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Underrepresentative Democracy: Why Turkey Should Abandon Europe's Highest Electoral Threshold

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UNDERREPRESENTATIVE DEMOCRACY: WHY TURKEY SHOULD ABANDON EUROPE'S HIGHEST ELECTORAL THRESHOLD

It is Election Day: you go to the polls, wait in line, and cast your ballot. You have been evaluating all the parties for months, and you are confident in the decision you have finally made. You vote for a party that is extremely popular in your corner of the country. Watching the returns, you see that your party is polling at around 45% in your province, easily defeating its competitors. Unfortunately, your party is not so popular nationally. To your dismay, you find out that your three representatives in the legislature combined for less than 23% of the vote in your province.

This scenario was the unfortunate reality for many voters in the province of Şırnak during the 2002 national elections in Turkey.¹ Since the current Turkish Constitution was introduced in 1982 following the 1980 military coup,² the electoral system has often faced criticism. The electoral threshold, which mandates that a political party must obtain at least 10% of the vote in a national election to be admitted to Parliament, has been a focal point of these criticisms and the subject of court cases in the Turkish Constitutional Court and the European Court of Human Rights, as well as numerous legislative reform efforts.³ While the threshold has withstood many challenges, commentators have raised concerns about the threshold's effects of forming unrepresentative governments and keeping minority and regional parties out of the Grand National Assembly.⁴ As evidenced by the results of the 2002 election which disenfranchised approximately 45% of the nation's voters,⁵ these concerns are well-founded, and this Note argues for Turkey to reform its election law to create a more democratic system. Recently, there has been a push in Turkey toward major constitutional reform,⁶ and commentators have

1. See *infra* notes 50–51 and accompanying text.

2. See *Turkey Votes for New Constitution*, SPOKESMAN-REVIEW, Nov. 8, 1982, at 6; see also *Turkish PM Ousted in 'Non-Violent' Military Coup*, OTTAWA CITIZEN, Sept. 12, 1980, at 40.

3. In the European Court of Human Rights, see *Yumak and Sadak v. Turkey*, App. No. 10226/03, Grand Chamber Judgment (Eur. Ct. H.R. July 8, 2008), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=837656&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C116DEA398649>. For a discussion of a Turkish Constitutional Court case, see *infra* note 115. For discussion of reform efforts, see *infra* notes 74–76 and accompanying text.

4. See *infra* notes 77–87 and accompanying text.

5. See *infra* note 44.

6. Göksel Bozkurt, *Gov't Plans to Speed Up Constitutional Amendment Process*, HÜRRIYET DAILY NEWS & ECON. REV., Jan. 20, 2010, <http://www.hurriyetdailynews.com/n.php?n=gov8217t-plans-to-speed-up-the-constitutional-process-2010-01-20>.

suggested that reform to the electoral threshold should be included.⁷ A constitutional reform package submitted on March 30, 2010, by Turkey's majority party, AKP, did not include changes to the electoral threshold.⁸ This reform package was adopted, without any mention of the electoral threshold, after a referendum on September 12, 2010 passed with 58% approval.⁹

This Note suggests that a threshold of 5%, which is in line with European averages, would drastically reduce the amount of “wasted” votes and would allow for representation of more viewpoints, including important regional and minority parties. Part I of this Note provides the context for the electoral threshold and an explanation of how it works. First, the parliamentary system is explained, as well as the concept of electoral thresholds. Second, the Turkish parliamentary system is explored, as well as the legal and historical basis for the threshold. Part II of this Note addresses Turkish electoral history since the implementation of the threshold. Part III of this Note examines the opposition to the threshold, both from within Turkey and from the international community. Part IV of this Note examines the European Court of Human Rights decision *Yumak and Sadak v. Turkey*, which addresses the legality of the threshold under the European Convention on Human Rights. Part V provides a discussion of alternatives to the current threshold, including systems used in other European states, as well as alternatives proposed specifically to address the threshold in Turkey.

7. See Cüneyt Ülsever, Op-Ed., *Civilian Tutelage or Democracy? (II)*, HÜRRİYET DAILY NEWS & ECON. REV., Feb. 2, 2010, <http://www.hurriyetdailynews.com/n.php?n=civilian-tutelage-or-democracy-ii--2010-02-02>. In an editorial about constitutional reform in Turkey, the author writes, “The 10 percent election threshold is not a constitutional issue directly, but unless it is lowered to, let’s say, 5 percent to 6 percent, in order to allow Kurdish deputies to have an entry in Parliament, I cannot believe in the sincerity of the government’s Kurdish initiative.” This demonstrates that the issue of the electoral threshold, in addition to concerning representative democracy, also indirectly affects the debate on minority rights and minority representation in government.

8. See *Kurdish Politicians Slam BDP Opposition to Package*, TODAY’S ZAMAN, Apr. 29, 2010, <http://www.todayszaman.com/tz-web/news-208770-100-kurdish-politicians-slam-bdp-opposition-to-package.html>; see also Pinar Aydinli, *Factbox—Turkey’s Contentious Constitutional Reform Project*, REUTERS, Mar. 30, 2010, <http://uk.reuters.com/article/idUKTRE62T36920100330>. For a detailed explanation of the reforms that were included in the reform package, with the precise new language adopted by the constitution as a result of the reforms, see Law No. 5982 Amending Certain Provisions of the Constitution, Prime Ministry of Turkey (2010), available at http://www.abgs.gov.tr/files/Bas%C4%B1nMusavirlik/haberler/constituional_amendments.pdf (Secretariat General for European Affairs trans.).

9. *Turkey Backs Constitutional Changes*, BBC NEWS, Sept. 12, 2010, <http://www.bbc.co.uk/news/world-europe-11278602>.

The final section, Part VI, offers the author's recommendation that Turkey adopt a 5% threshold, and includes an explanation for that recommendation.

I. PARLIAMENTARY PRINCIPLES AND THE TURKISH SYSTEM

A. *Basic Parliamentary Principles*

The majority of legislatures in Europe are elected by way of a proportional representation system.¹⁰ Unlike the plurality system employed in the United States, in which single-seat districts are won by candidates obtaining the highest share of votes, or the majority vote system employed in the United Kingdom,¹¹ proportional representation systems seek to allocate legislative seats in multi-seat districts by correlating the allocation of seats with the result of the vote.¹² Most modern democracies have adopted the proportional representation system of electing legislatures¹³ because it leads to results that are more representative of popular opinion than the plurality system.¹⁴

10.

Currently, proportional systems are the most widely used in Europe. By way of example, Bulgaria, the Czech Republic, Denmark, Estonia, Ireland, Luxembourg, Malta, Moldova, Norway, Poland, Portugal, Romania, Russia, Spain, Sweden, and Turkey have opted for one or other variant of proportional representation. There are also mixed systems containing various combinations of the two types of ballot (in Germany, Italy and Lithuania, for example).

Yumak, App. No. 10226/03, ¶ 62.

11.

In majority vote systems the winner is the candidate or list of candidates obtaining the majority of the votes in the decisive round of voting. This type of ballot makes it possible to vote in governments with clear parliamentary majorities, but at the same time it militates against the representation of minority political parties. Thus, for example, in the United Kingdom the use over many decades of a single round of voting in a single-member majority-vote system ("first past the post"), combined with the existence of two dominant political parties, has had the effect of giving few seats to other parties in relation to the number of votes that they obtain.

Id. ¶ 61.

12. For example, imagine State A in the United States has four Congressional seats, and thus four Congressional districts. Party A wins 75% of the vote in all four districts, whereas Party B wins 25% of the vote in all four districts. In this hypothetical election, Party A would win all four seats. In a proportional representation system, the State would be one district with four available seats, and Party A's 75% share of the vote would earn it three seats, while Party B's 25% share would earn it the remaining seat.

13. See STANLEY I. KUTLER, *Proportional Representation*, DICTIONARY OF AMERICAN HISTORY (3d ed. 2003).

14. See *Yumak*, App. No. 10226/03, ¶ 61 ("[T]he aim of the proportional representation system is to ensure that the votes cast are reflected in a proportional number of seats. Proportional representation

Some proportional representation systems utilize election thresholds. These thresholds generally achieve a greater degree of stability in the formation of governments in parliament.¹⁵ Many governments have considered these thresholds necessary because proportional representation can increase the difficulty of forming stable governments when a large number of parties are voted into the legislature.¹⁶ By ensuring that only parties achieving a certain percentage of the national vote are seated, thresholds can prevent severe fragmentation in parliament.¹⁷ Therefore, if a government set the election threshold at five percent, only parties polling at five percent or greater would be seated. The level at which the electoral threshold is set varies from state to state, and it can have a significant impact on the political landscape, with the conventional logic being that higher thresholds increase stability while decreasing representativeness.¹⁸

B. *The Turkish System*

The Turkish Grand National Assembly forms the national legislative body of the Republic of Turkey. It is a single chamber consisting of 550 members, each elected for four years.¹⁹ Each of Turkey's eighty-one provinces is represented by at least one deputy, while more heavily populated provinces may be split up into multiple constituencies.²⁰ Parties

is generally considered to be the fairest system because it tends to reflect more closely the various political forces.”)

15. As the ECHR noted in *Yumak*,

In some proportional systems statutory thresholds are used to correct the negative effects of proportional voting, and in particular to ensure greater parliamentary stability. These thresholds, generally expressed as a percentage of the votes cast, are ‘limits, fixed or variable, defined in terms of the electoral result, which determine the share of a list or candidate in the distribution of seats.’

Id. ¶ 63.

16. *Id.* ¶ 61 (“[T]he disadvantage of proportional representation is that it tends to lead to fragmentation among those seeking electoral support and thus makes it more difficult to establish stable parliamentary majorities.”).

17. *Id.* ¶ 63.

18. “A low threshold excludes only very small groupings, which makes it more difficult to form stable majorities, whereas in cases where the party system is highly fragmented a high threshold deprives many voters of representation.” *Id.* In essence, the decision of setting a threshold level constitutes a balance between stability and representativeness. There is reason to believe, however, that higher thresholds may not promote stability to the extent they are expected to. *See infra* notes 36–39 and accompanying text.

19. FOUND. FOR POLITICAL, ECON. AND SOC. RESEARCH (SETA), TURKEY’S ELECTIONS GENERAL FACTS (2011), available at http://www.setadc.org/pdfs/Turkey_Elections_Fact_Sheet_2011.pdf.

20. “Provinces with from one to 18 MPs form a single constituency; those with from 19 to 35 MPs are divided into two constituencies; Istanbul, which has more than 35 seats, is divided into three constituencies.” *Id.*

must obtain ten percent of the national vote in order to seat members in the Grand National Assembly.²¹ This threshold is established by Law No. 2839, Section 33.²² For parties passing the ten percent threshold, seats are allocated using the D'Hondt method of proportional representation, which is a widely used mathematical formula for allocating seats in proportional representation systems.²³

The current Turkish electoral system is a result of a bloodless military coup in 1980 that followed a period of volatility and violence.²⁴ The Turkish military blamed the instability of the 1970s on the inability of the parties in parliament to form a stable government.²⁵ No party was able to gain a majority in the legislature in either the 1973 or 1977 election. As a result, this period saw many changes in government, with one coalition

21. *Id.* ¶ 33.

22. Section 33 reads:

In a general election parties may not win seats unless they obtain, nationally, more than 10% of the votes validly cast An independent candidate standing for election on the list of a political party may be elected only if the list of the party concerned obtains sufficient votes to take it over the 10% national threshold.

Id. For an unofficial translation of Law No. 2839 by the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe, see <http://www.legislationline.org/documents/id/6991> (last visited Oct. 21, 2010).

23. *Yamak*, App. No. 10226/03, ¶ 34 (“In allocating seats the D’Hondt system of proportional representation is used. That method—under which the votes cast for each list are first divided by a series of whole numbers (1, 2, 3, 4, 5 etc.) and seats then allocated to the lists which have the highest quotients—tends to favour the majority party.”). See also Ricardo Zimbron, *The Unappreciated Margin: Turkish Electoral Politics Before the European Court of Human Rights*, 49 HARV. INT’L L.J. ONLINE 10, 13 & n.8 (2007), www.harvardilj.org/attach.php?id=127. Zimbron describes the D’Hondt method in this 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.

Id. at 13 n.8.

24.

On Sept. 12, 1980, the senior command of the army led by General Kenan Evren, carried out a bloodless coup. The action followed a resurgence of street fighting between leftists and nationalists. Leading politicians were arrested, and parliament, political parties, and trade unions were dissolved. A provisional constitution that gave almost unlimited power to military commanders was implemented.

FACTBOX—Coups in Turkey over Last 50 Years, REUTERS, Oct. 27, 2009, <http://www.reuters.com/article/idUSL289039>.

25. Ergun Özbudun, *Constitutional Law*, in INTRODUCTION TO TURKISH LAW 19, 35 (Tuğrul Ansay & Don Wallace, Jr. eds., 5th ed. 2005) (“This [ten percent threshold] is designed to prevent the proliferation of political parties and the excessive fragmentation of the party system, which, in the opinion of the National Security Council and the Consultative Assembly, contributed significantly to the political crisis in the 1970s.”). See *infra* note 126 for information on Dr. Özbudun’s participation in efforts to reform the threshold.

dissolving and being replaced by another.²⁶ It was this instability that prompted the military to include an electoral threshold in the Turkish system.²⁷

Turkey's electoral threshold is the highest amongst European democracies.²⁸ The average threshold in Europe (excluding Turkey) is 4.6%, and of the twenty-four countries in Europe that have thresholds, nineteen have thresholds of 5% or lower.²⁹ The five countries that have thresholds higher than five percent are Turkey (10%), Liechtenstein (8%), the Russian Federation and Georgia (7%), and Moldova (6%).³⁰ All other states either employ the threshold system with thresholds of five percent or lower,³¹ or they do not use thresholds at all.³² In addition, many states

26.

[I]n the elections of 1973 and 1977 the main political movements were unable to establish stable governments, although they had wide electoral support. That period of government instability was marked by the formation of one coalition after another, each made fragile by the disproportionate influence of the small parties on government policy.

Yumak, App. No. 10226/03, ¶ 44.

27. Commentators have suggested that the military also sought the threshold as a means to discourage representation of parties except those in the center of the political sphere.

The architects of the September 12 regime desired to construct a political sphere with the state at its center. This project reflected a political conception that perceived the state as the center and the society as the periphery. The different wings of politics, its left and its right, were to be determined according to this center. With this aim in view, it was stipulated that political parties would conform to a single type in their establishment and operation, that organic ties between political parties and other social organizations would be prevented by means of a series of prohibitions, and that the clustering of votes around a few central parties would be made obligatory by means of the 10 percent threshold for representation in the parliament.

Ahmet Insel, *The AKP and Normalizing Democracy in Turkey*, 102 S. ATLANTIC Q. 293, 294 (2003). If this was part of the military's motivation in drafting the new constitution, the decision to include a threshold shows that the military weighed stability as a far more important consideration than representativeness.

28. Zimbron, *supra* note 23, at 17.

29. *Id.* at 17–18.

30. *Id.* at 18.

31. EUROPEAN CENTRE FOR PARLIAMENTARY RESEARCH & DOCUMENTATION, ELECTORAL SYSTEMS IN EUROPE: AN OVERVIEW (Simon McGee ed., 2000), <https://ecprd.secure.europarl.europa.eu/ecprd/getfile.do?jsessionid=155220412B626127585647C5A9F23683?id=5063>. Six states have thresholds of 5%; thirteen states have thresholds lower than 5%. For example, Austria's threshold is 4%, Denmark's is 2%, Italy has a 4% threshold for the 155 lower house seats elected nationally using a proportional representation system (other Lower House seats are elected using a plurality system and Upper House seats use proportional representation without a national threshold), Sweden has a 4% threshold, Romania has a 3% threshold, and Albania has a 2% threshold. Netherlands allocates one seat in their legislature for every 0.67% of the vote a party receives, allocating the remainder according to the D'Hondt method. Thus, any party to receive at 0.67% of the vote would be assured representation. A 5% threshold is used in Germany, Czech Republic, Estonia, Hungary, Latvia, Poland, Slovakia, and Croatia. Note that the Czech Republic, Poland, and Romania all allow thresholds to be increased to higher levels for coalitions. This actually functions to decrease the barrier created by the threshold, however, as parties who would not reach the threshold on their own may

attempt to “broaden participation” with exceptions to the threshold requirement,³³ while Turkey does not.³⁴

II. TURKISH ELECTORAL HISTORY

Since the threshold became law, Turkish elections have consistently disenfranchised a significant percentage of voters. In most of these elections a significant portion of the electorate voted for parties that did not pass the ten percent threshold.³⁵ Of the eight elections since the coup, three produced coalition governments and five yielded single-party governments.³⁶ Prior to the coup, proportional representation without a threshold had been used since 1960.³⁷ In the four elections in that period, two resulted in coalition governments and the other two resulted in single-

combine to form a coalition of multiple parties so that they can pass the higher threshold. In this way, three parties polling at 3% in Poland, who would not be able to pass Poland's 5% threshold, could combine their efforts and pass the 8% coalition threshold. Though the source was published in 2000, all the preceding thresholds have remained the same. Since then, Ukraine lowered its threshold from 4% to 3% and Moldova raised its threshold from 4% to 5%. See Country Profile: Ukraine, ELECTION GUIDE, Nov. 1, 2010, <http://www.electionguide.org/country.php?ID=223> (last visited Sept. 6, 2011); Country Profile: Moldova, ELECTION GUIDE, Jan. 3, 2011, <http://www.electionguide.org/country.php?ID=142> (last visited Sept. 6, 2011).

32. *Id.* Countries that do not utilize thresholds include Cyprus, Belgium, Finland, and Portugal.

33.

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.

Zimbron, *supra* note 23, at 18.

34. *Id.* at 17.

35. *Id.* at 18. In 1987, 19.4% of the electorate (about 4.5 million votes) were not represented in parliament. Subsequently, during the 1991 election cycle, only 0.5% of voters (approximately 180,000) were unrepresented in parliament, the lowest disenfranchisement rate since the institution of the threshold. In 1995, 14% of the electorate (about 4 million votes) were not represented in parliament. In 1999, 18.3% of the electorate (about 6 million votes) were not represented in parliament. *Id.*

36. *Id.* at 15. Coalition governments were formed in 1991, 1995, and 1999. Single-party governments were formed in 1983, 1987, 2002, 2007, and 2011. *Id.* For a description of the results of the 2007 election, see *Turkey Re-elects Governing Party*, BBC NEWS, July 22, 2007, <http://news.bbc.co.uk/2/hi/europe/6910444.stm>. For a description of results of the 2011 election, see *Turkey Ruling Party Wins Election with Reduced Majority*, BBC NEWS, June 12, 2011, <http://www.bbc.co.uk/news/world-europe-13740147>.

37. *Id.* at 13–14 (“The plurality formula was abandoned [after the 1960 coup] in favour of a proportional representation system based on D’Hondt’s largest average formula with a district quota. . . . [T]he proportional representation system adopted in 1960 did not have a threshold imposed on it [That system] was broadly kept in place until the military coup that occurred in September 1980.”).

party governments.³⁸ These results suggest that Turkey's electoral threshold has not made elections significantly more likely to produce single-party governments, which are regarded as more stable.³⁹

A. *The 2002 National Elections*

The 2002 national elections demonstrated that the 10% threshold can produce unrepresentative election returns in the Grand National Assembly. While eighteen parties participated in the elections, only two passed the threshold.⁴⁰ The Justice and Development Party (AKP) won 363 seats, accounting for 66% of the seats in Parliament, despite only polling at 34.26% of the national vote.⁴¹ The Republican People's Party (CHP) won 178 seats, accounting for 33% of the seats in Parliament, despite only polling at 19.4% of the national vote.⁴² Several other parties polled between 5% and 9.5% of the vote, but were not awarded seats in Parliament because they failed to pass the national threshold.⁴³

The 2002 election is widely considered the least representative in Turkey's history, as approximately 45% of voters cast their ballots for parties who did not win a single seat in Parliament.⁴⁴ Numerous factors have been posited as explanations for the unusually high fragmentation of the vote, with so many voters casting their ballots for parties polling under 10%.⁴⁵ Regardless of which explanations hold true, the results would have

38. *Id.* at 14. Coalition governments were formed in 1973 and 1977. Single-party governments were formed in 1965 and 1969. *Id.*

39. *Id.* at 15 ("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.")

40. *Yumak*, App. No. 10226/03, ¶ 17.

41. *Id.*

42. *Id.*

43. *Id.* ¶ 18. The True Path Party (DYP) polled at 9.54%, the National Action Party (MHP) polled at 8.36%, the Young Party (GP) polled at 7.25%, the Democratic People's Party (DEHAP) polled at 6.22%, and the Motherland Party (ANAP) polled at 5.13%. *Id.*

44.

The results of these elections were generally interpreted as a huge political upheaval. Not only did the proportion of the electorate not represented in parliament reach a record level in Turkey (approximately 45%) but in addition the abstention rate (22% of registered voters) exceeded 20% for the first time since 1980. As a result, the National Assembly which emerged from the elections was the least representative since 1946, the year in which a multi-party system was first introduced. Moreover, for the first time since 1954, only two parties were represented in parliament.

Id. ¶ 19.

45.

To explain the National Assembly's unrepresentativity [sic], some commentators have referred to the cumulative effect of a number of factors over and above the existence of a high

been far more representative if the threshold had been set at a more reasonable level.⁴⁶ The end result of the elections was the formation of a government with the AKP holding an absolute majority, despite polling at less than 35% nationally.⁴⁷ Thus, a party for which 65% of the population did not vote ruled as if majority-elected.⁴⁸ A system where this is possible could lead to bizarre and undemocratic policies.⁴⁹

The province of Şırnak is a prime example of a failure to represent the voting populace in the 2002 election. There, DEHAP was the highest polling party at 45.95% but was not allocated any of the province's three seats because it did not poll at least 10% nationally.⁵⁰ Two of the seats were allocated to the AKP, which polled at 14.05% in the province, and one seat was allocated to an independent candidate who polled at 9.69% of the provincial votes.⁵¹ Thus, the province of Şırnak was represented in the Grand National Assembly by three representatives who combined for less than 23% of the province's votes.

B. The 2007 National Elections: Smaller Parties Circumvent The Electoral Threshold

In 2007, some smaller parties found ways to circumvent the 10% threshold. The first was the "independent strategy," first employed by the Democratic Society Party (DTP) which instructed its candidates to stand

national threshold. For example, because of the protest vote phenomenon linked to the economic and political crisis, the five parties which had obtained seats in the 1999 parliamentary elections—including the three which had formed the governing coalition between 1999 and 2002—were unable to reach the 10% threshold in 2002 and were accordingly deprived of representation in parliament. Similarly, electoral fragmentation had an effect on the results in that numerous attempts to form pre-electoral coalitions had come to nothing.

Id. ¶ 20.

46. *See infra* notes 121–22 and accompanying text.

47. *Id.* ¶¶ 21, 17.

48. CAROL MIGDALOVITZ, CONG. RESEARCH SERV., RL34039, TURKEY'S 2007 ELECTIONS: CRISIS OF IDENTITY AND POWER 9 (2007), available at <http://www.fas.org/sgp/crs/mideast/RL34039.pdf> ("AKP won only 34% of the vote in 2002, but it governed as if it had won a majority and did not reach out to the opposition.")

49. *See id.* at 10 ("[For example,] Erdoğan called for adultery to be criminalized until European officials shouted him down and he questioned the right of the European Court of Human Rights, whose jurisdiction Turkey accepts, instead of religious scholars (*ulema*) to judge the head scarf issue.")

50. "The results of the elections of 3 November 2002 in the province of Şırnak gave the DEHAP list 47,449 of the 103,111 votes cast, a score of about 45.95%. However, as the party had not succeeded in passing the national threshold of 10%, the applicants were not elected." *Yumak*, App. No. 10226/03, ¶ 16.

51. *Id.*

as independents so that they were not subject to the threshold.⁵² After winning their elections as independents, the MPs then joined the DTP once again.⁵³ This strategy was used by some candidates outside the DTP as well.⁵⁴ The second strategy involved a party's candidates joining the list of a larger party, then leaving that party and rejoining the old party after being elected to Parliament.⁵⁵ Unfortunately, both of these strategies have some disadvantages.

Electoral law in Turkey, while allowing independent candidates to run without any threshold limitation, carries some restrictions that limit the viability of small party candidates. Law Number 2839 Section 21(2) requires independent candidates to deposit a sum of money equal to the gross monthly salary of a civil servant of the highest rank, while Section 41(1) of that law stipulates that the candidate will lose that deposit if he does not obtain enough votes to win a seat.⁵⁶ The combination of these two sections has the effect of limiting the strategy to only the most serious of independent candidates and to those who are popular enough in a given province to outpoll large national parties. In addition, Turkish residents abroad are not able to vote for independent candidates, and unlike major political parties, independent candidates are not allotted television and radio time for their campaigns.⁵⁷

52. "The Party for a Democratic Society (DTP, pro-Kurdish, left-leaning) presented its candidates as independents using the label 'A thousand hopes'; it also supported certain left-wing Turkish candidates." *Id.* ¶ 23.

53. *Id.* ¶ 25 ("In the elections of 22 July 2007, 27 independent MPs were elected. In particular, more than twenty 'Thousand hopes' candidates were elected after obtaining approximately 2.23% of the votes cast and joined the DTP after the elections.")

54. "The independents also included a socialist MP (the former president of the ÖDP), a nationalist MP (the former president of the Great Union Party—BBP, nationalist) and a centrist MP (the former president of ANAP)." *Id.*

55. *Id.* ¶¶ 23–24. ("The Party of the Democratic Left (DSP) took part in the poll under the banner of the CHP, a rival party, and by that means managed to win 13 seats [T]he 13 MPs . . . subsequently resigned from the CHP and went back to the DSP, their original party.")

56. Section 21(2) reads:

Persons wishing to stand as independent candidates shall deposit with the competent Treasury authorities, as a guarantee, a sum equal to the gross monthly salary of a civil servant of the highest rank, and shall place a receipt for payment of that sum in the file presenting their candidature in the parliamentary election.

Id. ¶ 35. Section 41(1) reads, "[I]f, in a parliamentary election, an independent candidate has not obtained sufficient votes to win a seat, the sum deposited as a guarantee shall be forfeited to the Treasury." *Id.*

57.

Under the relevant legislation the name of independent candidates is not printed on the voting slips provided near the Turkish borders. That means that Turkish electors resident abroad may vote only for a political party using the ballot boxes placed at border crossing-points or large

The method of smaller parties joining the lists of larger parties also has drawbacks.⁵⁸ Democracy depends upon competition for legislative representation between differing opinions, which are generally compiled in the form of opposing parties.⁵⁹ The independence of a political party is undermined when it must rely on another to gain representation.⁶⁰ Smaller parties must gain approval of larger parties in order to be included in their lists.⁶¹ The strategy of allowing smaller parties to join the lists of larger parties also depends upon the whims of the larger parties, and this strategy may not be available in future elections.⁶² Moreover, the use of these tactics to circumvent the election threshold runs counter to the threshold's goal of ensuring government stability.⁶³

In the 2011 election, the threshold featured prominently in the strategies of political parties. Prime Minister Erdoğan announced that AKP's goal was to obtain a "super-majority" in the General Assembly, so they could unilaterally pass a new constitution.⁶⁴ This would require a two-thirds majority, meaning AKP would need to win 367 of the 550 seats.⁶⁵ Likely realizing it could hardly hope to obtain two-thirds of the national vote, AKP sought to take votes from the nationalist MHP, which was the third largest party in the Grand National Assembly following the

airports. Similarly, whereas political parties have time allocated on television and radio for electioneering broadcasts, independent candidates do not.

Id. ¶ 38.

58. *Id.* ¶ 4 (Tulkens, J., Vajić, J., Jaeger, J., and Šikuta, J., dissenting) ("[T]he Court did not consider the detrimental effect of these techniques on the party system as such when parties have to seek and find protection from other parties for the purpose of slipping through the 10% threshold.").

59. *Id.* ("In themselves, parties represent and unite different currents of thought.").

60. *Id.* ("Any interference with their independent participation in elections curtails the free expression of the opinion of the people—whether the interference is direct or indirect.").

61.

To achieve such alliances, candidates from one party have to be accepted, even approved of by another party, which undermines the independence of parties especially in respect of their representatives standing as candidates on other parties' lists. In other words, it means playing "hide and seek" with voters, thus undermining essential democratic principles.

Id.

62.

[T]hese correctives and safeguards are exclusively the result of political considerations and agreements and there can be no certainty that they will remain available in the future. These practices, which are in any case themselves contrary to the Turkish Constitution and Turkish electoral legislation (section 16 of Law no. 2839 on the election of members of the National Assembly), may be changed and disappear from one day to the next.

Id.

63. *Id.* ("[T]he Court itself acknowledges that these 'stratagems' run counter to the legitimate aim of fixing such a high threshold, namely preventing parliamentary fragmentation.").

64. Jürgen Gottschlich, *Erdogan Falls Short of Goal in Turkish Elections*, SPIEGEL ONLINE, June 13, 2011, <http://www.spiegel.de/international/europe/0,1518,768175,00.html>.

65. *Id.*

2007 election.⁶⁶ AKP's goal was to reduce MHP's share of the vote to under ten percent, and take a share of those seats. The campaign saw AKP taking a harder line on the Kurdish issue, and campaigning harder against MHP than CHP, its main opposition.⁶⁷ At one point in the campaign, six senior members of MHP resigned after secretly taped sex videos were released online.⁶⁸ One of those MHP politicians publically claimed the videos had been a trap set by Erdoğan and AKP.⁶⁹ AKP's efforts failed, and MHP ended up with 13% of the vote.⁷⁰ AKP won almost 50% of the vote and CHP won about 26% of the vote.⁷¹ This left AKP with 326 seats, well short of their goal, but still a comfortable majority.⁷²

III. OPPOSITION TO THE THRESHOLD

Many groups within Turkey have called for the reform of the electoral system. In 2008, the Kurdish Democratic Society Party (DTP) presented a proposal to Parliament to reduce the threshold from 10% to 3%.⁷³ In 2009, in response to dissatisfaction with the 10% threshold, the ruling AKP proposed a new election system under which a portion of the deputies elected to the Grand National Assembly would not be subject to the threshold.⁷⁴ The AKP has also publicly supported lowering the election threshold to 7% or even 5%.⁷⁵ These reform efforts were not the first. In 2002, three of the parties in the Grand National Assembly attempted, in vain, to call an emergency meeting to reduce the threshold to 5% before the 2002 national elections.⁷⁶ In addition to political opposition, the high

66. *Turkey Opposition Politicians Quit in Sex Video Scandal*, BBC NEWS, May 21, 2011, <http://www.bbc.co.uk/news/world-europe-13484990>.

67. *Id.*; see also Dorian Jones, *Turkey: AKP Faces Growing Challenge from Kurdish Unrest*, EURASIANET.ORG, May 19, 2011, <http://www.eurasianet.org/node/63520>.

68. *Turkey Opposition Politicians Quit*, *supra* note 66.

69. *Id.*

70. Gottschlich, *supra* note 64.

71. *Id.*

72. *Id.*

73. *Turkey's DTP Proposes to Reduce Election Threshold*, HÜRRIYET, July 16, 2008, <http://arama.hurriyet.com.tr/arsivnews.aspx?id=9452687>.

74. Ercan Yavuz, *Gov't to Propose New System of Deputy Election for Fair Representation*, TODAY'S ZAMAN, Sept. 23, 2008, <http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=154042&bolu=100>.

75. *Id.*

76. *Parties Likely to Demand Emergency Meeting For Threshold Today*, TURKISH DAILY NEWS, Sept. 17, 2002, 2002 WLNR 7615710 (Westlaw). The effort was led by the New Turkey Party (YTP) and was supported by the Motherland Party (ANAP) and the Saadet Party (SP). At the time, the Justice and Development Party (AKP), the Nationalist Movement Party (MHP), and the True Path Party (DYP) opposed the measure. *Id.* The leader of the YTP claimed that all parties in parliament agreed that the ten percent threshold was too high. Bülent Ecevit, Prime Minister of Turkey and leader of the

threshold has received criticism from Turkish scholars and prominent business leaders. The Turkish Industrialists and Businessmen's Association (TÜSIAD) has consistently criticized the threshold,⁷⁷ and Mustafa Koç, a prominent business leader speaking on behalf of TÜSIAD, called for the 10% threshold to be lowered in order to improve the fairness of representation in Parliament.⁷⁸ Turkish-American scholar Zeyno Baran⁷⁹ has criticized the threshold as contributing to the “combative, zero-sum political culture that typifies Turkey today.”⁸⁰ She has suggested that lowering the threshold to 5% or 7% would serve to erode this political culture and encourage consensus building.⁸¹ The president of Turkey has even suggested that the high threshold is no longer necessary for political stability and could be reduced.⁸²

In addition to opposition within the country, Turkey's high threshold has received criticism from other European countries and scholars. In 2007, the Council of Europe passed a resolution recommending that

Democratic Left Party (DSP), agreed that the threshold was too high but said it was wrong to amend the law just a month and a half before the elections. *Id.*

77. *See, e.g.*, BÜLENT TANOR, TURKISH INDUSTRIALISTS' & BUSINESSMEN'S ASS'N, PERSPECTIVES ON DEMOCRATISATION IN TURKEY: PROGRESS REPORT 2001—EXECUTIVE SUMMARY 16 (2001), <http://www.tusiad.us/Content/uploaded/DEMOCSSUMMARY.PDF> (recommending, *inter alia*, that the electoral threshold be lowered to 5%); *see also* Sahin Alpay, Opinion Paper, *Elections of November 3: A Victory for Turkish Democracy*, TURKISH INDUSTRIALISTS' & BUSINESSMEN'S ASS'N, Nov. 7, 2002, at 1 <http://www.tusiad.us/Content/uploaded/SAHIN%20ALPAY%20-%20ELECTIIONS.PDF> (calling the Turkish election system perhaps the worst in the world because it is “a system based on the principle of proportional representation with a 10 percent threshold which produces neither stable government nor fair representation”).

78. *Lower Election Threshold, Says Business Boss*, HÜRRIYET DAILY NEWS & ECON. REV., Oct. 1, 2009, <http://web.hurriyetdailynews.com/n.php?n=lower-election-threshold-says-business-boss-2009-10-01> (“‘If we are to speak about a democratic move, ways must be explored to lower the threshold and widen political representation in Parliament,’ said Mustafa Koç, head of a consultation committee with the Turkish Industrialists' and Businessmen's Association, or TÜSIAD.”).

79. Baran's biography is available at http://www.hudson.org/learn/index.cfm?fuseaction=staff_bio&id=BaranZeyno (last visited Nov. 1, 2010).

80. Zeyno Baran, *Turkey Divided*, 19 J. DEMOCRACY 55, 63 (2008), available at http://muse.jhu.edu/journals/journal_of_democracy/v019/19.1baran.html.

81. *Id.*

82.

Mr. Gül explained that the 10% threshold had been introduced to remedy the instability of previous years, in which there had been a large number of coalition governments in close succession. The threshold did not prevent independent candidates from standing. In the latest parliamentary elections, in July 2007, voter turnout had been 85%, which showed how representative parliament was. Now that political stability had been restored the 10% threshold could be reconsidered.

Yumak, App. No. 10226/03, ¶ 60.

electoral thresholds not exceed 3%.⁸³ The Parliamentary Assembly of the Council of Europe has also specifically requested that Turkey lower its 10% threshold.⁸⁴ Minority Rights International, a U.K.-based non-governmental organization, has blamed the 10% threshold for preventing minority parties from being elected to parliament.⁸⁵ A 2007 report from the group points out that pro-Kurdish parties have consistently received the highest percentage of votes in many areas in eastern and southeastern Turkey, but have failed to surpass the national 10% threshold.⁸⁶ The organization went on to suggest that Turkey reduce its threshold to 5%.⁸⁷

83.

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 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.

EUR. PARL. ASS., *State of Human Rights and Democracy in Europe*, Res. 1547, ¶ 58 (2007), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/ERES1547.htm>; see also EUR. PARL. ASS., *State of Human Rights and Democracy in Europe*, Recommendation 1791, ¶ 17.10 (2007), available at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/erec1791.htm> (calling on member states to “consider decreasing thresholds over 3% for parliamentary elections and to consider the balance between fair representation and effectiveness in parliament and government.”).

84. EUR. PARL. ASS., *Honouring of Obligations and Commitments by Turkey*, Res. 1380, ¶¶ 6, 23(ii) (2004), available at <http://assembly.coe.int/Documents/AdoptedText/ta04/ERES1380.htm>. Paragraph 6 of the resolution reads “requiring parties to win at least 10% of the votes cast nationally before they can be represented in parliament is excessive,” and paragraph 23(ii) urges Turkey to “amend the electoral code to lower the 10% threshold.” *Id.*; see also EUR. PARL. ASS., *Observation of the Parliamentary Elections in Turkey (22 July 2007)*, ¶ 59, Doc. No. 11367 (2007), available at <http://assembly.coe.int/documents/workingdocs/doc07/edoc11367.pdf> (“[T]he 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) [sic]. 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 taken by the Turkish authorities themselves.”).

85. MINORITY RIGHTS GROUP INTERNATIONAL, *A QUEST FOR EQUALITY: MINORITIES IN TURKEY 3* (2007).

86.

The 10 per cent national electoral threshold is a considerable obstacle to the representation of minorities in the national parliament. It is particularly detrimental for the pro-Kurdish parties, who have repeatedly failed to surpass the national threshold, despite having received the highest percentage of votes in Turkey’s eastern and south-eastern regions populated predominantly by the Kurds.

Id. at 25.

87. *Id.* at 35 (“The national threshold should be lowered to 5 per cent to conform with European standards and to ensure justice in representation.”). While many possible reforms to the threshold may exist, there is an insistence that European standards should guide reform. As European standards suggest no threshold should be higher than 5%, any reform should at least include a reduction in the threshold to this level. For a discussion of European standards, see EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), *REPORT: ON THRESHOLDS AND OTHER*

Despite the call for reform within Turkey and the echo of these concerns in Europe, the threshold remains unaltered. And despite previously voicing support for reducing the threshold, the AKP failed to address the issue when it submitted a sweeping constitutional reform package to Parliament.⁸⁸ Soon after the introduction of the reform package, Hakkı Suha Okay, the deputy chairman of the CHP, submitted a proposal that the threshold be lowered to 7%, hoping to pass the proposal so that it would be in effect for the 2011 elections.⁸⁹ However, the proposal was rejected by Prime Minister Recep Tayyip Erdoğan of the AKP, meaning the 10% threshold remained in effect for the 2011 elections.⁹⁰

IV. YUMAK AND SADAK V. TURKEY

Following the 2002 parliamentary elections, two candidates from Şırnak, both members of the People's Democratic Party (DEHAP), filed a complaint against the Turkish government in the European Court of Human Rights (ECHR).⁹¹ The applicants alleged that the imposition of the high electoral threshold "interfered with the free expression of the opinion of the people in the choice of the legislature."⁹² The applicants relied on Article 3 of Protocol Number 1 of the European Convention on Human Rights, which reads, "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."⁹³

FEATURES OF ELECTORAL SYSTEMS WHICH BAR PARTIES FROM ACCESS TO PARLIAMENT (II) 12 (2010), available at [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)007-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)007-e.pdf).

88. Liam Hardy, *Turkey Must Focus Itself on Constitutional Reform*, THE DAILY STAR, July 19, 2010 (LEXIS).

89. *Turkish Opposition Bids to Lower 'Unfair' Election Threshold*, EURACTIV, July 16, 2010, available at <http://www.euractiv.com/en/enlargement/turkish-opposition-bids-lower-unfair-election-threshold-news-496427>. Because changes to electoral law cannot be made in the year preceding elections, the proposal would have had to pass prior to July 22, 2010. *Id.*

90. See Göksel Bozkurt & İzgi Güngör, *Turkey's Terror Cannot Be Solved with Guns Alone*, CHP Chief Says, HÜRRIYET DAILY NEWS & ECON. REV., July 25, 2010, <http://www.hurriyetdailynews.com/n.php?n=terror-cannot-be-solved-with-guns-alone-chp-chief-says-2010-07-25>; see also *Main Opposition Leader: "We Proposed Re-Arrangement of Election Threshold"*, J. TURKISH WKLY., July 15, 2010, <http://www.turkishweekly.net/news/104559/main-opposition-leader-quot-we-proposed-re-arrangement-of-election-threshold-quot-.html>.

91. See *Yumak*, App. No. 10226/03, ¶¶ 1, 11, 14.

92. *Id.* ¶ 74.

93. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Mar. 20, 1952, 213 U.N.T.S. 221.

The applicants alleged that the 10% threshold deprived many voters the expression of their choice of political representation.⁹⁴ First, the applicants attacked the argument that the threshold serves the legitimate aim of ensuring governmental stability by pointing out that elections since the threshold had been established were no more likely to produce single-party governments.⁹⁵ Second, they argued that coalition governments are not necessarily less stable than single-party governments.⁹⁶ Finally, the applicants argued that a system which severely handicaps parties representing a particular group or region runs counter to the aims of democracy.⁹⁷

The government countered that the threshold was protected because it was the result of a legitimate governmental aim, arguing that the threshold was put in place to prevent “excessive fragmentation” of parliament and thus ensure political stability.⁹⁸ The government also argued that the loopholes in the law, which allowed independents to run without being subject to the threshold and allowed smaller parties to enter parliament by joining the list of larger parties, functioned as “existing correctives” to

94. *Yumak*, App. No. 10226/03, ¶ 77.

95. *Id.* ¶ 79 (“The applicants laid emphasis on the fact that two of the four elections in which proportional representation was used without recourse to the electoral threshold (those of 1965 and 1969) had produced single-party governments; the other two (those of 1973 and 1977) had led to coalition governments.”).

96. *Id.* ¶ 80 (“Moreover, though it was not excluded that lowering or abolishing the national electoral threshold would lead to a coalition government, such an outcome was not necessarily synonymous with governmental instability. Coalition governments were sometimes more stable than single-party governments.”).

97.

In the applicants’ submission, one of the main aims of a democracy based on a system of elected parties was to ensure that political parties whose electorate was implanted wholly or mainly in a particular region could function and be elected freely, without restrictions, and that the electors who voted for them should be represented on an equal footing.

Id. ¶ 89.

98.

They submitted that the 10% threshold was calculated to ensure the country’s political stability by preventing excessive fragmentation of the composition of parliament and to strengthen democracy and political parties by encouraging the latter to propose policies accepted more or less generally throughout the country. The threshold did not infringe the fundamental principles of democracy such as pluralism. On the contrary, facilitating the election of independent candidates by exempting them from the 10% threshold made it possible for pluralism to put down deep roots in society. In that connection, the Government emphasised that between 1961 and 1980, when Turkey did not apply any threshold, there had been twenty changes of government in nineteen years, whereas between 1983 and 2007, the period when the 10% threshold was in force, seven elections had produced three coalition governments and three single-party governments. These figures showed that the threshold had positive effects on governmental stability.

Id. ¶ 93.

prevent the effects of the 2002 elections from recurring.⁹⁹ This was the foundation of the government's main argument—that the 2007 elections proved the system worked.¹⁰⁰

Though not argued in *Yumak*, other commentators, both before and after this case, have supported higher thresholds as a means of discouraging votes for extremist parties. In a 1996 study, Robert Jackman and Karin Volpert analyzed the conditions that influence the success of extreme right parties, and found that increasing electoral thresholds dilutes support for these parties.¹⁰¹ This makes intuitive sense—extremist parties generally operate on the fringe of national politics, so making it more difficult to *elect* them would make voters less likely to even *vote* for them. In Turkey, the high threshold could be aimed at preventing the success of extreme-religious parties,¹⁰² extreme-right nationalist parties (such as the

99.

The two possibilities which had been put into practice in the 2007 elections—standing as an independent candidate or collaborating with another party with a view to being elected from its lists—were very concrete examples of the existing correctives. Recourse to these correctives in the latest elections had made it possible to offer 85% of all voters some representation in parliament. The Government submitted that if these options had been used in 2002, the results would have been similar.

Id. ¶ 98.

100.

As regards the results of the 2007 poll, given that 85% of all voters in the country were now represented in parliament, the Government considered that the principle of fair representation had been respected satisfactorily. Furthermore, in the smaller provinces, particularly those where most of the DTP's independent candidates were standing on 22 July 2007, the chances of being elected were higher than in larger provinces or constituencies. For example, to be elected in the first Istanbul constituency a candidate had to obtain about 111,750 votes, whereas in Hakkari province (south-eastern Turkey) 34,000 were needed. The distribution of seats among the provinces was manifestly more favourable to the smaller provinces, which made it possible to ensure that the principle of fair representation was respected.

Id. ¶ 101.

101. Matt Golder, Note, *Electoral Institutions, Unemployment and Extreme Right Parties: A Correction*, 33 BRIT. J. POL. SCI. 525, 527 (2003).

[Jackman and Volpert] also predict that higher electoral thresholds 'dampen the prospects for smaller parties of the extreme right'. This is because voters do not want to waste their vote. Their decision to include an interaction term between the effective threshold and the effective number of parties is based on Lijphart's conclusion that disproportionality and multi-partism are 'loosely inter-dependent'. They anticipate that 'the dampening effect of disproportionality on extreme right support will increase with multi-partism, while the positive effect of multi-partism diminishes with rising disproportionality'.

Id. at 527 (citations omitted).

102. Turkey has long been a secular republic, and secularists have deep-rooted fears of Islamists and political Islam. Secularists in Turkey fear that the AKP, the governing party since the 2002 elections, embraces an Islamist agenda. For further information about secularists, Islamists, and the AKP see Baran, *supra* note 80.

MHP),¹⁰³ or Kurdish parties allegedly tied to the PKK,¹⁰⁴ a separatist terrorist organization.¹⁰⁵ However, a recent study has found that, in some circumstances, higher thresholds have *increased* support levels for extreme right parties.¹⁰⁶ In Turkey, the types of parties the threshold might potentially seek to repress have all had some success in politics, especially the far-right MHP, which polled at 14% in the 2007 elections.¹⁰⁷ The argument that the threshold is necessary to prevent extremist parties from entering the legislature is also flawed because the constitution already has a mechanism for excluding parties that do not pass constitutional muster,¹⁰⁸ and it assumes an arbitrary level of popularity (in this case 10%) at which views become legitimate as opposed to extreme.¹⁰⁹

103.

“Our country is about to be broken into pieces and we need to prevent it,” said a textile worker, wearing a button-down black shirt in the style of Italian fascists that is typical of the attire worn by supporters of the Nationalist Action Party, known by initials in Turkish, MHP. “There are three things—my country, my flag, my prayer. I can’t let anyone touch any of them.”

Sabrina Tavernise, *Hard-liners Make Gains in Turkey Election*, N.Y. TIMES, July 23, 2007, <http://www.nytimes.com/2007/07/23/world/europe/23iht-turkey.5.6794446.html>.

104. *Turkish Top Court Bans Pro-Kurdish Party*, BBC NEWS, Dec. 11, 2009, <http://news.bbc.co.uk/2/hi/europe/8408903.stm> (“The 11 judges in Turkey’s Constitutional Court ruled that the DTP had become a ‘focal point of activities against the indivisible unity of the state, the country and the nation’, court president Hasim Kilic told reporters.”); *see also* Ayşe Karabat, *They Made It to Parliament but Tough Job Awaits DTP’s Women*, TODAY’S ZAMAN, July 25, 2007, <http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=117588> (“The DTP’s İstanbul deputy, Sebahat Tuncel, is under arrest and being tried on charges of being a member of the outlawed Kurdistan Workers’ Party (PKK)”); *EU Report: DTP Is Connected to PKK ‘In a Way,’* WORLD BULLETIN, Aug. 6, 2007, http://www.worldbulletin.net/news_detail.php?id=8226.

105. *Turkish Top Court Bans Pro-Kurdish Party*, *supra* note 104 (“The PKK is listed as a terrorist organisation by Turkey, the EU and the US”).

106.

Figure 1 shows that electoral thresholds have no effect on extreme right parties when the effective number of parties ranges between 2.3 and 3.1. About one third of the observations fall in this range. The figure also implies that increases in electoral thresholds help extreme right parties when there are few parties. This is at odds with Jackman and Volpert’s theoretical argument that raising electoral thresholds should decrease the electoral support of extreme right parties. If their argument were correct, then one would expect the conditional coefficient for electoral thresholds always to be negative. This is not the case here.

Golder, *supra* note 101, at 530 (footnote omitted).

107. Tavernise, *supra* note 103.

108. In Turkey, the Constitution allows the Courts to dissolve some political parties. “The decision to dissolve a political party permanently owing to activities violating the provisions of the fourth paragraph of Article 68 may be rendered only when the Constitutional Court determines that the party in question has become a centre for the execution of such activities.” Türkiye Cumhuriyeti Anayasası [Constitution] art. 69. para. 1 (Turk.), *translated in* World Constitutions Illustrated: Turkey (Jeffri J. Ruchti ed., Ministry of Justice of the Republic of Turk. trans., 2010) (HeinOnline). The standard for dissolving a political party is articulated by Article 68 of the Constitution.

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

The court ultimately ruled for the government, upholding the 10% threshold.¹¹⁰ The court emphasized that under Article 3 of Protocol Number 1, Contracting States are given a “wide margin of appreciation.”¹¹¹ The court found that the threshold served a legitimate aim¹¹² and was proportional to this aim.¹¹³ In finding proportionality, the court pointed to the two loopholes that the government had argued were corrective measures to prevent the recurrence of the 2002 results.¹¹⁴ The court also gave weight to a Turkish Constitutional Court decision that upheld *this* threshold while acknowledging that not *all* thresholds would be constitutional.¹¹⁵

Despite the court’s decision that the Turkish government was within its rights in maintaining the 10% threshold, the court’s language recommended the government reexamine the policy. The decision reads, “[T]he Court considers that in general a 10% electoral threshold appears

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.

Türkiye Cumhuriyeti Anayasası art. 68 para. 4. While this provision of the Constitution certainly should be scrutinized in and of itself, it does serve to nullify any concerns about possibility of allowing legislative access to less popular and harmfully extreme parties in the event that the threshold were lowered. This provision was recently used to ban the pro-Kurdish DTP. *Turkish Court Bans pro-Kurdish Party*, *supra* note 104.

109. If the threshold is used to weed out extreme views, theoretically any political philosophy whose proponents poll under the threshold would be characterized as extreme, and any philosophy whose proponents surpass the threshold would be considered legitimate. In a democracy, all viewpoints should be represented in the legislature to the extent that they exist in the society, and the result should be a compromise based on the relative political power of these competing philosophies.

110. *Yumak*, App. No. 10226/03, ¶¶ 147–48.

111. *Id.* ¶ 109(ii) (“The rights enshrined in Article 3 of Protocol No. 1 are not absolute. There is room for ‘implied limitations’, and Contracting States must be given a wide margin of appreciation in this sphere.”).

112. *Id.* ¶ 125 (“[T]he Court agrees with the Chamber’s finding that the interference in question had the legitimate aim of avoiding excessive and debilitating parliamentary fragmentation and thus of strengthening governmental stability.”).

113. *Id.* ¶¶ 132–46. To find proportionality, the Court compared the threshold to others in Europe, and decided that the threshold would be justified “so long as the chosen system provides for conditions which will ensure the ‘free expression of the opinion of the people in the choice of the legislature.’” *Id.* ¶ 132. The Court then analyzed the safeguards in the Turkish electoral system and found that these safeguards were enough that the right guaranteed by Article 3 of Protocol No. 1 would be protected. *Id.* ¶¶ 133–46.

114.

Consequently, the Court notes that the political parties affected by the high 10% threshold have managed in practice to develop strategies whereby they can attenuate some of its effects, even though such strategies also run counter to one of the threshold’s declared aims, which is to avoid parliamentary fragmentation.

Id. ¶ 143; *see also id.* ¶¶ 60, 125.

115. *Id.* ¶ 145. In its 1995 decision, the Constitutional Court upheld the national 10% threshold, but declared a 25% provincial threshold to be unconstitutional. *Id.* ¶¶ 42–43.

excessive,”¹¹⁶ and “it concurs with the organs of the Council of Europe, which have stressed the threshold’s exceptionally high level and have recommended that it be lowered.”¹¹⁷ Therefore, the court’s decision should be read narrowly, implicating the limited jurisdiction of the court when dealing with member country election laws, and should not be construed as approving such a high electoral threshold in general. Even while affirming that the imposition of the threshold was within the government’s rights, the court agreed with those who argued that the electoral system in Turkey should be reformed.¹¹⁸

V. ALTERNATIVES TO THE TEN PERCENT THRESHOLD

One possible alternative to the 10% threshold is to maintain an electoral threshold at a lower level. A common proposal is reducing the 10% threshold to 5%.¹¹⁹ This would put Turkey’s threshold in line with the European average.¹²⁰ Had a 5% threshold been in place during the 2002 elections, the result would have been a much more representative parliament. In that election, 36.5% of votes cast were for parties that obtained over 5% of the national vote, but still fell short of the 10% threshold.¹²¹ A 5% electoral threshold would thus have lowered the percentage of unrepresented votes from 45% to less than 10%. Even a more modest reform, lowering the threshold to 7%, would have allowed three more parties into parliament, and an additional 25% of the votes cast would have been represented.¹²²

Turkey could also opt to eliminate the threshold requirement entirely. Prior to the 1980 coup, parliament was elected by a proportional representation system without any national threshold.¹²³ The ratio of elections producing a single-party government as opposed to a coalition government was similar to the ratio under the current system.¹²⁴ It can be

116. *Id.* ¶ 147.

117. *Id.*

118. *Id.*

119. *See supra* notes 75, 76, and 81 and accompanying text.

120. *See supra* note 29 and accompanying text.

121. *See Yumak*, App. No. 10226/03, ¶ 18. The True Path Party (DYP) polled at 9.54%, the Nationalist Movement Party (MHP) polled at 8.36%, the Young Party (GP) polled at 7.25%, the People’s Democratic Party (DEHAP) polled at 6.22%, and the Motherland Party (ANAP) polled at 5.13%. These numbers add up to 36.5% of the national vote. *Id.*

122. *See id.* The DYP, MHP, and GP all polled above 7% (9.54%, 8.36%, and 7.25% respectively). Their share of the vote adds up to 25.15% of the national vote. *Id.*

123. *See supra* note 37 and accompanying text.

124. *See supra* notes 36 and 38 and accompanying text.

argued that the threshold has not met its primary purpose of helping produce more stable governments.

The AKP itself proposed a system whereby 450 of the deputies in parliament would be elected by the current process, and the remaining 100 deputies would be “Turkey Deputies” that would be elected on the basis of percentage of national vote for parties.¹²⁵ One percent nationally would equate to one seat in parliament, and these deputies would not be subject to the 10% threshold.¹²⁶ In essence, this would mean that the 10% threshold would apply to 450 deputies, and the remaining 100 would be subject only to a 1% national threshold. This solution, unfortunately, still keeps representation for parties polling under 10% at well below the level of representation that would adequately represent their percentage of the vote.¹²⁷ That is why the Turkey Deputy idea was suggested *in addition to* a reduction of the threshold to 5%.¹²⁸ There are concerns, however, that the Turkey Deputy system could serve to divide parliament in two, and do more harm than good.¹²⁹ In addition, the Constitutional Court may be a barrier to this system, as it has overturned a similar proposal in the past.¹³⁰

125.

Following Parliament Speaker Köksal Toptan’s suggestion last Friday of establishment of four parliamentary commissions to draft a new Political Parties Law, which included lowering Turkey’s much-criticized 10 percent election threshold, the government has suggested that 100 deputies in the 550-seat Turkish Parliament be elected as “Turkey deputies” to provide fair representation of parties.

Yavuz, *supra* note 74.

126.

According to the AK Party’s proposal—which was also included in the draft constitution prepared by a group of constitutional law experts led by Professor Ergun Özbudun last year—these 100 deputies will be elected according to the percentage of the vote parties receive. For example, a party that received 50 percent of the nationwide vote will have 50 Turkey deputies, while a party that received 1 percent vote will receive one Turkey deputy.

Id.

127. For example, a party polling at six percent would have six representatives out of a legislature of 550. This is a mere 1.09% of the legislature. If the threshold were just lowered to five percent that party would probably receive about 33 seats.

128.

AK Party officials [said] that even if the election threshold were reduced to 5 percent, a party that garners 4.9 percent of the nationwide vote would still not be able to have representation in Parliament. They said lowering the election threshold needs to be accompanied by the “Turkey deputy” system, which makes it possible for parties to be represented in Parliament even if they fail to pass the election threshold. The AK Party wants the new method of election to go into effect in the next general elections scheduled for July 22, 2011, and will reportedly try to convince opposition parties to back the proposal.

Yavuz, *supra* note 74.

129.

[O]pposition parties have taken different stances regarding the AK Party’s proposal. The CHP thinks this new deputy election system will divide Parliament into two while the MHP,

Another possible solution would be to allow regional or minority parties, the chief victims of the threshold, to either be exempted from the national threshold or be subject to a lowered threshold. This idea is similar to the Polish electoral system, where ethnic minority parties do not have to surpass the threshold.¹³¹ This would allow Turkey to ensure that only the most relevant national parties would be elected to the Grand National Assembly, while also allowing representation for important regional and minority interests.¹³² There could, however, be some confusion on what constitutes a “regional” or a “minority” party. In addition, this proposal may conflict with the Turkish Constitution, which states that “[m]embers of the Turkish Grand National Assembly represent, not merely their own constituencies or constituents, but the Nation as a whole.”¹³³ Though no such proposal has been put before the Turkish courts, it is possible that the courts could interpret this constitutional language as a prohibition of such an exception that would put regional or minority interests on equal footing with national interests.

VI. CONCLUSION

While there are many creative solutions which would increase the representativeness of Turkey’s electoral system, in this case the simplest solution is the best. Rather than a complicated system consisting of “Turkey Deputies” or separate requirements for minority parties, Turkey should simply lower its threshold to 5% for two primary reasons. First, this would bring Turkey in line with European norms and democratic principles.¹³⁴ Second, the purpose of proportional representation is to maximize the correlation between representation and the voters.¹³⁵ The

sharing the same concerns, says the election threshold should be lowered, either to 7 or 8 percent. The pro-Kurdish Democratic Society Party (DTP) says it is ready to support any attempt to lower the election threshold, adding that it could negotiate on the “Turkey deputy” system.

Id.

130. “This method of election of deputies was first proposed in 1995 by the late President Turgut Özal and former Prime Minister Tansu Çiller, who was also former leader of the True Path Party (DYP); however, the relevant amendments were cancelled by the Constitutional Court soon after they were implemented.” *Id.*

131. Zimbron, *supra* note 23, at 18. In general, Poland operates a five percent national threshold. This system allows representation for ethnic minority parties who are unable to surpass the five percent threshold, thereby encouraging the representation of minorities in the legislature.

132. A system like this would also allow parties to make a decision on whether to focus on issues of national importance or on issues which directly affect a certain region or minority.

133. Türkiye Cumhuriyeti Anayasası art. 80.

134. *See supra* note 29 and accompanying text.

135. *See supra* note 14 and accompanying text.

only “wasted” votes in parliamentary systems are those cast for parties failing to meet the electoral threshold.¹³⁶ Therefore, minimizing these votes by reducing the threshold is the most effective way to make government more representative. A threshold of 5% would also be low enough that important minority and regional parties could obtain representation without having to resort to legal loopholes.

In the end, this issue comes down to that voter in Şırnak who, along with most of his neighbors and peers, was represented by politicians who did not win his vote, along with the millions of voters who saw their legislature skewed by the effects of this extraordinarily high threshold. A party that 65% of voters did not vote for ended up with 66% of the seats in Turkey's parliament.¹³⁷ The voters of an EU candidate country expect more, and it is time for Turkey to deliver on the promise of fundamental rights contained in its constitution.¹³⁸ “Seçim barajı,” the Turkish phrase for the electoral threshold, literally means “election barrier.” It is aptly named, not only because the threshold serves as a barrier through which parties must pass to enter government, but also because the threshold serves as a barrier between the current Turkish democracy in the shadow of a military coup and a democracy that reformists believe Turkey deserves.

*Sinan Alkin**

136.

The number of ‘wasted votes’—in other words votes which do not go towards electing any candidates—is very small. Only votes for those candidates who fail to reach the threshold can be said to be wasted. This helps to reaffirm to voters that their participation will more than likely ‘make a difference.’

EUROPEAN CENTRE FOR PARLIAMENTARY RESEARCH & DOCUMENTATION, *supra* note 31.

137. *See supra* note 41 and accompanying text.

138. *See Türkiye Cumhuriyeti Anayasası art. 5* (“The fundamental aims and duties of the state are . . . to strive for the removal of political, social and economic obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of the social state governed by the rule of law.”).

* J.D. (2011), Washington University in St. Louis School of Law; B.A. (2008), University of Illinois at Urbana-Champaign. The author would like to thank all his family and friends in Turkey, who provide him inspiration on a daily basis, as well as the editorial board and staff of the *Washington University Global Studies Law Review*. The author would like to dedicate this Note to the memory of his grandfather, Alptekin Alkin, a man who took joy from lifting up those around him and inspired the best in everyone fortunate enough to meet him.