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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
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REPORT
ON THRESHOLDS AND OTHER FEATURES
OF ELECTORAL SYSTEMS WHICH BAR PARTIES
FROM ACCESS TO PARLIAMENT (II)

Adopted by the Council for Democratic Elections
at its 32nd meeting
(Venice, 11 March 2010)
and by the Venice Commission
at its 82nd plenary session
(Venice, 12-13 March 2010)

on the basis of comments by
Mr Jean-Claude Colliard (Member, France)

Introduction

1. Following Recommendation 1791 (2007) of the Parliamentary Assembly of the Council of Europe on the state of human rights and democracy in Europe and the conclusions of the 2007 Forum on the Future of Democracy, the Advisory Committee of the Forum called for the Venice Commission to undertake a more detailed examination of the issue of thresholds for parliamentary representation. In consultation with the secretariat, it was decided to carry out this study in several stages. The first stage involved a presentation of various arrangements that serve to limit parties' access to parliament, and compared the different ways in which such arrangements are incorporated into particular electoral systems. This led to the adoption of a report (CDL-AD(2008)037) by the Council for Democratic Elections at its 26th meeting (Venice, 18 October 2008) and the Venice Commission at its 77th plenary session (Venice, 12-13 December 2008).

2. This report reflects the second stage of the study, which is concerned with the actual impact of the various types of restriction on access to parliament, with an emphasis on both legal and natural thresholds. It was adopted by the Council for Democratic Elections at its 32nd meeting (Venice, 11 March 2010) and the Venice Commission at its 82nd plenary session (Venice, 12-13 March 2010). A third stage might entail the preparation of common European rules on this subject.

General comments

3. There is an obvious reason why our democracies are representative, namely that except in a few rare cases of direct democracy it is impossible to consult the millions of citizens of modern states directly. They therefore reach their decisions through the intermediation of their representatives, the number of whom will not exceed several hundred. This is where the difficulties begin, because to pass from a few million, or tens of millions, of votes to a few hundred representatives necessarily entails a degree of simplification, and thus deformation. Only the political currents that achieve a certain impact on the public will be represented, while more marginal ones will be pushed aside. While this is inevitable, though, there are also various formal arrangements for restricting access. These will be described here, starting with certain general considerations. We will then examine the issues of legal or explicit thresholds and natural or implicit ones, before suggesting certain general conclusions on what sort of balance to strike.

1. General considerations

4. We will first look briefly at the restrictions placed first on candidates and then on parties, which as far as political representation is concerned are absolutely critical.

1.1 Restrictions on candidates

5. The following is not an exhaustive list:

1.1.1 General conditions

6. The right to stand for election is often subject to various conditions. These may include age, for example the minimum age considered necessary to be able to fulfil certain important functions, registration on the electoral roll of the constituency where the candidate is standing, because it is these voters whom he or she intends to represent, and legal capacity, such as the exclusion of candidates with certain pathological conditions or, somewhat differently, criminal convictions. These are all acceptable if the criteria are objective and rational and do not result in persons' exclusion for political reasons.

7. Similarly, it is acceptable to establish ineligibilities to be elected for persons exercising functions that give them an excessive advantage over other candidates, such as senior officials, military commanders and judges.

8. The current trend is to align eligibility with electoral capacity, in other words any voter can be a candidate. There remains the issue of senior officials, whom it is still probably acceptable to exclude, at least in constituencies where they exercise the relevant functions¹.

1.1.2 Candidate selection

9. The right to stand for election may be subject to the support either of a certain number of electors to exclude frivolous candidates, which is acceptable if the number is sufficiently small, say single figures in a single seat system and a few dozen in a list system, or of a political party. The latter is more complex and raises the question of political parties' recognition and their selection procedure, for example whether this is in the hands of the leadership, the various party bodies or the membership as a whole, or – as seems to be a growing trend – is based on a primary elections system. This is dealt with in the Venice Commission's Code of Good Practice in the field of Political Parties², but it has to be pointed out that for individuals the need for party support is the main restriction on election to parliament because without the investiture or support of a party of a certain size the chances of success are very limited, even if individual candidatures are possible.

1.1.3 Financial issues

10. Similarly, in order to exclude frivolous candidates - in principle a valid objective – candidates may be asked to pay a deposit that will only be repaid if they secure a minimum number of votes. This is acceptable if the amount is small, but after a certain point it may make selection dependent on financial means, which must clearly be rejected. Similarly, where the state repays part or all of electoral expenses care must be taken to ensure that the conditions posed do not in practice prevent the reimbursement of individuals or small parties. The danger is that the various arrangements will have a cumulative effect so that the least well endowed will receive the least assistance. However this major topic falls outside the scope of this study.

1.2 Restrictions on parties

1.2.1 Party privileges

11. Generally speaking, recognised parties receive favourable treatment in the electoral process since candidates presented by them may be excused the sponsorship requirements (Germany) or they may be reduced (Denmark). However, the fact that this generally concerns parties that are already represented seriously hinders new parties' efforts to enter the election arena. While it might be acceptable for parties to be favoured since they are the structural embodiment of the popular political will, the criterion for recognition must be broader than just existing parliamentary representation. Size of membership, representation in local councils or even a minimum number of votes in previous elections, irrespective of whether they secured election, might also be taken into account.

1.2.2 Candidate financing

12. Here again candidates from large parties are at an advantage because their organisation can meet part or all of their campaign costs. This raises the very sensitive issue of political party funding. The public financing of parties is a widespread practice. This is very desirable if it is

¹ On restrictions on voting rights, see Code of Good Practice in Electoral Matters (CDL-AD(2002)023rev), I.1.1.

² CDL-AD(2009)021.

based on objective criteria and does not result in one or other party receiving favourable treatment. In fact practice varies, such as only financing parties, only financing election campaigns or a combination of the two, as in Spain, Italy and France. Specifically financing election campaigns may have the advantage of not confining financial assistance to established parties.

1.2.3 Campaign material

13. Most electoral legislation guarantees each candidate a minimum level of resources, in the form of assistance with election addresses, posters and meeting rooms. The difficulty arises with party political broadcasts, which clearly cannot be offered to every candidate (in France, for example, more than 6000 candidates stand in parliament elections) and so broadcasting time is shared between political parties. This raises the question of how time should be allocated, to which there are several different approaches. These include equal time for all, equality between majority and opposition (though these notions must be clear), the same time for the large parties and the same, but less, time for the smaller ones and time proportional to previous results. Each has its pros and cons. Whatever option is chosen, a minimum amount of time should be reserved for small and/or new parties, subject to their standing in a significant number of constituencies. In fact, this is provided for in most countries' legislation.

14. While these general considerations need to be mentioned the main focus of this report must be the minimum threshold for entering parliament, which is often embodied, explicitly or implicitly, in electoral law.

2. Legal or explicit thresholds

15. Clearly, the law may set some minimum figure for election to parliament to avoid excessive proliferation of parties where the previously mentioned arrangements have not sufficed. These will be briefly summarised, and the problems then considered.

2.1 Current situation

16. The situation is fairly simple in the case of single member majority/plurality systems, more complex for proportional systems with national and/or local thresholds.

2.1.1 Single member majority systems

17. There is no problem with single round plurality systems as in Britain. The person who receives the most votes is elected with no minimum condition. In practice, people are rarely elected with fewer than 35% of the votes cast. Since the abstention rate may be as much as 40% (38.5% in the United Kingdom in 2005), this constitutes barely more than 20% of the registered voters in that constituency, which is not very representative but still more votes than any other candidate has received, thus justifying that person's election. Nevertheless, the temptation to introduce a minimum participation threshold, as certain countries do for referendums, must be avoided, since this could result in a parliament that was poorly representative, because it was incomplete.

18. The main example of a two-round single member majority system is France, which has made the conditions for access to the second round increasingly strict. Since 1976 this has been dependent on obtaining the support of at least 12.5% of the registered voters, which with an abstention rate of 40% means more than 20% of the votes cast. In fact, in the most recent parliamentary elections, in 2007, there were only three constituencies with more than two candidates in the second round, out of a total of 577, including ones that were won on the first round. Admittedly, this has the disadvantage of eliminating parties that are not part of major

coalitions but it does also avoid manoeuvring by dissident candidates. In fact it raises the question of what we expect from the electoral process, which we will consider later.

2.1.2 Proportional systems: national or local thresholds?

19. If the justification for a minimum threshold is to avoid excessive fragmentation and secure a reasonably well-structured parliament, thus making it easier to form a government, a national threshold is the logical approach and this is the one that is most frequently adopted. A major disadvantage is that it impedes the representation of regional parties and ones representing the interests of national minorities. Certain countries, such as Spain, where this is a particularly important issue have therefore opted for a constituency threshold. It is probably inappropriate to make any general recommendation. At most it might be argued that national thresholds are acceptable in countries where there is no real national minority problem, or where there are specific measures to deal with it, but that they must be used with care, and even replaced by local thresholds where this is necessary.

2.1.3 Level of the threshold

20. The approach adopted varies widely from country to country. In the Council of Europe member states the threshold varies from 10% of the votes cast to 0 – that is no legal threshold – as the following, non-exhaustive, list shows:

21. Threshold as % of votes cast:

| | |
|-------|---|
| 10% | Turkey |
| 7% | Russia (since 2007, previously 5%) |
| 5% | Germany, Belgium (by constituency), Estonia, Georgia, Hungary, Moldova, Poland, Czech Republic, Slovakia, |
| 4% | Austria, Bulgaria, Italy, Norway, Slovenia, Sweden |
| 3% | Spain (by constituency), Greece, Romania, Ukraine (4% until 2004) |
| 2% | Denmark |
| 0.67% | Netherlands (the only legal threshold is the national threshold of 1/150 of the votes cast). |

22. Several countries, in particular Sweden, Finland, Ireland and Iceland, have no legal threshold but as their constituencies are small, as in Ireland, or limited in size, the natural thresholds considered below have the same effect.

23. Practice varies widely, although in general thresholds are around 4 to 5%. It needs to be recognised that this can pose problems.

2.2 Problems raised

24. We will consider first a number of particularly significant undesirable effects, and then certain ways of dealing with them. Finally, we will look at the difficult issue of the relevance of such systems.

2.2.1 Undesirable effects

25. We will consider two particular examples of such effects, though there are others.

- Turkey: for the 2002 elections, the party in power decided to introduce a 10% threshold of votes cast, probably to prevent the Kurdish party from gaining representation. What it failed to anticipate was that it would itself fail to reach this figure and that the so-called "proportional" system would give the following curious results:

| | % of votes | Seats | % of seats |
|-----------------|-------------|-----------|-------------|
| AKP | 34.2 | 361 | 66.9 |
| CHP | 19.5 | 179 | 33.1 |
| Not represented | 46.3 | 0 | 0 |
| | <hr/> 100.0 | <hr/> 540 | <hr/> 100.0 |

26. More than half the electorate was deprived of representation and those parties that were elected had a percentage of seats twice that of their percentage of votes, so that a proportional system became a majority one.

- Russia: in 1995, there was a 5% threshold for the half of the Duma that was elected on a proportional basis. The results were as follows:

| | % of votes | Seats | % of seats |
|-------------------|-------------|-----------|-------------|
| CP | 22.3 | 99 | 44.0 |
| Liberal Democrats | 11.2 | 50 | 22.2 |
| Our Home – Russia | 10.1 | 45 | 20.0 |
| Yabloko | 6.9 | 31 | 13.8 |
| Not represented | 49.5 | 0 | 0 |
| | <hr/> 100.0 | <hr/> 225 | <hr/> 100.0 |

27. Each party represented had twice the percentage of seats as its percentage of votes. What was distinctive about this election was that the proportional part led to plurality type results, with heavy over-representation of the main parties, whereas the plurality part led to proportional types results, namely fragmentation and the election of local candidates. We will return later to the question of how far the results of a particular form of voting reflect the party system.

2.2.2 Redressing the balance

28. Several countries offer a lifeline to parties that fail to reach the national threshold. They may be allowed to take part in the allocation of seats if they have won in a minimum number of constituencies. One seat is sufficient in Denmark or Austria, and 3 in Germany. In the last-named this is facilitated by the division of seats, half of which are elected by single member plurality system and half from lists presented in each *Land*.

29. In practice, these provisions do not normally operate, though it may happen. For example, in the 1994 German elections, the PDS only obtained 4.4% of the votes but won three seats directly in the eastern *Länder* and therefore took part in the national apportionment, giving it 30 seats. In 2002 however it obtained 4% of the vote but only two seats directly, and therefore did not receive any more. This is a real threshold effect, since the third seat in 1994 in fact represented 28.

30. Such formulae or local minima, as in Denmark or Sweden, may help to deal with the problem of national minorities.

2.2.3 Relevance of the system

31. Too many adverse effects would cast doubt on this approach but this is not the case in practice. If a significant part of the political spectrum were to be denied parliamentary representation this would be grounds for criticism, but at least in the established democracies this is not the case since those seeking election adapt to the rules in force and both parties and voters take account of them in their behaviour.

32. As a result, there are relatively few wasted votes, meaning ones that secure no representation. This emerges from an examination of the highest thresholds referred to above: for example, in Germany they number between 3 and 6%; in Austria between 0.7 and 2% and in Sweden between 2 and 5.7%. However, the situation may be different where the party system is not well established, in which case there may be significant variations. The fact that the electoral system may tend to simplify the party system is not in itself a fault.

33. However, national thresholds are sometime of only limited value, since another form of threshold may play a greater role.

3. Natural or implicit thresholds

34. The term natural is not really the right one since in practice it is the relevant electoral law that determines the apportionment of seats between constituencies. The size of constituencies is critical, even though compensatory arrangements are possible.

3.1 The issue of size

35. This was highlighted more than 40 years ago by Douglas Rae in *The Political Consequences of Electoral Laws* (Yale University Press, 1967) but it continues to be generally ignored despite the fact that it is far more important than the eternal issue of how precisely to define proportionality. We will not consider the latter here since every system is based on the highest average principle (except possibly for the last seats, but the effect is marginal) and it has little to do with the question of thresholds.

3.1.1 The concept

36. The starting point is simple. If a constituency includes four seats, a proportion of the votes in the order of 25% is necessary to win one of them. On the other hand, if there are 100 seats, subject to any national minimum 1% of the vote is sufficient to win one seat. Constituency size is therefore critical. The situation can be summarised by the following formula which calculates a representativeness limit: L is the number of votes necessary to be certain of winning a seat.

$$L = \frac{\text{total number of votes}}{\text{number of seats} + 1} + \epsilon \text{ (the smallest possible value)}$$

Take the example of a four-member constituency: $L = \frac{100\%}{4+1} + \epsilon$

37. In other words, if a party has 20.1% it is sure to win a seat, whereas one with $\frac{100\%}{4+1} - \epsilon$

is not. If four parties have 20.1% the fifth may remain unrepresented with 19.6%, though it is immediately obvious that this is a possibility, not a certainty. For example, if the votes are apportioned 20.1 – 20.1 – 20.1 – 19.6 – 10.1 – 10, the party with 19.6% will be represented. An absolute formula requires the number of competing parties to be taken into account, which greatly reduces the validity of the one proposed by M. Gallagher and P. Mitchell, where the threshold is $L = 75\% (N+1)$, N being the number of seats to be filled. In this context, reference should be made to Mr Jaklic's report (CDL-AD(2008)037), which deals with the latter at some length and quotes the examples cited by P. Norris. These reinforce the rapporteur's scepticism, particularly in the case of Spain, which is considered below.

38. A general formula must take account of the number of parties taking part. The rapporteur has produced the following tentative formula, though this has not been fully thought through and must be treated with caution.

$$L = \frac{uv}{N + up - 1} - \varepsilon \quad \text{where:}$$

- uv is the number of useful votes (ones that can be counted after taking account of the legal threshold)
- N is the number of seats in the constituency
- up is the number of useful parties (those allowed to take part because they have received useful votes)

39. Taking the previous example of four seats and five parties standing, the formula gives

$$L = \frac{100\%}{4 + 5 - 1} - \varepsilon, = 12.5 - \varepsilon$$

40. In such a case there is no distribution of votes that will enable a party with fewer than 12.5% of the votes to win a seat. However, the rapporteur is still not fully convinced and would welcome a demonstration to the contrary. Besides, while this formula may help to explain the results of an election, it is of little value to lawmakers because it presupposes advanced knowledge of the number of parties taking part.

41. Moreover even if the formula is convincing at constituency level (and it is still just a hypothesis), it is not obviously transposable to the national scene.

3.1.2 The problem of national transposition

42. If all the constituencies were the same size the main difficulty would be to establish whether the number of parties taking part was always the same. Since only so-called "useful" parties are considered this would be possible. Unfortunately, this is far from being the case. Only Iceland has 6 equal 9 seat constituencies while Irish constituencies are fairly uniform with 3, 4 or 5 seats. However constituencies in Belgium range from 24 to 4 seats, in Denmark from 16 to 2, in Finland from 33 to 6, in Luxembourg from 23 to 9 and so on.

43. To resolve this difficulty, Douglas Rae proposes an average that is simply the total number of seats divided by the total number of constituencies. For example, in Spain 350 seats and 52 constituencies gives an average of 6.73.

44. The application of the previous formulae would give:

$$L = \frac{100}{N + 1} - \varepsilon = \frac{100}{6.73 + 1} - 0.1 = 12.8$$

$$L = 75\% (N+1) = 75\% (7.73) = 5.8$$

$$L = \frac{100}{N + pu - 1} = \frac{100}{6.73 + 4 - 1} = \frac{100}{9.73} = 10.3$$

45. The last example is based on four parties, assuming that each constituency is fought by the three main parties (PSOE, PP, IU) plus a nationalist or regional one. However this is an

approximation. The results vary considerably. All that can be concluded is that a party that exceeds these figures has a very good chance of being elected whereas below this level the situation is much less certain. A more detailed examination of the Spanish situation, which is quite topical, highlights the difficulty.

3.1.3 The Spanish case

46. Spain has 52 constituencies which vary greatly in size. Figures for 2008 give three main groups:

- 5 may be considered large: Madrid 35, Barcelona 31, Valencia 16, Seville 12, Alicante 12, or 106 seats,
- 20 may be considered medium, between 6 and 10 seats, for a total of 145,
- 27 are small, between 1 and 5 seats, for a total of 99.

47. Clearly then, under the preceding formulae a party with a uniformly distributed national result of 5% of the votes cast is only likely to win in constituencies with more than 15 seats. The best example is provided by the 2004 elections where the IU, with 5% of the votes, won five seats. As the theory would suggest, two each were in the major constituencies of Madrid and Barcelona, one was in Valencia and there were none elsewhere.

48. However another factor is the spatial distribution. If a party's votes are concentrated in a few constituencies, the national result is meaningless. Thus, the Catalan parties only stand in Catalonia. In the same elections, the CIU won 10 seats with 3.2% of the national vote (but much more in Catalonia) and the ERC 8 seats with 2.5% of the national vote (idem).

49. Clearly then, calculating on a national scale only gives very approximate results. Nevertheless, based purely on a nationally calculated threshold, as above, the following conclusions can be drawn:

- the parties below the threshold will probably be under-represented, that is they will win a lower percentage of seats than of votes,
- the parties above it will certainly be over-represented.

50. This example makes the rapporteur sceptical about the Gallagher/Mitchell formula. They consider the threshold in Spain to be 1.35%, which does not correspond to reality and is in any case below the legal threshold (3% per constituency), whereas in 50 constituencies out of 52 (Madrid with 35 seats and Barcelona with 31 being the exceptions) the implicit threshold reinforces considerably the explicit one.

51. All that can be said with certainty is that this implicit threshold serves a relative purpose, namely that it does not prevent representation, as the legal one does, but it makes it more difficult for smaller parties. As noted above, it can be considered to be an indication of the level beyond which parties will be under- or over-represented.

52. Nevertheless, the effect is sufficiently significant to warrant certain attenuating measures.

3.2 Attenuating measures

53. This significant effect may be avoided by action at national level or minimised by the actions of those concerned. This also raises the question of what is meant by "being represented".

3.2.1 Action at national level

54. The simplest way to avoid an implicit threshold is to have a single national constituency, as in the Netherlands, with 150 seats, and Israel, with 120. In the former, for example, parties can win a seat if they secure 1/150, or 0.67%, of the useful votes. This results in almost perfect representativeness, but at the price, inevitably, of a proliferation of parties, with generally ten or more represented.

55. A variant, which leads to the same result, is to calculate the allocation of seats at national level but then apportion them between the electoral divisions, in this case the *Länder* in Germany and in Austria, thus avoiding the effects of an implicit threshold in these divisions while maintaining representatives' geographical affiliations.

56. In Germany, this geographical affiliation is reinforced by the dual vote system, with half the seats attributed to single member constituencies and the other half to lists, from which seats are then allocated on a compensatory basis to achieve national proportional representation. The system has great attraction but is not exempt from criticism. The most traditional one concerns the *Überhangsmandate*, or the additional seats that parties obtain and retain if they win more seats directly than they would be entitled to on a proportional basis (16 in the 2009 elections). The Constitutional Court has also identified a curious perverse effect of second votes, whereby in certain cases parties can obtain more seats by receiving fewer second votes. As a result, the Court has declared this aspect of the electoral law unconstitutional and called for a redrafting, which will probably be completed by 2013 (judgment of 3 July 2008).

57. Finally, reference should be made to an interesting approach that has been used for several years in the Scandinavian countries, which consists of retaining a certain number of seats to be apportioned nationally to compensate for any disproportion resulting from election results. The higher the percentage of such seats, the easier it becomes to secure national proportional representation. The figure is low in Norway (5% or 8 out of 169), higher in Sweden (11% or 39 out of 349) and Iceland (14% or 9 out of 63) and highest in Denmark (23% or 40 out of 175). In these last three countries it is therefore possible to achieve almost perfect proportional representation. For example, in the 2007 Danish elections, the gap between a party's percentage vote and its percentage of seats was never more than 0.4%. Since one seat is 0.57% of the total this means that each party had exactly the number of seats to which it was entitled. The gaps were equally small in Sweden, and in Iceland, where in 1999 for example it was non-existent.

3.2.2 The actions of those concerned

58. While avoiding the illusion that those concerned are perfectly informed, it is reasonable to assume that their actions will take account of the constraints imposed by implicit thresholds. Thus regional parties will only present candidates in their region, or even in favourable constituencies within that region where they will concentrate their manpower and financial resources. Similarly, small ideological parties will focus on what in theory is favourable ground for them. If the system allows, this can lead to alliances between parties, whereby, for example, one will not stand in a particular constituency in exchange for another party including one of its candidates on its list, there or elsewhere. To ensure that explicit or implicit thresholds are not too easily thwarted some electoral laws specify higher thresholds for alliances than for individual parties, but this is rare.

59. Besides, reasonably well informed voters may themselves decide not to vote for parties they otherwise support that have no chance of success, so that their votes will carry weight in the final choice. An example is the significant number of split votes in German elections, where according to estimates as many as 15% of electors vote for small parties in the proportional part of elections but major ones in the plurality part. In practice, this is not significant in this

system because the compensatory arrangements mean that seats won directly are deducted from the proportional allocation, so seats are not really lost and the final result is the same, though subject to the aforementioned *Überhangsmandate*. The main function of such split votes is in fact to ensure that small parties cross the 5% barrier, and this can be critical.

60. Be that as it may, the notion of "useful votes", as a common explanation of the British two party system, is also to be found in proportional systems and may be used to mitigate, in part, any threshold effect. Hence, as noted above, the relatively small number of so-called "wasted votes".

3.2.3 The notion of being represented

61. All this leads to a question that could have been asked earlier. At what point can a party be deemed to be represented? How convincing is the traditional answer: once it has a seat in parliament? Two examples may be given from either end of the political spectrum. Was the IU in Spain represented when, in the 2004 elections, it won 5 seats out of 350, or 1.4% of the seats compared with 5% of the votes? Similarly was the French National Front represented in 1997 with 1 seat, or 0.2% of the total, compared with 14.9% of the votes (a seat that was in any case subsequently taken away from it) and unrepresented in 1993 and 2002, with no seats but more than 10% of the votes?

62. Clearly the criterion is unsatisfactory, even though there has been little attempt to find an alternative. In practice, there are three different sets of circumstances:

- the major parties are assured in all cases of reasonable representation or even, in a proportional system, a greater or lesser degree of over-representation;
- small parties will never secure representation because they are always the victims of an explicit or implicit threshold;
- parties in an intermediate situation are a more complex case because they can hope to win a few seats but not in proportion to their election results. Is a party represented when it wins 5% of the votes and 1% of the seats? Here we need to refine our criteria, for example by specifying that parties are not represented if – say – their percentage of seats is less than one-third of their percentage of votes. At one time, Greek electoral law took account of this concern by providing that small parties that exceeded the national 3% threshold were entitled to a percentage of seats equal to at least 70% of their percentage of votes (though with somewhat perverse effects, since the necessary seats were removed from the party immediately above and so on, with the largest party the only one that was sure to be spared).

4. **General conclusions**

63. Finally, a number of general points may be made concerning the purposes of elections, the search for a satisfactory balance and the fairness of the system.

4.1 Purposes of elections

64. What function do parliamentary elections serve? The obvious answer is to select the people's representatives, so a parliament's political composition must reflect, as closely as possible, that of the country. However, this is no longer a sufficient response. Parliamentary elections are also, and perhaps above all, the means whereby the people indirectly but effectively appoint a prime minister, together with his or her team and majority. This notion was already apparent in Britain in the late nineteenth century with the confrontation between Gladstone and Disraeli and is now generally the case. For example, in September 2009, the CDU's election posters in Berlin carried the message *Wir wählen die Kanzlerin* - we are electing

the Chancellor. In other words, voters were being told in no uncertain terms that they were required to choose a head of government rather than just a member of parliament.

65. This leads to the idea that electoral systems serve to concentrate votes on the real competitors, thus giving voters themselves a key role in this critical decision, even if it does reduce the representation of parties less directly involved. Is it more democratic for a small party with, say, 5% of the votes to decide, after the election and outside the control of the voters, to form an alliance with one or other major party and thus hand it control of the country? An example is the decision of the German liberals in 1982 to switch support from Schmidt to Kohl, though the latter recognised clearly that this had to be legitimised by fresh elections. In other words, the effect of most electoral systems, which is to strengthen the two main parties so that one can govern and the other form the opposition, is by no means reprehensible, even if it does reduce the representation of smaller parties. Nevertheless, the reduction should not be excessive, though this is largely a subjective matter and raises the issue of what constitutes a reasonable balance.

4.2 A satisfactory balance

66. At what point does a threshold become excessive? Proportional representation purists would say right from the start, as it permits a gap to emerge between representatives and those they represent. Nevertheless, most electoral legislation establishes thresholds to avoid fragmentation. The German Constitutional Court is quite punctilious on this subject, but has never questioned the 5% threshold for representation. It has even offered it protection, for example in a decision of 30 May 1962 on access to the media during election campaigns, where it stated that if new parties whose sole aim was to make themselves known were to have the same access to broadcasting facilities as the large parties, this would create a sense of uncertainty in the electorate and a tendency for voting to fragment, which was definitely to be avoided. Admittedly, this is an old decision but the reasoning is still valid.

67. Is a higher threshold acceptable? In its judgment of 8 July 2008 in the case of *Yumak and Sadak v Turkey*³ the European Court of Human Rights accepted the 10% threshold in Turkish legislation on the grounds that it had the legitimate aim of avoiding excessive parliamentary fragmentation, thus encouraging the emergence of a majority government. However its acceptance was also based partly on the existence of several correctives and safeguards, notably the independent candidatures that permitted the election of a few Kurdish members of parliament.

68. In 2007 in its Resolution 1547 the Council of Europe's Parliamentary Assembly opted for a 3% limit, though with the important reservation that this recommendation applied to "well-established democracies". This threshold seems a little low, even if we recognise the important distinction between established democracies and less established ones where the party system is still being created. In the former, a 3 to 5% threshold is probably acceptable, subject to the existence of safeguards, particularly for national minorities, and so long as the implicit threshold is not still higher. In the new democracies, in contrast, higher thresholds might be envisaged to encourage the establishment of simple and effective party systems, with the same precautions and certainly without exceeding 10%, which is already fairly high.

69. We should beware of giving the impression that the general recommendation concerning a fairly low threshold represents a condemnation of any totally or partially majority/plurality-based system. The United Kingdom, for example, can hardly be considered not to be an electoral democracy.

³ Application no. 10226/03, judgment of 8 July 2008.

4.3 The fairness of the system

70. In the end, what is important is that the relevant electoral rules are clear and easy to understand by both parties and voters so that they can adjust their behaviour to take them into account. For example, they should not think that any party with 5% of the vote is sure to be represented because that is the national threshold, if at the same time an implicit constituency threshold actually prevents or seriously reduces the chances of such representation. This is not so easy to grasp.

71. Reference should be made here to national compensatory arrangements, which are particularly important in the Scandinavian countries and can ensure that small parties enjoy at least minimum representation.

72. At all events, there is no point in seeking a uniform electoral system for all the countries of the Council of Europe. The answer may be to set limits, bearing in mind what has been said earlier, and leave it to each country to decide what arrangements are best suited to its particular circumstances, having regard to its history and party system, and best able to strike a satisfactory balance between the two potentially conflicting requirements of representativeness and governability.