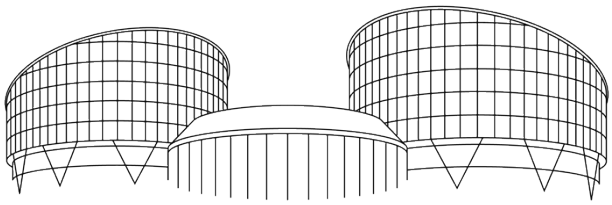

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF ÖZGÜRLÜK VE DAYANIŞMA PARTİSİ (ÖDP)
v. TURKEY

(Application no. 7819/03)

JUDGMENT

STRASBOURG

10 May 2012

FINAL

22/10/2012

This judgment has become final under Article 44 § 2 of the Convention.

In the case of Özgürlük ve Dayanışma Partisi (ÖDP) v. Turkey,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Françoise Tulkens, *President*,
Danutė Jočienė,
Dragoljub Popović,
András Sajó,
Işıl Karakaş,
Guido Raimondi,
Paulo Pinto de Albuquerque, *judges*,
and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 4 October 2011 and 10 April 2012,

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

PROCEDURE

1. The case originated in an application (no. 7819/03) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish political party, Özgürlük ve Dayanışma Partisi (the Freedom and Solidarity Party) ("the applicant party"), on 1 October 2002.

2. Before the Court, the applicant party was represented by Mr M. Bektaş, a lawyer practising in Ankara. The Turkish Government ("the Government") were represented by their Agent.

3. The applicant party, which had been granted the right to take part in the next parliamentary elections, alleged that it had been discriminated against on account of the refusal of its application for the financial assistance to political parties available under the Constitution.

4. On 30 July 2007 the application was communicated to the Government. The Court also decided to rule on the admissibility and merits of the application at the same time.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant party, Özgürlük ve Dayanışma Partisi ("the ÖDP"), is a Turkish political party based in Ankara.

6. By a decree of 28 November 1998, the Higher Electoral Commission published a list of the eighteen political parties authorised to participate in the parliamentary and municipal elections to be held on 18 April 1999. The ÖDP featured on the list. In order to be able to participate in the elections in question, the political parties had to have had, for at least six months prior to the elections, branches in no fewer than half the country's provinces and to have already organised their party conference.

7. On 23 September 1998 the ÖDP applied to the Ministry of Finance for the financial assistance available to political parties under Article 68 of the Constitution.

8. By a decision of 23 November 1998, the Ministry of Finance refused the application on the ground that only political parties meeting the criteria laid down by Law no. 2820 on political parties were eligible for public funding.

9. On 29 December 1998 the ÖDP brought proceedings in the Ankara Administrative Court seeking the setting-aside of the decision of 23 November 1998. The ÖDP began by pointing out that the Constitution itself provided that "the State shall grant political parties sufficient and equitable funding" and that "the law shall define the principles applicable to party funding, members' subscriptions and donations". The applicant party observed in particular that the criteria laid down by the Law on political parties excluded parties which were not represented in Parliament from entitlement to State subsidies. Pointing to the difficulty of carrying out political activities and campaigning without the necessary financial resources, it contended that the statutory exclusion was unconstitutional and contrary to the principles of a democratic State, to the State's duty to promote democratic rights and freedoms, and to the principle of non-discrimination. Furthermore, the provisions in question were in breach of international human rights protection instruments.

10. In a judgment of 29 September 1999, the Ankara Administrative Court rejected the application lodged by the ÖDP, on the ground that the latter did not satisfy the criteria laid down by Law no. 2820 on political parties. The court did not rule on the plea of unconstitutionality raised by the ÖDP.

11. The ÖDP lodged an appeal on points of law against the judgment of 29 September 1999, reiterating the arguments it had submitted at first instance.

12. In a judgment delivered on 25 April 2002 and served on the applicant party on 10 July 2002, the Supreme Administrative Court upheld the impugned judgment, which it found to be in accordance with the rules of procedure and law.

II. RELEVANT LAW AND PRACTICE

A. The national context

1. The Constitution

13. The final paragraph of Article 68 of the Constitution states that "the State shall grant political parties sufficient and equitable funding" and that "the law shall define the principles applicable to party funding, members' subscriptions and donations".

2. The Law on political parties

14. Under additional section 1 of Law no. 2820 on political parties, the State provides financial assistance (the overall amount of which represents 2/5000ths of its budget) to the political parties represented in Parliament, in proportion to the number of votes they obtained in the preceding parliamentary elections. Political parties that are not represented in Parliament are also entitled to this assistance, provided that they obtained at least 7% of the votes cast in the preceding election. Parties with at least three members of Parliament are also eligible, even if they did not participate in the last election.

15. The funding provided to political parties is tripled in a parliamentary election year and doubled in a municipal election year.

3. Constitutional case-law

16. By a judgment of 20 November 2008, the Turkish Constitutional Court dismissed by a majority a plea of unconstitutionality raised by the Ankara Administrative Court, which alleged that the statutory 7% threshold imposed on political parties in order to obtain State funding was discriminatory and therefore unconstitutional. In making its ruling, the Constitutional Court considered that one of the aims of political parties was to obtain electoral support with a view to participating in government and hence contributing to the expression of the opinion of the people. It concluded from this that parties which had not obtained a sufficient level of electoral support did not contribute to the expression of the opinion of the people to the same extent as political parties with broader popular support. It dismissed the argument that using the extent of parties' contribution to

democratic political life as the criterion for allocating State funding was not objective, equitable or proportionate.

17. A minority of the judges of the Constitutional Court took the view that the 7% threshold was too high (corresponding to almost three million votes in the 2007 referendum), that it gave an unfair advantage to political parties which exceeded it and that the criterion based on the "contribution to the expression of the opinion of the people" was subjective and in breach of the principle of the rule of law.

4. Direct funding of political parties and a brief overview of the elections in issue in the present case

18. The ÖDP obtained 0.8 % of the valid votes cast in the parliamentary elections of 18 April 1999, 0.34 % of the vote in the elections of 3 November 2002 and 0.15 % of the vote in the 2007 elections.

19. The parties that received funding prior to the elections in question had either won seats in the National Assembly in the preceding parliamentary elections or had obtained more than 7% of the valid votes cast in those elections.

Ahead of the 1999 general election, six political parties (including one that was not represented in Parliament) of the twenty-one parties fielding candidates received State financial assistance. Before the 2002 general election, six parties (including one not represented in Parliament) of the fifteen parties contesting the election received State funding. Prior to the 2007 election, funding was given to five of the fifteen parties fielding candidates; of the five parties concerned, three were not represented in Parliament. The ÖDP has never received State funding.

B. International instruments

20. The relevant passages of the Guidelines on political party regulation drawn up by the OSCE/ODIHR and the Venice Commission, and adopted by the Venice Commission at its 84th Plenary Session (Venice, 15-16 October 2010, CDL-AD(2010)024), read as follows.

> "**3. Public funding**
>
> **(a) Importance of public funding**
>
> 176. Public funding and its requisite regulations (including spending limits, disclosure, and impartial enforcement) has been designed and adopted throughout the globe as a potential means of preventing corruption, to support the important role played by political parties and to remove undue reliance on private donors. Such systems of funding are aimed at ensuring that all parties are able to compete for elections in accordance with the principle of equal opportunity, thus strengthening political pluralism and helping to ensure the proper functioning of democratic institutions. Generally, legislation should attempt to create a balance between public

and private contributions as the source for political party funding. In no case should the allocation of public funding limit or interfere with the independence of a political party.

177. The amount of public funding awarded to parties must be carefully designed to ensure the utility of such funding while not eradicating the need for private contributions or nullifying the impact of individual donations. While the nature of elections and campaigning in different States makes it impossible to identify a universally applicable amount of funding, legislation should put in place review mechanisms aimed at periodically determining the impact of public-finance systems and the need (as such exists) to alter financial-allocation amounts. Generally, subsidies should be set at a meaningful level to fulfil the objective of support, but should not be the only source of income and should not create conditions for over-dependency on State support.

(b) Financial support

178. Legislation should explicitly allow that State support for political parties may be financial. The allocation of public money to political parties is often considered integral to respect the principle of equal opportunity for all candidates, in particular where the State's funding mechanism includes special provisions for women and minorities. Where financial support is awarded to parties, relevant legislation should develop clear guidelines to determine the amount of such funding, which should be allocated to recipients in an objective and unbiased manner.

(c) Other forms of public support

179. In addition to direct funding, the State may offer support to parties in a variety of other ways, including tax exemptions for party activities, the allocation of free media time, or the free use of public meeting halls for the purposes of campaign activities. In all such cases, both financial and in-kind support must be given on the basis of equality of opportunity to all parties and candidates (including women and minorities). While 'equality' may not be absolute in nature, a system for determining the proportional (or equitable) distribution of State support (whether financial or in-kind) must be objective, fair and reasonable.

...

(d) Allocation of funding

183. The system for allocating public support to political parties should be determined by relevant legislation. Some systems allocate money prior to an election based on the results of the previous election or proof of minimum levels of support. [Other] systems provide payment after an election based on the final results. Generally, a pre-election disbursement of funds, or a percentage of funding, best ensures the ability of parties to compete on the basis of equal opportunity.

...

185. The allocation of funding may either be fully equal ('absolute equality') or proportionate in nature based on a party's election results or proven level of support ('equitable'). There is no universally prescribed system for determining the distribution of public funding. Some have argued that legislation for public funding is

generally most effective at achieving political pluralism and equal opportunity by providing a combination of both absolute and equitable equality. Where minimum thresholds of support are required for funding, it should be considered that an unreasonably high threshold may be detrimental to political pluralism and small political parties. Further, it is in the interest of political pluralism to have a lower threshold for public funding than the electoral threshold for the allocation of a mandate in Parliament.

...

187. Legislation should ensure that the formula for the allocation of funding does not provide a monopoly or disproportionate amount of funding to one political party. Nor should the formula for allocation of funding allow the two largest political parties to monopolise the receipt of public funding.

(e) Requirements to receive public funding

188. At a minimum, some degree of public funding should be available to all parties represented in Parliament. However, to promote political pluralism, some funding should ideally be extended beyond parties represented in Parliament to all parties representative of a minimum level of the citizenry's support and presenting candidates in an election. This is particularly important in the case of new parties, which must be given a fair opportunity to compete with existing parties.

...

190. Public funding, by providing increased resources to political parties, can increase political pluralism. As such, it is reasonable for legislation to require a party to be representative of a minimum level of the electorate prior to receipt of funding. However, as the denial of public funding can lead to a decrease in pluralism and political alternatives, it is ... accepted good practice to enact clear guidelines for how new parties may become eligible for funding and to extend public funding beyond parties represented in Parliament. A generous system for the determination of eligibility should be considered to ensure that voters are given the political alternatives necessary for a real choice."

THE LAW

I. ADMISSIBILITY

21. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 3 OF PROTOCOL No. 1

22. Relying on Articles 9, 10, 11 and 14 of the Convention, the applicant party alleged that, in refusing it the financial assistance granted to other parties, on the ground that it had obtained less than 7% of the vote in the preceding parliamentary elections, the State had discriminated against it, placing it at a disadvantage in the 1999, 2002 and 2007 election campaigns. It alleged that, in so doing, the State had infringed the free expression of the opinion of the people in the choice of the legislature.

23. The Court will begin by examining this complaint from the standpoint of Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1.

Article 14 of the Convention reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 3 of Protocol No. 1 provides:

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

A. The parties' submissions

24. The applicant party contended that the impugned refusal to grant it public funding had given rise to inequality between the various political parties contesting the parliamentary elections, by increasing the chances of success of the parties which were already represented in Parliament or had obtained more than 7% of the vote in the preceding elections. In the applicant party's view, those parties had access to a substantial source of funds which gave them an unfair advantage (contrary, in particular, to the constitutional and treaty provisions prohibiting discrimination) compared with new parties contesting the elections, especially when it came to disseminating their opinions (since the funding increased their capacity to access the mass media) and to the organisation of various meetings and sociocultural events at national level.

25. The Government contested the applicant party's argument. They observed that the distinction made between political parties with regard to public funding was based on the results of the preceding elections (in terms of the number of votes cast or parliamentary seats won following those elections). In other words, it was based on legitimate and objective grounds.

A refusal to grant State funding might be considered discriminatory if it was based on a party's political views, but that was not the situation in the present case. Furthermore, States had a wide margin of appreciation when it came to laying down the minimum criteria to be met by political parties in order to qualify for State funding, provided that the parties' right to participate in political life was not infringed.

B. Criteria employed by the Court in applying Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1

26. The Court reiterates that discrimination means treating differently, without an objective and reasonable justification, persons in similar situations. "No objective and reasonable justification" means that the distinction in issue does not pursue a "legitimate aim" or that there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, among many other authorities, *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 42, ECHR 2009). The scope of a Contracting Party's margin of appreciation in this sphere will vary according to the circumstances, the subject matter and the background (see *Andrejeva v. Latvia* [GC], no. 55707/00, § 82, ECHR 2009).

27. The Court further reiterates that Article 3 of Protocol No. 1 enshrines a characteristic principle of an effective political democracy and is accordingly of prime importance in the Convention system (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 47, Series A no. 113). The role of the State, as ultimate guarantor of pluralism, involves adopting positive measures to "organise" democratic elections "under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature" (ibid., § 54).

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

no. 236; *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 44, *Reports of Judgments and Decisions* 1998-I; and *Yumak and Sadak v. Turkey* [GC], no. 10226/03, § 107, ECHR 2008).

29. As the European Commission of Human Rights observed on a number of occasions, the words "free expression of the opinion of the people" mean that elections cannot be conducted under any form of pressure in the choice of one or more candidates, and that in this choice the elector must not be unduly induced to vote for one party or another (see *X. v. the United Kingdom*, no. 7140/75, Commission decision of 6 October 1976, Decisions and Reports (DR) 7, p. 95, at p. 96). The word "choice" means that the different political parties must be ensured a reasonable opportunity to present their candidates at elections (ibid.; see also *X. v. Iceland*, no. 8941/80, Commission decision of 8 December 1981, DR 27, p. 145, at p. 150, and *Yumak and Sadak*, cited above).

30. That being said, the rights enshrined in Article 3 of Protocol No. 1 are not absolute. There is room for "implied limitations", and Contracting States must be given a wide margin of appreciation in this sphere (see, among other authorities, *Matthews v. the United Kingdom* [GC], no. 24833/94, § 63, ECHR 1999-I, and *Labita v. Italy* [GC], no. 26772/95, § 201, ECHR 2000-IV). As regards the right to stand as a candidate for election, that is, the so-called "passive" aspect of the rights guaranteed by Article 3 of Protocol No. 1, the Court has been even more cautious in its assessment of restrictions in that context than when it has been called upon to examine restrictions on the right to vote, the so-called "active" element of the rights under Article 3 of Protocol No. 1.

31. However, it is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions imposed on the right to vote and to stand for election do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness (see *Mathieu-Mohin and Clerfayt*, cited above, § 52).

C. Application of the above-mentioned principles in the present case

1. Whether there was a difference in treatment

32. In the instant case the Court notes that the applicant party alleged that it had been placed at a disadvantage in the 1999, 2002 and 2007 parliamentary elections compared with the parties that received financial assistance from the State, since it had been refused funding on the grounds that it was not represented in Parliament (owing to a threshold of representation set at 10% of the vote nationwide) and that it had obtained less than 7% of the vote in the preceding parliamentary elections.

33. The Court notes that the ÖDP, which was founded in 1996, was unable to apply for financial assistance from the State until after the 1999 elections. The results it obtained in subsequent elections – 0.8% of the valid votes cast in the parliamentary elections of 18 April 1999, 0.34% in the elections of 3 November 2002 and 0.15% in the 2007 elections (see paragraphs 18-19 above) – fell below the 7% threshold laid down in the national legislation and rendered the party ineligible for the funding in question.

34. Nevertheless, the Court observes that, ahead of the 1999 general election, six political parties (one of which was not represented in Parliament) out of the twenty-one parties that contested the election received State funding. Prior to the 2002 general election, six parties (one of which was not represented in Parliament) out of the fifteen parties that fielded candidates received funding and, in the period preceding the 2007 elections, State funding was granted to five of the fifteen parties taking part in the election (including to three that were not represented in Parliament).

35. It is quite clear that the system of public funding for political parties applied in the instant case placed the ÖDP, which received no financial assistance, at a disadvantage compared with its rivals which received such assistance and were thus able to fund the nationwide dissemination of their opinions much more easily. Accordingly, the applicant party was treated differently in the exercise of its electoral rights under Article 3 of Protocol No. 1 as a result of the application of the system in question.

36. The Court must ascertain, in the light of the principles set forth above, whether the system in issue pursued a legitimate aim and whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. Applying these two criteria will enable it to establish whether the impugned measures amounted to discrimination contrary to Article 14 of the Convention and whether they impaired the very essence of the right to the free expression of the opinion of the people within the meaning of Article 3 of Protocol No. 1.

2. Whether the difference in treatment pursued a legitimate aim

37. As regards funding for political parties, the Court recognises that the subscriptions of party members, the traditional source of funding, are no longer sufficient to meet expenses, which are constantly on the rise against a background of political competition and complex and costly modern means of communication. It observes that in Europe, as in the rest of the world, State funding for political parties is aimed at preventing corruption and avoiding excessive reliance by parties on private donors. It follows that this funding is intended to strengthen political pluralism and contributes to the proper functioning of democratic institutions.

38. An examination of the systems in place in the majority of European countries reveals that there are no uniform rules in this sphere. In that

regard, the Court observes that the funds allocated to political parties at election time are divided between the parties either in a strictly equal manner or on the basis of equitable distribution, that is, on the basis of their respective performances in the preceding elections.

39. It can also be observed that the national legislation in those Contracting States which have opted for a system of equitable distribution of public funds almost invariably requires a minimum level of electoral support. If no such minimum level were set, it is likely that the system in question would have the perverse effect of encouraging an upsurge in the number of candidacies, prompted by the desire to secure increased funding, thus resulting in a proliferation of candidates, since each vote obtained would translate into an annual sum by way of public funding.

40. In the member States other than Turkey, the minimum share of the vote a political party must obtain in order to qualify for public funding varies between 0.5% and 5% of the votes cast in the preceding election, and is often lower than the electoral threshold required in order to secure seats in Parliament. Hence, in addition to the parties represented in Parliament, new political parties which have a minimum level of support among citizens also receive public funding in proportion to their share of the vote.

41. The Court further notes that none of the instruments adopted by the institutions of the Council of Europe concerning political parties in a pluralist democratic regime finds to be unreasonable the requirement under national legislation for parties claiming public funding to enjoy a certain minimum level of electoral support, nor do those instruments lay down specific percentages in that regard. In that connection the Court refers to the observations of certain specialist institutions pointing to the need to avoid setting an excessively high threshold which may be detrimental to political pluralism and to small political parties (see paragraph 185 of the Guidelines on political party regulation drawn up by the OSCE/ODIHR and the Venice Commission and adopted on 15 and 16 October 2010 (CDL-AD(2010)024) – paragraph 20 above), and stressing that the formula for the allocation of public funding should prevent the two largest political parties from monopolising the receipt of public funding (ibid., paragraph 187).

42. In view of the foregoing, the Court considers that the public funding of political parties on the basis of a system of equitable distribution requiring a minimum level of electoral support pursues the legitimate aim of enhancing democratic pluralism while preventing the excessive and dysfunctional fragmentation of candidacies, thereby strengthening the expression of the opinion of the people in the choice of the legislature (see, to similar effect, *Fournier v. France*, no. 11406/85, Commission decision of 10 March 1988, DR 55, p. 130, and, *mutatis mutandis*, *Cheminade v. France* (dec.), no. 31599/96, ECHR 1999-II, regarding a system of public funding which restricted the reimbursement of campaigning costs and

deposit to candidates and lists that had obtained a certain percentage of the vote).

3. Whether the difference in treatment was proportionate

43. The Court notes that the minimum level of electoral support which parties claiming public funding must obtain in Turkey, namely 7% of the vote in the preceding parliamentary elections, is the highest in Europe (see paragraph 40 above). In order to satisfy itself that this threshold is not disproportionate, the Court will first assess the consequences it entails, before examining the corrective mechanisms which accompany it.

44. The Court observes at the outset that the 7% threshold is lower than the minimum level of electoral support required in order to win seats in the Turkish Parliament, which is set at 10% of the national vote. In the context of the parliamentary elections in issue in the present case, political parties not represented in Parliament which had attained the threshold of 7% of the votes cast were eligible to receive State funding ahead of the next elections. In the 1999 elections, one of the six parties that received public funding was not represented in Parliament. In the 2002 elections, the proportion was the same, and in 2007 three parties not represented in Parliament, and two parties that were, received public funds. In other words, during the periods in issue in the present case, the political parties represented in Parliament did not monopolise public funding, and neither did the party in power and the main opposition party.

45. The Court must also take into consideration the ÖDP's performance in the parliamentary elections preceding the periods during which the public funding in question was granted. The number of votes obtained by the applicant party represented between 0.8% and 0.15% of the valid votes cast during those elections. These figures were substantially below the minimum level of electoral support required under the Turkish legislation in order to qualify for public funding, and would also have been deemed insufficient for the purposes of obtaining such funding in several other European countries. Although the applicant party's complaint does not amount to an *actio popularis*, since the party was directly and immediately affected by the minimum level in question, the ÖDP has nevertheless not succeeded in demonstrating before the Court that the level of support it enjoyed made it representative of a significant portion of the Turkish electorate.

46. It must also be borne in mind that the State provides political parties with other forms of public support besides direct funding. The corrective mechanisms which accompany the system of public funding in force in Turkey, under which not all parties are entitled to receive direct subsidies, include tax exemptions on certain items of revenue and the allocation of broadcasting time during electoral campaigns. It was not disputed between the parties that the ÖDP had benefited from these alternative forms of public assistance.

47. In view of its findings regarding the ÖDP's failure to secure a minimum level of support among citizens and the compensatory effect of other forms of public assistance which were available to the applicant party, the Court considers that the impugned difference in treatment was reasonably proportionate to the aim pursued.

48. The Court concludes that, in the circumstances of the present case, the refusal by the State to grant direct financial assistance to the ÖDP on the grounds that it had not obtained the 7% minimum share of the vote required by the law was based on objective and reasonable grounds, did not impair the very essence of the right to the free expression of the opinion of the people, and was therefore not contrary to Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1.

49. Accordingly, there has been no violation of those provisions.

III. ALLEGED VIOLATION OF ARTICLES 9, 10 AND 11 OF THE CONVENTION

50. The applicant party also complained of a violation of Articles 9, 10 and 11 of the Convention. As these complaints relate to the same set of facts examined from the standpoint of Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1, the Court considers that it is not necessary to examine them separately.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the application admissible;

2. *Holds* by five votes to two that there has been no violation of Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1;

3. *Holds* unanimously that it is not necessary to examine separately the complaints under Articles 9, 10 and 11 of the Convention.

Done in French, and notified in writing on 10 May 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Françoise Tulkens
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Tulkens and Sajó is annexed to this judgment.

F.T.
S.H.N.

JOINT PARTLY DISSENTING OPINION OF JUDGES TULKENS AND SAJÓ

(Translation)

1. We do not share the view of the majority that there has been no violation in this case of Article 14 of the Convention read in conjunction with Article 3 of Protocol No. 1.

2. We would like to make clear at the outset that we have no intention of discussing the issue of State funding for political parties, a matter which is not within our competence. The Convention does not guarantee a right to such funding. But where there exists a system of public funding, which is bound to have an impact on the elections themselves, it must be applied in a non-discriminatory manner. Our only concern therefore relates, from the standpoint of Article 14 of the Convention, to the issue of *equality* in the electoral process and, accordingly, in the right to free elections and the right to free expression of the opinion of the people in the choice of the legislature, as guaranteed by Article 3 of Protocol No. 1. In that regard the judgment aptly points out that this provision enshrines a characteristic principle of an effective political democracy and is accordingly of "prime importance" in the Convention system (see paragraph 27 of the judgment). These assertions must be taken seriously.

3. In the instant case the Court acknowledges that additional section 1 of Law no. 2820 on political parties, which makes State financial assistance to new political parties not yet represented in Parliament conditional on their having obtained at least 7% of the votes cast in the preceding election, placed the ÖDP at a disadvantage compared with other political parties during the 1999, 2002 and 2007 election campaigns. It was therefore subjected to a difference in treatment (see paragraph 35 of the judgment).

4. According to the Court's well-established case-law, discrimination consists in treating differently, without an objective and reasonable justification, persons in similar situations. It is therefore for the Government to adduce evidence to show that the difference in treatment was justified and was not discriminatory in its effects.

5. The majority rightly points out that, as in the rest of the world, funding for political parties is aimed at preventing corruption and avoiding excessive reliance by parties on private donors. This system is intended to strengthen political pluralism and contributes to the proper functioning of democratic institutions (see paragraph 37 of the judgment). However, a minimum of electoral support is required. In the Council of Europe member States, the minimum level of support which a party must attain in order to qualify for public funding varies between 0.5% and 5% of the votes cast in the preceding election.

6. The 7% threshold which triggers eligibility for State funding in Turkey is therefore particularly high and is in fact the highest in Europe. This inevitably results in the establishment of virtual "monopolies" or dominant positions for certain parties and in the inability of other parties to raise their profile and thus contest the elections on an equal footing. The presence of large parties is thus (artificially) boosted and multiplied to the detriment of the other parties, and the current system of funding perpetuates that imbalance. Moreover, the Government did not dispute the existence of this effect which, in our view, is damaging to small parties and, accordingly, to political pluralism.

7. Of course, the Court cannot substitute its own assessment for that of the national authorities when it comes to determining the minimum level of electoral support required. However, it cannot merely content itself with criteria which are objective in appearance only and which do not take into consideration the essential requirement that minorities must always have access to equal opportunities in a pluralist society. It is true that, in the instant case, the statutory provision in question may appear neutral; however, in the context of political debate, pluralism ranks as a Convention principle. In that regard the minimum level of support required may constitute discrimination.

8. Whereas in the Court's judgment in *Yumak and Sadak v. Turkey* ([GC], no. 10226/03, ECHR 2008) of 8 July 2008 concerning the 10% electoral threshold the reason accepted by the Court as justification for the difference in treatment was governmental stability (§ 125), this could clearly not be invoked in the present case. Here, the only arguments advanced were practical considerations which were patently not sufficient to justify discrimination.

9. In examining the proportionality of the impugned difference in treatment, the Court puts itself in the place of the national authorities and conducts its own analysis of the applicant party's position. It considers that the ÖDP did not succeed in demonstrating that the level of support it enjoyed made it representative of a significant portion of the Turkish electorate. But this is not the Court's role. Its role is to ascertain and ensure that the national authorities carried out a correct and appropriate assessment as to whether the exclusion of the applicant party was in conformity with the Convention. That is missing here, which is what leads us to consider that there has been a violation of the Convention.