

The Need to Amend Turkish Legislation to Ensure Political Participation in Turkey

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Abstract

The Turkish Constitution of 1982 states that political parties are indispensable elements of democratic political life. However many of the grounds for the prohibition and dissolution of political parties which are stated in the Law no. 2820 on Political Parties are incompatible with the law of the ECHR. In addition, the national election threshold of 10% which is stipulated in the Law no. 2839 on the election of members of the National Assembly is the highest of all the thresholds applied in Europe. The organizations such as the Council of Europe, the OSCE and the European Union call on Turkey to consider lowering it. In order to ensure political plurality and political participation in Turkey, the legislation such as the Law no. 2820 on Political Parties and the Law no. 2839 on the election of members of the National Assembly should be amended.

Keywords: Political pluralism, political parties, national election threshold

Türkiye’de Siyasal Katılımı Sağlamak için Türk Mevzuatı’nda Değişiklik Yapma İhtiyacı

Özet

1982 Anayasası, siyasi partilerin, demokratik siyasal hayatın vazgeçilmez unsurları olduğunu belirtmektedir. Bununla birlikte 2820 sayılı Siyasal Partiler Kanunu’nda düzenlenen siyasi parti yasaklarının birçoğu, İnsan Hakları Avrupa Sözleşmesi Hukuku’nun ortaya koyduğu kriterlerle çelişmektedir. 2839 sayılı Milletvekili Seçimi Kanunu’nda öngörülen %10’luk ulusal seçim barajı ise Avrupa’da uygulanan

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en yüksek orandaki seçim barajıdır. Avrupa Konseyi, AGİT, Avrupa Birliği gibi örgütler, Türkiye'ye, seçim barajını indirmesi çağrısında bulunmaktadır. Türkiye'de siyasi çoğulculuğun ve siyasi katılımın sağlanabilmesi için 2820 sayılı Siyasi Partiler Kanunu ile 2839 sayılı Milletvekili Seçimi Kanunu'nda değişikliklerin yapılması gereklidir.

Anahtar Kelimeler: *Siyasi çoğulculuk, siyasi partiler, ulusal seçim barajı*

INTRODUCTION

As it is stated by the European Court of Human Rights (ECtHR), “democracy appears to be the only political model contemplated by the European Convention on Human Rights (ECHR) and, accordingly, the only one compatible with it” and “there can be no democracy without pluralism”.¹ For the Court, since the political parties have an “essential role in ensuring pluralism and the proper functioning of democracy” which is “a fundamental feature of the European public order”, they are under the protection of articles 10 and 11 of the ECHR².

The Turkish Constitution of 1982 also states that political parties are indispensable elements of democratic political life. However the constitutional criteria for prohibition and dissolution of political parties of the 1982 Constitution go beyond the criteria recognised as legitimate by the ECtHR and the Venice Commission³. The Law no. 2820 on Political Parties of 1983 is also being criticized for not being compatible with the European criteria.

Besides the Law no. 2820 on Political Parties, the Electoral Law no. 2839 on the Election of Members of the National Assembly stipulates that in a general election, political parties may not win seats unless they obtain nationally, more than 10% of the votes validly cast. This national threshold of 10% of the Turkish election system has also been questioned on its compatibility with the principle of a democratic state.

Because of their importance for ensuring political pluralism, especially political participation in Turkey, in this article, firstly, related provisions concerning prohibition and dissolution of political parties in the Law on Political Parties and then national threshold of 10% in the Electoral Law

1 European Court of Human Rights, Case of United Communist Party of Turkey and Others v. Turkey, Judgment of 30 January 1998, par.43,45; ECtHR, Case of Partidul Comunistul (Nepeceristi) and Ungureanu v. Romania, Judgment of 3 February 2005, par. 44,45.

2 Loc. cit.

3 European Commission for Democracy Through Law, Opinion on The Constitutional and Legal Provisions Relevant to the Political Parties in Turkey, Opinion No. 489/2008, CDL-AD (2009)06, Strasbourg, 13 March 2009, par.105.

no. 2839 on the Election of Members of the National Assembly will be analysed in order to determine their compatibility with the European criteria and some general recommendations will be given within this context.

I. THE LAW NO. 2820 ON POLITICAL PARTIES: THE STATUTORY FRAMEWORK FOR THE PROHIBITION AND DISSOLUTION OF POLITICAL PARTIES

The articles 68 and 69 of the 1982 Constitution are the main provisions of the Constitution which are related to the political parties. Under paragraph 4 of article 68 which is titled "Forming parties, membership and withdrawal from membership in a party", the statutes and programmes, as well as the activities of political parties shall not be in conflict with the independence of the state, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law, sovereignty of the nation, the principles of the democratic and secular republic; they shall not aim to protect or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime.

Besides this provision which sets out criteria with which political parties should comply, article 69 of the Constitution which is titled "The principles to be observed by political parties" also lays out criteria for dissolution of political parties. According to paragraph 5 of article 69, permanent dissolution of a political party shall be decided when it is established that statute and programme of political party violate provisions of fourth paragraph of Article 68.

And under paragraph 6 of same article, the decision to dissolve a political party permanently owing to activities violating provisions of fourth paragraph of Article 68 may be rendered only when the Constitutional Court determines that party in question has become a centre for the execution of such activities. In this provision, becoming a centre for execution of such activities is also qualified: A political party shall be deemed to become centre of such actions only when such actions are carried out intensively by members of that party or the situation is shared implicitly or explicitly by the grand congress, general chairmanship or the central decision-making or administrative organs of that party or by the group's general meeting or group executive board at the Turkish Grand National Assembly or when these activities are carried out in determination by the above-mentioned party organs directly.

The criterion of becoming a centre for execution of "activities" for permanent dissolution of a political party, the requirement of a three-fifth ma-

jority of the Constitutional Court for permanent dissolution of a political party and the deprivation of state aid partially or wholly as a new sanction imposed upon political parties were introduced in the 1982 Constitution in 2001 as a result of Turkey's democratization and europeanization process⁴. It's obvious that the 2001 constitutional amendments are important developments regarding freedoms of political parties as they make dissolution of political parties more difficult. However their influence remained limited since the grounds for dissolution for political parties which are stipulated in paragraph 4 of article 68 remained unchanged in the Constitution.

In addition to constitutional provisions, foundation and activities of political parties, their supervision and dissolution or their deprivation of State aid wholly or in part as well as election expenditures and procedures of political parties and candidates are regulated by The Law no. 2820 on Political Parties of 1983.

The Law no. 2820 of Political Parties which was adopted under a military regime in 1983 not only broadens constitutional criteria for prohibition and dissolution of political parties which is enshrined in paragraph 4 of article 68 of the Constitution by formulating additional prohibitions for political parties such as acting against preservation of the status of the Presidency of the Religious Affairs but also interprets some of these constitutional criteria extensively, beyond their wording in the Constitution, which makes it possible to restrict the freedom of association of political parties excessively.⁵

Under article 80 of the Law on Political Parties which is titled "Protection of the principle of unity of the state", political parties shall not aim to change the principle of the unitary State on which the Turkish Republic is founded, nor carry on activities in pursuit of such an aim. According to article 81 which is titled "Preventing the creation of minorities", political parties shall not assert that there exist within the territory of the Turkish Republic any national minorities based on differences relating to national or religious culture, membership of a religious sect, race or language; or aim to destroy national unity by proposing, on the pretext of protecting, promoting or disseminating a non-Turkish language or culture, to create minorities on the territory of the Turkish Republic or to engage in similar activities.

4 The articles 69 and 149 of the 1982 Constitution.

5 European Commission for Democracy Through Law, Opinion on The Constitutional and Legal Provisions Relevant to the Political Parties in Turkey, op.cit., par.75,76; Oktay Uygun, Kamu Hukuku İncelemeleri, İnsan Hakları, Demokrasi, Hukuk Devleti, Egemenlik, (Istanbul: On İki Levha Yayıncılık, Ocak 2011), s.795

However jurisprudence of ECtHR concerning dissolution of political parties by Turkish Constitutional Court clearly demonstrates that the programme of a political party which is considered incompatible with the current structures, the form of organization and constitutional ideology of the State is also protected under the law of ECHR provided that it does not harm democracy itself and call for the use of violence⁶. In these cases, ECtHR decided that Turkey violated article 11 of the Convention⁷. As it is stated by many academics, promoting or disseminating a non-Turkish language or culture may be evaluated by a political party from a different perspective such as a policy which ensures national integrity or as a way to promote cultural diversity⁸.

Besides articles 80 and 81 of the Law on Political Parties, paragraph 3 of article 96 of same law states that political parties shall not be formed with the name 'communist', 'anarchist', 'fascist', 'theocratic' or 'national socialist', the name of a religion, language, race, sect or region, or a name including any of the above words or similar ones. Even though ECtHR declared in its judgement of 1998 concerning the case of the United Communist Party of Turkey (TBKP) and others against Turkey that "...in the absence of any concrete evidence to show that in choosing to call itself "communist", the TBKP had opted for a policy that represented a real threat to Turkish society or the Turkish State, the Court could not accept that the submission based on the party's name may, by itself, entail the party's dissolution", this article still remains unchanged in the law despite the judgement of ECtHR finding violation of article 11 of the Convention⁹.

6 Bakır Çağlar ve Naz Çavuşoğlu, 'Parti Kapatma Davalarında Mermer Mozaik İkilemi', *Anayasa Yargısı*, No.16,1999, s.178.

7 European Court of Human Rights, Case of United Communist Party of Turkey and Others v. Turkey, Judgment of 30 January 1998, par. 61; Case of Socialist Party and Others v. Turkey, Judgment of 25 May 1998, par.54; Case of Freedom and Democracy Party (ÖZDEP) v. Turkey, Judgment of 8 December 1999, par.48; Case of Yazar and Others v. Turkey, Judgment of 9 April 2002, par.61; Case of Dicle for the Democratic Party (DEP) of Turkey v. Turkey, Judgment of 10 December 2002, par. 65,66; Case of Socialist Party of Turkey (SPT) and Others v. Turkey, Judgment of 12 November 2003, par. 50,51; Case of Democracy and Change Party and Others v. Turkey, Judgment of 26 April 2005, par.26,27; Case of Emek Partisi and Senol v. Turkey, Judgment of 31 May 2005, par. 29,30; Case of Demokratik Kitle Partisi and Elçi v. Turkey, Judgment of 3 May 2007, par. 33, 34; Case of HADEP and Demir v. Turkey, Judgment of 14 December 2010, par.81,82.

8 Naz Çavuşoğlu, 'Cultural Identity: A Minority Question?', *İstanbul Üniversitesi Siyasal Bilgiler Fakültesi Dergisi*, Sayı:23-24, Ekim 2000-Mart 2001, s.96; Fazıl Sağlam, 'Siyasi Partiler Kanunu'nda Uluslararası Normlara Uygunluk Sağlamak İçin Yapılması Gereken Değişiklikler', *Anayasa Yargısı*, No.17, 2000, s.123.

9 European Court of Human Rights, Case of United Communist Party of Turkey and Others v. Turkey, Judgment of 30 January 1998, par.54.

In addition, according to article 89 of the Law on Political Parties which is titled “Preservation of the Status of the Presidency of the Religious Affairs”, political parties should not pursue an aim contrary to the provision of article 136 of the Constitution which is related with preservation of the Presidency of the Religious Affairs in general administration. This provision which extends prohibition stated in the constitutional provision should be amended since political parties may both defend secularism and at the same time oppose its preservation under general administration as an official religious organization which is tasked with giving public service on religious issues.¹⁰

The relevant provisions of the 1982 Constitution especially concerning the grounds for dissolution for political parties which reflect the official ideology of the State and the Law on Political Parties which was tailored according to the anti-democratic worldview of the 1980 military regime should be democratized in order to ensure political pluralism in Turkey¹¹. Therefore, they should be amended as soon as possible in order to harmonise the Turkish law with the law of European Convention of Human Rights.

II. THE NATIONAL THRESHOLD OF 10% IN THE LAW NO. 2839 ON THE ELECTION OF MEMBERS OF THE NATIONAL ASSEMBLY

The rules of the electoral system are laid down by the Electoral Law no. 2839 on the election of members of the National Assembly. According to section 33 of this Law, in a general election, parties may not win seats unless they obtain nationally, more than 10% of the votes validly cast. In other words, the political parties failing to receive at least 10% of valid votes throughout the country can not be represented in the parliament.

The national threshold of an election system is important for striking the balance between the principles of fair representation and governmental stability. The Turkish Constitutional Court’s approach to the compatibility of electoral thresholds with the principle of a democratic State has been contradictory. The Constitutional Court’s jurisprudence on electoral

10 Uygun, *op.cit.*, s.809.

11 According to Köker, the mentality or the internal legalistic culture of the Turkish judiciary must also change for democratization of Turkish politics and law. See Levent Köker, “A Key to the “Democratic Opening”: Rethinking Citizenship, Ethnicity and Turkish Nation-State”, *Insight Turkey*, Vol.12, No.2, 2010, s.62-65; For Özbudun, the legal regime of political parties still constitutes one of the most objectionable “democracy deficits” in the Turkish political system. Ergun Özbudun, “Turkey’s Search for a New Constitution”, *Insight Turkey*, Vol.14, No.1, 2012, pp.40-43

systems shows that in some of its judgments, it adopted an approach based on judicial activism while in the others, it preferred an approach based on judicial self-restraint.

At the time when the 1961 Constitution was in force, in its judgment delivered in 1968, the Constitutional Court held to be contrary to the principle of a democratic State the “ordinary threshold” of the electoral law. It grounded its decision on the principles of a democratic State and pluralism and rejected the practice of applying an “ordinary threshold” within each electoral constituency¹². According to electoral law, the ordinary threshold varied in accordance with the number of seats to be filled in each parliamentary constituency. This threshold applied in a constituency was calculated by dividing the number of votes cast by the number of seats to be filled, and seats were awarded only to candidates who got across it.

However the Constitutional Court declared null and void this constituency threshold of 5% and held that such a threshold, which could enable the representatives of a minority of electors to form a government, was likely to hinder representation of all currents of thought¹³. It ruled that it was contrary to the principles of a democratic state, the right to vote and to be elected, the multi-party system etc. and the legislature’s margin of appreciation on electoral systems was limited to the principle of a democratic state. In this judgment, the Constitutional Court adopted an approach that preferred fair representation, instead of government stability. In other words, during this period, it adopted an approach which is based on judicial activism regarding the electoral system¹⁴.

At the time when the 1982 Constitution was in force, in its judgment delivered in 1984 the Constitutional Court held that “the threshold of 1/10”¹⁵ was not contrary to the Constitution. It declared that¹⁶:

“...The first paragraph of Article 67 of the Constitution provides that citizens are entitled to vote and stand for election in accordance with rules laid down by law. However, it does not grant an unlimited margin of appreciation to the legislatu-

12 The Turkish Constitutional Court, E. 1968/15, K. 1968/13, KT.3,4 ve 6/5/1968.

13 Naz Çavuşoğlu, *Anayasa Notları*, (Istanbul:Beta,1997), s. 170.

14 Necmi Yüzbaşıoğlu, ‘Türkiye’de Uygulanan Seçim Sistemleri ve Bunlara İlişkin Anayasa Mahkemesi Kararlarına Göre Nasıl Bir Seçim Sistemi’, İHFM, C.LV,1996, s. 131; Erdoğan Teziç, *Anayasa Hukuku*, (Istanbul: Beta, 1998), s. 302.

15 The Turkish Constitutional Court prefers to use the term as “the threshold of 1/10” in its judgment as it was declared like that in the Law of The Election of Local Authorities of 1984. At that time this threshold was applied in the election of local authorities. This threshold can also be expressed as a 10% threshold in practice.

16 The Turkish Constitutional Court, E. 1984/1, K.1984/2, K.T. 1/3/1984.

re. By virtue of Article 67 elections are conducted under the administration and scrutiny of the judicial power and according to the principles of free, equal, secret and universal suffrage in a single ballot, the votes being counted and recorded in public. Provided those rules are complied with, the legislature may therefore adopt whatever electoral system it deems most appropriate. If the constituent assembly had had a particular system in mind, it would have adopted a binding rule. As it did not do so, the legislature is free to adopt the system it considers best adapted to the country's political and social conditions...Provided that it does not enact measures tending to restrict free expression of the people, or subject political life to the hegemony of a single party, or destroy the multi-party system, parliament can put in place one of the existing electoral systems...".

In this judgment, the Constitutional Court varied its 1968 case-law and adopted an approach which stressed government stability, instead of fair representation¹⁷. Although this threshold was higher than the former one, the Court underlined that legislature was free to adopt the electoral system it considered best adapted to the country's political and social conditions. The Constitutional Court noted that since the Constitution didn't contain any provisions concerning the electoral system to be adopted, the legislature's political choices couldn't be interfered and the proportional representation system which applied this threshold was not contrary to the exigences of democratic society order. In its judgment the Constitutional Court preferred an approach which is based on judicial self-restraint regarding the electoral system¹⁸.

In its judgment of 18 November 1995, the Constitutional Court ruled on the constitutionality of article 34/A of Law no. 2839 which referred to article 33 of the same law concerning the electoral threshold of 10% for the allocation of the seats for Assembly members elected in the "national constituency"¹⁹. The Constitutional Court declared null and void the provisions establishing the national constituency but held that the 10% national threshold could be regarded as compatible with Article 67 of the Constitution.

However, in the same judgment, the Constitutional Court declared null and void an electoral threshold of 25 % for the allocation of seats within provinces. It held that such a provincial threshold was inconsistent with the principle of fair representation. The Court grounded its decision on paragraph 6 of article 67 of the Constitution which provided that electoral

17 Teziç, loc.cit.; Yüzbaşıoğlu, loc.cit.

18 Bakır Çağlar, 'Anayasa Mahkemesi Kararlarında 'Demokrasi'', Anayasa Yargısı, No.7,1990, s. 81; Yüzbaşıoğlu, loc.cit.

19 The Turkish Constitutional Court, E. 1995/54, K. 1995/59, K.T. 18/11/1995.

laws must have been framed in such a way as to strike a balance between the principles of fair representation and governmental stability²⁰:

“...The constitutional structure of the State, which is based on national sovereignty, is a product of the nation’s will, mediated through free elections. That choice, emphasised in the various articles of the Constitution, is set forth clearly and precisely in Article 67, entitled ‘The right to vote, to be elected and to engage in political activities’. Paragraph 6 of Article 67, as amended, provides that electoral laws must be framed in such a way as to strike a balance between the principles of fair representation and governmental stability. The aim is to ensure that the electors’ will is reflected as far as possible in the legislature...The effect of unfair systems adopted with the intention of ensuring stability is to hamper social developments...Where representation is concerned, the importance attached to fairness is the main condition for governmental stability. Fairness ensures stability. However, the idea of stability, in the absence of fairness, creates instability. The principle of fair representation with which the Constitution requires compliance consists in free, equal, secret and universal suffrage, with one round of voting and public access to the counting of votes and the recording of results, and produces a number of representatives proportional to the number of votes obtained. The principle of governmental stability is perceived as a reference to methods designed to reflect votes within legislature so as to guarantee the strength of the executive power...In elections ... importance must be attached to combining these two principles, which seem antinomic in certain situations, in such a way as to ensure that they counterbalance and complement each other...Although a national threshold is imposed in parliamentary elections in accordance with the principle of governmental stability, imposing in addition a threshold for each electoral constituency is incompatible with the principle of fair representation...”.

In the same judgment the Constitutional Court also declared that 10% national threshold could be regarded as compatible with the principles of governmental stability and the fair representation:

“...In order to achieve the goal of governmental stability, set forth in the Constitution, a national threshold has been introduced...Clearly, the threshold of 10% of the votes cast nationally laid down in section 33 of Law no. 2839...came into force with the approval of the legislature. Electoral systems must be compatible with constitutional principles..., and it is inevitable that some of these systems should contain strict rules. Thresholds which result from the nature of the systems and are expressed in percentages, and which at national level restrict the right to vote and to be elected, are applicable and acceptable...provided that they do not exceed normal limits...The threshold of 10% is compatible with the principles of governmental stability and fair representation...”

20 Ibid. This provision was added to the constitution by a constitutional amendment in 1995.

Consequently, in this judgment, The Constitutional Court tried to adopt an approach which emphasized a balance between the principles of fair representation and governmental stability as formulated clearly and precisely in Article 67 of the Constitution.

The national threshold of 10% was also examined by the ECtHR. The case was brought by Mehmet Yumak and Resul Sadak who stood as candidates for the political party DEHAP (Democratic People's Party) in the province of Şırnak, in the 2002 parliamentary elections. But although DEHAP obtained approximately 45.95% of the vote in Şırnak province, the applicants were not elected since DEHAP did not secure 10% of the vote nationally. The applicants argued that setting a threshold of 10% of the vote in parliamentary elections interfered with the free expression of the opinion of the people in their choice of the legislature and therefore infringed the right to free elections under Article 3 of Protocol No.1 to the ECHR. In its judgment of 30 January 2007, the second section of the ECtHR held that there had been no violation of Article 3 of Protocol No.1²¹.

In view of the extreme diversity of electoral systems adopted by the Contracting States, and taking into account the fact that many countries using one or other variant of proportional representation have national thresholds for election to parliament, the ECtHR acknowledged that the Turkish authorities, both judicial and legislative, but also politicians, were best placed to assess the choice of an appropriate electoral system, and that it could not propose an ideal solution which would correct the shortcomings of the Turkish electoral system. However, it also noted that the 10% national threshold applied in Turkey appeared to be the highest in comparison with the thresholds adopted in other European systems²².

Consequently, while noting that it was desirable for the threshold to be lowered and/or for corrective counterbalances to be introduced to ensure optimal representation of the various political tendencies without sacrificing the objective sought (the establishment of stable parliamentary majorities), the Court considered that it was important in this area to leave sufficient latitude to the national decision-makers²³.

In that connection, it also attached importance to the fact that the electoral system, including the threshold, was the subject of much debate within Turkish society and that numerous proposals of ways to correct the

21 European Court of Human Rights, Case of Yumak and Sadak v. Turkey, Judgment of 30 January 2007.

22 Ibid. par. 76.

23 Ibid., par.77.

threshold's effects were being made both in parliament and among leading figures of civil society. What was more, as early as 1995 the Constitutional Court had stressed that the constitutional principles of fair representation and governmental stability necessarily had to be combined in such a way as to balance and complement each other²⁴.

At the applicants' request the case was then referred to the Grand Chamber of the ECtHR and in its judgment of 8 July 2008, the ECtHR held that there had been no violation of article 3 of Protocol No.1²⁵. In this judgment, with regard to the national 10% threshold, the Court considered that it constituted interference with the applicants' electoral rights. However it pursued the legitimate aim of avoiding excessive and debilitating parliamentary fragmentation and thus of strengthening governmental stability²⁶.

The Court noted that 10% threshold was the highest of all the thresholds applied in the member States of the Council of Europe. It also attached importance to the views expressed by the organs of the Council of Europe, which agreed as to the exceptionally high level of the national threshold and had called for it to be lowered²⁷. However it observed that it could not assess a particular threshold without taking into account the electoral system of which it formed a part, although it could accept that a threshold of about 5% corresponded more closely to the member states common practice. The Court therefore considered that it should have examined the correctives and other safeguards in place in the Turkish system in order to assess their effects²⁸.

Within this context, as regards the possibility of standing as an independent candidate, the Court declared that this method could not be considered to be ineffective in practice. In the elections of 22 July 2007 in particular the small parties were able to avoid the impact of the threshold by putting up independent candidates, by which means they succeeded in obtaining seats. For the Court, the fact that independents were not required to reach any threshold had greatly facilitated the adoption of that electoral strategy²⁹. The other possibility of forming an electoral coalition with other political groups had also produced tangible results, particularly in the 1991 and 2007 elections³⁰.

24 Ibid.

25 European Court of Human Rights, Case of Yumak and Sadak v. Turkey, Judgment of 8 July 2008.

26 Ibid., par.117,125.

27 Ibid., par.130.

28 Ibid.,par.132.

29 Ibid ,par.137.

30 Ibid, par.139.

In addition the Court pointed out that the 2002 elections had taken place in a crisis climate with many different causes like economic and political crises, earthquakes etc. and the representation deficit observed after those elections could have been partly contextual in origin and not solely due to the high national threshold³¹. In the light of these facts, the Court noted that the political parties affected by the threshold had managed in practice to develop strategies to attenuate some of its effects, although such strategies also ran counter to one of the threshold's declared aims, that of avoiding parliamentary fragmentation³².

The Court also took into account the case law of the Turkish Constitutional Court regarding the electoral threshold and assessed the Constitutional Court's efforts in seeking to prevent any excessive effects of the threshold by striking a balance between the principles of fair representation and governmental stability as a guarantee designed to stop the threshold impairing the essence of the right enshrined in Article 3 of Protocol No.1³³.

Consequently, in the light of these facts, the ECtHR found no violation of the Article 3 of Protocol No.1 of the ECHR. However it declared that in general a 10% electoral threshold appeared excessive and compelled political parties to make use of stratagems which did not contribute to the transparency of the electoral process so it concurred with the views of the Council of Europe bodies which had stressed the threshold's exceptionally high level and recommended lowering it.³⁴

Besides the jurisprudence of the Turkish Constitutional Court and the ECtHR, the approach of some international organizations to this matter is also very important for evaluating the appropriateness of the national threshold of 10%. In its Resolution 1547 (2007) entitled State of human rights and democracy in Europe, the Parliamentary Assembly of the Council of Europe noted that there shouldn't have been thresholds higher than 3% during the parliamentary elections though with the important reservation that this recommendation applied to well established democracies³⁵:

"In well-established democracies, there should be no thresholds higher than 3% during the parliamentary elections. It should thus be possible to express a maximum number of opinions. Excluding numerous groups of people from the right to be

31 Ibid, par.141,142.

32 Ibid, par.143.

33 Ibid, par.144,146.

34 Ibid., par. 147.

35 Parliamentary Assembly, Resolution 1547(2007), 18 April 2007, par.58.

represented is detrimental to a democratic system. In well-established democracies, a balance has to be found between fair representation of views in the community and effectiveness in parliament and government”.

In its Recommendation 1791 (2007) entitled State of human rights and democracy in Europe, the Parliamentary Assembly recommended to the Committee of Ministers to urge member States to consider decreasing thresholds over 3% for parliamentary elections and the balance between fair representation and effectiveness in parliament and government³⁶. Similarly, in its Resolution 1705 (2010) entitled Thresholds and other features of electoral systems which have an impact on representativity of parliaments in Council of Europe member states, the Assembly called on the Council of Europe member states to consider decreasing legal thresholds that were higher than 3%, and removing other obstacles, including high financial deposits, which barred minor parties or independent candidates from being represented in elected bodies³⁷.

As it is seen clearly in all of these resolutions and recommendations, the Council of Europe prefers a threshold no more than 3%. However, the Resolution 1547 (2007) differs from the other Council of Europe documents on the point that it specifically mentions that this threshold should be applied in “ well-established democracies”³⁸.

Nevertheless, the European Commission for Democracy Through Law’s (the Venice Commission) approach concerning the level of threshold differs from the criteria declared in Resolution 1547 (2007).

The Venice Commission firstly declares that a 3% limit for the threshold seems a little low even for the established democracies. It makes reference to the “important distinction” between “established democracies” and “less established ones”. “The less established democracies” or “the new democracies” is briefly defined as the ones “ where the party system is still being created ” or there is a lack of “ simple and effective party systems ”.

Then it recommends two different thresholds for these two kinds of democracies. With some precautions, a 3 to 5 % threshold is probably acceptable for the established democracies and a threshold without exceeding 10 % may be acceptable for the less established ones :

36 Parliamentary Assembly, Recommendation 1791(2007), 18 April 2007, par.17.10.

37 Parliamentary Assembly, Resolution 1705(2010), 27 January 2010, par. 22.3.

38 Although it doesn’t define them, it makes reference to “old and younger democracies” in some of the paragraphs of the Resolution. Additionally, it does not declare another threshold for younger democracies. Parliamentary Resolution 1547(2007), 18 April 2007, par. 47, 51.

“...This threshold (3%) seems a little low, even if we recognise the important distinction between established democracies and less established ones where the party system is still being created. In the former, a 3 to 5 % threshold is probably acceptable, subject to the existence of safeguards, particularly for national minorities, and so long as the implicit threshold is not still higher. In the new democracies, in contrast, higher thresholds might be envisaged to encourage the establishment of simple and effective party systems, with the same precautions and certainly without exceeding 10%, which is already fairly high”³⁹.

It also pointed out that the approach adopted concerning the level of threshold varied widely in the Council of Europe member states but generally, the thresholds were around 4 to 5 %⁴⁰.

As regards the national electoral threshold of 10% in Turkish electoral system, The Parliamentary Assembly, in its Resolution 1380 (2004) on Honouring of obligations and commitments by Turkey, considered that requiring parties to win at least 10% of the votes cast nationally before they could be represented in parliament was excessive and it invited Turkey to amend the electoral code to lower the 10% threshold⁴¹. The Ad hoc Committee of the Parliamentary Assembly of the Council of Europe also referred to the Assembly Resolutions 1380 (2004) and 1547 (2007) in its report entitled Observation of the Parliamentary elections in Turkey (22 July 2007)⁴²:

“...However, the Rapporteur believes that Turkey could do more in terms of organising even better elections that would guarantee a genuinely representative Parliament. The 10% threshold requirement could be lowered, in accordance with Assembly Resolutions 1380 (2004) and 1547(2007). The fact that the new Parliament elected on 22 July 2007 is far more representative than the outgoing Parliament representing about 90 percent of the opinions of the electorate, is due to the fact that three instead of two parties are represented and to the ploy of opposition parties to launch party-sponsored independent candidates and not to any steps

39 European Commission for Democracy Through Law, Report on Thresholds and Other Features of Electoral Systems Which Bar Parties From Access to Parliament (II), CDL-AD(2010)007, 15 March 2010, s. 12, par. 68.

40 The report mentions that the percentage of the threshold is 10% in Turkey; 7% in Russia; 5% in Germany, Belgium (constituency), Estonia, Georgia, Hungary, Moldova, Poland, Czech Republic and Slovakia; 4% in Austria, Bulgaria, Italy, Norway Slovenia and Sweden; 3% in Spain (by constituency), Greece, Romania, Ukraine; 2% in Denmark; 0.67 % in Netherlands. Several countries, in particular Sweden, Finland, Ireland and Iceland, have no legal threshold but as their constituencies are small, as in Ireland, or limited in size, the natural thresholds have the same effect. Ibid., s.5, par. 21,23.

41 Parliamentary Assembly, Resolution1380(2004), 22 June 2004, par.6,23.

42 Parliamentary Assembly, Observation of the Parliamentary elections in Turkey (22 July 2007), Doc.11367, 12 September 2007, par. 59,60.

taken by the Turkish authorities themselves. The Turkish authorities may wish to consider seizing the Venice Commission on this issue, as well as on simplifying electoral legislation”.

According to the Organisation for Security and Cooperation in Europe (OSCE), the 10% threshold is also an exceptionally high threshold by European standards and in order to avoid distortions, the authorities should consider reviewing the level of the threshold⁴³. In its report concerning the 2002 parliamentary elections, it declared that such a high number distorted the essential purpose of a proportional system and argued that this threshold also virtually eliminated the possibility of regional or minority parties entering the Turkish Grand National Assembly (TGNA)⁴⁴:

“...A 10% threshold is unusually high in Europe. One result of such a high threshold in an election featuring 18 political parties was that an extremely large proportion of the electorate cast their votes for parties which are not represented in the new Parliament the high national threshold also virtually eliminates the possibility of regional or minority parties entering the TGNA. The Turkish authorities should examine whether the 10% threshold is achieving its desired purposes and should consider lowering the threshold...”

Similarly, in its report concerning the 2007 parliamentary elections, the OSCE noted that the electoral system contained an unusually high threshold of 10% which led to distortions⁴⁵. However it also pointed out that election as an independent remained a means by which the rigour of the 10% nationwide threshold for political parties could be mitigated⁴⁶. In this report, it also made reference to the ECtHR’s judgement on the case of Yumak and Sadak v. Turkey of 30 January 2007 and the OSCE’s report concerning the 2002 parliamentary elections⁴⁷:

“...The 10% threshold remains unusually high by international comparison. On 30 January 2007, the European Court of Human Rights ruled, on a complaint brought by two Turkish applicants, Mehmet Yumak and Resul Sadak, that it did not amount to a violation of the right to free elections, but noted that it was the highest

43 OSCE, Office for Democratic Institutions and Human Rights, The Republic of Turkey Parliamentary Elections 3 November 2002, OSCE/OIDHR Assessment Report, 4 December 2002, s.1.

44 Ibid., s.7.

45 OSCE, Office for Democratic Institutions and Human Rights, The Republic of Turkey Parliamentary Elections 22 July 2007, OSCE/OIDHR Needs Assessment Mission Report 29 May-1 June 2007, 12 June 2007, s.1.

46 Ibid., s.6.

47 Ibid., s.4.

threshold of any Council of Europe member state, and advised open discussion to consider lowering it. OSCE/ODIHR noted in 2002 that it leads to distortions and that some 45% of votes in those elections were effectively rendered ineffective, gaining no representation in the TGNA..."

The European Commission also pointed out the high level of national threshold in Turkey's progress reports. In 2003 and 2004 Regular Reports on Turkey's progress towards accession, it noted that the 10% threshold of the electoral system made it difficult for minorities to be represented in Parliament⁴⁸. Similarly, in 2006 Progress Report, it declared that the 10% threshold under the electoral law made it difficult for all but the nationwide largest parties to be represented in TGNA⁴⁹. In 2007 and 2011 Progress Reports, it mentioned that this threshold was the highest among European parliamentary systems but despite the calls by political parties and civil society organisations for it to be lowered, it remained unchanged⁵⁰.

Likewise, the European Parliament called on Turkey to reform the electoral system by reducing the threshold of 10%, thereby ensuring wider representation of political forces and minorities in the TGNA⁵¹. In its resolution of 10 February 2010 on Turkey's progress report 2009, it reiterated its call from its previous resolutions in 2006 and 2007 for the electoral system to be reformed by reducing the threshold, thereby ensuring party pluralism, especially in order to allow newly founded parties to gain access to the political process, as well as wider representation of political forces and minorities in the TGNA⁵².

Therefore, as it's clearly stated by all of these international and supra-national organizations, Turkey should take into consideration to reduce its national threshold as soon as possible in order to ensure wider representation of all political forces in the TGNA as it's necessary in a pluralistic democracy.

48 Commission of the European Communities, 2004 Regular Report on Turkey's Progress Towards Accession, {COM (2004) 656 final}, 6.10.2004, s.49; 2003 Regular Report on Turkey's progress towards accession, 5.11.2003, s.38.

49 Commission of the European Communities, Turkey 2006 Progress Report, {COM (2006) 649 final}, 8.11.2006, s.22.

50 Commission of the European Communities, Turkey 2007 Progress Report, {COM (2007) 663}, 6.11.2007, s. 6, 7; European Commission, Commission Staff Working Paper Turkey 2011 Progress Report, SEC (2011) 1201 final, 12.10.2011, s.8.

51 European Parliament, European Parliament resolution on Turkey's progress towards accession, 27 September 2006, OJ C 306 E, 15.12.2006, s. 289; European Parliament resolution of 24 October 2007 on EU-Turkey relations, OJ C 263 E, 16.10.2008, s. 454; European Parliament resolution of 21 May 2008 on Turkey's 2007 progress report, OJ C 279 E, 19.11.2009, s. 60.

52 European Parliament, European Parliament Resolution of 10 February 2010 on Turkey's progress report 2009, 10 February 2010, par.7, <http://www.europarl.europa.eu/sides/getDoc.do?language=EN&reference=B7-0068/2010>, (Erişim Tarihi: 10 Mayıs 2010).

CONCLUSION

Political parties have an essential role in ensuring pluralism and the proper functioning of democracy. However, many of the grounds for prohibition and dissolution of political parties which are declared in the Turkish Law no. 2820 on Political Parties are incompatible with the criteria of the ECtHR as it can be seen clearly in the jurisprudence of the Court concerning dissolution of political parties by the Turkish Constitutional Court.

These articles of the Law on Political Parties which are definitely contrary to the European criteria should either be abrogated or amended in order to harmonise the Law on Political Parties with the law of European Convention of Human Rights which covers both the ECHR and the jurisprudence of the ECtHR .

Likewise, the national election threshold of 10% which is stipulated in the Turkish Law no. 2839 on the election of members of the National Assembly is incompatible with political pluralism which is a fundamental feature of the democratic constitutional system.

The ECtHR decided that the national threshold did not constitute a violation of the Article 3 of Protocol No.1 to the ECHR by taking into account the specific political context of the 2002 parliamentary elections and the correctives and other guarantees which had limited the threshold's effects in practice. Nevertheless, it also declared that 10% threshold applied in Turkey is the highest of all the thresholds applied in Europe.

Additionally, the organizations such as the Council of Europe, the OSCE and the European Union agree on the high level of the national threshold and call simultaneously on Turkey to consider lowering it. Reducing the national election threshold is therefore important for balancing the principles of stability and fair representation in a more efficient way. Turkey, should take into consideration the recommendations of these international and supranational organizations.

In the light of these considerations, the Turkish legislation such as the Law no. 2820 on Political Parties and the Law no. 2839 on the election of members of the National Assembly should be amended as a priority in order to ensure political participation in Turkey.

BIBLIOGRAPHY

Books

- ÇAVUŞOĞLU, Naz: Anayasa Notları, İstanbul, Beta,1997
TEZİÇ, Erdoğan: Anayasa Hukuku, 5. bası, İstanbul, Beta,1998
UYGUN, Oktay: Kamu Hukuku İncelemeleri, İnsan Hakları, Demokrasi, Hukuk Devleti, Egemenlik, İstanbul, On İki Levha Yayıncılık, Ocak 2011

Articles

- Çağlar, Bakır: "Anayasa Mahkemesi Kararlarında 'Demokrasi'", Anayasa Yargısı, No.7, 1990.
Çağlar, Bakır, ÇAVUŞOĞLU, Naz: 'Parti Kapatma Davalarında Mermer Mozaik İkilemi', Anayasa Yargısı, No.16,1999.
Çavuşoğlu, Naz: 'Cultural Identity: A Minority Question?', İstanbul Üniversitesi Siyasal Bilgiler Fakültesi Dergisi, Sayı:23-24, Ekim 2000-Mart 2001
Köker, Levent: "A Key to the "Democratic Opening": Rethinking Citizenship, Ethnicity and Turkish Nation-State", Insight Turkey, Vol.12, No.2, 2010.
Özbudun, Ergun: "Turkey's Search for a New Constitution", Insight Turkey, Vol.14, No.1, 2012.
Sağlam, Fazıl: 'Siyasi Partiler Kanunu'nda Uluslararası Normlara Uygunluk Sağlamak İçin Yapılması Gereken Değişiklikler', Anayasa Yargısı, No.17, 2000.
Yüzbaşıoğlu, Necmi: "Türkiye'de Uygulanan Seçim Sistemleri ve Bunlara İlişkin Anayasa Mahkemesi Kararlarına Göre Nasıl Bir Seçim Sistemi", İHFM, C.LV, 1996

Documents

Council of Europe

- European Commission for Democracy Through Law, Opinion on The Constitutional and Legal Provisions Relevant to the Political Parties in Turkey, Opinion No. 489/2008, CDL-AD (2009)06, Strasbourg, 13 March 2009
European Commission for Democracy Through Law, Report on Thresholds and Other Features of Electoral Systems Which Bar Parties From Access to Parliament (II),CDL-AD(2010)007, 15 March 2010
Parliamentary Assembly, Resolution 1547(2007), 18 April 2007
Parliamentary Assembly, Recommendation 1791(2007), 18 April 2007
Parliamentary Assembly, Resolution 1705(2010), 27 January 2010
Parliamentary Assembly, Resolution1380(2004), 22 June 2004
Parliamentary Assembly, Observation of the Parliamentary elections in Turkey (22 July 2007), Doc.11367, 12 September 2007

OSCE

- OSCE, Office for Democratic Institutions and Human Rights, The Republic of Turkey Parliamentary Elections 3 November 2002, OSCE/OIDHR Assessment Report, 4 December 2002

OSCE, Office for Democratic Institutions and Human Rights, The Republic of Turkey Parliamentary Elections 22 July 2007, OSCE/OIDHR Needs Assessment Mission Report 29 May-1 June 2007, 12 June 2007

European Union

Commission of the European Communities, 2004 Regular Report on Turkey's Progress Towards Accession, {COM (2004) 656 final}, 6.10.2004

Commission of the European Communities, 2003 Regular Report on Turkey's progress towards accession, 5.11.2003

Commission of the European Communities, Turkey 2006 Progress Report, {COM (2006) 649 final}, 8.11.2006

Commission of the European Communities, Turkey 2007 Progress Report, {COM (2007) 663}, 6.11.2007

European Commission, Commission Staff Working Paper Turkey 2011 Progress Report, SEC (2011) 1201 final, 12.10.2011

European Parliament, European Parliament resolution on Turkey's progress towards accession, 27 September 2006, OJ C 306 E, 15.12.2006

European Parliament, European Parliament resolution of 24 October 2007 on EU-Turkey relations, OJ C 263 E, 16.10.2008

European Parliament, European Parliament resolution of 21 May 2008 on Turkey's 2007 progress report, OJ C 279 E, 19.11.2009

European Parliament, European Parliament Resolution of 10 February 2010 on Turkey's progress report 2009, 10 February 2010, par.7, <http://www.europarl.europa.eu/sides/getDoc.do?language=EN&reference=B7-0068/2010>, (Erişim Tarihi: 10 Mayıs 2010).

Jurisprudence

Turkish Constitutional Court, E. 1968/15, K. 1968/13, KT.3,4 ve 6/5/1968.

Turkish Constitutional Court, E. 1984/1, K.1984/2, K.T. 1/3/1984.

Turkish Constitutional Court, E. 1995/54, K. 1995/59, K.T. 18/11/1995.

ECtHR, Case of Yumak and Sadak v. Turkey, Judgment of 30 January 2007.

ECtHR, Case of Yumak and Sadak v. Turkey, Judgment of 8 July 2008.

ECtHR, Case of Partidul Comunistulor (Nepeceristi) and Ungureanu v. Romania, Judgment of 3 February 2005.

ECtHR, Case of United Communist Party of Turkey and Others v. Turkey, Judgment of 30 January 1998.

ECtHR, Case of Socialist Party and Others v. Turkey, Judgment of 25 May 1998.

ECtHR, Case of Freedom and Democracy Party (ÖZDEP) v. Turkey, Judgment of 8 December 1999.

ECtHR, Case of Yazar and Others v. Turkey, Judgment of 9 April 2002.

ECtHR, Case of Dicle for the Democratic Party (DEP) of Turkey v. Turkey, Judgment of 10 December 2002.

ECtHR, Case of Socialist Party of Turkey (SPT) and Others v. Turkey, Judgment of 12 November 2003.

ECtHR, Case of Democracy and Change Party and Others v. Turkey, Judgment of 26 April 2005.

ECtHR, Case of Emek Partisi and Senol v. Turkey, Judgment of 31 May 2005.

ECtHR, Case of Demokratik Kitle Partisi and Elçi v. Turkey, Judgment of 3 May 2007.

ECtHR, Case of HADEP and Demir v. Turkey, Judgment of 14 December 2010.