



The Unappreciated Margin: Turkish Electoral Politics Before the European Court of Human Rights

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I. INTRODUCTION

On November 21, 2007, the Grand Chamber of the European Court of Human Rights will hear the case of *Yumak and Sadak v. Turkey*. The question for the Council of Europe's highest court will be whether Turkey's 10% electoral threshold amounts to a denial of free expression of the opinion of the people in the choice of the legislature, thereby constituting a violation of Article 3 of Protocol 1 of the European Convention of Human Rights. The Grand Chamber has never before considered a case on electoral systems, preferring to leave this controversial area to the discretion of the member states by granting to them a wide 'margin of appreciation.'¹ At a time when the Court remains unsure of its own boundaries, and with judicial institutions being regarded with increasing skepticism by those who fear a "government of judges,"² the ruling will have crucial implications for the development of democracy within the Council of Europe's Member States.

The impact of the Court's ruling could even go beyond re-shaping the electoral laws within the European Union ("EU") and have an impact on Turkey's ambitions for European accession. With integration at the top of the EU agenda, the prospect of Turkish membership will be increasingly remote if Turkey is seen as a country whose values will disrupt the process of deepening integration. Two of the most problematic issues facing Turkey in this context are the prolonged armed conflict with

¹ Mathieu-Mohin and Clerfayt v. Belgium, 10 Eur. H.R. Rep. 1 (1987).

² See ALEC STONE SWEET, GOVERNING WITH JUDGES (2000).

the Kurdish secessionist movement, the Kurdistan Workers' Party ("PKK"), and the significant influence of the military in Turkish politics. The European community sees these issues as both costly for the Turkish economy, hence a potential drain from the EU budget, and undemocratic in the non-recognition of minority rights and pluralism. The present case touches on both areas. The 10% threshold was initially imposed by the military during the 1980 intervention, and its effect has been to exclude minorities, especially the Kurdish minority, from the National Assembly. A ruling against Turkey would therefore not only establish an important judicial precedent within the European community; it would also test Turkey's resolve to join the EU. This article looks at the issues that will be facing the Grand Chamber and the context within international law.

II. THE BACKGROUND TO *YUMAK*

The case that will be considered by the Grand Chamber on November 21st was brought by Mehmet Yumak and Resul Sadak. As parliamentary candidates, Yumak and Sadak stood for the early general parliamentary elections on November 3, 2002 from the list of the Democratic People's Party ("DEHAP") in the province of Şırnak. The province of Şırnak was regarded as an electoral district with three seats in the Turkish Grand National Assembly. DEHAP obtained 47,449 votes of the 103,111 votes cast in this province, thereby gaining the greatest number of votes in the province. However, since Article 33 of the Electoral Law (Law No. 2839) stipulates that a 10% *national* threshold is required to gain any seats in the National Assembly, DEHAP was not allocated any seats, as it only received 6.1% of the national vote.

On March 1, 2003, Yumak and Sadak lodged their applications with the European Court of Human Rights ("ECtHR") complaining of a violation of their "right to free elections" under Article 3 of Protocol 1.³ The Court found no violation and the case was referred to the Grand Chamber. In its judgment, the ECtHR noted:

[Given] the extreme diversity of electoral systems adopted by the Contracting States, and taking into account the fact that many countries using one or other

³Article 3, Protocol 1 provides: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. Council of Europe, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Mar. 20, 1952, E.T.S. 9. It is important to note that this is not an application based on the right to non-discrimination protected by Article 14. Although there is an overlap in the rights protected by Article 14 and Article 3, Protocol 1, this case is unique precisely because it does not allege an Article 14 violation against the Kurdish minority in Turkey, of which there have been many; this case turns on the right to having elections calculated to ensure "the free expression of the opinion of the people." That concept can be taken to mean that no constraint or pressure should be brought to bear on electors to influence their choice of candidate; it also implies, essentially, the principle of equal treatment for all citizens in the exercise of their right to vote and their right to stand for election.

variant of proportional representation have national thresholds for election to parliament, the Court must accept that in the present case the Turkish authorities (both judicial and legislative) – but also Turkish politicians – are best placed to assess the choice of an appropriate electoral system, and it cannot propose an ideal solution which would correct the shortcomings of the Turkish electoral system.⁴

The Court therefore reinforced the wide “margin of appreciation” granted to states in determining their own electoral procedures, as held in *Mathieu-Mohin and Clerfayt v. Belgium*.⁵

The Test

The test the ECtHR uses to determine whether or not a domestic law is in violation of the Convention is the test of proportionality. This test requires that there be a reasonable relationship between the means employed, including the severity and duration of the measure, and the public objective sought. It is well documented that disproportionality between votes won to seats in the legislature rises with increases in the effective electoral threshold.⁶ The question is whether or not this outcome can be justified by a legitimate aim that employs proportional means.

*Legitimacy*⁷

The first challenge that the government must meet is to show that its electoral law serves a legitimate aim. It is clear that in most electoral systems, the will of the people as expressed through their vote is not usually reflected exactly in the composition of that country's legislative or executive branches. A well-known example is the U.S. system of presidential elections, which in 2000 awarded George W. Bush the presidency despite his not winning the popular vote. This result, however, is a direct consequence of the U.S. Electoral College, a system whereby each state is allocated a set number of 'electoral college votes' roughly proportional to that state's population, and if a candidate wins an absolute majority of these votes, he or she is declared the winning candidate regardless of the actual number of votes he or she has received in the country as a whole. While it could be argued that this amounts to a denial of the free expression of the opinion of the people, it would be easy to counter that this electoral device has a legitimate aim, as it protects less populous

⁴ *Yumak and Sadak v. Turkey*, 30 January 2007, no. 10226/03, ¶ 76, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=813250&portal=hbk m&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

⁵ *Mathieu-Mohin and Clerfayt v. Belgium*, 10 Eur. H.R. Rep. 1 (1987).

⁶ G. Bingham Powell, Jr. & George S. Vanberg, *Election Laws, Disproportionality and Median Correspondence: Implications for Two Visions of Democracy*, 30 BRIT. J. POL. SCI. 383 (2000).

⁷ For figures from this section, see SABRI SAYARI & YILMAZ ESMER, POLITICS, PARTIES, AND ELECTIONS IN TURKEY (2002).

states from being ignored by political candidates by effectively giving the votes of their residents a marginally higher weight than that given to the residents of the most populated states.

In this case, the government argues that the 10% electoral threshold serves the legitimate aim of ensuring governmental stability. A proportional voting system in Turkey without this threshold, it is argued, does not lead to stable single party majorities. However, a study of the historical background in Turkey casts doubt on this justification for the threshold, since an electoral system without a threshold could also enable solid governments to be formed. Throughout the 1950s, Turkey used a plurality electoral system based on voting for party lists in multimember districts. This system was perceived to be largely unrepresentative by political parties such as the Republican People's Party ("CHP"), which had long been advocating a more representative electoral system, and it was replaced after the 1960 military intervention. The plurality formula was abandoned in favour of a proportional representation system based on D'Hondt's largest average formula with a district quota.⁸

Table 1

Election Year	Electoral System	Election Outcome	Leading Party	% of Votes Won by Leading Party
1961	PR with District Threshold	Coalition	CHP	36.7
1965	PR with no Threshold	One-Party	AP	52.9
1969	PR with no Threshold	One-Party	AP	46.5
1973	PR with no Threshold	Coalition	CHP	33.3
1977	PR with no Threshold	Coalition	CHP	41.4

⁸The most widely used method for allocating seats in party-list proportional representation systems is the D'Hondt method which operates in the following way. Once all votes have been cast and tallied, the party's total number of votes is divided by a denominator that increases as the party gains more seats. The formula for the quotient is $X/(Y+1)$, where X is the number of votes received by the party, and Y is the number of seats that have been allocated to that party thus far. Whichever party has the highest quotient each time gets the next seat allocated. This process is repeated until all seats have been allocated.

As Table 1 shows, when the proportional representation system adopted in 1960 did not have a threshold imposed on it, it produced two single-party governments (1965 and 1969) and two coalition governments (1973 and 1977). One party systems resulted even when the party in power did not receive more than 50% of the votes, but coalition governments were needed when no party won more than 45% of the vote. The system used in 1961 was broadly kept in place until the military coup that occurred in September 1980.⁹ Under the impression that the social-political problems of the 1970s in Turkey derived from instability in government created by the electoral system, the military government decided to amend the electoral system. One way to stem the proliferation of parties when using an electoral system that encourages a multiparty system is to introduce national quotas or thresholds that a party must meet in order to have any seats at all allocated in the legislature. This means that if a party does not receive a minimum percentage of votes within a particular region (be it a district, or the whole country), the votes it received will not count towards increasing its representation in the legislature. The military government introduced the Electoral Law (Law No. 2839), which imposed both a district threshold and a national threshold of 10%. The purported objective of this law was to introduce stability in the administration.

⁹The only significant changes were the removal of the district threshold after the 1961 elections and the use of a 'National Balance' system in the 1965 Elections. The National Balance system was broadly similar to the D'Hondt system used in the 1961 elections, but it was designed to encourage even more participation by removing the barrage of the district threshold of the 1961 elections in the following way. Votes that did not meet the district threshold were transferred to a national district, in which the remaining votes were ranked and seats distributed across parties according to the proportion of their remaining votes in the national district. This system is more inclusive than the D'Hondt with threshold, and is therefore comparable to the proportional system with no threshold.

Table 2

Election Year	Electoral System	Election Outcome	Leading Party	% of Votes Won by Leading Party
1983	PR with Double Threshold	One-Party	ANAP	45.1
1987	PR with Double Threshold	One-Party	ANAP	36.3
1991	PR with Double Threshold	Coalition	DYP	27
1995	PR with Country Threshold	Coalition	RP	21.4
1999	PR with Country Threshold	Coalition	DSP	22.2
2002	PR with Country Threshold	One-Party	AKP	34.3

Table 2 shows that of the six elections under the new electoral regime, three resulted in coalition governments (1991, 1995, and 1999), and three resulted in single-party governments (1983, 1987, and 2002). Looking at the electoral system from the perspective of its capacity to produce single-party majorities, it is apparent that the results produced after the imposition of Electoral Law No. 2839 are not too dissimilar to the ones produced in the previous system. There are, however, significant differences in the composition of the legislature. The new system imposes an almost insurmountable barrier for political parties traditionally supported by ethnic minorities in specific regions within the national territory. In the 2002 elections, for example, of the eighteen political parties participating in the elections, only two reached the 10% country threshold required to be allocated seats in the legislature. The remaining parties, having received around 46% of the national vote between them, did not receive a single seat in the legislature. This brings into question the legitimacy of the government's purported aim of maintaining stability through the imposition of a high electoral threshold.

Proportionality

Even if the electoral system could be shown to serve a legitimate aim, it arguably still has an impact on effective political participation significant enough to rise to the level of an Article 3, Protocol 1 violation. There is presently little guidance for the application of Article 3, Protocol 1 in the matter of electoral systems. Article 3 of the Protocol goes no further than prescribing “free” elections held at “reasonable intervals” “by secret ballot” and “under conditions which will ensure the free expression of the opinion of the people”. Subject to that reservation, it does not create any “obligation to introduce a specific system” such as proportional representation or majority voting with one or two ballots.¹⁰ The Council of Europe has not issued any binding standards for electoral thresholds. The question has not been raised in the organisation’s standard-setting texts. According to Cain,

[T]he decision to use winner-takes-all rules as opposed to proportional or semi-proportional rules gives advantages to some groups and not others. Unless the rules arrive from heaven on a stone tablet in the offices of some wise political science professor, their selection can be viewed as arbitrarily favouring some over others.¹¹

Increasingly, however, states are guided by general principles found in international law.

III. DRAWING FROM INTERNATIONAL LAW

Article 3, Protocol 1 makes no mention of minorities, or effective participation. A more direct reference to these issues is found in Article 2 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, which provides in part:

(2) Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.

(3) Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.

In Article 15 of the Framework Convention on National Minorities, a similar point is made:

¹⁰ Mathieu-Mohin and Clerfayt v. Belgium, 10 Eur. H.R. Rep. 1, ¶ 54.

¹¹ Bruce E. Cain, *Party Autonomy and Two-party Electoral Competition*, 149 U. PA. L. REV. 793 (2001).

Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.¹²

Similarly, the Copenhagen Document, Paragraph 35, requires The Organization for Security and Co-operation in Europe (“OSCE”) participating states to “respect the right of persons belonging to national minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities.”

The right to take part in elections for public office, both as a voter and a candidate, and to enjoy the conditions which make such participation effective is clearly one of the most important forms of participation in public life. Nowhere is this right more clearly spelled out than in Article 25 of the International Covenant on Civil and Political Rights (“ICCPR”), which provides:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

States are not required to adopt any given electoral system. In the General Comment to Article 25 of the ICCPR, for example, this is made clear in Paragraph 21 which states that ‘the Covenant does not impose any particular electoral system.’ However, the principles spelled out in this and other instruments of international law exist to prevent the creation of electoral systems that have the effect of discriminating against certain groups of society by not allowing them to vote or be elected to public office. Turkey has traditionally operated as a ‘Monist’ jurisdiction.¹³ This means that the ‘Law’ is seen as a single entity of which ‘national’ and ‘international’ versions are merely particular manifestations. In the case of conflicts between the two systems, international law is said to prevail. As a member of the Council of Europe and the OSCE, and having ratified the ICCPR with no reservations on Article 25, Turkey is bound by the principles of international law in the creation and maintenance of a fair electoral system.

Turkey is not the only country in Europe with an electoral threshold. It is, however, the one with the highest threshold, and it has no countermeasures in place to ensure that minorities are not excluded. Of the 23 states (excluding Turkey) that

¹²The Framework Convention on National Minorities has not yet been ratified by Turkey.

¹³ THE IMPACT OF EU ACCESSION ON THE LEGAL ORDERS OF NEW EU MEMBER STATES AND (PRE-) CANDIDATE COUNTRIES: HOPES AND FEARS (Alfred E. Kellerman et al. eds., 2006).

have electoral thresholds, 19 have a national threshold of 5% or less. The average for these 23 states is 4.6%. Seven states (Georgia, Germany, Hungary, Italy, Norway, Poland, and Serbia) have countermeasures in place to broaden participation. Germany and Poland for example both operate a 5% national threshold but candidates may also be elected by direct mandate to the German Bundestag, and in the Polish system ethnic minority parties do not have to surpass the threshold.¹⁴ The countries whose thresholds exceed 5% are Moldova (6%), Georgia (7%), Russia (7%), and Liechtenstein (8%). All of the other states have no national thresholds.¹⁵

From these principles, it can be concluded that one test the Grand Chamber could use when deciding whether an electoral system is in violation of Article 3, Protocol 1 is to determine whether the method of allocating votes used by the country in question systematically excludes a large proportion of the population from having the expression of their will reflected in the legislature. This concern is echoed in Paragraph 21 of the General Comment to Article 25 of the ICCPR, which states that “the drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely.” In its ruling, it is not suggested that the Court would have to order Turkey to remove its electoral threshold. As can be seen from the systems in other countries, participatory countermeasures such as those found in Germany and Poland would be sufficient.

There is no doubt that the current system deprives a large proportion of the population of the possibility of being represented in parliament. In the parliamentary elections of 1987, 1991, 1995 and 1999 the proportion of the votes cast in favour of parties not represented in parliament has been, respectively, 19.4% (about 4.5 million votes), 0.5% (about 140,000 votes), 14% (about 4 million votes) and 18.3% (about 6 million votes). The results of the 2002 election led to a “crisis of representation”, since 45.3% of the votes – about 14.5 million votes – had not been taken into consideration and were not reflected in the composition of parliament.¹⁶ According to an OSCE report, the 10% national threshold in Turkey’s electoral system virtually eliminates the possibility of regional or minority parties entering the Turkish Grand National Assembly and distorts the essential purpose of a proportional system.¹⁷

Given these facts it seems odd that the Court has chosen to make the regulation of electoral laws a state prerogative and has continued to widen the margin of

¹⁴ KURDISH HUMAN RIGHTS PROJECT, BRIEFING PAPER: UPCOMING ELECTIONS IN TURKEY (2007).

¹⁵ See Sarah Birch, *Electoral Systems and Party Systems in Europe East and West*, 2 PERSP. EUR. POL. & SOC’Y 355 (2001); EUROPEAN CENTRE FOR PARLIAMENTARY RESEARCH & DOCUMENTATION, *ELECTORAL SYSTEMS IN EUROPE: AN OVERVIEW* (2000); AREND LIJPHART, *ELECTORAL SYSTEMS AND PARTY SYSTEMS: A STUDY OF TWENTY-SEVEN DEMOCRACIES, 1945-1990* (1994).

¹⁶ SAYARI & ESMER, *supra* note 7.

¹⁷ See ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, *ASSESSMENT REPORT: REPUBLIC OF TURKEY PARLIAMENTARY ELECTIONS* (2002).

appreciation reserved for states in this area. It could be argued that the Court has an unusually difficult position as a court with jurisdiction over states with “an extreme diversity of electoral systems”; this position, however, is not unique. The Inter-American Commission on Human Rights was faced with a case touching on the same issues in *Yatama v. Nicaragua*.¹⁸ The case concerned alleged violations resulting from the enactment of an electoral law enacted nine months before the municipal elections which, among other things, required each political party to have candidates in at least 80% of the municipalities. In that case, the Court held:

The requirement that all political parties present candidates in at least 80% of the municipalities is a disproportionate restriction that unduly limited the political participation of the candidates postulated by YATAMA for the municipal elections of November 2000. It does not take into account that the indigenous and ethnic population is a minority, nor that there would be municipalities in which there would be no support for candidates, or that there would be no interest to seek this support.¹⁹

The situation is remarkably similar to *Yumak and Sadak v. Turkey*: Both cases deal with electoral systems that do not take into account minorities and their particular needs in order to enjoy effective political participation. The Inter-American Commission has set a precedent that states in its jurisdiction cannot create laws that unduly discriminate against these groups in the name of stability. Importantly, the Inter-American Commission did not impose any particular electoral system on Nicaragua – it simply ruled that measures should be taken that are aimed at enhancing indigenous communities’ participation with due respect for their traditions and customs. At this time, this is exactly what is required of the Grand Chamber of the European Court of Human Rights.

IV. CONCLUSION

Turkey’s current electoral system has the effect of discriminating against minorities to an extent that seems more than sufficient to constitute a violation of Article 3, Protocol 1 of the Convention. In a country with societal and ethnic divisions of such magnitude, an electoral system that is perceived by the people as being discriminatory can be more destabilizing in the long run than an electoral system that encourages the participation of smaller parties. Turkey has already experienced serious military intervention twice in the past 50 years, and the armed conflict with Kurdish secessionists has not diminished. The continuation of a discriminatory system could lead to a future crisis that will bring Turkey further away from its goal of becoming a member of the European Union. The case of *Yumak and Sadak v. Turkey* presents a rare opportunity for the Grand Chamber to establish a key

¹⁸ YATAMA v. Nicaragua, Case 12.388, Inter-Am. C.H.R., Report No. 125/01 (2005).

¹⁹ *Id.* ¶ 223.

precedent. By diminishing the margin of appreciation currently granted to Council of Europe members, the Court will create greater internal consistency in its rulings and bring its jurisprudence in this area in line with international standards.

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