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The Impact of Turkey's Recent Amendments to the Electoral Laws on Fundamental Freedoms and Electoral Integrity

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On March 31, 2022, amendments were adopted that enacted modifications in electoral regulations, including changes to the election threshold, campaign exemptions, and the formation of electoral boards. Although there have been positive steps, such as lowering the election threshold and facilitating the participation of the visually impaired, overall, the changes have been somewhat problematic for fundamental freedoms and electoral integrity. This is even more concerning given the current situation in Turkey, with its already shrinking space for civil society, the vulnerability of the judiciary to political influence, violations of the Supreme Election Council's independence and impartiality, growing restrictions on the media, and the newly enacted disinformation law. The policy brief analyzes the impact of the amendments and offers recommendations to civil society organizations, the media, opposition parties, international organizations, and social media companies on how to protect electoral integrity.

After the shift from a parliamentary to a presidential system in 2018, modifications to the electoral laws had long been anticipated. The Legislative Proposal on the Amendment of the Law on Parliamentary Elections and Certain Laws (Law no. 7393), which was prepared with the joint signatures of the members of Parliament from the ruling Justice and Development Party (AKP) and the Nationalist Movement Party

(MHP), was accepted on March 31, 2022, after a three-day discussion process, and it was published in the Official Gazette on April 6, 2022.¹ The above law enacted modifications in electoral regulations, including changes to the election threshold, campaign exemptions, and the formation of electoral boards. Turkey will hold the June 2023 presidential and parliamentary elections under this new election law.²

This policy brief aims to examine the challenges posed by the amendments to fundamental rights and freedoms and their potential implications for electoral integrity³ as well as to propose recommendations to address these challenges. It will first give an overview of the current situation in Turkey and then analyze six areas of concern that have been highlighted by the amendments and discuss the possible implications. The final section of the brief will provide recommendations urging civil society organizations, the media, opposition parties, international organizations, and social media companies on what they can do to protect the integrity of elections.

The current situation in Turkey

As stated by the Organization for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR)⁴, “to provide a fully democratic basis for the conduct of elections, constitutional and legislative reform should ensure broad guarantees for fundamental freedoms of association, assembly, expression, and electoral rights.”⁵ Although some positive steps have been taken with Law no. 7393, such as lowering the election threshold and facilitating the participation of the visually impaired, overall, the changes do little to establish safeguards for fundamental freedoms and electoral rights.

The new amendments are even more concerning given the current situation for civil society, the violations of fundamental rights and freedoms, and the serious threats to electoral integrity in Turkey. The previous policy briefs on Turkey from Freedom House demonstrated that systemic violations of the rule of law and the increasingly repressive and securitized environment represent a significant threat to Turkey's already shrinking space for civil society. Unsurprisingly, Turkey was designated “Not Free” by Freedom in the World 2022, Freedom House's annual report assessing the condition of political rights and civil liberties worldwide.⁶ There has been increasing concern about electoral integrity due to the vulnerability of the judiciary to political influence, violations of the Supreme Election Council's (YSK) independence and impartiality, growing restrictions on the media, and the newly enacted disinformation law, as detailed below.

Due to the stronger political influence of the executive over the judiciary, opposition politicians are deliberately targeted at the will of Recep Tayyip Erdoğan's government. Numerous examples, including the prolonged detention of Selahattin Demirtaş, former co-leader of the Peoples' Democratic Party (HDP), the political ban of the president of the Republican People's Party (CHP) branch in Istanbul, and prison sentences for members of Parliament and elected mayors from the opposition parties, indicate how the state of political affairs influences the judiciary. Recently, a court sentenced Istanbul Mayor Ekrem İmamoğlu, who is a potential contender against Erdoğan, to two years and seven

months in prison and imposed a lifetime political ban for allegedly insulting officials from the YSK for their decision to invalidate the results of the 2019 mayoral election. This verdict, which was made six months before the upcoming election, exemplifies the efforts to prevent the mayor from running for president in the general election.⁷ Overall, these cases demonstrate political motivations, due to their timing, the coordination of prosecution efforts, the actions of judges, and defiance of legal precedent.⁸

In a similar vein, the YSK, the body responsible for conducting elections, investigating irregularities, complaints, and objections, and making final decisions, is unable to demonstrate independence and impartiality, which is a necessity to conduct free and fair elections. Judges are chosen by judicial bodies under AKP influence and they have frequently given controversial and legally questionable decisions in favor of the AKP. YSK has not fully exercised its regulatory authority in line with the Constitution and legislation.⁹ Many such cases have been reported by international and civil society organizations, including YSK's decision to declare unsealed ballots and envelopes to be valid in the 2017 referendum,¹⁰ the denial of the mayoral mandate for successful HDP candidates in Southeast Turkey,¹¹ and the annulment of March 31, 2019, Istanbul election and the subsequent re-run.¹²

According to a recent report by the Reuters Institute, only 23 percent of respondents in Turkey believe that the country's media are independent of political influence, which is not surprising given the current situation.¹³ At this time, 90 percent of Turkish media outlets are owned by pro-government businesses, resulting in a strong influence by AKP over broadcast media and newspapers. The opposition parties have extremely limited opportunities to communicate their messages to the public, because of their unfair treatment by mainstream media. Journalists critical of the ruling AKP and the MHP alliance often face intense political and financial pressure.¹⁴ The lack of pluralistic media threatens the freedom of information and expression, which are essential components of the democratic process.

Obstacles to freedom of information and expression are also likely to worsen due to the recently enacted Law on the Amendment to the Press Law and Certain Laws.¹⁵ This law, often referred to as the “disinformation law”, criminalizes the spread of disinformation and makes it punishable by up to three years of imprisonment. This punishment can be increased by 50 percent if a perpetrator conceals their identity or spreads misinformation as a part of an organization. Many opposition parties, civil society organizations, and international organizations have expressed deep concerns over the broad scope and vague language of the law, which may result in stifling voices critical of the regime, hindering freedom of expression and information, and affecting media plurality ahead of the election.¹⁶ Allowing judges and prosecutors to exercise control and discretion over the information provided might

have serious repercussions, such as prosecution and arbitrary arrest for criticizing the government or reporting electoral malpractices during the election period. Before this law, already several people were arrested for defaming Erdoğan on social media in the run-up to the June 2018 presidential and parliamentary elections.¹⁷ A similar situation will likely arise during the upcoming election process, but this time suspects could be more easily prosecuted under the disinformation act.

Social media has become an important means for Turkish citizens to gain access to independent media and express themselves with some degree of freedom.¹⁸ However, this disinformation law will further increase restrictions and subdue public debate on social media. Social media companies now face serious obligations and restrictions, rendering their compliance with the law difficult. According to the disinformation law, any content that is illegal or considered harmful to public safety must be removed by social media companies within four hours of notification. They are also required to disclose user data and algorithms when requested by the authorities. When they abide by the law, authorities will have the ability to take down content from social media and access user data, obtaining private data and threatening free speech. This might also create a dangerous precedent for other countries seeking to assert control over social media.¹⁹

On the other hand, if social media companies do not abide by the new law, they might face advertising prohibitions and bandwidth reductions, and be penalized by up to 3 percent of the value of their global sales. As experts note, companies have privacy policies that are often in conflict with the disinformation law and are unlikely to seek to violate these policies in Turkey.²⁰ Therefore, as companies are less likely to fully comply with the disinformation law, platforms may experience disruptions during the election period. As a result, Turkish citizens may not be able to use social media to access news, express their opinions, or report electoral irregularities. Given the above, whether companies abide by the law or not, there is a serious risk that freedom of expression and information will be severely limited in the run-up to the elections.

The looming threat to electoral integrity

As mentioned above, the current political climate and state of institutions in Turkey is highly problematic for fundamental rights and freedoms and electoral integrity. Law no. 7393 is woefully inadequate to remedy this situation and has the potential to cause new problems. According to the Global State of Democracy Index, produced by the International Institute for Democracy and Electoral Assistance (International IDEA),²¹ Turkey is categorized as a hybrid regime. It is below the global average in most attributes of democracy, including fundamental rights and civil liberties, judicial independence, and media integrity.

More specifically, Turkey is placed in the subcategory of “electoral authoritarian regimes”, where multi-party elections are typically held at the national level, but the regime often violates the minimum standards necessary for liberal democracy in systematic and profound ways.²²

In more developed democracies, political actors cannot as readily manipulate electoral institutions or intimidate voters, as independent media and judiciaries will denounce such actions. However, as electoral authoritarian regimes have a weaker rule of law and a bureaucracy that is more vulnerable to political pressure, state actors are often involved in intimidation and institutional-level manipulations, such as excluding the opposition on legal grounds, changing electoral rules to causing division among the opposition, undermining electoral alliances, and appointing partisan bureaucrats.²³ The Turkish government has practiced institutional-level manipulation by amending legislation to introduce provisions that could have serious negative impacts, as detailed below.

Lower election threshold but the same challenges to fair representation

Law no. 7393 lowered the election threshold, the minimum percentage of votes nationwide required for a party or an alliance to enter parliament, from 10 percent to 7 percent. However, this threshold is still among the highest in Europe and remains a substantial barrier for smaller parties and ones that do not participate in elections as a part of an electoral alliance. Even if small parties pass the national threshold, their representation may not be proportional to the votes they receive, since parliamentary seats are allocated at the electoral district, using the *d'Hondt method*. The *d'Hondt method* is a widely used mathematical formula for translating votes proportionally into seats. However, it tends to favor parties with the most votes. Votes cast for smaller parties may be “wasted” if they do not receive enough votes at the electoral district level to obtain seats.²⁴ This can potentially lead to millions of voters being left without representation, which undermines the principle of fair representation.

Law no. 7393 reduces the advantage of being part of an electoral alliance. Before the adoption of Law no. 7393, Turkey used a two-stage allocation system. In the first stage, seats in electoral districts were allocated among (i) alliances that surpassed the electoral threshold, (ii) parties that exceeded the threshold and took part in the elections without joining an alliance, and (iii) independent candidates.²⁵ In the second stage, the seats allocated to alliances were distributed to their members. In the 2018 presidential and parliamentary elections, the formation of an alliance enabled major parties to benefit from the seats allocated to alliances in the second stage, resulting in these parties winning more seats than they would have won on their own. This is because the distribution of alliance votes is in proportion to the number of votes obtained by an alliance member.

However, with the new amendments, all parties will compete for seats individually regardless of their alliance membership. This does not increase fair representation, as the use of the d'Hondt method continues to advantage the major parties. Nevertheless, smaller parties may still seek to form alliances with other major parties to pass the threshold. This may create the risk of parties entering an alliance solely to pass the threshold rather than for mutual gains building upon common principles.

Running in elections becomes harder for new parties

To run in elections, a party must establish its branches in at least half of Turkey's provinces at least six months before the day of the election. Under Law no. 7393, a party is now also required to hold its district, provincial and grand congresses on two occasions before the elections. This benefits more established political parties while rendering it difficult for newer parties. Considering that the election is scheduled to take place in June 2023, holding at least two-party congresses, which would typically require months of preparation for each before the general election, may prove challenging for newer parties within the timeframe while established parties have already met this criterion. As stated in Paragraph 7.6 of the 1990 Conference on Security and Cooperation in Europe (CSCE)²⁶/OSCE Copenhagen Document, which outlines a set of principles regarding human rights and fundamental freedoms that Turkey agreed to, the right of individuals and groups to establish their political parties must be respected by states, with safeguards provided to ensure that they are treated equally before the law and by the authorities.²⁷ The change brought about by Law no. 7393 is problematic from this perspective, particularly because it infringes upon the right to association and political participation for new parties.

This modification will prevent members of recently dissolved parties to simply re-establish the same party under a new name ahead of the elections. In June 2021, the Constitutional Court accepted an indictment regarding the dissolution of the HDP for its alleged ties with the Kurdistan Workers' Party (PKK). If the Court decides to dissolve HDP, which is Turkey's third biggest party, HDP will not be able to establish a new party to run in the upcoming election. As the election is less than a year away, they will not have time to hold the two congresses required by the new regulation. In this case, millions of HDP voters would end up not being adequately represented in Parliament.

Removing the words "prime minister" from campaign restrictions

Law no. 7393 gives a considerable advantage to the ruling party during the campaign period and further destabilizes the level playing field. With the transition to a presidential system

after the 2017 referendum, there was a need to amend legislation as there was no longer a prime minister. However, instead of replacing the term "prime minister" with "president" in the campaign rules and restrictions, the amendment only removed the term "prime minister." In other words, bans that formerly applied to the "prime minister" do not apply to the "president". The president's exemption from campaign restrictions may lead to the misuse of public resources, diminishing equal opportunities for their opponents.

The ruling bloc has already enjoyed a significant advantage, both in accessing public resources and using state bureaucracy for campaign purposes. According to the observations of the OSCE/ODIHR on the 2018 parliamentary election, the president and the AKP used the advantages of their office for electoral purposes, such as using administrative resources and involving civil servants in campaigns.²⁸ Similarly, during the campaign leading up to the local elections in March 2019, there was a lack of equality among candidates. The AKP candidates, for whom the president frequently campaigned, benefited from the president's strong participation in local election campaigns, resulting in a clear advantage over the opposition.²⁹ As the new amendments now legally exempt the president from restrictions on campaigning, the misuse of administrative resources is likely to be even greater in the upcoming election, once again deepening the existing inequalities for the opposition parties.

The most threatening regulation for the integrity of elections: the designation of electoral boards

The formation of electoral boards has been altered by replacing a seniority system with a lottery system among first-category judges. This change seriously threatens election security because it allows the appointment of inexperienced and politically vulnerable judges who are susceptible to political pressure and influence. While the first category is defined according to an evaluation, every three years, regarding a judge's performance in the profession, seniority emphasizes a judge's higher level of experience and knowledge. The lottery system might replace experienced judges with inexperienced judges. Electoral administration requires the application of highly technical law and knowledge, so a departure from the seniority principle undermines judicial assurance.³⁰ Moreover, during the AKP's rule, nepotism in the judiciary has increased, which means that these less experienced judges are more likely to be prone to political pressure. Overall, the move away from the seniority system now paves the way for appointing these judges to electoral boards. This in turn jeopardizes electoral integrity, as these judges may rule pro-government decisions while executing critical tasks, such as recording ballot-box committee processes and evaluating objections and complaints related to election.

The ambiguity regarding the definition of "suspicion" in voter registration updates

Finally, the changes in the law also impact the updating of voter registrations. Under the new law, updating procedures shall be carried out using voter registers listing citizens' residence addresses three months before the start date of the election. The amendments confer authority on the chairpersons of the district electoral boards to reject a request to change the registration address if they think the request is suspicious. However, the amendment does not specify what constitutes a suspicious application, which might lead to arbitrary violation of the right to vote by not correctly listing a citizen's address in the voter register.

Conclusion and policy recommendations for protecting electoral integrity in Turkey

The upcoming presidential and parliamentary elections are a critical moment that will shape the start of Turkey's second century. These elections will either end the AKP's 20-year rule or entrench it. It is vitally important to hold elections in an environment where electoral integrity is protected. However, the recent amendments have not improved electoral integrity in Turkey, nor did they seek to implement the recommendations of international and civil society organizations, such as easing eligibility requirements for parties to run in elections, providing a legal basis for election monitoring, conducting a judicial review of YSK's rulings, and regulating campaign finance.³¹ On the contrary, the amendments appear to further threaten the security of elections. There is a need for comprehensive legal reform to reverse the current decline, but this is unlikely to happen given the current political situation.

However, if oversight institutions, such as the judiciary, media, and civil society organizations, are active and independent, they can contribute significantly to the integrity of elections and compensate for deficiencies in formal electoral management. In other words, electoral integrity can still be achievable to some extent.³² Given the deficiencies in the Supreme Electoral Council, attacks on judicial impartiality, and the implications of Law no. 7393, civil society organizations and independent media stand out as the institutions that can protect electoral integrity. The opposition parties, international organizations, and platform companies can also provide an environment that will safeguard the integrity of the electoral process. Therefore, we make the following policy recommendations:

1. For civil society organizations

Raise public awareness of the potential consequences of the amendments. The legislative process was neither transparent nor inclusive.³³ An incomplete understanding of the amendments is likely to create the ideal environment for disinformation to be circulated

and consumed. Hence, civil society organizations should raise awareness about the negative impact of the election law by issuing press releases, mobilizing campaigns, and holding public meetings.

Monitor elections online and offline. Given the numerous allegations of election safety violations from all over the country during the previous elections,³⁴ especially concerning electoral violence incidents from Southeast Turkey, civil society organizations should be able to monitor the election to ensure that the voting process is conducted freely and fairly. Contrary to international commitments, the current legislation does not allow international observation of elections nor monitoring by non-party citizens.³⁵ As in previous elections, citizens must register on behalf of either political parties or independent candidates to monitor polling sites. Civil society organizations have played a vital role in organizing nonpartisan citizen election monitoring in the past and should continue to do so by increasing human resources and their technical capacities. There is also a need to extend their monitoring capabilities in the context of social media and collaborate with fact-checking organizations to ensure the accuracy of the content to report malpractices during the election period.

2. For independent media

Provide reliable election-related information and develop strategies to combat disinformation.

Independent media is crucially important for delivering election-related information to voters. Independent media should be able to act as a gatekeeper of the information ecosystem, as election-related disinformation is likely to spread across online and offline media. Informed by observations from previous elections, journalists should aim to identify narratives in a timely fashion and fact-check them before they spread across the media. In addition, media companies can create their fact-checking bodies to examine the claims, e.g., the BBC Reality Check and the New York Times Fact Check.

Accommodate those who are ignored by mainstream media. Citizens can make informed voting decisions when diverse information and different voices are represented in the media. However, the Turkish media is dominated by pro-government outlets, which limits the plurality of voices accessible. Independent media should continue to serve as an alternative channel allowing the opposition parties to reach voters, as these parties are largely neglected by the mainstream media.

3. For opposition parties

Educate the public and party activists about how the election law undermines electoral integrity and conduct election monitoring. The opposition has not been able to attract sufficient public attention to the problems with the law, even when CHP's complaint alleging that four articles of Law no. 7393 violated the Constitution was rejected

by the Constitutional Court.³⁶ Opposition parties should ensure that both their party branches and the public understand the impact of the amendments on election security and mobilize party members to participate in election observation.

4. For international organizations

Support civil society organizations' work to safeguard electoral integrity. Intergovernmental organizations promoting democracy, such as OSCE/ODIHR, the United Nations bodies providing electoral assistance, the International IDEA and non-governmental organizations, such as the International Foundation for Electoral Systems, should support civil society organizations through experience-sharing and capacity-building activities to help them raise awareness among the public about Law no. 7393 and to increase their monitoring capabilities.

Observe elections in an effective and reliable manner. International election monitoring has become essential to safeguard electoral integrity, as it helps deter electoral fraud, increase voter trust, and assess the legitimacy of elections.³⁷ Therefore, international election observation missions should be deployed to scrutinize elections. To ensure missions are effective and reliable, they should dedicate enough time to their missions, employ qualified observers, be supplied with adequate resources, and perform large scale coverage in Turkey.

5. For social media companies

Resist restrictions on free speech. Companies should be aware of the risks of censorship and the restriction of freedom of speech that can arise when they agree to a government request for content removal or account

suspension, or the sanctions they may face if they do not. Companies should disclose their stance in advance so that the public can understand the risks of utilizing their platforms.³⁸ In either case, their actions may restrict an individual's right to access information and express themselves. To mitigate these risks, strategic litigation against government demands in cooperation with civil society organizations can be an effective strategy.³⁹

Develop technology against arbitrary internet restrictions. Numerous cases have shown that the Turkish authorities have restricted internet connectivity arbitrarily and disrupted access to social media platforms.⁴⁰ Companies should implement new technological solutions to prevent internet service providers from slowing down user activity on platforms during critical moments, such as elections.

Consider the political and social context and engage with civil society organizations. Social media companies' policies are generally US-centric, and their content moderation policies are better suited for English-speaking countries. The rest of the world lacks many of the crucial safeguards that have been put in place in the United States.⁴¹ Social media companies should invest more in considering the political and social context of the posts they moderate.⁴² In recent years there have been positive developments in this area, as companies have started partnering with IFCN-accredited fact-checking organizations in Turkey.⁴³ To ensure fair and transparent content moderation during the election period, companies should also collaborate with organizations that can provide local expertise on elections, such as Oy ve Ötesi (Vote and Beyond) and the Seçim Güvenliği Platformu (Election Security Platform).

Endnotes

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- 4 ODIHR is the OSCE's human rights body dedicated to promoting democracy, rule of law and human rights. It is responsible for monitoring elections, assessing legislation, and advising governments on how to build and strengthen democratic institutions.
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- 12 İmamoğlu had won the mayorship of Istanbul with a small margin of votes in the election of March 31, 2019, but the AKP objected. YSK annulled the election and re-ran it on June 26. İmamoğlu won the second election with a wider margin.
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