
CASE LAW REVIEW

The Freedom of Expression of the People's Opinion in the Choice of the Legislature

(Judgement of the European Court of Human Rights of 30 January, 2007
on the Case *Yumak and Sadak v. Turkey*, 10226/03)

NANA CHIGHLADZE*

1. Topicality of the Judgment

Similar to the judicial practice of the other High Contracting Parties to the European Convention on Human Rights, the role of the judgments of the European Court of Human Rights is significantly increasing in Georgia as well and the frequency of their use as an authoritative interpretation of the provisions of the European Convention is gradually increasing. Each court judgment has a paramount importance for correct understanding and application of the essence of a right guaranteed by the Convention.

One of the main preconditions of the existence of a rule of law state is the provision for democratic elections in the country. In its turn, such elections are based upon the legal framework and practice, saturated with global experience and national traditions. Along with certain acts of the international organisations, Article 3 of Protocol No.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the judgments of the European Court of Human Rights are regarded as the instruments containing European election standards. Their analysis will definitely assist the Georgian lawmakers and the society at large in a flawless arrangement of elections.

The matter of dispute in the case below, as reviewed by the European Court of Human Rights, is the level of compliance with the fulfilment of the obligation assumed by the High Contracting Party, Turkey, under Article 3 of Protocol No. 1 of the European Convention with respect to ensuring the freedom of expression of the opinion of the people in the choice of the legislature.

2. The Circumstances of the Case

Two Turkish nationals, Messrs Mehmet Yumak and Resul Sadak, lodged an application with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms against the Republic of Turkey. They alleged that the national electoral threshold of 10 percent for parliamentary elections interfered with the free expression of the opinion of the people in the choice of the legislature. They relied upon Article 3 of Protocol No. 1. Under this Article: "The High Contracting Parties undertake to

* Professor for Constitutional Law of the Tbilisi State University Law Faculty.

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.”

The applicants were born and live in Sirnak. 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 Sirnak. The results of the elections in this province gave the DEHAP list approximately 45.95 percent of votes cast. As the party had not succeeded in passing the national threshold of 10 percent, however, the applicants were not elected. The three seats in the Parliament allocated to the Sirnak province were shared as follows: two seats for the Justice and Development Party (AKP – a party of the conservative right), which had polled 14.05 percent, and one seat for an independent candidate who had polled 9.69 percent. Of the eighteen parties which had taken part in the elections only two succeeded in passing the 10 percent threshold.

The results of these elections were generally interpreted by the applicants as a huge political upheaval as they considered that the major proportion of the electorate – in particular, approximately 45 percent – was not represented in parliament. At the same time, the abstention (deliberate refusal of the electors to participate in the elections) rate amounted to 22 percent and exceeded 20 percent for the first time since 1980. As a result, the National Assembly which emerged from the elections was the least representative since 1946, the year in which a multi-party system was first introduced.

The statistics existing before the elections of 3 November 2002 are rather interesting. In the parliamentary elections of 1991, five parties gained seats in the representative body. The proportion of the votes cast in favour of the parties not represented in the new parliament amounted to 0.5 percent. In 1995, five parties again succeeded in passing the established threshold; however, none of them had a parliamentary majority. This time the proportion of the votes cast in favour of the parties not represented in the parliament came to 14 percent. The 1999 parliamentary elections again resulted in no party having a parliamentary majority. Five political parties won seats in the National Assembly. The proportion of the votes cast in favour of the parties not represented in parliament came to 18 percent.

3. Relevant Domestic and International Law and Practice

3.1 Relevant Council of Europe Materials

3.1.1 Report of the *ad hoc* Committee of the Parliamentary Assembly of the Council of Europe

It is stressed in the report of the *ad hoc* Committee for the Observation of Parliamentary Elections in Turkey (3 November 2002) that: “As widely reported by the media, only two parties out of 18 found their way into the new parliament (Justice and Development Party and Republican People’s Party), leaving out all other parties which had so far been represented in the Parliament because they could not meet the 10 percent threshold. The party in government until the elections received only 1 percent of the votes. Economic and corruption problems were determining factors in the elections. A clear and absolute majority emerged with 362

seats for the Justice and Development Party, 179 seats for the opposition and nine seats for independent members. (These independent members are elected in small towns where they have a good reputation.) It should be recalled that the Justice and Development Party had 59 seats in the previous parliament whilst the Republican People's Party had only three.

This situation might probably create 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 percent which also means, however, that approximately 44 percent of the voters have no representation in the Parliament. The results, therefore, must be considered as a clear protest vote against the establishment as a whole since none of the three parties in the old governing coalition received enough votes for a single seat.

3.1.2 Venice Commission Code of Good Practice in Electoral Matters

The Council of Europe has not issued any binding standards or relevant stipulations for electoral thresholds. The Code of Good Practice in Electoral Matters, adopted by the Venice Commission, makes general recommendations on the subject.

3.1.3 The Council of Europe Parliamentary Assembly's Resolution 1380 (2004) on "Honouring of Obligations and Commitments by Turkey"

In Paragraphs 6 and 23 of the Resolution, the Assembly recognises that Turkey is a functioning democracy with a multiparty system, free elections and separation of power. 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 2001-2002 will limit the use of such an extreme measure as dissolution. The Assembly also considers that the 10 percent threshold is excessive. The Assembly, therefore, invites Turkey, as part of its authorities' current reform process, to amend the electoral code and to lower the 10 percent threshold.

3.2 Relevant Domestic Texts

3.2.1 The Constitution

Article 67 VI of the Constitution, as amended on 23 July 1995, stresses that: "Electoral laws must strike a balance between fair representation and governmental stability" whilst Article 80 of the Constitution provides that: "Members of the Grand National Assembly of Turkey shall represent the whole nation and not the regions or persons which have elected them."

3.2.2 Law No. 2839 on the Election of Members of the National Assembly

Section 33 of Law provides: "In a general, election parties may not win seats unless they obtain, nationally, more than 10 percent 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 percent national threshold..."

3.3 Judicial Practice

In 1995, the Constitutional Court of Turkey had the opportunity to rule on the constitutionality of the 10 percent threshold both nationwide and in national constituencies. The Court declared the restrictions related to national constituencies null and void but retained the nationwide 10 percent threshold. It was mentioned in the judgment that the constitutional structure of the state, which is based upon national sovereignty, is a product of free elections. The main goal of the balance between the principles of fair representation and governmental stability, provided for by the Constitution, is to ensure that the electors' will is reflected as far as possible in the legislature. To this end, there should be the appropriate legislation in the light of the country's specific circumstances and the requirements of the Constitution and such an election system which is the most compatible with the declaration of the will of the population and its decision-making.

The Constitutional Court explicitly stated that opting for unfair systems adopted with the intention of ensuring stability would hamper social developments. Fairness is the precondition of stability. The principle of fair representation, guaranteed by the Constitution, implies free, equal and secret elections with one round of voting and public access to the counting of votes 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 Constitutional Court referred to the existence of the national election threshold as one of the preconditions of governmental stability. Furthermore, it took account of the fact that the threshold of 10 percent of the votes cast nationally came into force with the approval of the legislature. The threshold is applicable and acceptable provided that it does not exceed normal limits. The Court delivered the judgement anonymously and ruled that the 10 percent threshold was compatible with the principles of fair representation and governmental stability. Several judges disagreed with the arguments of the majority, considering that the 10 percent national threshold was incompatible with Article 67 of the Constitution. In the same judgment, however, the Constitutional Court declared null and void an electoral threshold of 25 percent for the allocation of seats within provinces, holding that such a threshold was inconsistent with the principle of fair representation.

4. Arguments of the Parties

4.1 Arguments of the Applicants

The applicants alleged the violation of Article 3 of Protocol No.1 of the European Convention as their right to free expression of the opinion in the choice of the legislature was restricted. They submitted that the electoral threshold was based upon the particular situation in Turkey after the 1980 military regime and that its aim was to depoliticise society by installing an authoritarian government. They rejected the argument that the threshold served the legitimate aim of ensuring governmental stability. The applicants

referred to a study of the historical background in Turkey which, in their opinion, evidenced the opposite. The existence of a proportional system without a threshold did not obstruct the creation of single-party parliament in 1965, 1969, 1973 and 1977 and, during the period 1983-2006, Turkey had had only three single-party governments even though the threshold had then been in force. Based upon the foregoing, they alleged that imposing such a high threshold did not serve any legitimate aim.

The applicants contended that such a high national threshold obstructed the development of the representative democracy, made unfair the representation and led to a crisis of the legitimacy for the government since 55 percent of the votes cast would not have made parliament the free tribune which is supposed to be the basis of parliamentary democracy. Raising the election threshold to 10 percent was also disproportionate and arbitrary and impaired the very essence of the right guaranteed by Article 3 of Protocol No.1. In the parliamentary elections of 1987, 1991, 1995 and 1999, the proportion of the votes cast in favour of the parties not represented in parliament had been, respectively, 19.4, 0.5, 14 and 18.3 percent. The results of the 2002 election had led to a “crisis of representation” since about 45 percent of the votes had not been taken into consideration.

The applicants also stressed that the electoral threshold of 10 percent was very high in comparison with the thresholds which applied in other European systems and that there was no good reason to impose it.

4.2 Arguments of the Government

The Government submitted that Article 3 of Protocol No.1 did not set forth an absolute right to vote and that the Contracting States should be left a wide margin of appreciation with regard to the fixing of electoral thresholds. Article 3 of the Protocol provides for the organisation of free elections without imposing any particular electoral system. In addition, these elections are to be held by secret ballot and at “reasonable” intervals. Admittedly, the elections are to be held under conditions calculated to ensure “the free expression of the opinion of the people.” That concept means that no constraint or pressure was to be brought to bear on electors to influence their choice of candidate. By virtue of the respective law, the Government of Turkey introduced the proportional system with a national threshold of 10 percent. That system had made it possible to form majorities in the aftermath of the elections in 1983-2002 and to maintain stability. That meant that the threshold served a legitimate aim which, in their opinion, was upheld by the Constitutional Court when it held that the threshold was not an obstacle to “fair representation” which is a principle that is enshrined in the Constitution.

The Government believed that high election threshold stimulated the creation of pre-election coalitions which served as a better guarantee for the parties to have more chances for entering the parliament and, at the same time, excluded the fragmentation and splitting of the will of the people. Another argument of the Government supporting the high electoral threshold was that in 1961-1980, Turkey had had twenty different governments whereas during the period when the 10 percent threshold had been in force, there had been only six. The Government believed that the existing threshold ensured political stability which had a crucial influence upon the country’s economy.

5. The Assessment and the Judgment of the Court

The Court stressed the very important aspect that Article 3 of Protocol No.1 seems at first sight different from the other provisions of the Convention 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.

The Court pointed out that the rights guaranteed by Article 3 of Protocol No.1 are crucial to establishing and maintaining the foundations of a meaningful democracy governed by the rule of law. Nonetheless, the Court stressed that this right was not absolute and that there was room for implied limitations. It referred to several judgments and, despite the discontent with the thresholds introduced by the state, re-affirmed the principle that the states should provide for the rules in this area in accordance with the historical and political factors specific to each state with the stipulation that the election system should guarantee the expression of the opinion of the people in the choice of the legislature. It does not follow, however, 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. No electoral system, therefore, can eliminate “wasted votes.” The main purpose of introduction of qualifications is the attainment of the legitimate public goal upon the basis of the principle of proportionality. The Court explicitly stated that the election threshold was part of the election law. The Court indicated that a high election threshold has not obstructed the origin of new political forces which succeeded in the elections. Consequently, the Court upheld the arguments of the state that the high election threshold was the motivation for the new or small political parties to develop within the whole country and for being represented at the highest level.

The Court stated that only the Turkish Government and the politicians were competent for the correction of the problems which originated as a result of the elections of 2002. At the same time, irrespective of the fact that the Turkish national 10 percent threshold was almost an example in Europe – and it would have been desirable to reduce to the level which would have provided for the representation of every political trend in the country to maximum practicable extent – the Court presumed that the freedom of appreciation should be enjoyed by the legislature in this respect.

The Court held by five votes against two that, despite the high election threshold, Turkey had not exceeded the margin of appreciation which is guaranteed by Article 3 of Protocol No.1 of the Convention.

6. Dissenting Opinion

The two case reviewing judges consider that it is surely not for the Court to say whether or not one electoral system is better than another, seeing that any electoral system has advantages and disadvantages, that there is no “perfect” system and that nobody can avoid the phenomenon of “wasted votes.” The Court, however, does have a duty, in their opinion, to determine in the last resort whether or not the conditions imposed upon the

exercise of the right concerned satisfy the requirements of the case-law of the country which means that they should consider the electoral system as a whole. Many countries which have adopted proportional representation systems have at the same time laid down thresholds for the election of political parties to parliament in order to ensure governability. No doubt, this is a legitimate aim. A problem can arise, however, from the proportionality point of view when the threshold concerned is too high.

The judges having a dissenting opinion believe that the current election system, which provides for the election threshold – which is twice as high as the one employed by other European countries – does not permit political parties which are very strong at a regional level but less so nationally to win seats in parliament. This means that in a large country, the political parties which represent millions of voters are prevented from entering the national legislature. The judges consider that the freedom, granted by Article 3 of Protocol No.1, was abused in this specific case and that the margin of appreciation which the majority has given to the respondent state was excessive. They believe that the Turkish electoral system, which lays down a national threshold of 10 percent, raises such a problem under Article 3 of Protocol No.1 that there is a violation of that provision. They remain convinced that this case would warrant examination by the Grand Chamber.

7. Commentary

The judgment of the European Court of Human Rights on the *Yumak and Sadak v. Turkey* case gave a very narrow interpretation to the essence of ensuring “free elections” and the “free expression of the opinion of the people in the choice of the legislature” as guaranteed by Article 3 of Protocol No. 1 of the Convention by the state. Free elections, to a certain extent, mean the optimum regulation of the election system and the related election threshold. The Court refrained from the assessment of the election system of Turkey without which it is difficult to answer the question of whether or not the margin of appreciation, as guaranteed by Article 3 of Protocol No. 1, was exceeded.

It is strange that a number of own assessments had no essential impact on court judgment. The Court regarded the belated proposal of the Government to the applicant to form a coalition with the other parties, for example, as one of the guarantees of success in the elections as it is a weak point in the Turkish election system. As a counter argument, the Court referred to the relevant provision of the law in force which makes it illegal to form joint lists before elections. The greater probability of the election of the applicants if they had been independent candidates was assessed in an unconvincing manner. In the course of making the judgment, the Court did not rely upon the provisions of Resolution No.1380 of the Council of Europe Parliamentary Assembly wherein the high election threshold, which is not acceptable for the European systems, was given an expressly negative assessment. Apart from this, the Court had the grounds to see the danger that the election law of Turkey would become more conservative in the future and which would make it even more difficult to win the parliamentary elections. The applicant also spoke about the bill, which was the subject of political debates in Turkey in those times and which was

intended to do away in future with the possibility of standing as an independent candidate in political elections. The Court also did not take this trend into account.

An incomparably high election threshold is another issue. Current election law regards the proportional election system as a progressive and fair system whose mandatory characteristic is the election threshold. The determination of its reasonable level is of particular importance for a better reflection of the balance of political parties in a legislative body. Every country is required to find an optimum solution as too low of a threshold may result in excessive party variety whilst a very high one excludes the diversity of political forces.

In the case of the Republic of Turkey, the lack of logic of the election threshold is beyond doubt. First of all, almost 45 percent of the electors who participated in the elections were deprived of the possibility of having a representative in the legislature which, in its turn, makes a serious problem for the legitimacy of this body. The judgment of the European Court of Human Rights on *Yumak and Sadak v. Turkey* case can be disputed. When a provision of an international agreement, including the European Convention and its Protocols, is not adequately clear and sophisticated and is given without clear-cut wording, the High Contracting Parties, based upon general principles, should be entitled to independently regulate certain issues within the framework of their domestic legislation. They enjoy wide discretion in this field but the main purpose of the existence of the European Court of Human Rights is to assess the quality of observance of the values as guaranteed by the international act which, in this case, are the requirements of Article 3 of Protocol No.1 of the Convention. Furthermore, it also has to identify the legitimate public purpose in the case of the restriction of rights and the proportionality of applied measures and to make an adequate judgment. The fairness of the above discussed judgment of the European Court of Human Rights is doubtful and its revision by the Grand Chamber is quite logical.