

The Electoral Threshold Case in Turkey

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According to recent statements made to a journalist by the President Hasim Kilic of the Turkish Constitutional Court,^[1] the Court will soon deliver a decision on the 10% electoral threshold that exists for political parties to be represented in Parliament in a case brought before the Court by three political parties through the *constitutional complaint*, also known as the “individual application” mechanism. The statement made by Justice Kilic has led the Court to confront a difficult situation, once again. A heated public debate has already begun around the issue.^[2]

Pursuant to Article 33 of the Law No. 2839 on the Election of Members of the National Assembly, the election threshold in Turkey is 10% of valid total votes cast nationwide.

The positions of the political parties, which are currently in the Parliament, vis-à-vis the electoral threshold can be summarized as follows. The Justice and Development Party (AKP), the government party, supports the threshold for the obvious reason that the threshold favors its majority and power, despite its earlier promises to abolish the threshold. The main opposition party, the Republican People’s Party (CHP) supports abolition of the threshold, and has made many calls for it. Another opposition party, the Nationalist Movement Party (MHP) supports the threshold, because according to the MHP any lower threshold will allow the pro-Kurdish political movement to gain more representative power. Hence, it is clear that the pro-Kurdish political party, the Peoples’ Democratic Party (HDP), is firmly for abolishing the threshold. In fact, members of an earlier pro-Kurdish political party brought a case before the European Court of Human Rights (ECHR). The case was decided by the ECHR (the Grand Chamber) in 2008 in the case of *Yumak and Sadak v. Turkey*. In the final ruling in that case, the ECHR held, with majority of 13 to 4, that there was *no violation* of Article 3 of Protocol 1 or the right to free election by noting though that “...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.”^[3]

So where does the controversy come from in the present case to abolish the electoral threshold?

There are several controversial issues the Turkish Constitutional Court may face. Some of them are concerned with the possible outcome of declaring the threshold as a violation of the right to free election under the Constitution and the ECHR, while the others are concerned with the legality of procedure versus the legality of content.

In the 2010 Constitutional Amendment Referendum held in Turkey, the “individual” the constitutional complaint mechanism was adopted, and the Constitutional Court was charged with a new task. The initial motivation for the adoption of this mechanism was to reduce the number of cases before the ECHR, where Turkey had been among the top three violators of the Convention. The Constitutional Court started its task of hearing individual constitutional complaints on September 23, 2012. Since then, the Court has delivered very important decisions as a result of this mechanism, like the *Twitter case*,^[4] which can be considered as an important turning point concerning freedom of expression in Turkey, at least in terms of the Constitutional Court’s approach to it.^[5] The Constitutional Court can be deemed successful so far in its new task of hearing individually driven cases and reducing the caseload of Turkey’s cases at the European Court of Human Rights.

However, not all Turkish politicians welcomed the Constitutional Court’s important decisions, ^[6] like the Twitter decision; in fact, the situation has been quite the opposite. The government party, the AKP—although taking pride as the architect of the individual application mechanism—has harshly criticized the Court’s human-rights-protecting decisions.^[7] Because of those decisions, the Court has been at the target of the AKP for some time, especially following the *Twitter* decision.^[8] Therefore, a decision finding the electoral threshold to be an infringement of the right to free election could lead to harsher action against the Court. The Court may confront a threat which may give rise to its reorganization and recomposition. There has been already a call (or threat) to abolish the Court, should the Court rule that there is a violation of the right to free election.^[9]

Apart from these political controversial issues, the Court also faces a legal barrier. According to the constitutional complaint mechanism in Turkey, an applicant can allege that the state has caused an infringement on his/her rights, protected by both the Constitution and the European Convention on Human Rights. If the Constitutional Court rules that there is a violation of a right, the Court can decide how the violation shall be remedied. The possible remedies might be (pecuniary) compensation and/or if the violation results from a court decision, the case will be subjected to re-trial in that court to eliminate the cause of the violation. However, pursuant to Article 45/3 of the Law no. 6216 on the Establishment and Judgment Procedures of the Constitutional Court, an individual application that directly challenges a law or administrative ordinance in general character cannot be brought before the Court. According to this provision, the constitutionality of a piece of legislation cannot be the subject of a constitutional complaint. Thus, the Constitutional Court cannot declare a law null and void through a constitutional complaint mechanism. Even though the Constitutional Court finds that a right has been violated, the remedy will not be an invalidation of the law, because the Court lacks this important competence. [10]

The constitutional complaint mechanism can be criticized as ineffective due to the lack of this competence, but this is law en force. Nonetheless, Article 45/3 itself can be claimed unconstitutional, as there is no such prohibition in the Constitution regarding the matter that the Constitutional Court cannot hear an individual application which challenges directly a piece of legislation.

Therefore, there are three possible legal options for the Constitutional Court in the electoral threshold case. According to the first, and easiest, the Court can dismiss the application since it challenges the constitutionality of a law. Second, the Court can hear the case and rule that there is no violation of the right to free election, which will be in conformity with the ECHR *Yumak and Sadak v. Turkey* decision and with the Court's earlier decision.[11] Third, and with the highest risk, the Court can hear the case and rule that there is a violation.

This third option would lead to a political turmoil in Turkey. AKP members will severely criticize the decision, whereas the opposition parties, albeit not all, will hail it. Sooner or later, (as soon as the upcoming June 2015 parliamentary elections) such a decision would have a very significant impact on the Turkish political system, since it could result in the total abolition of the electoral threshold, in the adoption of lower one, or in the setting up a completely new electoral system.

If the Constitutional Court delivers a decision ruling a violation, the lack of a clear legal competence will lead to condemnation of the decision as well as the Court itself. The Court will be accused of exceeding its competence, and thus of deciding illegitimately. Such a criticism would not be unfounded due to the constitutional and legal context, summarized above.

Of course, this sort of criticism cannot be avoided, but legally it could be appeased through pursuing a different legal path. According to this option, the Constitutional Court may invoke its "concrete norm control capacity," which deserves further explanation. The Turkish Constitutional Court is a perfect example of the Kelsenian (European) model of judicial review, in which there are various modes of constitutional review.[12] One of these modes is concrete judicial review. In the concrete judicial review, any court within the judiciary may consider that a law, which will be applied to the legal dispute to be decided by that court, can be brought before the Constitutional Court on the grounds that the court deems such law to be unconstitutional. In line with the Kelsenian model, the courts themselves cannot decide on the constitutionality of laws in Turkey; they must forward the matter to the Constitutional Court.

Now, the Constitutional Court in the present electoral threshold case may consider itself as a court to solve a legal dispute. The Constitutional Court acting in the capacity to resolve a legal dispute in the electoral threshold case may consider that Article 45/3 of Law no. 6216 as well as Article 33 of the Law No. 2839 are unconstitutional. By deciding so, it must forward the matter to itself (i.e. the Constitutional Court), and will act then in its concrete constitutional review capacity. As a result, the Constitutional Court may declare the electoral threshold unconstitutional. This solution will not prevent political resistance, but it may successfully avoid criticisms of surpassing legal competencies. This will, however, depend on how well the Court constructs and devises its argument.

This solution is not without precedence, because the Court itself has already lodged concrete norm review cases

in two situations. The first occurs when the Constitutional Court acted in its own capacity as the Supreme Court for trying the President of the Republic, the Speaker of the Grand National Assembly of Turkey, and members of the Council of Ministers, among others, for offences relating to their functions. The second occurs when the Constitutional Court hears cases of political party dissolution. In these two situations, the Constitutional Court may bring before itself a claim of unconstitutionality of a law and can decide the matter substantively. The constitutional complaint mechanism could be added to these two situations, and therefore be subject to substantive review by the Turkish Constitutional Court.

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[3] *Yumak and Sadak v. Turkey* [GC], no. 10226/03, § 147, ECHR 2008.

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[10] This option is clearly made possible in the German constitutional complaint mechanism (Art. 95/3 of the Federal Constitutional Court Act).

[11] In a judgment delivered on 8 November 1995 (E. 1995/54, K. 1995/59) the Constitutional Court had the opportunity to rule on the constitutionality of the electoral threshold. In that decision, the matters to be reviewed were the national as well as the provincial electoral threshold. The Constitutional Court held that the 10% national threshold was compatible with the Constitution, while having declared the 25% provincial threshold unconstitutional. This earlier decision, however, does not prevent the Court from ruling differently in the present case.

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[12]Hans, Kelsen *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 *The Journal of Politics*, no. 2, 183, (1942), p. 183-200.

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