



## National Security Program

Foreign Policy Project

### ISSUE BRIEF:

# Turkish *Baraj*: The Parliamentary Threshold and the Constitutional Court

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DECEMBER 2014

### Key Takeaways:

**Turkey's Constitutional Court has announced that it is considering whether to hear a complaint about the country's electoral threshold (*baraj* in Turkish).**

- In Turkey's parliamentary system, a political party must achieve at least 10 percent of the national vote to win seats in the parliament. This is the highest barrier to parliamentary representation in the world.

**There is no clear precedent for the Court's power in such a case, leading to confusion as to what would happen should it rule against the threshold.**

- Some believe that if the Court overturns the threshold, it will be automatically reset to zero. Others argue that the Court can only send the electoral law back to parliament for reconsideration, but it cannot change the threshold.
- The Turkish Constitution mandates that changes to the electoral law be made at least one year before an election. This might mean that even if there were a new threshold, it would not go into effect in time for parliamentary elections slated for June 2015.

**Nor is it clear how the government would react to a Court decision against the threshold.**

- President Recep Tayyip Erdoğan has ignored court orders in the past and called the head of the Constitutional Court a "donkey," suggesting he might keep the electoral threshold unaltered, regardless of the judiciary's opinion.
- Such a move might lead opposition parties to boycott the election and/or declare its results illegitimate. It would also particularly anger the Kurds, who have long sought a lower threshold, and could spark renewed tensions.

**However, if the 10 percent threshold is changed for the 2015 election, it could drastically impact the makeup of the Turkish parliament, reducing the Justice and Development Party's (AKP) majority and limiting its ability to make the sweeping changes it seeks to Turkey's political system.**



## Introduction

Rarely are the mechanisms for democratic representation created perfectly. Tweaks, and even major revisions, to electoral laws are often needed to account for changing demographics (redrawing districts), evolving political sensibilities (expanding suffrage), or even unintended consequences. Regrettably, those in power sometimes also change the rules of the game in order to consolidate their power or exclude opponents.

With single member congressional districts—in which the candidate with the most votes is the sole representative of each electoral region—redrawing district maps to change political constituencies is the easiest and most frequent change to electoral rules in the United States. In parliamentary systems with proportional representation, like Turkey's, the electoral threshold can play a similar role: raising or lowering the number of votes a party needs to gain seats in parliament can have significant impacts on the makeup of governments.

Indeed, Turkey's 10 percent electoral threshold—so far as is known, the highest ever applied anywhere in democratic elections—has been in place for eight consecutive parliamentary elections over three decades. Issued by a military government in preparation for a return to civilian rule in 1983, it has been a frequent object of criticism in Turkey and abroad on grounds of being anti-democratic. No serious effort has ever been made to change it, however, as the parties that formed legislative majorities in successive parliaments have apparently felt, occasionally incorrectly, that its continuation served their interests. Now, thanks to prospective judicial intervention, the future of the 10 percent threshold appears to be very much in play.

On November 30, the Constitutional Court announced that it will decide shortly whether to hear an individual application (a complaint by an individual that their rights have been violated, filed directly with the Constitutional Court without review by lower courts) on the constitutionality of Turkey's 10 percent electoral threshold. President Erdoğan has made clear that he does not believe the Court has the power to decide the issue, having called the head of the Court a "donkey loaded with books."<sup>1</sup>

The question of where the barrier to entry into parliament ought to be set, the particular way in which it is now being considered—by the highest court, not parliament itself—and the government's explicit criticism of the judicial process raises some of the most fundamental questions and tensions implicit in the design of constitutional democracies: the will of the majority versus the rights of minorities; populism versus checks and balances; and the ballot box versus rule of law. When cast against the background of Turkey's increasingly polarized political environment, the Court's decision and the government's reaction have the potential to either repair fraying trust in the country's democratic system or open wide holes in the socio-political fabric that has been sustained through 90 parlous years of the Republic of Turkey's existence.

# Turkey's Electoral Threshold: History and Background

The Turkish Grand National Assembly is composed of 550 seats, distributed to electoral districts according to population. In each electoral district, candidates are elected to parliament through a system of proportional representation. Under this system, voters do not cast their vote for a particular candidate, but for a political party. Political parties put forward a list of candidates in each electoral district, and candidates from these lists ascend to parliament based on the party's percentage of the total vote.

Not every party that runs in Turkey's parliamentary elections gets rewarded with seats in the Grand National Assembly. As is common in parliamentary systems, Turkey employs an electoral threshold to limit entry into parliament only to parties that surpass a certain percentage of votes.

As Turkey prepares for parliamentary elections in mid-2015, its Constitutional Court (*Anayasa Mahkemesi*, or AYM) is expected to make a decision on whether or not to hear a case alleging that the threshold violates an individual's right to be represented in government.

## **ORIGIN AND IMPACT**

The rules are clear: parties that fail to surpass that threshold, no matter how high their share of the vote may be in any given electoral district, are excluded from the final count and their votes discarded. Independent candidates, unaffiliated with any party, are the sole exception to this rule; they win seats based on their performance in their districts, regardless of whether they receive 10 percent or not.

### Creation and Justification

The 10 percent threshold came into effect in 1983, pursuant to Article 33 of Law No. 2839 on the Election of Members of the National Assembly, as part of preparation for the transition back to civilian rule. Turkey's military government blamed the political instability of the era in significant part on the lack of an election threshold, which produced fractured coalition governments, symbolized by parliament's inability to fulfill its then-responsibility to elect a president for Turkey, despite more than a hundred ballots prior to the 1980 military coup. The framers hoped that a high threshold would drive voters into large, centrist parties. A reason for the threshold often adduced in recent years—that it was intended to exclude Kurdish parties—is at best questionable, as Turkey's military rulers almost certainly believed the system already contained ample safeguards to ensure that ethnically-based parties would not be allowed to compete anyway.

Seen as less easy to contain were parties based on religion, although constitutionally as illegitimate as parties based on ethnicity. The choice of 10 percent may have been influenced by a perception that the Islam-based National Salvation Party, having slipped from 11.8 percent to 8.6 percent in the two prior elections (1973 and 1977), would die of natural causes under a 10 percent system. Following the passage of the 1982 constitution

and the implementation of the 10 percent threshold, the concept seemed to be working, as the 1983 and 1987 parliamentary elections produced majority, one-party governments.

However, the threshold's success in taming Turkey's unruly political scene was fleeting. By the 1990s, Turkey saw a return to fractious and short-lived coalition governments, as well as the rise of Islamist parties. Seemingly against odds, Turkish voters pushed five parties over the threshold in three consecutive elections in the 1990s. The Islamist Welfare Party (RP), the progenitor of today's AKP, rose to prominence in this decade—with its leader, Necmettin Erbakan, becoming Turkey's first Islamist prime minister, leading a coalition government.

Concern that the rise of Erbakan and RP was leading to the Islamization of the secular Republic, caused the military to step into politics. In what is known as Turkey's "post-modern coup," the military sought to force the resignation of Erbakan's government; although Erbakan tenaciously managed to hold on for four months, his coalition was seriously weakened and subsequently collapsed. Shortly thereafter, RP was prosecuted and dissolved for anti-secular activities, and several of its leading members—including Erdoğan, then-mayor of Istanbul—were given prison sentences and banned from participating in politics for five years.

Continuing political instability and massive corruption led to a financial crisis in 2001. The 2002 parliamentary elections were held in the aftermath of this economic crash. Rampant inflation, unemployment, and government mismanagement of the economy bred resentment towards Turkey's past coalition governments. No party in parliament was reelected and the AKP rode this wave of dissatisfaction to its historic electoral victory in 2002 in the first parliamentary elections it contested as a party.

Indicative of the impact of the threshold, AKP won nearly two-thirds of the seats in parliament with little more than a third of the popular vote. In a sense, this was exactly what the originators of the threshold had envisioned—strong government no matter how fractious the voters may be—but the wrong party was at the helm. The military government legislators clearly had not anticipated that the threshold would serve the ends of a religiously-oriented party.

### In Comparative Perspective

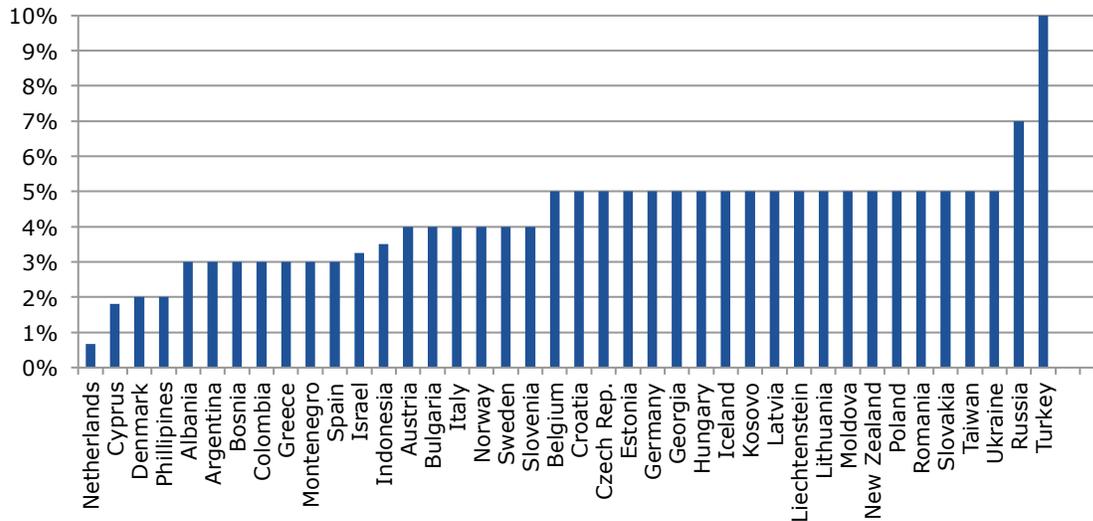
Electoral thresholds vary worldwide: from .67 percent in the Netherlands to Turkey's extremely high 10 percent. Among European Union (EU) member states, 5 percent is the highest threshold. A 2002 European Council decision declared that all member states must use a system based on proportional representation, and that a member state's threshold must not exceed 5 percent.

Among EU member states, the Czech Republic, France, Germany, Hungary, Lithuania, Poland, Romania, and Slovakia employ a 5 percent threshold; Austria, Italy, and Sweden have a threshold of 4 percent; Greece has a 3 percent threshold; and Cyprus has a

threshold of 1.8 percent. Turkey’s 10 percent threshold is by far the highest of electoral thresholds worldwide, even surpassing Russia’s 7 percent.

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## International Comparison of Electoral Thresholds



### IMPACT ON TURKISH POLITICS

High electoral thresholds, such as Turkey’s, lead to a high number of “wasted” votes. As noted by the International Institute for Democracy and Electoral Assistance, “[T]he existence of a formal threshold tends to increase the overall level of disproportionality, because votes for those parties which would otherwise have gained representation are wasted.”<sup>2</sup> They generally disadvantage smaller parties, newer parties, minority parties, and parties with geographically concentrated support. Higher thresholds also risk distorting election results: by discarding the votes cast for parties who fail to surmount the electoral threshold, the resulting makeup of parliament does not reflect the votes of the entire electorate and magnifies the victory of those parties able to meet the threshold.

#### Outcomes of Recent Elections

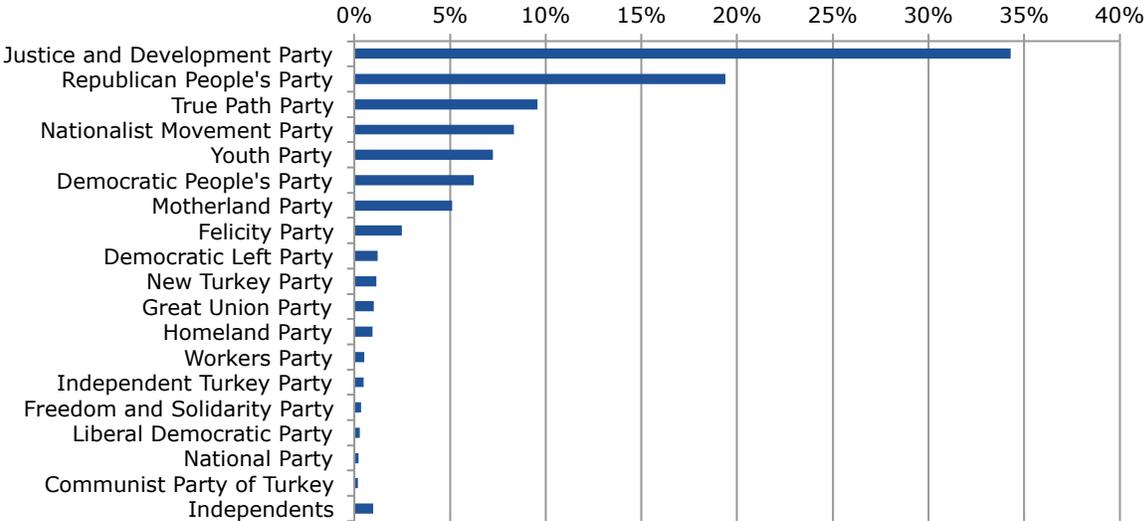
Turkey has a high number of political parties (27 parties signed up to participate in the 2011 parliamentary elections), but elections under the 10 percent threshold have consistently seen only a handful of parties—sometimes as few as two—make it into parliament. Since 2002, the AKP has been the main beneficiary of this system.

This has altered the electoral strategy of parties and candidates, most notably Kurdish politicians. Unable to obtain 10 percent of the vote, Kurdish politicians often choose to bypass the threshold by running as independents. Then, once seated in parliament, they announce their party affiliation and form a parliamentary bloc, which requires only twenty members.

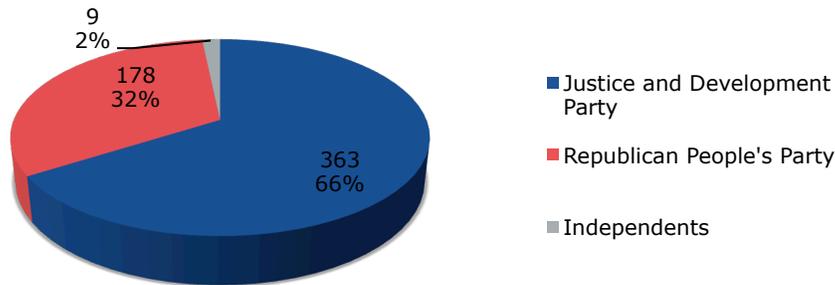
In the 2002 parliamentary elections, out of the 18 parties contesting the election, only two overcame the threshold: the AKP and the Republican People's Party (CHP). These elections saw every party previously sitting in parliament ejected and were a windfall for the newly-established AKP, which entered parliament after running in its first parliamentary election with 363, or 66 percent of seats, although it had won only 34.3 percent of the national vote.

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### 2002 Election Vote Breakdown

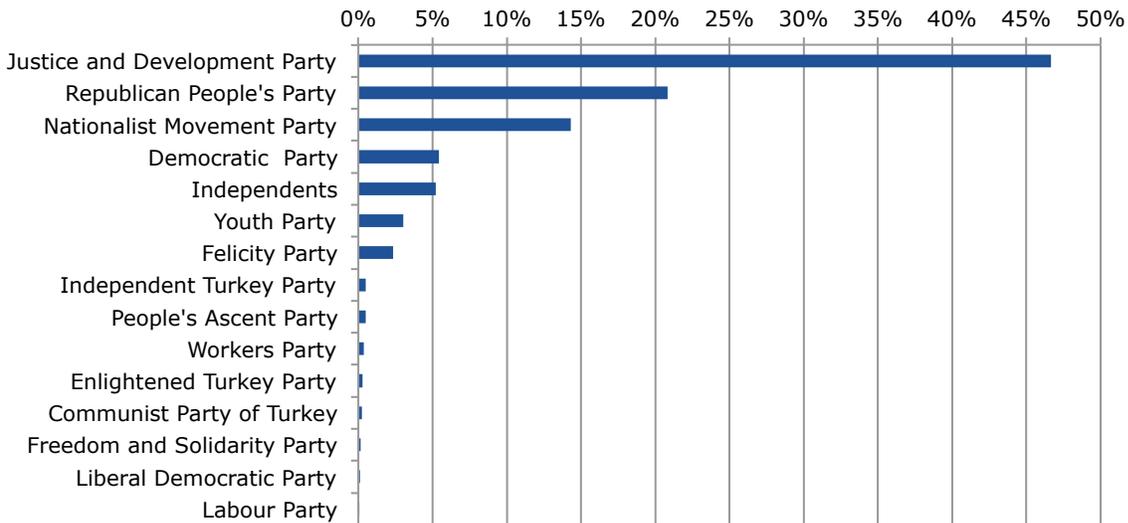


## 2002 Election Seats in Parliament Awarded

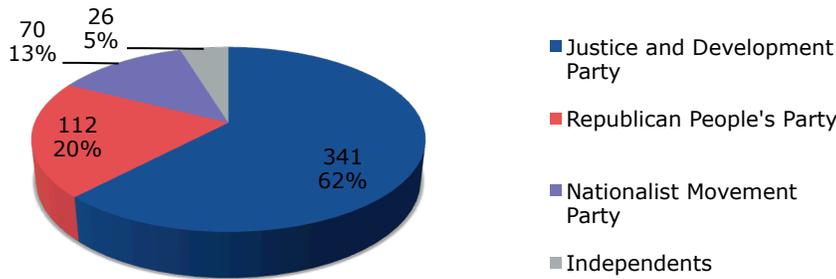


For the AKP, 2007 was another good year. Out of 14 parties, only three were able to exceed the threshold: the AKP, the CHP, and the Nationalist Movement Party (MHP). The AKP secured 341 seats (62 percent) with 46.7 percent of the vote, the CHP gained 112 seats (20.4 percent) with 20.9 percent of the vote, and the MHP gained 71 seats (12.9 percent) with 14.3 percent of the vote.

## 2007 Election Vote Breakdown

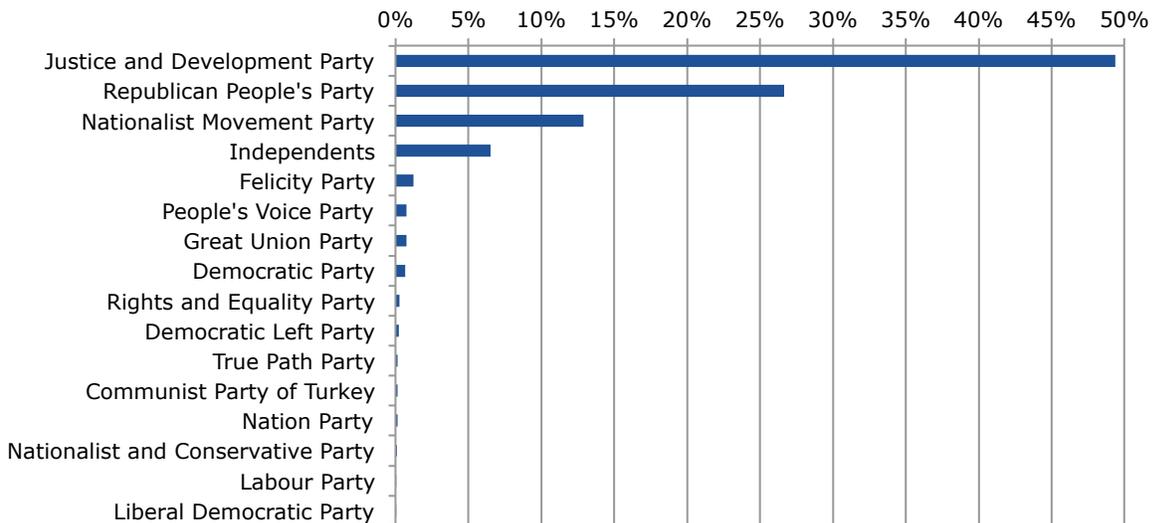


## 2007 Election Seats in Parliament Awarded



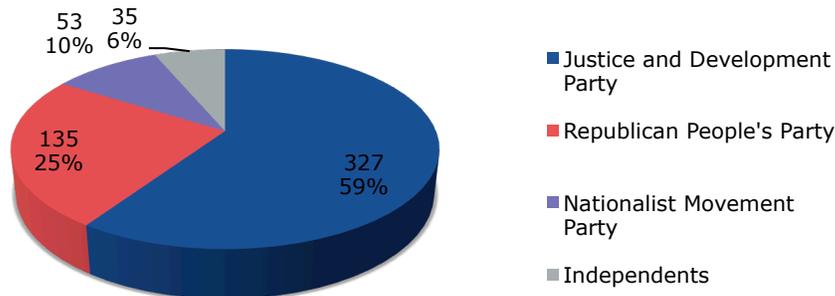
The 2011 parliamentary elections saw this pattern repeated. The AKP, though it won only 49.8 percent of the national vote, obtained 327 parliamentary seats, or 59.5 percent. Although the threshold has clearly worked in the AKP's favor, this pattern demonstrates another quirk of the system: as the AKP has significantly increased its popular vote, its share of parliament has steadily, if only slightly, dropped.

## 2011 Election Vote Breakdown



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## 2011 Election Seats in Parliament Awarded



### Implications for 2015 Election

Because the president is an apolitical post according to the Turkish Constitution, Erdoğan had to resign from the party upon his election. With the AKP now led by Prime Minister Ahmet Davutoğlu, the 2015 elections will be a test of the AKP's staying power without its leading co-founder and most charismatic leader at the helm. Additionally, it will determine whether or not the AKP will be able to realize its full political ambitions, such as sweeping changes to the Constitution and Turkey's political system, that hinge on the party attaining a sizeable majority in parliament.

There are two ways to change the constitution: at least three-fifths of parliamentarians have to vote in favor of the proposed amendment (330 out of 550), sending it to a public referendum (which can then be adopted by a simple majority of voters); or a three-quarters parliamentary majority (367 out of 550) has to ratify the amendment, triggering automatic adoption of the proposed amendment without recourse to a public referendum. Both of these avenues are presently closed to Erdoğan, as his former party in parliament, the AKP, only has 312 seats.

If attaining enough seats to amend the constitution is an improbable prospect for the AKP even with the boost from the 10 percent threshold, it will be nigh impossible if the threshold is removed or lowered.

### **DEMANDS FOR REFORM**

Calls to lower Turkey's 10 percent threshold certainly are not new. But as the AKP grip on power has increased, demands for change have gotten louder and have been embraced by a wider swath of Turkey's political actors.

#### The Kurds

The 10 percent threshold has proved prohibitively high for Turkey's Kurdish political parties, who historically win overwhelming majorities in the primarily Kurdish southeast, but fail to attain 10 percent of the vote nationally. One of the central demands of Kurds in

the ongoing peace process between the government and the Kurdistan Workers' Party (PKK) has been lowering the threshold.

### The AKP

Erdoğan himself has previously suggested several alternative electoral models, although it is not clear if he ever seriously considered it. His proposals included lowering the threshold to 5 percent or eliminating it entirely while narrowing electoral constituencies.<sup>3</sup> The narrowed electoral districts would have five seats each. The party that secures the most votes in each district would win all of the seats, instead of allocating seats based on a proportional system.

Another AKP proposal would impose single-member districts, where each electoral district elects one member of the 550-seat parliament. In each district, the party candidate who wins the largest percentage of the vote would gain the electoral seat.

Even if sincere, these proposals were not made purely out a concern for creating a just and fair system of representation. With the AKP expected to come in first in the majority of electoral districts, each of these proposals would greatly strengthen its already dominant position.

### The Opposition

Minority party leaders, unable to devise a strategy to best the AKP, would not mind seeing the threshold lowered and their seats in parliament increased. Deputy Demir Çelik, from the pro-Kurdish Peoples' Democratic Party, explained that the election threshold is not acceptable: "The political parties in power exploit the election threshold in order to hinder the rights of other political parties. For the last 12 years, the Justice and Development Party has intentionally not lowered the threshold, as it gets 50-60 more deputies thanks to the 10 percent barrier."<sup>4</sup>

The CHP has long advocated for lowering the threshold and has in the past introduced legislation that would lower the threshold to 3 percent. "The high number of parties that would be represented in parliament [if there were a lower threshold] will not introduce turmoil, but rather multiple voices, which is a *sine qua non* of democracy," said CHP Deputy Chairman Sezgin Tanrikulu.<sup>5</sup>

### The European Union

The European Union has consistently recommended that Turkey lower its parliamentary threshold. In 2010, for example, a Council of Europe parliamentary assembly report recommended a threshold of 3 percent, saying: "In stable democracies, legal thresholds over 3 percent are hardly justifiable."<sup>6</sup>

Significantly, however, the European Court of Human Rights (ECHR) sustained the legitimacy of the ten-percent threshold in a 2008 ruling in response to a complaint lodged by two former candidates from the pro-Kurdish party DEHAP, which had failed to meet the

threshold in the 2002 elections. Although noting its belief that the threshold be decreased, the ECHR asserted that the existence of the threshold is not a violation of individual freedoms or human rights. Still, in its final decision in *Yumak and Sadak vs. Turkey*, the Court opined, “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.”<sup>7</sup>

Thus, were Turkey’s Constitutional Court to rule against the threshold on human rights grounds, it might be bringing Turkey closer to EU electoral norms, but it would be exceeding EU judicial requirements.

## Current Challenge to the Threshold

The future of the 10 percent threshold became a subject of headlines and rampant speculation in Turkey on November 30, 2014, when Haşim Kılıç, head of the Constitutional Court, announced in a newspaper interview that the Court would consider the threshold’s constitutionality. “The Court,” he relayed, “is considering the individual applications on the subject of the election threshold and will make its decision within the next two to three weeks.”<sup>8</sup>

Although it now seems that the expected ruling will only be on the Court’s ability to hear the complaint about the threshold, not on its constitutionality, the possibility that the Court could strike down this barrier has raised significant and contentious legal and political questions about what comes next.

### THE CASE

The Constitutional Court is considering numerous individual applications against the threshold, which come from multiple political parties.

In early December 2014, CHP Deputy Umut Oran appealed to the Court. “The higher the election threshold is, the bigger is the blow to democracy,” he said in his petition, arguing that the threshold violates the constitutional principle of “just representation.”<sup>9</sup>

Earlier, in June 2014, the Grand Unity Party, which is not represented in parliament, appealed to the Constitutional Court for the elimination of the threshold. “I took it to the [Constitutional Court] because there is no other way. We want the will of the people to be accurately reflected in the ballot boxes,” said Grand Unity Party leader Mustafa Destici.<sup>10</sup>

### THE CONSTITUTIONAL COURT

Under the terms of a 2010 constitutional amendment, Turkey’s Constitutional Court is composed of 17 members, each serving one non-renewable, 12-year term. They are appointed—3 by the parliament, 14 by the President—from lists of nominees provided by the state’s leading judicial and educational organs. Of these 17, Kılıç is the only one to have

been appointed by President Turgut Özal in 1990. Five others were appointed by President Ahmet Sezer and 12 by President, and AKP co-founder, Abdullah Gül.

Despite the AKP's influence in shaping the Court, it has come under fire from the government for some of its 2014 decisions. Most notably, the Court ruled against government actions blocking access to Twitter and YouTube and overturned parts of a law that gave the justice minister substantial powers over the Supreme Board of Judges and Prosecutors, which oversees the Turkish judiciary. "We have to obey the Constitutional Court's decision," said Erdoğan after the Court ruled against the Twitter ban in April 2014, "but we don't have to respect it."<sup>11</sup>

Within three months of that statement, however, Erdoğan had decided he did not even have to obey judicial decisions, at least those issued by lower courts. In September 2014, after successive lower court rulings ordered a halt to construction of his extravagant presidential palace, built in a protected forest, he retorted, "Let them tear it down if they can." He added: "They ordered suspension, yet they can't stop this building. I'll be opening it; I'll be moving in and using it."<sup>12</sup>

There is good reason to think Erdoğan will not be any more kindly disposed to the Constitutional Court's ruling on the matter of the threshold. On an occasion marking the 52nd anniversary of the Constitutional Court in April 2014, Kılıç made an impassioned speech criticizing the government's interference in the judiciary, accusing it of attempting to "occupy the judiciary by imposing a new sort of tutelage," and committing "a corruption of conscience" against justice.<sup>13</sup> In response, Erdoğan called Kılıç a member of the "parallel state," meaning a member of the Gülen movement, which Erdoğan, on other occasions, has called "terrorist" and whose adherents he has pledged to root out of the government.<sup>14</sup>

Erdoğan, who once called on the judges of the Constitutional Court to "take off their judicial robes" if they want to meddle in politics, further insulted the Court by saying "we need people who digest that which is written in books, not donkeys loaded with books."<sup>15</sup>

Yet neither Kılıç himself, nor the Court under his leadership, can be justly accused of being tilted against the AKP. During his tenure as president, Kılıç was the deciding vote in the closure case against the AKP in 2008. If he had voted in favor of closure, the party would have been dissolved. When the Court also voted in 2008 to cut the AKP's state funding, Kılıç was the only member to cast a vote against it. And at the same time as Court was deciding whether to hear the challenge to the threshold, it declined to rule on the issue of Erdoğan's presidential palace. Further, since that 2008 case, 12 new judges—70 percent of the Court—have been added, all of them appointed by Gül and, therefore, at least in part, likely favorable to the AKP. A ruling against the threshold would not be the work of a bench inimical to the government.

## **INDIVIDUAL APPLICATIONS TO THE CONSTITUTIONAL COURT**

The ability of the Constitutional Court to consider this case is, perhaps ironically, a product of a package of constitutional amendments, adopted by popular referendum in 2010, that

were intended by the AKP to strengthen the government's grip on the judiciary, while appearing merely to reform and professionalize it to meet EU standards. Among other changes, the amendments created the right of individual application directly to the Constitutional Court.

This change was made in response to the huge number of cases filed against Turkey in the ECHR. To avoid this embarrassment, the AKP sought to create a way to avoid, or at least delay, complaints making their way to the European body. The amendment in question rewrote Article 148 of the Turkish Constitution to include: "Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities. In order to make an application, ordinary legal remedies must be exhausted." This amendment went into effect on September 24, 2012.

Though it now appears revolutionary for Turkey, the change was barely noticed at the time, perhaps because it was assumed the Court would be heavily dominated by the government and would avoid clashing with it. In fact, such individual applications have been soaring in numbers. Between September 2012 and August 2013 the Court received around 6,700 applications. By July 2014, that number reached 22,677.<sup>16</sup> Individual applications are facilitated by the relatively nominal fee—roughly, only \$100—that applicants must pay in order to initiate the process.

## What to Expect

There is no clear precedent in Turkey's Constitutional Court for a case such as this, leading to confusion as to what will happen should the Court rule that the 10 percent threshold is an unconstitutional violation of an individual's rights. Additionally, the charged political atmosphere in Turkey, the government's increasing disdain for the judiciary, and the importance of the upcoming elections all contribute to uncertainty about how the main actors will respond to any decision by the Court.

### **LEGAL AND PROCEDURAL DETAILS**

Before the Constitutional Court can review the substantive issues of the case and make a ruling for or against the threshold, it must first decide whether or not the application is admissible to be considered by the Court. If the Court decides that it is legally able to review the threshold, several outcomes are possible.

#### Powers of the Court

Some understand this to mean that, if the Court rules against the threshold, it will be removed and immediately reset at zero. Under this understanding, should the government want upcoming elections to be held with some threshold other than zero or 10 percent, parliament would have to pass a new electoral law.

Another interpretation is that a Court decision would not reset the threshold to zero because the Court cannot change the electoral law. According to this view, the Court can only decide whether or not a right has been violated and then send the law for legislative review. As Ergun Özbudun, a professor of constitutional law at İstanbul Şehir University, put it, “Regarding petitions related to a violation of a personal right, the AYM does not have the authority to cancel [a law].”<sup>17</sup> Since the electoral threshold is set by law, not enshrined in the constitution, proponents of this view point to Article 45 (3) of the Law No. 6216 on the Establishment and Judgment Procedures of the Constitutional Court that states that, “Direct individual applications may not be petitioned against legislative proceedings.” Following a ruling by the Court, therefore, the matter would have to be sent to parliament to decide just where to set the new threshold; until then it would remain at 10 percent.

### Timeline for Implementation

A further wrinkle to both these theories is the question of whether the parliament could even set a new threshold for the 2015 election. According to the Turkish Constitution, for a law to apply to elections, it must be passed at least one year before the election is to be held. On the face of it, therefore, even if parliament were to pass a new electoral law, it could not do so in time for it to apply to the parliamentary elections slated for the summer of 2015—unless the constitution is amended to remove this provision. The AKP, however, does not have enough votes to send such a constitutional amendment to a popular referendum. To have any hope of passing, the AKP would require opposition votes; this is extremely unlikely. As such, if the 10 percent threshold is overturned by the Constitutional Court, the 2015 parliamentary elections should either be held with a threshold of 10 or zero, depending on which interpretation prevails.

Yet, even this seemingly clear constitutional principle is in question. Kılıç, for example, claimed, initially, at least, that the Constitutional Court’s decision will be exempt from this restriction. “The verdict goes into effect immediately,” he said. “A verdict regarding the violation of a right is [taken] for the violation to be eliminated immediately.”<sup>18</sup> He later seemed to walk back this assertion, hedging that while the decision would go into effect immediately, the legislature would need time to act on it.<sup>19</sup> Still, others point to the parliamentary elections of 1991 as providing precedent for changing the electoral law less than a year before elections. Ahead of these elections, the Turkish parliament amended the district system, narrowing the number of electoral constituencies, without recourse to a constitutional amendment.

### The Final Arbiter

One thing is certain, however, final say in how, and with what threshold, the 2015 parliamentary elections will be carried out rests with the Higher Election Commission (*Yüksek Seçim Kurulu*, or YSK), an ostensibly independent body. Yet, as evidenced by their failure to consider complaints of vote tampering filed by the opposition in the March 2014 local elections, the Commission appears to be dominated by Erdoğan loyalists. If there is

any uncertainty or competing assertions about what the legally-binding threshold should be, chances are the YSK will side with ruling the party.

## **POSSIBLE OUTCOMES AND RAMIFICATIONS**

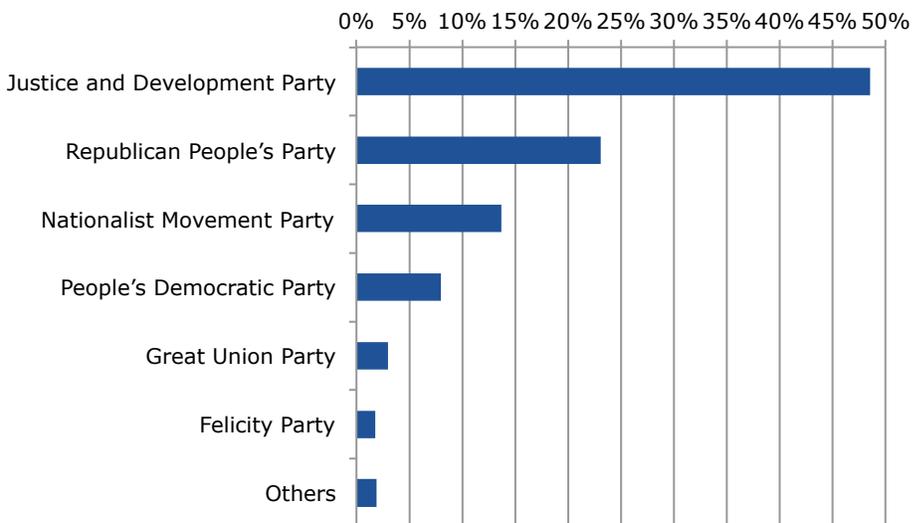
Separate from the question of what can and should legally happen if the Constitutional Court rules against the threshold is the issue of what will actually take place.

### Government Sets New, Lower Threshold

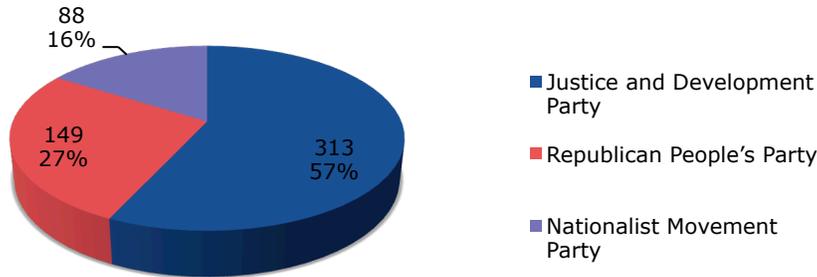
If the 10 percent threshold is lowered or eliminated before the 2015 election, it could drastically impact the makeup of the Turkish parliament. Kurdish parties would ascend to parliament, while the MHP would not be at risk of falling out of parliament altogether. Notably, without the threshold magnifying its electoral victories, the AKP may fail to gain the kind of majority it has been enjoying.

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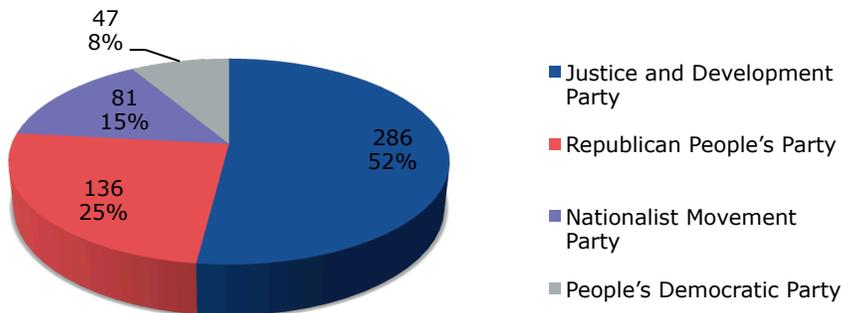
### **Projected 2015 Election Vote Breakdown (based on Nov. 2014 polling data)**



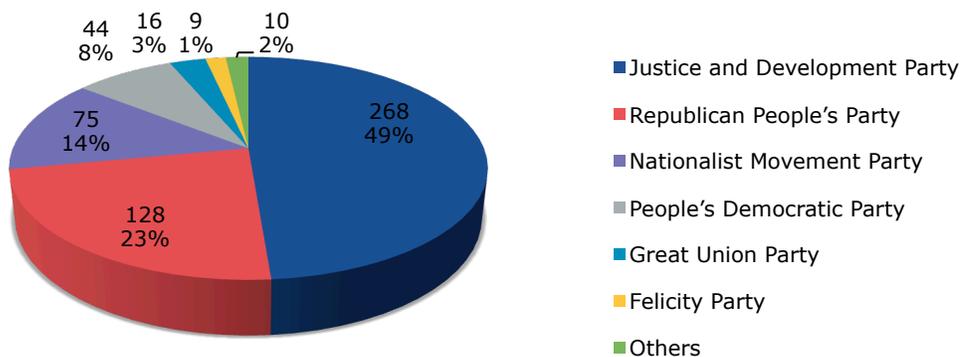
**Projected 2015 Seats in Parliament Awarded with 10% Threshold  
(assumes no independent candidates)**



**Projected 2015 Seats in Parliament Awarded with 5% Threshold  
(assumes no independent candidates)**



**Projected 2015 Seats in Parliament Awarded with No Threshold  
(assumes no independent candidates)**



A removed or lowered threshold may also change the behavior of Turkish voters. Under the 10 percent threshold, a vote for a smaller party was often a wasted vote, and so it encouraged voters to cast their vote among the larger parties more likely to ascend to parliament. For that reason, Kurdish voters could often be expected to vote for the AKP. With a lower obstacle to representation, voters will effectively have more options to choose from and could shift their allegiances elsewhere, eroding the AKP's base.

A decrease in AKP representation would hamper the AKP's plans, such as amending the constitution to strengthen the power of the presidency, which requires a two-thirds majority in parliament to pass. AKP leaders, however, do not seem unduly worried by this prospect. "When we set off on our political journey in 2001, this restriction was already in place," explained Prime Minister Ahmet Davutoğlu. "Despite the 10 percent limit, the AK Party came into power 15 months after its establishment. No limit will block us; we can rely on the people's will."<sup>20</sup>

#### The Threshold is Maintained—Legitimately or Not

The rest of the government, however, does not appear to share Davutoğlu's sanguinity. The public statements of the president and other high-ranking officials strongly suggest that they are disinclined to see the threshold changed. "Sovereignty does not rest with the Constitutional Court," Erdoğan said, denouncing the Court's consideration of the issue as trying to inappropriately interfere in politics. He went on to quote a maxim of Mustafa Kemal Atatürk: "Sovereignty," and, therefore, presumably the right to decide the threshold, "rests with the nation."<sup>21</sup>

Justice Minister Bekir Bozdağ echoed Erdoğan's remarks, accusing the AYM of attempting to meddle in the upcoming elections. "There are only six months left until the election; what is the use of launching a debate on elections within six months?" he asked. "[I]s there some 'engineering' aimed for the 2015 election? The courts cannot do engineering aimed at the elections and cannot regulate politics; it should not regulate."<sup>22</sup>

With the Turkish government staunchly opposed to the Constitutional Court's consideration of the issue, it is possible that it would seek to keep the threshold where it is. There are a few options by which it could seek this outcome: Erdoğan's government could persuade a majority of the judges to vote against overturning the threshold or, if the Court overturns the threshold, the government could simply ignore the ruling and proceed as if nothing happened—as Erdoğan has already done with judicial demands that construction of his palace be stopped.

The latter option could spur a constitutional crisis and risk the legitimacy of the elections if they are held with a 10 percent threshold in defiance of the Court's ruling. Both options could reflect badly on the AKP and Erdoğan, making it appear as though the party fears it cannot win under a lower threshold. Worse still, it could be seen by the Kurds—who are engaged in peace negotiations with the government and are some of the most adamant opponents of the 10 percent threshold—as a signal that this government is not serious

about granting them increased political rights. The result could be a collapse of the talks and renewed PKK violence.

### Court Tries to Split the Difference

Given the extreme political pressure they are being put under, the justices might try to find a way to attenuate the tension without compromising their principles. One way to do that would be for the Court to rule against the threshold but announce that their verdict will not apply to the 2015 elections. There are certainly legal grounds for why that should be the case and by making it clear that they accept that interpretation, the justices would largely remove Erdoğan's incentive to disregard the Court and its ruling.

But while such an approach would be a wise maneuver to preserve the dignity and authority of the judiciary, it would largely render the Court's decision meaningless. With Erdoğan determined to amend the Constitution to create a presidential system and likely—without a change to the threshold—to gain enough votes in parliament to usher in such a change, the AKP would have four years and an abundance of power to override the Court's decision. Although political prudence is often considered an important quality for judges—such as the 1935 U.S. Supreme Court “switch in time that saved nine”—in this case it would likely prove a futile gesture.

## Endnotes

- <sup>1</sup> "Erdoğan Blasts Top Court on Election Threshold, Gov't More Moderate," *Today's Zaman*, December 2, 2014.
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- <sup>3</sup> Göksel Bozkurt, "AKP Plans for the 'Electoral System,'" *Hurriyet Daily News*, November 11, 2013; Nuray Babacan and Turan Yilmaz, "Turkey's Ruling AKP Drafts New Electoral System with Narrowed Constituencies," *Hurriyet Daily News*, April 18, 2014.
- <sup>4</sup> "Top Court Considering Election Threshold Dominates Political Agenda," *Today's Zaman*, December 1, 2014.
- <sup>5</sup> "Opposition CHP Submits Bill to Reduce Election Threshold to 3 Percent," *Today's Zaman*, April 22, 2014.
- <sup>6</sup> "Thresholds and Other Features of Electoral Systems Which Have an Impact on Representativity of Parliaments in Council of Europe Member States," *Council of Europe Parliamentary Assembly*, January 11, 2010.  
Available at: <http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=12842&lang=EN>
- <sup>7</sup> The European Court of Human Rights, *Case of Yumak and Sadak v. Turkey*, July 8, 2008.  
Available at:  
<http://portales.te.gob.mx/internacional/sites/portales.te.gob.mx.internacional/files/CASE%20OF%20YUMAK.pdf>
- <sup>8</sup> "Top Court Considering Election Threshold Dominates Political Agenda," *Today's Zaman*, December 1, 2014.
- <sup>9</sup> "Election Threshold Debate a 'Plot by a Greater Mind,' Pro-Gov't Daily," *Today's Zaman*, December 4, 2014.
- <sup>10</sup> "CHP Secretary-General: Ruling Party Threatening Members of High Court," *Today's Zaman*, December 7, 2014.
- <sup>11</sup> Tulin Daloglu, "Erdoğan Disrespects Turkey's Top Court," *al-Monitor*, April 9, 2014.
- <sup>12</sup> Kadri Gursel, trans. Sibel Utku Bila, "Erdoğan's \$350M Presidential Palace," *al-Monitor*, September 17, 2014.
- <sup>13</sup> "Turkey's Top Judge Accuses Erdoğan Gov't of 'Corruption of Conscience,'" *Hurriyet Daily News*, April 25, 2014.
- <sup>14</sup> "Turkish PM Indirectly Slams Top Judge of Protecting the 'Parallel Gang,'" *Hurriyet Daily News*, April 27, 2014.
- <sup>15</sup> Semih Idiz, "Erdoğan's Newfound Respect for the Constitutional Court," *Hurriyet Daily News*, June 24, 2014; "Erdoğan Blasts Top Court on Election Threshold, Gov't More Moderate," *Today's Zaman*, December 2, 2014.
- <sup>16</sup> The European Commission, *Turkey: 2013 Progress Report*, October 2013; The European Commission, *Turkey Progress Report*, October 2014.
- <sup>17</sup> Erdoğan Blasts Top Court on Election Threshold, Gov't More Moderate," *Today's Zaman*, December 2, 2014.
- <sup>18</sup> "Top Court May Rule on Election Threshold Soon," *Today's Zaman*, November 30, 2014.
- <sup>19</sup> "Hukukçular Ve Siyasetçiler Yorumladı; AYM Seçim Barajını Kaldırabilir Mi?" *T24*, December 1, 2014.
- <sup>20</sup> "Erdoğan Blasts Top Court on Election Threshold, Gov't More Moderate," *Today's Zaman*, December 2, 2014.
- <sup>21</sup> Ibid.
- <sup>22</sup> "Turkish Justice Minister Sees 'Plot' Behind Debate on Electoral Threshold," *Hurriyet Daily News*, December 4, 2014.