COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

GRAND CHAMBER

CASE OF YUMAK AND SADAK v. TURKEY

(Application no. 10226/03)

JUDGMENT

STRASBOURG

8 July 2008

In the case of Yumak and Sadak v. Turkey,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Boštjan M. Zupančič, *President*,
Peer Lorenzen,
Françoise Tulkens,
Josep Casadevall,
Rıza Türmen,
Corneliu Bîrsan,
Volodymyr Butkevych,
Nina Vajić,
Anatoly Kovler,
Vladimiro Zagrebelsky,
Elisabeth Steiner,
Javier Borrego Borrego,
Khanlar Hajiyev,
Renate Jaeger,
Ján Šikuta,
Isabelle Berro-Lefèvre,
Päivi Hirvelä, *judges*,

and Vincent Berger, *Jurisconsult*,

Having deliberated in private on 21 November 2007 and 4 June 2008,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 10226/03) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Turkish nationals, Mr Mehmet Yumak and Mr Resul Sadak ("the applicants"), on 1 March 2003.

2. The applicants, who had been granted legal aid, were represented by Mr T. Elçi, a lawyer practising in Diyarbakır. The Turkish Government ("the Government") were represented by their Agent.

3. The applicants alleged that the electoral threshold of 10% imposed nationally for parliamentary elections interfered with the free expression of the opinion of the people in the choice of the legislature. They relied on Article 3 of Protocol No. 1.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 9 May 2006 it was declared partly admissible by a Chamber of that Section composed of Jean-Paul Costa,

Ireneu Cabral Barreto, Rıza Türmen, Mindia Ugrekhelidze, Antonella Mularoni, Elisabet Fura-Sandström and Dragoljub Popović, judges, and Sally Dollé, Section Registrar.

5. A hearing on the merits (Rule 54 § 3) was held in public in the Human Rights Building, Strasbourg, on 5 September 2006.

6. In its judgment of 30 January 2007 ("the Chamber judgment"), the Chamber held by five votes to two that there had been no violation of Article 3 of Protocol No. 1. The joint dissenting opinion of Judges Ireneu Cabral Barreto and Antonella Mularoni was annexed to the judgment.

7. On 21 April 2007 the applicants asked for the case to be referred to the Grand Chamber by virtue of Article 43 of the Convention. On 9 July 2007 a panel of the Grand Chamber granted the request.

8. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

9. The applicants and the Government each filed observations on the merits. Observations were also received from Minority Rights Group International, a non-governmental organisation based in London, which the President had authorised to intervene in the written proceedings (Article 36 § 2 of the Convention and Rule 24).

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 21 November 2007 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr	M. ÖZMEN,	*Co-Agent*,
Mr	H. HÜNLER,	*Counsel*,
Ms	A. ÖZDEMIR,	
Ms	V. SIRMEN,	
Ms	Y. RENDA,	
Ms	Ö. GAZIALEM,	*Advisers*;

(b) *for the applicants*

Mr	T. ELÇI,	*Representative*,
Mr	T. FISHER,	
Ms	E. FRANK,	*Advisers*,
Mr	R. SADAK,	*Applicant*.

The Court heard addresses by Mr Elçi and Mr Özmen and replies from Mr Fisher and Mr Özmen to questions from several judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The applicants were born in 1962 and 1959 respectively and live in Şırnak. They stood for election in the parliamentary elections of 3 November 2002 as candidates of the People's Democratic Party (DEHAP) in the province of Şırnak, but neither of them was elected.

A. The parliamentary elections of 3 November 2002

12. Following the 1999 earthquakes, Turkey went through two serious economic crises in November 2000 and February 2001. There then followed a political crisis, due, firstly, to the state of health of the then Prime Minister and, secondly, to the numerous internal divisions within the governing coalition, a grouping of three political parties.

13. It was in that context that on 31 July 2002 the Grand National Assembly of Turkey ("the National Assembly") decided to bring forward the date of the next parliamentary elections to 3 November 2002.

14. In early September three left-wing political parties, the People's Democracy Party (HADEP), the Labour Party (EMEP) and the Democratic Socialist Party (SDP), decided to form a "Labour, Peace and Democracy Block" and to form a new political party, DEHAP. The applicants began their electoral campaign as the new party's leading candidates in the province of Şırnak.

15. Such pre-electoral alliances had already been formed in 1991: the Nationalist Labour Party (MÇP – the successor to and predecessor of the MHP) and the Reformist Democracy Party (IDP) had secured seats for their candidates by joining the list presented by the Welfare Party (RP); and the People's Labour Party (HEP – the predecessor of DEHAP) had won eighteen seats in Parliament by placing candidates on the list of the People's Social Democrat Party (SHP). In that way some parties not likely to obtain 10% of the national vote sometimes manage to obtain parliamentary representation: they join the list of a larger party and then, once elected, leave it and go their own way, either with independent MPs or under the banner of another party.

16. 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. The three seats allocated to Şırnak province were shared as follows: two seats for the AKP (*Adalet ve Kalkınma* – the Justice and Development Party, a party of the conservative right), which had polled 14.05% (14,460 votes), and one seat

for Mr Tatar, an independent candidate who had polled 9.69% (9,914 votes).

17. Of the eighteen parties which had taken part in the elections, only the AKP and the CHP (*Cumhuriyet Halk Partisi* – the People's Republican Party, a left-wing party) succeeded in passing the 10% threshold. With 34.26% of the votes cast, the AKP won 363 seats, 66% of those in the National Assembly. The CHP, which polled 19.4%, obtained 178 seats, or 33% of the total. Nine independent candidates were also elected.

18. However, not only DEHAP, which polled 6.22%, but many other political parties were unable to obtain seats in Parliament. These included the True Path Party (DYP, centre-right), the National Action Party (MHP, nationalist), the Young Party (GP, centrist) and the Motherland Party (ANAP, centre-right), which polled 9.54%, 8.36%, 7.25% and 5.13% of the votes cast respectively.

19. 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 multiparty system was first introduced. Moreover, for the first time since 1954, only two parties were represented in Parliament.

20. To explain the National Assembly's unrepresentativeness, some commentators have referred to the cumulative effect of a number of factors over and above the existence of a high 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.

21. After these elections the AKP, which had an absolute majority in Parliament, formed a government.

B. The parliamentary elections of 22 July 2007 (subsequent to the Chamber judgment)

22. In early May 2007 the Turkish Parliament decided to hold early parliamentary elections, choosing 22 July 2007 as the date. The decision followed a political crisis resulting from Parliament's inability to elect a new President of the Republic to follow on from Ahmet Necdet Sezer before the expiry of his single seven-year term of office, on 16 May 2007.

In the normal course of events, these elections should have been held on 4 November 2007.

23. Fourteen political parties took part in the elections, which were marked by two characteristics. Firstly, a strong mobilisation of the electorate was observed following the presidential crisis, since the participation rate rose to 84%. Secondly, political parties used two pre-electoral strategies to circumvent the national 10% threshold. 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 thirteen seats. The Party for a Democratic Society (DTP, pro-Kurdish, left-leaning) presented its candidates as independents using the slogan "A thousand hopes"; it also supported certain left-wing Turkish candidates. This movement was backed by other small left-wing groups such as the EMEP, the SDP and the ÖDP (the Liberty and Solidarity Party, socialist). More than sixty independent candidates stood for election in about forty provincial constituencies.

24. In the elections the AKP, the CHP and the MHP managed to get over the 10% threshold. With 46.58% of the votes cast, the AKP won 341 seats, 62% of the total. The CHP, with 20.88% of the votes, won 112 seats, 20.36% of the total; however, the thirteen MPs mentioned in paragraph 23 above subsequently resigned from the CHP and went back to the DSP, their original party. The MHP, which polled 14.27% of the votes, won seventy-one seats, or 12.9% of the total.

25. The strong showing by independent candidates was one of the main features of the elections of 22 July 2007. There were none in the National Assembly in 1980 but 1999 saw them return, when there were three. In 2002 nine independent MPs were elected from a national total of 260 independent candidates. In the elections of 22 July 2007, twenty-seven 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. The DTP, which had twenty MPs, the minimum number to be able to form a parliamentary group, was thus able to do so. 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).

26. A government was formed by the AKP, which again secured an absolute majority in Parliament.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. The constitutional and legislative context

1. The Constitution

27. Article 67 of the Constitution, as amended on 23 July 1995, provides:

> "Citizens shall have the right to vote, to stand for election, to engage in political activities independently or as members of a political party and to take part in referenda in accordance with the rules laid down by law.
>
> Elections and referenda shall be conducted under the administration and supervision of the judiciary and in accordance with the principles of free, equal, secret and universal suffrage, in a single round of voting, the votes cast being counted and recorded in public. Nevertheless, the law shall make suitable provision for Turkish citizens resident abroad to be able to exercise their right to vote.
>
> Every Turkish citizen of at least eighteen years of age shall have the right to vote and to take part in referenda.
>
> Exercise of these rights shall be regulated by law.
>
> Serving members of the armed forces, officer cadets and persons serving prison sentences, other than those convicted of an unintentional offence, shall be deprived of the right to vote.
>
> The National Electoral Commission shall determine the measures to be taken to guarantee the security of the operations to count and record the votes in prisons and remand centres, and those operations shall be conducted in the presence of the competent judge, who shall take charge of and supervise them.
>
> Electoral laws must reconcile fair representation with governmental stability.
>
> Amendments to electoral laws shall not be applicable to elections taking place during the year following their entry into force."

28. Article 80 of the Constitution provides:

> "Members of the Grand National Assembly of Turkey shall represent the whole nation and not the regions or persons which have elected them."

29. Under the terms of Article 95 of the Constitution and section 22 of Law no. 2820 on political parties, a political party which has at least twenty MPs may form a parliamentary group.

2. The electoral system

30. Law no. 2839 on the election of members of the National Assembly, published in the Official Gazette on 13 June 1983, lays down the rules of the system for parliamentary elections.

31. Turkey's Grand National Assembly is a single-chamber parliament which currently has 550 members elected to serve for five years. The

elections are held in the constituencies formed by the eighty-one provinces in a single round of voting. They take place throughout the national territory, on the same day; suffrage is free, equal, universal and secret. Counting the votes and recording the results is done in public. Each province is represented in Parliament by at least one MP. The other seats are allocated in proportion with the local population. Provinces which have between one and eighteen MPs form a single constituency; those with between nineteen and thirty-five MPs are divided into two constituencies; while Istanbul, which has more than thirty-five seats, is divided into three constituencies.

32. Section 16 of Law no. 2839 provides:

> "... [P]olitical parties may not present joint lists ..."

33. Section 33 of Law no. 2839 (as amended on 23 May 1987) provides:

> "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 ..."

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.

35. Sections 21(2) and 41(1) of Law no. 2839 read as follows:

Section 21(2)

> "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."

Section 41(1)

> "... if, 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."

36. Section 36 of Law no. 2820 on political parties (published in the Official Gazette of 24 April 1983) provides:

> "In order to be able to take part in an election, a political party must have a seat in at least half the provinces and have held its general meeting at least six months before polling day, or must have a group within the Grand National Assembly."

37. Section 81 of Law no. 2820 provides:

> "Political parties are not entitled to assert that there exist within the territory of the Republic of Turkey minorities based on a race, religion, sect, culture or language."

38. 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 for only a political party when using the ballot boxes placed at border crossing-points or large airports. Similarly, whereas political parties have time allocated on television and radio for electioneering broadcasts, independent candidates do not.

3. Constitutional case-law

39. The Constitutional Court's case-law on the compatibility of electoral thresholds with the principle of a democratic State has been contradictory.

40. At first, in a judgment delivered on 6 May 1968 (E. 1968/15, K. 1968/13), the Constitutional Court held to be contrary to the principle of a democratic State the "ordinary threshold" introduced by Parliament in order to correct the effects of the proportional representation system. This is a threshold which varies in accordance with the number of seats to be filled in each parliamentary constituency. The threshold applied in a constituency is calculated by dividing the number of votes cast by the number of seats to be filled, and seats are awarded only to candidates who pass it. The Constitutional Court held in particular that such a threshold, which could enable the representatives of a minority of electors to form a government, was likely to hinder the representation of all currents of thought.

41. Later, after the adoption of the 1982 Constitution, the Constitutional Court gave its views on the question of electoral systems in a judgment delivered on 1 March 1984 (E. 1984/1, 1984/2), ruling as follows:

> "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 legislature. 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 the free expression of the people, or subject political life to the hegemony of a single party, or destroy the multiparty system, Parliament can put in place one of the existing electoral systems."

42. In a judgment of 18 November 1995 (E. 1995/54, K. 1995/59), the Constitutional Court had the opportunity to rule on the constitutionality of section 34/A of Law no. 2839. That section, which referred to section 33 of the same Law, also imposed the electoral threshold of 10% for the allocation of the seats for Assembly members elected in the "national constituency". The Constitutional Court declared the provisions establishing

the national constituency null and void, but held that the 10% national threshold could be regarded as compatible with Article 67 of the Constitution.

The relevant passages of the judgment read as follows:

> "... [T]he Constitution defines the Turkish State as a Republic ... 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. ... [In order to] choose the system the methods of which are most conducive to the expression of the collective will and the taking of collective decisions in the legislature, ... enacting the appropriate legislation in the light of the country's specific circumstances and the requirements of the Constitution, it is necessary to opt for [the system] which is most compatible with the Constitution or to reject any system incompatible with it.
>
> The impact of a representative democracy is visible in various fields. 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] the legislature so as to guarantee the strength of the executive power. The 'governmental stability' which it is sought to ensure through the threshold (described as a 'hurdle'), just like 'fair representation' ..., is protected by the Constitution. 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 ...
>
> 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 ..."

Three judges of the Constitutional Court out of eleven disagreed with the arguments of the majority, considering that the 10% national threshold was incompatible with Article 67 of the Constitution.

43. In the same judgment, however, the Constitutional Court declared null and void an electoral threshold of 25% for the allocation of seats within

provinces (provincial threshold). Holding that such a threshold was inconsistent with the principle of fair representation, it observed:

> "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'."

4. Brief account of past parliamentary elections

44. The elections of 1950, 1954 and 1957 – in which the majority representation system was used – were unable to ensure an institutional balance between the majority in Parliament and the opposition. This imbalance was one of the main reasons for the 1960 *coup d'état*. Following the intervention of the armed forces, Parliament adopted proportional representation, using the D'Hondt method, to strengthen pluralism and the political system. As a result, the elections in 1965 and 1969 produced stable majorities in the National Assembly while enabling small parties to be represented. However, in 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.

45. Following the military regime between 1980 and 1983, Law no. 2839 on the election of members of the National Assembly, enacted on 13 June 1983, re-established proportional representation, with two electoral thresholds. To the 10% national threshold was added a provincial threshold (the number of electors divided by the number of seats to be filled in each constituency); in 1995 the Constitutional Court declared the provincial threshold null and void. In the 1983 parliamentary elections the Motherland Party (ANAP) obtained an absolute majority in Parliament.

46. The parliamentary elections of 29 November 1987 likewise enabled the ANAP, with 36.31% of the vote, to form a stable parliamentary majority. Two other parties also won seats. In the elections of 20 October 1991, five parties gained seats in Parliament. This result was due in particular to the fact that three small political parties (MÇP, IDP and HEP) had taken part in the elections under the banner of other political parties with the aim of circumventing section 16 of Law no. 2839, which makes it illegal to form joint lists before elections. The government was based on a coalition of two parties. In those elections the eighteen candidates of the HEP (People's Labour Party, pro-Kurdish) were elected to Parliament on the list of the (social-democratic) SHP; they later resigned from the SHP to join the ranks of their own party, the HEP.

47. In the general election of 24 December 1995, five parties gained seats in Parliament. However, as none of them had a parliamentary majority, a coalition was formed.

48. The 1999 parliamentary elections again resulted in no party having a parliamentary majority. Five political parties won seats in the National Assembly. A coalition of three parties formed a government.

49. Before the election on 3 November 2002, the year which had seen the highest proportion of votes going to parties not ultimately represented in Parliament was 1987, with 19.4% of the votes cast. In 1991, owing to the participation of two pre-electoral coalitions, one between the RP, the MÇP and the IDP and the other between the SHP and the HEP, that proportion was brought down to 0.5%. After the elections on 22 July 2007 it was 13.1%.

50. As indicated above (see paragraphs 12-21), the elections of 3 November 2002 enabled the AKP to form a stable government which lasted until 22 July 2007, notwithstanding the fact that 45.3% of the votes – approximately 14,500,000 votes – were not reflected in the composition of Parliament.

B. Relevant Council of Europe documents

51. The Council of Europe has not laid down binding rules on the question of electoral thresholds.

1. Documents of the Parliamentary Assembly of the Council of Europe

52. The relevant part of Resolution 1547 (2007) on the state of human rights and democracy in Europe, adopted by the Assembly on 18 April 2007, reads as follows:

> "58. 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."

53. In its Recommendation 1791 (2007) on the state of human rights and democracy in Europe, adopted on 18 April 2007, the Assembly recommended that the Committee of Ministers take measures to remedy the deficiencies noted in the above-mentioned Resolution. With regard to electoral thresholds, it recommended that the Committee of Ministers urge member States to:

> "17.10 consider decreasing thresholds over 3% for parliamentary elections and ... consider the balance between fair representation and effectiveness in Parliament and government."

2. Documents of the European Commission for Democracy through Law (the Venice Commission)

54. The Code of good practice in electoral matters, adopted by the Venice Commission in 2002, emphatically states: "The five principles underlying Europe's electoral heritage are universal, equal, free, secret and direct suffrage." "Within the respect of" those principles, "any electoral system may be chosen".

55. The relevant part of the Venice Commission's Report on electoral law and electoral administration in Europe, of 12 June 2006, reads as follows:

> "[T]he effects of one particular electoral system can be different from country to country, [and] we must appreciate that electoral systems can pursue different, sometimes even antagonistic, political aims. One electoral system might concentrate more on a fair representation of the parties in Parliament, while another one might aim to avoid a fragmentation of the party system and encourage the formation of a governing majority of one party in Parliament. One electoral system encourages a close relationship between voters and 'their' constituency representatives, while another makes it easy for the parties to specifically introduce women, minorities or specialists into Parliament by way of closed party lists. In some countries, complicated electoral systems are accepted in order to combine several political aims. In other countries, it is seen as a priority that the electoral system be not too difficult for the electorate and the administration to understand and operate. The appropriateness of an electoral system is determined according to whether it will do justice, bearing in mind the local conditions and problems. In particular, transparency of the elaboration of the list should be ensured. Thus, the electoral system and proposals to reform should be assessed in each individual case."

56. In its Report on electoral rules and affirmative action for national minorities' participation in decision-making process in European countries, of 15 March 2005, the Venice Commission, having analysed the practices of certain member States, recommended five specific measures to promote the representation of minorities. Two of the measures concerned have a bearing on the question of electoral thresholds:

> "...
>
> d. Electoral thresholds should not affect the chances of national minorities to be represented.
>
> e. Electoral districts (their number, the size and form, the magnitude) may be designed with the purpose to enhance the minorities' participation in the decision-making processes."

3. Documents specifically relating to elections in Turkey

(a) Report of the *ad hoc* Committee of the Parliamentary Assembly of the Council of Europe

57. The Government referred to the report of the *ad hoc* Committee for the Observation of Parliamentary Elections in Turkey (3 November 2002),

produced on 20 December 2002. The relevant parts of the report read as follows:

> "As widely reported by the media, two parties only out of eighteen found their way into the new TBMM [the Grand National Assembly of Turkey]: the AKP (Justice and Development [Party]) and CHP (Republican People's Party), leaving out all other parties, which had been represented so far in the Parliament because they could not meet the 10% threshold. The party in government until the elections received only 1% of the votes. Economic and corruption problems were determining in the elections.
>
> A clear and absolute majority has emerged with 362 seats for the AKP, 179 seats for the opposition and 9 seats for independent members. (These independent members are elected in small towns where they have a good reputation.) It should be recalled that AKP had 59 seats in the previous Parliament, and the CHP 3 (1999 elections).
>
> This situation might create probably greater stability in the country by avoiding complicated and unstable coalitions. On Monday 4 November 2002 the Turkish Stock Exchange went up by 6.1%.
>
> However, it also means that approximately 44% of the voters have no representation in the Parliament.
>
> The results must thus be considered as a clear protest vote against the Establishment as a whole, since none of the three parties in the old governing coalition got enough votes for a single seat!"

(b) The Parliamentary Assembly's Resolution 1380 (2004)

58. Paragraphs 6 and 23 of Resolution 1380 (2004) on the honouring of obligations and commitments by Turkey, adopted by the Parliamentary Assembly of the Council of Europe on 22 June 2004, are worded as follows:

> "6. With regard to pluralist democracy, the Assembly recognises that Turkey is a functioning democracy with a multiparty system, free elections and separation of powers. The frequency with which political parties are dissolved is nevertheless a real source of concern and the Assembly hopes that in future the constitutional changes of October 2001 and those introduced by the March 2002 legislation on political parties will limit the use of such an extreme measure as dissolution. The Assembly also considers that requiring parties to win at least 10% of the votes cast nationally before they can be represented in Parliament is excessive and that the voting arrangements for Turkish citizens living abroad should be changed.
>
> ...
>
> 23. The Assembly therefore invites Turkey, as part of its authorities' current reform process, to:
>
> ...
>
> ii. amend the electoral code to lower the 10% threshold and enable Turkish citizens living abroad to vote without having to present themselves at the frontier;
>
> ..."

(c) Report on observation of the parliamentary elections in Turkey (22 July 2007)

59. The relevant parts of the Report on observation of the parliamentary elections in Turkey, produced by an *ad hoc* Committee of the Parliamentary Assembly of the Council of Europe, read as follows:

> "XII. Conclusions and recommendations
>
> 55. The parliamentary elections in Turkey, on 22 July 2007, were generally in compliance with Turkey's Council of Europe commitments and European standards for free elections.
>
> 56. Overwhelmingly, the voting was well organised and conducted in an orderly and professional fashion, which testifies to a long-standing tradition of democratic elections in Turkey.
>
> 57. The high voter turnout shows that confidence in the democratic process exists in Turkey.
>
> 58. Electoral administrators at all levels dispatched their duties effectively and in good faith.
>
> 59. 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% 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.
>
> 60. The Turkish authorities may wish to consider seizing the Venice Commission on this issue, as well as on simplifying electoral legislation."

60. Moreover, in reply to a question from a parliamentarian following his address to the Parliamentary Assembly on 3 October 2007, the President of the Republic of Turkey said that the 10% threshold met a real need, but might in due course be dispensed with (see the verbatim record of the sitting on 3 October 2007). The relevant parts of his reply read as follows (Registry translation of summary in French in the verbatim record of the sitting on 3 October 2007):

> "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."

C. Comparative law

61. Although there is no uniform classification of types of ballot and electoral systems, it is usual to distinguish three main types: majority vote

systems, proportional systems and mixed systems. 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. There are other similar cases, in France for instance, where there is a majority vote system spread over two rounds of voting. At the opposite extreme, the aim of the proportional representation system is to ensure that the votes cast are reflected in a proportional number of seats. Proportional representation is generally considered to be the fairest system because it tends to reflect more closely the various political forces. However, the 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.

62. 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).

63. 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". However, the role played by thresholds varies in accordance with the level at which they are set and the party system in each country. 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.

64. Analysis of the electoral thresholds adopted in the member States which have proportional representation shows that only four States have opted for high thresholds: Turkey has the highest, at 10%; Liechtenstein has an 8% threshold; and the Russian Federation and Georgia a 7% one. A third of the States impose a 5% threshold and thirteen of them have chosen a lower figure. The other member States (seven in number) do not use thresholds. Moreover, in several systems the thresholds are applied only to a restricted number of seats (in Norway and Iceland, for example). Thresholds

for parties and thresholds for coalitions may be set at different levels. In the Czech Republic, for example, the threshold for one party is 5%, whereas in the case of a coalition it is raised by 5% for each of the constituent parties. In Poland, the threshold for coalitions is 8% whatever the number of constituent parties. There are similar variations among the thresholds for independent candidates: in Moldova, for example, the relevant threshold is 3%.

THE LAW

I. SCOPE OF THE GRAND CHAMBER'S JURISDICTION

65. The Court observes that in the Chamber judgment (paragraph 40) the complaint was formulated as follows:

> "The applicants alleged that the imposition of an electoral threshold of 10% in parliamentary elections interfered with the free expression of the opinion of the people in the choice of the legislature. ..."

66. During the proceedings before the Chamber the applicants, relying mainly on the results of the elections held on 3 November 2002, complained of the 10% threshold. To that end, they carried out a comprehensive review of elections in Turkey since 1946, the year in which a multiparty system was introduced under the Republic. Later, in their referral request submitted on 20 April 2007, criticising in particular the analysis of the Turkish electoral system made by the Chamber in its judgment, they submitted that that judgment gave the Contracting Party an extremely wide margin of appreciation as regards the introduction and operation of the electoral system.

67. After 9 July 2007, the date on which a panel of five judges allowed the applicants' request for the case to be referred to the Grand Chamber, early parliamentary elections took place in Turkey.

68. Whereas they had commented at some length on the elections of 22 July 2007 in the observations they submitted to the Grand Chamber on 7 September 2007, the applicants' representatives made it clear at the hearing on 21 November 2007 that the application had been lodged in order to secure a ruling that there had been a violation resulting from the elections of 3 November 2002, not those of 22 July 2007.

69. The Government argued at the hearing that, in so far as the applicants' complaints related to Turkey's constitutional structure, they should be considered to be an *actio popularis*, and maintained that the general results of 22 July 2007 had confirmed the Chamber's findings in its judgment of 30 January 2007.

70. The Court must therefore determine the scope of the examination of the case it is required to make, deciding in particular whether it can restrict itself to studying the results of the elections on 3 November 2002, without taking into account events after the Chamber judgment.

71. The Court reiterates that, according to its settled case-law, the "case" referred to the Grand Chamber necessarily embraces all aspects of the application previously examined by the Chamber in its judgment, there being no basis for a merely partial referral of the case (see *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 66, ECHR 2004-XI, and *K. and T. v. Finland* [GC], no. 25702/94, §§ 140-41, ECHR 2001-VII).

72. The "case" referred to the Grand Chamber is the application as it has been declared admissible. This does not mean, however, that the Grand Chamber may not also examine, where appropriate, issues relating to the admissibility of the application, just as is possible in normal Chamber proceedings, for example by virtue of Article 35 *in fine* of the Convention (which empowers the Court to "reject any application which it considers inadmissible ... at any stage of the proceedings"), or where such issues have been joined to the merits or where they are otherwise relevant at the merits stage (see *K. and T. v. Finland*, cited above, § 141).

73. The Court observes at the outset that it does not have jurisdiction to examine a domestic electoral law in the abstract, and that it is primarily for the national authorities, and in particular the courts, which are specially qualified for the task, to construe and apply domestic law (see, for example, *Gitonas and Others v. Greece*, 1 July 1997, § 44, *Reports of Judgments and Decisions* 1997-IV, and *Briķe v. Latvia* (dec.), no. 47135/99, 29 June 2000). However, in the present case, the applicants' case does not amount to an *actio popularis*. In the elections of 3 November 2002 they were affected directly and immediately by the impugned threshold (see, *mutatis mutandis*, *Moureaux and Others v. Belgium*, no. 9267/81, Commission decision of 12 July 1983, Decisions and Reports (DR) 33, p. 97). Since the Chamber gave judgment before the elections of 22 July 2007, it mainly took into account the results of the elections of 3 November 2002 and the context in Turkey at that time. The Court will now examine the case in the light of the results of the parliamentary elections of 3 November 2002, but without neglecting the elections of 22 July 2007, in which the applicants were admittedly not candidates, but which nevertheless have some bearing on the assessment of the effects of the electoral threshold complained of by the applicants.

II. ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1

74. The applicants alleged that the imposition of an electoral threshold of 10% in parliamentary elections interfered with the free expression of the

opinion of the people in the choice of the legislature. They relied on Article 3 of Protocol No. 1, which provides:

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

A. The Chamber judgment

75. The Chamber found that the aim of the 10% electoral threshold imposed in parliamentary elections was to strengthen governmental stability by preventing excessive and debilitating parliamentary fragmentation. It could also be considered necessary to achieve that aim and proportionate. It accordingly concluded that "Turkey [had not] overstepped its wide margin of appreciation with regard to Article 3 of Protocol No. 1, notwithstanding the high level of the threshold complained of" (see paragraphs 66-79 of the Chamber judgment).

B. The parties' submissions

1. The applicants

76. The applicants contested the Chamber's considerations, arguing that it had made a restrictive and cursory interpretation of the right to free elections.

77. In the first place, the applicants considered that, as the 10% threshold prevented a large part of the population from expressing its choice regarding its parliamentary representation, it quite evidently constituted a serious interference with the right to participation and served no legitimate aim for the purposes of Article 3 of Protocol No. 1.

78. In that connection, the applicants challenged the argument that the measure complained of was intended to strengthen parliamentary stability. They asserted that the military authorities, who had taken power in the 1980 *coup d'état*, placed the full blame for the social and political agitation in Turkey between 1970 and 1980, and the governmental instability it had led to, on the electoral system then in force. In their opinion it was artificial to establish a causal link between the threshold and the political situation in Turkey in the 1970s, as assessed in the Chamber's judgment.

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.

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.

81. The applicants contended that it was difficult to defend the view that the exceptional measure in question strengthened representative democracy. The Council of Europe had been created to strengthen democracy and democratic values. Although the Contracting States certainly had a broad margin of appreciation in the matter, they could not rely on that latitude – without taking into account the right to fair representation – to an unlimited or disproportionate extent, namely by excluding from the political life of the country a particular discrete segment of the population.

82. Such a high national threshold made representation very unfair and led to a crisis of legitimacy for the government, since Parliament ought to be the free tribune of any democracy. Clearly, a Parliament whose composition reflected only about 55% of the votes cast was not capable of supplying the representative legitimacy on which any democracy is based. In that connection, the applicants pointed out that in the parliamentary elections of 1987, 1991, 1995 and 1999 the proportion of the votes cast in favour of parties not represented in Parliament had been, respectively, 19.4% (about 4,500,000 votes), 0.5% (about 140,000 votes), 14% (about 4,000,000 votes) and 18.3% (about 6,000,000 votes). The results of the 2002 election had led to a "crisis of representation", since 45.3% of the votes – that is, about 14,500,000 votes – had not been taken into consideration and were not reflected in the composition of Parliament.

83. The applicants submitted that the Court should take account of the following factors: firstly, the crucial role of pluralism as a pillar of democracy and the consequent importance of political parties, particularly those which act to ensure that a particular region of a country can make its voice heard in Parliament; secondly, the fact that the electoral threshold used in Turkey was the highest among the member States of the Council of Europe and, since there were no corrective measures, the fact that it hindered the expression of certain social groups; thirdly, and lastly, the special situation in Turkey and the effects of the threshold in practice, namely the impossibility for any party based in one region to be represented in the National Assembly. If those factors were not taken into consideration, the right to free elections would be left to the arbitrary interpretation of individual States, which could use that fact to plead justification for thresholds higher than 10%.

84. The applicants also argued that the 10% threshold was not in conformity with the common European standard. The national threshold adopted in Turkey was the highest in Europe, or possibly in the world. If that threshold had been applied in other countries, a number of well-established parties would no longer participate in government; that would apply, for example, to the Free Democrats in Germany, the centrist and

Christian parties in Scandinavia, the Greens in the Netherlands and the centre-left and the right in Italy. In most countries which had introduced a threshold, the level chosen was 5% (in 2001 the average was 4.25% in central and eastern Europe). Even countries which were experiencing serious problems regarding integration and which needed to stabilise party representation, in view of the existence of independent or very small parties, had not seen fit to impose thresholds twice as high. The applicants pointed out, by way of example, that in the 2002 elections an electoral threshold of 5% would have enabled eight parties (out of the eighteen which put up candidates), including DEHAP, to win seats in the Turkish Parliament, instead of just the two main national parties.

85. The argument that the applicants or other members of their party could have participated in the elections as independent candidates – one of the Government's main arguments and one of the grounds on which the Chamber had based its decision – disregarded the role of parties in the context of the political system. Neither independent candidatures nor the formation of alliances could take the place of independent political parties, since these played an essential role as fundamental elements of democracy. It was obvious that candidates who stood in their own name and were able to count only on their own limited personal and financial resources could not compete with parties which had considerable logistical and financial resources.

86. Moreover, in Turkey independent candidates were subject to a number of unfavourable restrictions and conditions. For example, the names of independent candidates were not printed on the ballot slips supplied to border areas, which meant that persons entering Turkish territory for the precise purpose of taking part in an election in a frontier polling station could not vote for independent candidates, a fact which considerably reduced such candidates' chances of being elected. The impossibility for independent candidates to make electoral broadcasts, although all political parties had an express entitlement to air time on television and radio, was also a serious disadvantage (see paragraph 38 above). Lastly, the right of electors to choose, freely and equally, to be represented by parties – rather than independents, for example – and the right of all parties to compete on an equal footing were essential principles for the purposes of Article 3 of Protocol No. 1.

87. As regards the possibility of forming a coalition with other political parties with the aim of getting across the 10% threshold, the applicants pointed out that section 16 of Law no. 2839 prevented parties from presenting joint lists and from participating in parliamentary elections by forming perfectly legal coalitions. Further, they submitted that the political climate, marked by the rising strength of nationalism, made it impossible to form such alliances.

88. The applicants further explained that under section 36 of the Law on political parties a political party could not put up candidates for election if it was not implanted in the country (see paragraph 36 above). Moreover, under the same law, it was forbidden to create a party based on a particular ethnic group or region (see paragraph 37 above). That rule reflected the prevailing official ideology in Turkey. The absolute rejection of regional parties manifestly constituted a serious infringement of the principle previously stated by the Court that there is "no democracy without pluralism". Account needed to be taken of the vast, multicultural nature of Turkish society, and the applicants and their party were bound to be penalised because, even if they sought support throughout the country by defending national policies, it was mainly a particular segment of the population which supported them.

89. 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. If that principle was applied, it was obvious that the impossibility for DEHAP to enter Parliament when it had obtained more than 45% (about 2,000,000) of the votes cast in south-eastern Turkey significantly distorted representation. In addition, the obligation to operate at national level was to be seen in the context of a political culture which systematically ignored debate about "the Kurdish question", manifestly blocking the free expression of the will of a large proportion of the people of south-eastern Turkey, in breach of the Court's settled case-law. Accordingly, the free expression of the will of the majority of the electorate in the region concerned had been deliberately hindered.

90. More concretely, the applicants submitted that on account of the application of the electoral threshold in the 2002 parliamentary elections DEHAP, which was known for its interest in and commitment to the Kurdish question, had not obtained a single seat in Parliament although it had achieved very high scores in a number of constituencies. In their opinion it could not be considered that the parliamentary elections of 22 July 2007 had solved the problem, even though the DTP, the successor to DEHAP, had presented independent candidates. The fact that political parties supported by Kurds had presented independent candidates was in itself a handicap.

91. Consequently, in the applicants' submission, the fact that they were not elected to the National Assembly on account of the national 10% threshold when in the parliamentary elections of 3 November 2002 the DEHAP list – to which they belonged – had obtained 45.95% of the votes cast in the constituency of Şırnak was incompatible with Article 3 of Protocol No. 1. They argued that the excessively high threshold was in

conflict with the object and purpose of the provision concerned, which was to guarantee the right to the free expression of the opinion of the people in the choice of the legislature. By depriving a whole segment of the population of the possibility of one day being represented in Parliament by a party which voiced its opinions, the national threshold removed the very essence of that right. Such a serious and systematic interference with the rights of a whole group, unique as it was among all European electoral systems, could not be justified by the margin of appreciation left to the State and therefore manifestly constituted a violation of the Convention.

2. The Government

92. The Government asked the Grand Chamber to endorse the Chamber's finding that there had been no violation of Article 3 of Protocol No. 1.

93. 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.

94. The Government further submitted that the refusal to propose policies accepted more or less generally throughout the country and cutting oneself off from the rest of the country by representing only one region or a particular constituency could not be considered compatible with the unitary structure of the State. On that point, Turkey was not alone. The *Mathieu-Mohin and Clerfayt* judgment showed that even in Belgium, where there were different language groups, MPs and senators represented the Belgian nation. Similarly, Article 80 of the Turkish Constitution provided that MPs represented society as a whole.

95. The Government considered that the threshold was a proportionate measure which mainly fell within its margin of appreciation. They argued in particular that, as had been confirmed by the elections on 22 July 2007, the applicants could have been elected on 3 November 2002 if they had stood as independents or if DEHAP had formed an electoral coalition with one or more of the large parties.

96. In that connection, they submitted that the results of the parliamentary elections of 22 July 2007 corroborated the Chamber's findings in its judgment of 30 January 2007. The members of the DTP – the party which, according to the applicants, had taken the place of the one they were members of – had stood as independent candidates in the 2007 elections and had been elected easily because as independents they were not subject to the national threshold. A few days after their election they had rejoined the DTP and formed a parliamentary group (see paragraph 25 above). Having decided that it could not cross the threshold in the 2007 elections, the DTP had urged its members to stand as independent candidates and had managed to obtain twenty seats in Parliament. It was important to note that the total number of votes obtained by the DTP's independent candidates represented only 2.04% of the national vote, which meant that the DTP would not even have been able to reach the 5% threshold which, according to the applicants, was the expression of a "common democratic political tradition" among European countries. If the threshold had been lower – say 2% – the DTP, with 2.04% of the votes cast, would have won only one seat, or two at the most. By winning twenty seats, or 3.6% of the total number of seats in the Grand National Assembly, the DTP had managed to raise its representation in Parliament to the maximum.

97. Moreover, political parties could collaborate under the banner of a large party, even though forming joint lists was prohibited by section 16 of Law no. 2839 on the election of members of the National Assembly. The DSP, for instance, a party which had been a member of the ruling coalition from 1999 to 2002, had been unable to get over the 10% threshold in the 2002 elections. Before the 2007 elections, therefore, it had collaborated with the CHP, its rival, managing in that way to obtain thirteen seats on that party's lists. The MPs elected as a result then left the CHP and rejoined their first party, the DSP. In the 1991 elections the HEP, which was the first avatar of the group which ultimately became the applicants' party, had also managed to get some of its candidates elected from the lists of another party.

98. 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.

99. In their referral request the applicants had asserted that the 10% threshold had been kept with a view to excluding from Parliament their political party and its successor, the DTP, in 2002 and 2007 respectively. But the results of the 2007 elections proved that that allegation was without foundation. The DTP had a parliamentary group of twenty MPs, and on that

account its participation in the next elections was guaranteed by virtue of section 36 of Law no. 2820 on political parties, even if it did not satisfy the condition of national implantation. Section 36 provided that political parties which had a parliamentary group could take part in the following elections even if they did not satisfy the national implantation condition.

100. The Government rejected the applicants' argument that the judgment given by the Chamber on 30 January 2007 permitted States thenceforth to raise the participation threshold in accordance with opinion poll results. The Chamber's reasoning clearly indicated that it had properly taken into account the existing alternatives to the threshold and the review carried out by the Constitutional Court on the basis of the principles of "fair representation" and "governmental stability", which had to complement each other. In the light of the possible alternatives, the Chamber had also held that the free expression of the opinion of the people had not been hindered and that the Government had not overstepped their margin of appreciation. The results of the 2007 elections clearly confirmed the findings of the Chamber judgment.

101. 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.

102. In conclusion, the Government submitted that, where the free expression of the opinion of the people in the choice of the legislature was not hindered, regulation of the electoral system and the system of political representation of a State Party to the Convention fell outside the purview of Article 3 of Protocol No. 1. The 10% threshold applied to political parties in parliamentary elections did not prevent the people from expressing their opinion freely on the choice of their representatives in Parliament. That had been proved by the elections held on 22 July 2007. The conclusions of the Chamber's judgment of 30 January 2007 were therefore correct. The Chamber had not departed from the Court's case-law nor given a new interpretation of Article 3 of Protocol No. 1.

C. The third-party intervener's submissions

103. The non-governmental organisation Minority Rights Group International agreed with the applicants. They said that the 10% threshold was the highest national threshold in Europe. It had been introduced without being accompanied by the slightest corrective measure which might have remedied the problems it caused. On account of the threshold it was absolutely impossible for a party operating on a regional basis to be represented in Parliament. In Turkey that meant more precisely that none of the Kurdish parties could enter Parliament even though in their own regions these parties regularly achieved scores comparable with that reached by the applicants in 2002 (over 45% of the votes cast). It was clear that all the measures taken by the Government, centring on the 10% threshold, were the result of a deliberate policy of exclusion. Moreover, even if the policy had not been deliberate, the effects would have been the same.

104. In addition, the excessively high threshold ran counter to the object and purpose of Article 3 of Protocol No. 1, namely guaranteeing the right to the free expression of the opinion of the people in the choice of the legislature. By depriving a whole segment of the population of the possibility of one day being represented in Parliament by a party which voiced its opinions, the national threshold removed the very essence of that right. Such a serious and systematic interference with the rights of a whole group, unique as it was among all European electoral systems, could not be justified by the margin of appreciation left to the State and therefore manifestly constituted a violation of the Convention.

D. The Court's assessment

1. General principles established by the case-law of the Convention institutions

(a) Criteria applied by the Court in relation to Article 3 of Protocol No. 1

105. The Court emphasises in the first place that Article 3 of Protocol No. 1 enshrines a characteristic principle of an effective democracy and is accordingly of prime importance in the Convention system (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 47, Series A no. 113). Democracy constitutes a fundamental element of the "European public order", and the rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law (see, most recently and among many other authorities, *Ždanoka v. Latvia* [GC], no. 58278/00, §§ 98 and 103, ECHR 2006-IV).

106. The Court has often emphasised the role of the State as ultimate guarantor of pluralism and stated that in performing that role the State is

under an obligation to adopt positive measures to "organise" democratic elections "under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature" (see *Mathieu-Mohin and Clerfayt*, cited above, § 54; see also, *mutatis mutandis*, *Informationsverein Lentia and Others v. Austria*, 24 November 1993, § 38, Series A no. 276).

107. Free elections and freedom of expression, and particularly the freedom of political debate, form the foundation of any democracy (see *Mathieu-Mohin and Clerfayt*, cited above, § 47, and *Lingens v. Austria*, 8 July 1986, §§ 41-42, Series A no. 103). The "free expression of the opinion of the people in the choice of the legislature" is a matter on which Article 11 of the Convention also has a bearing, guaranteeing as it does freedom of association, and thus indirectly the freedom of political parties, which represent a form of association essential to the proper functioning of democracy. Expression of the opinion of the people is inconceivable without the assistance of a plurality of political parties representing the currents of opinion flowing through a country's population. By reflecting those currents, not only within political institutions but also, thanks to the media, at all levels of life in society, they make an irreplaceable contribution to the political debate which is at the very core of the concept of a democratic society (see *Lingens*, cited above, § 42; *Castells v. Spain*, 23 April 1992, § 43, Series A no. 236; and *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 44, *Reports* 1998-I).

108. As the Commission has observed on a number of occasions, the words "free expression of the opinion of the people" mean that elections cannot be conducted under any form of pressure in the choice of one or more candidates, and that in this choice the elector must not be unduly induced to vote for one party or another (see *X. v. the United Kingdom*, no. 7140/75, Commission decision of 6 October 1976, DR 7, p. 95). Accordingly no form of compulsion must be brought to bear on voters as regards their choice of candidates or parties. The word "choice" means that the different political parties must be ensured a reasonable opportunity to present their candidates at elections (ibid.; see also *X. v. Iceland*, no. 8941/80, Commission decision of 6 December 1981, DR 27, p. 145).

109. As regards the general interpretation of Article 3 of Protocol No. 1, the Court has set out in its case-law the following main principles (see, among other authorities, *Mathieu-Mohin and Clerfayt*, cited above, §§ 46-51; *Ždanoka*, cited above, § 115; *Podkolzina v. Latvia*, no. 46726/99, § 33, ECHR 2002-II; and *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 61, ECHR 2005-IX):

(i) Article 3 of Protocol No. 1 seems at first sight different from the other provisions of the Convention and its Protocols which guarantee rights, as it is phrased in terms of the obligation of the High Contracting Parties to hold elections which ensure the free expression of the opinion of the people

rather than in terms of a particular right or freedom. However, having regard to the *travaux préparatoires* of Article 3 of Protocol No. 1 and the way the provision has been interpreted in the context of the Convention as a whole, the Court has established that Article 3 of Protocol No. 1 guarantees individual rights, including the right to vote and the right to stand for election (see *Mathieu-Mohin and Clerfayt*, cited above).

(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 (see, among other authorities, *Matthews v. the United Kingdom* [GC], no. 24833/94, § 63, ECHR 1999-I, and *Labita v. Italy* [GC], no. 26772/95, § 201, ECHR 2000-IV).

(iii) The concept of "implied limitations" under Article 3 of Protocol No. 1 is of major importance for the determination of the relevance of the aims pursued by the restrictions on the rights guaranteed by this provision. Given that Article 3 is not limited by a specific list of "legitimate aims" such as those enumerated in Articles 8 to 11, the Contracting States are therefore free to rely on an aim not contained in that list to justify a restriction, provided that the compatibility of that aim with the principle of the rule of law and the general objectives of the Convention is proved in the particular circumstances of a case. It also means that the Court does not apply the traditional tests of "necessity" or "pressing social need" which are used in the context of Articles 8 to 11. In examining compliance with Article 3 of Protocol No. 1, the Court has focused mainly on two criteria: whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people.

(iv) However, it is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with. It has to satisfy itself that limitations do not curtail the rights in question to such an extent as to impair their very essence, and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim and that the means employed are not disproportionate (see *Mathieu-Mohin and Clerfayt*, cited above, § 52). In particular, any such conditions must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage (see *Hirst (no. 2)*, cited above, § 62; *Hilbe v. Liechtenstein* (dec.), no. 31981/96, ECHR 1999-VI; and *Melnychenko v. Ukraine*, no. 17707/02, § 56, ECHR 2004-X). Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws which it promulgates (see *Hirst (no. 2)*, cited above, § 62).

(v) As regards the right to stand as a candidate for election, that is, the so-called "passive" aspect of the rights guaranteed by Article 3 of Protocol No. 1, the Court has been even more cautious in its assessment of restrictions in that context than when it has been called upon to examine restrictions on the right to vote, that is, the so-called "active" element of the rights under Article 3 of Protocol No. 1. In *Melnychenko* (cited above, § 57), the Court observed that stricter requirements may be imposed on eligibility to stand for election to Parliament than is the case for eligibility to vote. On that point, it took the view that, while it is true that States have a wide margin of appreciation when establishing eligibility conditions in the abstract, the principle that rights must be effective requires that the eligibility procedure contain sufficient safeguards to prevent arbitrary decisions (ibid. § 59; see also, *mutatis mutandis*, *Podkolzina*, cited above, § 35).

(vi) Similarly, the Court has held that, once the wishes of the people have been freely and democratically expressed, no subsequent amendment to the organisation of the electoral system may call that choice into question, except in the presence of compelling grounds for the democratic order (see *Lykourezos v. Greece*, no. 33554/03, § 52, ECHR 2006-VIII).

(b) Electoral systems and thresholds

110. The Court reiterates that the Contracting States enjoy a wide margin of appreciation when it comes to determination of the type of ballot through which the free expression of the opinion of the people in the choice of the legislature is mediated. In that regard, Article 3 of Protocol No. 1 goes no further than prescribing "free" elections held at "reasonable intervals" "by secret ballot" and "under conditions which will ensure the free expression of the opinion of the people". Subject to that reservation, it does not create any "obligation to introduce a specific system" such as proportional representation or majority voting with one or two ballots (see *Mathieu-Mohin and Clerfayt*, cited above, § 54).

111. The rules in this area vary in accordance with the historical and political factors specific to each State; the large variety of situations provided for in the electoral legislation of numerous member States of the Council of Europe shows the diversity of the possible options. For the purposes of applying Article 3 of Protocol No. 1, any electoral legislation must be assessed in the light of the political evolution of the country concerned, so that features that would be unacceptable in the context of one system may be justified in the context of another (see *Py v. France*, no. 66289/01, § 46, ECHR 2005-I), at least 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".

112. Moreover, it should not be forgotten that electoral systems seek to fulfil objectives which are sometimes scarcely compatible with each other:

on the one hand to reflect fairly faithfully the opinions of the people, and, on the other, to channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will. Article 3 of Protocol No. 1 does not imply that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory. Thus no electoral system can eliminate "wasted votes" (see *Mathieu-Mohin and Clerfayt*, cited above, § 54).

113. With regard to the level fixed by electoral thresholds, it should be noted that in *Magnago and Südtiroler Volkspartei v. Italy* (no. 25035/94, Commission decision of 15 April 1996, DR 85-A, p. 112), in which the facts most closely resemble the circumstances of the present case, the Commission expressed the opinion that "the 4% threshold required for the election of the remaining 25% of the members of the Chamber of Deputies" and even "a system which fixe[d] a relatively high threshold" fell within the wide margin of appreciation left to States in the matter. The Commission went on to say that similar thresholds existed in other European legal systems (see *Tête v. France*, no. 11123/84, Commission decision of 9 December 1987, DR 52, p. 68, which concerned a 5% threshold applied to the allocation of seats in elections to the European Parliament). Lastly, the Commission considered that electoral thresholds were intended to promote the emergence of sufficiently representative currents of thought.

114. In *Federación nacionalista Canaria v. Spain* ((dec.), no. 56618/00, ECHR 2001-VI) the Court examined the thresholds which formed part of a system of proportional representation used in the Autonomous Community of the Canary Islands. There were two conditions framed as alternatives: candidates had to obtain either at least 30% of the valid votes cast in an individual island constituency or at least 6% of the valid votes cast in the Autonomous Community as a whole. The Court observed that such a system, "far from hindering election candidates such as those put forward by the applicant federation, afford[ed] smaller political groups a certain degree of protection".

115. Lastly, in its very recent decision concerning, *inter alia*, a 5% threshold applicable in parliamentary elections (see *Partija "Jaunie Demokrāti" and Partija "Mūsu Zeme" v. Latvia* (dec.), nos. 10547/07 and 34049/07, 29 November 2007), the Court took the view that the threshold concerned could not be held to be contrary to the requirements of Article 3 of Protocol No. 1 in that it encouraged sufficiently representative currents of thought and made it possible to avoid an excessive fragmentation of Parliament.

2. Application of the above principles in the present case

116. In the present case the Court notes that the applicants alleged a breach of Article 3 of Protocol No. 1 on account of the fact that they had not been elected to the National Assembly in the parliamentary elections of

3 November 2002 despite the score of 45.95% of the votes cast in the constituency of Şırnak achieved by DEHAP, the party on whose list they had stood for election. They explained that their party, which had polled 6.22% of the national vote, had failed to reach the electoral threshold of 10% and had accordingly been deprived of parliamentary representation.

117. The Court observes that the national threshold concerned is laid down by statute, in section 33 of Law no. 2839, and determines how the seats in Parliament are to be shared nationally among the different lists and different candidates. It clearly constitutes interference with the applicants' electoral rights as provided in Article 3 of Protocol No. 1, a point which is not in dispute between the parties.

118. In the light of the principles set out above, the Court must first verify whether the measure complained of – whose foreseeability is not in dispute between the parties – serves a legitimate aim. Secondly, it must ascertain whether there was any arbitrariness and whether there was a reasonable relation of proportionality between the means employed and the aim pursued. In applying those two criteria, it will seek to determine whether the limitation in question impaired the very essence of the right to the free expression of the people, within the meaning of Article 3 of Protocol No. 1.

(a) Legitimate aim

119. The Court observes that, unlike other Convention provisions, Article 3 of Protocol No. 1 does not specify or limit the aims which a restriction must be intended to serve. A great variety of aims may accordingly be compatible with it, provided that the compatibility of any particular aim with the principle of the rule of law and the Convention's general objectives is established in the specific circumstances of a given case.

120. In the applicants' submission, the threshold served no legitimate aim since it prevented a large part of the population from expressing its choice regarding its representation in Parliament. The Government rejected that argument, contending that the purpose of the threshold was to avoid excessive parliamentary fragmentation and thus strengthen governmental stability.

121. With regard to electoral systems, the Court's task is to determine whether the effect of the rules governing parliamentary elections is to exclude some persons or groups of persons from participating in the political life of the country (see *Aziz v. Cyprus*, no. 69949/01, § 28, ECHR 2004-V) and whether the discrepancies created by a particular electoral system can be considered arbitrary or abusive or whether the system tends to favour one political party or candidate by giving them an electoral advantage at the expense of others (see *X. v. Iceland*, cited above).

122. The Court accepts that high thresholds may deprive part of the electorate of representation. However, that circumstance alone is not decisive. Such thresholds can work as a necessary corrective adjustment to the proportional system, which has always been accepted as allowing for the free expression of the opinion of the people even though it may operate to the detriment of small parties when accompanied by a high threshold (see, *mutatis mutandis*, *Liberal Party, Mrs R. and Mr P. v. the United Kingdom*, no. 8765/79, Commission decision of 18 December 1980, DR 21, p. 211)

123. In Turkey the 10% threshold is a general rule which applies without any distinction to all political party candidates whatever electoral constituency they are standing in. Since 1983, when the threshold was introduced, numerous parties with very varied political lines have been unable to obtain any seats in Parliament, having failed to reach it. The elections of 3 November 2002 illustrate the point: not only DEHAP, the applicants' party, but several other parties, in particular the DYP, the MHP, the GP and the ANAP (who obtained 9.54%, 8.36%, 7.25% and 5.13% of the votes cast respectively), failed to win any seats in Parliament (see paragraph 18 above). In 1991 and 2007 a number of candidates following the same political line as DEHAP managed to win seats, either on the ticket of another political party or by standing as independents (see paragraphs 15 and 25 above).

124. In addition, the Turkish electoral system, like that of many member States, is predicated on the context of a unitary State. In accordance with Article 80 of the Constitution, MPs represent "the whole nation", not "the regions or persons which have elected them" (see paragraph 29 above); that is precisely because of the unitary nature of the Turkish State. Each province is represented in Parliament by at least one MP. The remaining seats are distributed in accordance with the number of inhabitants, thus ensuring the representation of the whole national territory (see paragraph 32 above). That is the result of a choice made by the legislature reflecting the country's constitutional structure and grounded on political and institutional criteria. It is not as such incompatible with Article 3 of Protocol No. 1, which does not in principle impose on Contracting States the obligation to adopt an electoral system guaranteeing parliamentary representation to parties with an essentially regional base irrespective of the votes cast in other parts of the country. On the other hand, a problem might arise if the relevant legislation tended to deprive such parties of parliamentary representation (see paragraph 121 above).

125. Lastly, the Convention institutions have generally accepted that electoral thresholds are intended in the main to promote the emergence of sufficiently representative currents of thought within the country (see *Magnago and Südtiroler Volkspartei*, cited above, and *Tête*, cited above; see also, to the same effect, *Partija "Jaunie Demokrāti" and Partija "Mūsu Zeme"*, cited above). Consequently, the 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.

(b) Proportionality

126. Referring to the Constitutional Court's judgment of 18 November 1995, the Chamber considered that although the threshold was high it did not go beyond a level within the margin of appreciation of the national authorities in the matter, since it could not as such hinder the emergence of political alternatives within society. The applicants contested the Chamber's conclusion, whereas the Government asked the Court to uphold it.

127. The Court observes that the national 10% threshold applied in Turkey is the highest of all the thresholds applied in Europe (see paragraph 64 above). In order to verify that it is not disproportionate, the Court will therefore first assess its level in comparison with the threshold applied in other European countries. It will then examine the correctives and other safeguards with which it is attended.

(i) Elements of comparative law

128. The applicants submitted that the threshold applied in the present case was not in conformity with "the common democratic political tradition" of European countries.

129. The Court observes that electoral thresholds are not unknown among European electoral systems and that there are different kinds which vary according to the type of election and the context within which they are used. Analysis of the electoral thresholds adopted in the member States shows that, apart from Turkey, only three States have opted for high thresholds. Liechtenstein has fixed the level at 8%, and the Russian Federation and Georgia at 7%. A third of the States impose a 5% threshold and thirteen of them have chosen a lower figure. The other States which have a proportional representation system do not use thresholds. Thresholds also vary according to whether they apply to a party or a coalition, and some countries have adopted thresholds for independent candidates (see paragraphs 61-64 above).

130. The Court also attaches importance to the views expressed by the organs of the Council of Europe, which agree as to the exceptionally high level of the Turkish national threshold and have called for it to be lowered. In its Resolution of 18 April 2007, in which it stressed the indissoluble link between the representativeness of democracy and thresholds, the Parliamentary Assembly of the Council of Europe pointed out that "in well-established democracies, there should be no thresholds higher than 3% during the parliamentary elections". That opinion was reiterated in the Parliamentary Assembly's Recommendation 1791 (2007) (see paragraphs 52-53 above). In addition, in texts concerning Turkey, namely

the Parliamentary Assembly's Resolutions 1380 (2004) and 1547 (2007) and the Report on observation of the Parliamentary elections in Turkey (22 July 2007), produced by an *ad hoc* Committee of the Parliamentary Assembly, the organs of the Council of Europe urged Turkey, among other recommendations, to amend its electoral code to lower the 10% threshold (see paragraphs 58-59 above).

131. However, the effects of an electoral threshold can differ from one country to another and the various systems can pursue different, sometimes even antagonistic, political aims. One system might concentrate more on a fair representation of the parties in Parliament, while another one might aim to avoid a fragmentation of the party system and encourage the formation of a governing majority of one party in Parliament (see paragraph 55 above). None of these aims can be considered unreasonable in itself. Moreover, the role played by thresholds varies in accordance with the level at which they are set and the party system in each country. 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 (see paragraphs 58-59 above).

132. The large variety of situations provided for in the electoral legislation of the member States of the Council of Europe shows the diversity of the possible options. It also shows that the Court cannot assess any particular threshold without taking into account the electoral system of which it forms a part, although the Court can agree with the applicants' contention that an electoral threshold of about 5% corresponds more closely to the member States' common practice. However, it has already been pointed out that any electoral legislation must be assessed in the light of the political evolution of the country concerned, so that features that would be unacceptable in the context of one system may be justified in the context of another, at least 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" (see, among other authorities, *Mathieu-Mohin and Clerfayt*, cited above, § 54). That is why the Court must now assess the effects of the correctives and other safeguards with which the impugned system is attended.

(ii) Correctives and other safeguards

133. The Government submitted that the Turkish electoral system has correctives which tend to counterbalance the threshold's negative effects. In that connection, they argued that, as the elections of 22 July 2007 had confirmed, the applicants could have been elected in the elections of 3 November 2002 if they had stood as independent candidates or if their party, DEHAP, had entered an electoral coalition with one of the large parties.

134. The Court notes that the applicants did not really contest the Government's assertion that recourse to the above types of electoral strategy could have given them a real chance of being elected to Parliament. However, they emphasised the importance of political parties in representative democracies, arguing that neither independent candidatures nor the formation of alliances could take the place of independent political parties, which played a crucial role as fundamental elements of democracy.

135. The Court must therefore determine whether the alternatives referred to by the Government can be regarded as means to attenuate the threshold's negative effects.

136. As regards the possibility of standing as an independent candidate, the Court, like the Chamber in paragraph 71 of its judgment, emphasises the irreplaceable contribution made by parties to political debate. They act as both an instrument which citizens can use to participate in electoral debate and a tribune through which they can express their support for various political programmes (see, *mutatis mutandis*, *United Communist Party of Turkey and Others*, cited above, § 25). They can thus be distinguished from other political actors such as independent candidates, who in general are locally based. Similarly, the Court notes that in Turkey independent candidates are subject to a number of unfavourable restrictions and conditions not applicable to political parties. They must deposit a guarantee, their names are not printed on the ballot slips supplied to frontier posts and large airports, and they are not able to broadcast electoral messages whereas all political parties have an express entitlement to air time on television and radio (see paragraphs 35 and 38 above).

137. The Court notes however that this method cannot 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. The DTP, for example, DEHAP's successor, was able to form a parliamentary group after winning twenty seats in Parliament (see paragraph 25 above).

138. It is true that this result was essentially due to the fact that, instead of putting up their own candidates in their own name, the opposition parties opted for a strategy which might be called "independents supported by a party" (see paragraph 23 above). The fact that independents were not required to reach any threshold greatly facilitated the adoption of that electoral strategy, despite the restrictions listed above (see paragraphs 35 and 38). Nevertheless, this was a makeshift solution compared with the position of a candidate officially sponsored by his or her political party.

139. The same applies to the possibility of forming an electoral coalition with other political groups. The Court notes in that regard that section 16 of Law no. 2839 prevents parties from presenting joint lists and from participating in parliamentary elections by forming perfectly legal

coalitions. As the Government pointed out, political parties have developed an electoral strategy whereby they can circumvent this prohibition. Use of this strategy has produced tangible results, particularly in the 1991 and 2007 elections. Before the elections of 20 October 1991, two alliances were formed under the banner of two large political parties. By that means some small parties, including the HEP – DEHAP's predecessor – managed to obtain eighteen seats in Parliament (see paragraph 15 above). The same electoral strategy bore fruit in the elections of 22 July 2007 (see paragraph 24 above).

140. Admittedly, since 45.3% of the votes in the elections of 3 November 2002 (about 14,500,000) were cast for unsuccessful candidates, these electoral strategies can have only a limited effect. As the Chamber pointed out in paragraph 73 of its judgment, the fact that such a large part of the electorate was not ultimately represented in Parliament was hardly consistent with the crucial role played in a representative democracy by Parliament, which is the main instrument of democratic control and political responsibility, and must reflect as faithfully as possible the desire for a truly democratic political regime.

141. However, it should be noted that, as numerous analysts have remarked, the elections of November 2002 took place in a crisis climate with many different causes (economic and political crises, earthquakes, etc. – see paragraphs 12 and 20 above). In that connection, the fact that the three parties which had formed the governing coalition after the 1999 elections were unable to reach the 10% threshold and were thus deprived of parliamentary representation (see paragraph 20 above) appears significant.

142. In addition, an overall analysis of the parliamentary elections held since 1983 shows that the representation deficit observed after the elections of November 2002 could be partly contextual in origin and not solely due to the high national threshold. On that point, it should be noted that, with the exception of those elections, the proportion of the votes cast for ultimately unsuccessful candidates never exceeded 19.4% (19.4% in 1987, 0.5% in 1991, 14% in 1995 and 18% in 1999). The proportion of votes for candidates who failed to secure a seat even fell to 13.1% in the elections of 22 July 2007 (see paragraph 49 above).

143. 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 (see paragraphs 60 and 125 above).

144. The Court also attaches importance to the role of the Constitutional Court in the matter. At the time when the 1961 Constitution was in force the Constitutional Court, grounding its decision on the principles of a democratic State and pluralism, rejected the idea of applying an "ordinary threshold" within each electoral constituency (see paragraph 40 above).

Later, after the adoption of the 1982 Constitution, when ruling on the question of electoral systems, the Constitutional Court held that the legislature did not have an unlimited margin of appreciation in the matter and could not adopt "measures tending to restrict the free expression of the opinion of the people, or subject political life to the hegemony of a political party, or destroy the multiparty system" (see paragraph 41 above).

145. In its judgment of 18 November 1995, the Constitutional Court varied its 1968 case-law (see paragraph 42 above), examining the basis for the existence of the threshold complained of as a corrective to the general principle of proportionality whereby excessive and debilitating parliamentary fragmentation could be avoided. While accepting that thresholds restricted "the right to vote and to be elected", the Constitutional Court held that they were acceptable provided that they did not exceed normal limits and accordingly ruled that the 10% threshold was compatible with constitutional principles. On the other hand, citing the principle of "fair representation", it declared null and void an electoral threshold of 25% for the distribution of seats within provinces. It thus asserted that the constitutional principles of fair representation and governmental stability should necessarily be combined in such a way that they counterbalanced and complemented each other (see paragraph 43 above).

146. It can be seen from the foregoing considerations that the Constitutional Court, in exercising vigilance to prevent any excessive effects of the impugned electoral threshold by seeking the point of equilibrium between the principles of fair representation and governmental stability, provides a guarantee calculated to stop the threshold concerned impairing the essence of the right enshrined in Article 3 of Protocol No. 1.

(iii) Conclusion

147. In conclusion, the Court considers that in general a 10% electoral threshold appears excessive. In that connection, it concurs with the organs of the Council of Europe, which have stressed the threshold's exceptionally high level and recommended that it be lowered (see paragraphs 58 and 130 above). It compels political parties to make use of stratagems which do not contribute to the transparency of the electoral process. In the present case, however, the Court is not persuaded that, when assessed in the light of the specific political context of the elections in question, and attended as it is by correctives and other guarantees which have limited its effects in practice, the threshold has had the effect of impairing in their essence the rights secured to the applicants by Article 3 of Protocol No. 1.

148. There has accordingly been no violation of that provision.

FOR THESE REASONS, THE COURT

Holds by thirteen votes to four that there has been no violation of Article 3 of Protocol No. 1.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 8 July 2008.

Vincent Berger Jurisconsult	Boštjan M. Zupančič President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of Judges Tulkens, Vajić, Jaeger and Šikuta is annexed to this judgment.

B.M.Z.
V.B.

JOINT DISSENTING OPINION OF JUDGES TULKENS, VAJIĆ, JAEGER AND ŠIKUTA

(*Translation*)

We do not agree with the majority's conclusion that there has been no violation of Article 3 of Protocol No. 1, although we take the same principles as our starting-point (paragraphs 105-15 of the judgment).

1. In a proportional system the requirement of some kind of threshold cannot in itself be held to be contrary to the requirements of Article 3 of Protocol No. 1, in that it encourages sufficiently representative currents of thought and makes it possible to avoid an excessive fragmentation of Parliament. However, there is no doubt that the current system in Turkey of a 10% threshold set up in 1980 – which is the highest in Europe – deprives a large proportion of the population of the possibility of being represented in Parliament.

As established in the parliamentary elections of 1987, 1991, 1995 and 1999, the proportion of the votes cast in favour of parties not represented in Parliament was, respectively, 19.4% (about 4,500,000 votes), 0.5% (about 140,000 votes), 14% (about 4,000,000 votes) and 18.3% (about 6,000,000 votes). The results of the 2002 election led to a "crisis of representation", since 45.3% of the votes – about 14,500,000 votes – had not been taken into consideration and were not reflected in the composition of Parliament[1]. According to an OSCE report, the 10% national threshold in Turkey's electoral system virtually eliminates the possibility of regional or minority parties entering the Turkish Grand National Assembly and distorts the essential purpose of a proportional system[2]. In fact, the high 10% threshold tends to suppress parliamentary criticism and debate, which are the essence of representative democracy. And as the Court has repeatedly observed, there can be no democracy without pluralism (see *Freedom and Democracy Party* (*ÖZDEP*) *v. Turkey* [GC], no. 23885/94, §§ 39 and 41, ECHR 1999-VIII).

2. The Government argued that the 10% electoral threshold served the *legitimate aim* of ensuring governmental stability. A proportional voting system in Turkey without this threshold, it was submitted, would not lead to stable majorities. The Court endorsed that argument without analysing it or

1. R. Zimbron, "The Unappreciated Margin: Turkish Electoral Politics Before the European Court of Human Rights", 49 *Harvard International Law Journal Online* 10 (2007), http://www.harvardilj.org/online/125, p. 18.
2. OSCE, Office for Democratic Institutions and Human Rights, Assessment Report: Republic of Turkey Parliamentary Elections (2002), 4 December 2002.

subjecting it to any criticism. Some have argued, however, that a study of the historical background in Turkey casts doubt on this objective, since under an electoral system without such a high threshold it was also possible for solid governments to be formed[1]. Conversely, such a threshold brings more polarisation than stability.

Moreover, in practice, smaller groups are now represented in Parliament by means of circumvention (see point 4 below). Thus the purpose of the law can no longer be considered to be the exclusion of smaller parties or groups from Parliament, as the only remaining effect seems to be that it weakens within the election process the chances of all smaller parties which are not sure to pass the threshold. They have either to find allies or disappear during elections by having their candidates stand as independents.

3. As regards the *proportionality* of the interference, the majority's first argument is that the elections of 3 November 2002 took place in a crisis of tension caused by a number of different factors (economic pressure, political crises and earthquakes – see paragraph 141 of the judgment). In other words, an exceptional solution was needed for an exceptional situation.

However, that argument – which at first sight appears reasonable – is rendered considerably less persuasive by the fact that it was not just in those elections of November 2002 that the high threshold of 10% was used. Firstly, the system was adopted much *earlier*, in 1983, and since then numerous political parties following extremely varied political lines have been unable to secure seats in Parliament, having failed to get over the threshold (see paragraph 123 of the judgment). Secondly, the threshold was also applied *after* the 2002 elections, during the parliamentary elections of 22 July 2007. It is true that reforms of the electoral system have been discussed, but to date an invisible hand seems to have prevented these from coming to fruition. In those circumstances, we consider that the argument which the majority found decisive, namely the specific context of the 2002 elections, is not relevant.

4. The majority's second argument lies in the importance it attaches to what it calls "correctives and other safeguards" capable of limiting the effects of the 10% electoral threshold, which the majority, in any event and in general terms, found to be excessive (see paragraph 147 of the judgment).

But what are the safeguards concerned? The Court itself acknowledges that they amount to "stratagems" which political parties are compelled to make use of and which do not contribute to the transparency of the electoral process (ibid.). A stratagem is literally a ruse, as in the phrase *ruse de guerre*. Can a democratic system which does not function properly be corrected by "stratagems" and thus made compatible with the Convention?

1. R. Zimbron, *op. cit.*, p. 13.

In concrete terms, Turkish political parties have developed electoral techniques to "by-pass" the obstacles; these include in particular putting up independent candidates supported by a party (but who immediately rejoin their original party once elected) and adding candidates from one party to the list of another party. The Court had no hesitation in finding that this was only a makeshift solution (see paragraph 138 of the judgment). It also drew attention to all the difficulties in such a system, inasmuch as these candidates are subject to a number of unfavourable restrictions and conditions compared with political parties (see, for instance, paragraph 35 of the judgment). The Court nevertheless accepted these "stratagems" on account of what was presented as their result in practice. In other words, the end justified the means.

Apart from the obvious problem of political morality that such a position raises, it seems to us to be logically difficult to accept, since the Court itself acknowledges that these "stratagems" run counter to the legitimate aim of fixing such a high threshold, namely preventing parliamentary fragmentation. Furthermore, these 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. That being the case, it is difficult to accept that such correctives may be described as safeguards for the purposes of the Convention. Lastly, the 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. In themselves, parties represent and unite different currents of thought. 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. Certainly, this is the case when different parties form hidden alliances during the elections, by-passing the legislation in place as interpreted by the Constitutional Court (see paragraph 42 of the judgment). 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.

5. The voting system in the instant case, which has the highest threshold in Europe, which fails to accommodate the interests and opinions of a large part of the electorate that identifies strongly with a particular region, or with a national or other minority (see paragraphs 114-15 of the judgment), and in which forming open coalitions with other political parties is prohibited (see

judgment of the Constitutional Court – paragraph 42 of the present judgment), clearly exceeds the very wide margin of appreciation left to the State and runs counter to the object and purpose of Article 3 of Protocol No. 1. As Professor I. Budge has written, "[w]hat might have been justified then as an exceptional measure to buttress a still fragile democracy can hardly be justified now when the democracy is considered sufficiently stable and mature to seek membership of the European Union"[1].

6. We are, therefore, not satisfied that these limitations of the voting system do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 52, Series A no. 113). It would seem, however, that by admitting that the system in place can be seen as being in accordance with Convention standards only if corrected, and at the same time accepting that these corrections are due to "*stratagems*", the majority itself to a certain degree accepts a similar view.

Free elections are one of the foundations of justice and peace in Europe; they are indispensable for the development of an effective political/pluralist democracy and thus of the rule of law and observance of human rights. It is difficult to see how these fundamental goals, underlying not only the Convention but the whole Council of Europe system, can be achieved if based on electoral rules that need to be circumvented (see paragraphs 133-46 of the judgment, in particular 139 and 143) in order to be compatible with the Convention. Changes in this direction, by introducing the necessary reforms of the electoral system in a clear and transparent way, would thus – in our opinion – be the only appropriate way to improve the present situation in accordance with the Convention.

1. Observations of the applicants, received at the Registry on 29 October 2007, point 4.