to the duration of the state of emergency, and that any permanent measures affecting local democracy are taken following the ordinary laws and procedures, after proper parliamentary debate;
- introduce provisions for adequate judicial review of the measures taken by the governorship in municipalities where special powers are instituted in their respect in the context of the fight against terrorism;
- provide adequate rules and framework for the reinstatement of suspended/dismissed local representatives in case the terrorism-related charges do not lead to a criminal conviction.

101. The Venice Commission remains at the disposal of the authorities for any assistance they may need in this respect.