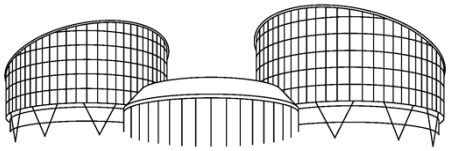

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF AHMET YAVUZ YILMAZ v. TURKEY

(Application no. 48593/07)

JUDGMENT

Art 3 P1 • Right to free elections • Alleged lack of clarity regarding the use of a Kurdish song during election campaign • Applicant's complaints before the Court and domestic authorities purely abstract • Playing a Kurdish song not appearing to be a criminal offence and no prosecution brought • Applicant able to stand as independent candidate and not prevented from conveying political and social opinions to the public • Electoral rights not so curtailed as to significantly impair their effectiveness

STRASBOURG

10 November 2020

FINAL

10/02/2021

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Ahmet Yavuz Yılmaz v. Turkey,

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

Jon Fridrik Kjølbro, *President,*
Valeriu Griţco,
Egidijus Kūris,
Ivana Jelić,
Arnfinn Bårdsen,
Darian Pavli,
Saadet Yüksel, *judges,*
and Stanley Naismith, *Section Registrar,*

Having regard to:

the application (no. 48593/07) 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 national, Mr Ahmet Yavuz Yılmaz ("the applicant"), on 30 October 2007;

the decision to give notice to the Turkish Government ("the Government") of the complaint concerning Article 3 of Protocol No. 1 to the Convention;

the parties' observations;

Having deliberated in private on 29 September 2020,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. Relying on Article 3 of Protocol No. 1 to the Convention, the applicant complained that during the parliamentary election campaign held on 22 July 2007, in which he stood as an independent candidate from the province of Ardahan, he had been subjected to a treatment that constituted a breach of his right to free elections.

THE FACTS

2. The applicant was born in 1959 and lives in Ardahan. He was represented by Mr G.S. Yılmaz, a lawyer practising in Ardahan.

3. The Government were represented by their Agent.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. The applicant, who is a lawyer, stood for election as an independent candidate from the province of Ardahan in the parliamentary elections of 22 July 2007.

6. During the election campaign, on 2 July 2007 the applicant applied to the Ardahan District Electoral Council. Referring to the decision of the Supreme Electoral Council dated 8 May 2007, which stated that no other

language than Turkish could be used during the election campaign, he requested the District Council to determine whether playing a song that would be sung in both the Turkish and Kurdish languages from his campaign vehicle would constitute a breach of domestic law. In his petition, he stated that the Kurdish language was being used on national TV channels, namely the TRT, and he referred to a decision of the Court of Cassation, dated 27 April 2005, which had concluded that playing a song that was sung in a language other than Turkish would not constitute a crime under domestic law.

7. On 5 July 2007 the Ardahan District Electoral Council decided that it had no jurisdiction to deliver a decision on the matter. The District Electoral Council held that whether playing a Kurdish song during the election campaign would constitute a crime within the meaning of Section 58 of Law no. 298 could only be determined by a criminal court in the course of criminal proceedings.

8. On 9 July 2007 the applicant filed an objection against this decision with the Ardahan Provincial Electoral Council, stating that there was no rule which prohibited him from using a Kurdish song for his campaign.

9. On 12 July 2007 the Ardahan Provincial Electoral Council dismissed the objection, stating that deciding on this matter would breach its jurisdiction as that decision should be delivered by the criminal courts.

10. The applicant subsequently filed a further objection with the Supreme Electoral Council.

11. On 21 July 2007 the Supreme Electoral Council dismissed the case, holding that the decision of the Ardahan Provincial Electoral Council had been in line with the domestic law and procedure.

12. The general election was held on 22 July 2007 and the applicant contested the elections as an independent candidate together with fourteen political parties. The applicant, the only independent candidate, obtained 5,187 votes out of the 55,606 votes that were validly cast in the Ardahan District.

13. On 24 July 2007 the applicant filed an objection with the District Electoral Council, disputing the election results. He requested a recount, alleging that because he was an independent candidate, his name had been printed in a smaller font size on the ballot papers, compared to political parties.

14. On the same day the District Electoral Council delivered a decision and stated that it did not have jurisdiction to examine these complaints. The applicant then applied to the Supreme Electoral Council.

15. On 28 July 2007 the Supreme Electoral Council dismissed the applicant's recount request, stating that the ballot papers had been prepared in accordance with conditions set out in Law No. 298.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

16. Section 58 of Law No. 298 on the fundamental provisions governing elections and voter registration read, at the material time, as follows:

> "... it shall be forbidden to use any language or script other than Turkish in campaigning for election on radio or television or by other means."

17. By Law of No. 6529 dated 2 March 2014, the relevant part of Section 58 was amended as follows:

> "The Turkish flag and religious statements shall not be written on leaflets and all kinds of printed materials used for propaganda purposes. All kinds of propaganda disseminated by political parties and candidates may be made in different languages and dialects as well as Turkish."

18. By a decision of 27 April 2005 (no. 2003/12472E, 2005/2707 K), the Court of Cassation delivered a decision in the case of two accused persons, Y.U. and A.B. According to this decision, Y.U. had sung a song in Kurdish, and A.B. had played a Kurdish song during the election campaign. The Court of Cassation held that that the fact that they had played or sung a song in Kurdish did not constitute propaganda in violation of the law and that they should be acquitted of the charges against them.

THE LAW

ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL NO. 1 TO THE CONVENTION

19. Relying solely on Article 3 of Protocol No. 1 to the Convention, the applicant stated that his right to free elections had been breached. He mainly argued that he had not been able to play a Kurdish song during his electoral campaign. In the second part of his complaint, he further stated that as an independent candidate his name had not appeared on equal footing with the political parties on the ballot paper, that strict security measures had been applied during his campaign, and that he had had to hold his campaign meeting in a sports centre which was far away from the city centre.

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. Admissibility

1. *Regarding the complaint concerning the applicant's alleged inability to play a Kurdish song during his political campaign*

20. The Government submitted that the applicant did not have victim status within the meaning of Article 34 of the Convention. In this connection, they pointed out that the applicant had not played the song in question during his election campaign and no criminal proceedings had been initiated against him based on section 58 of Law No. 298.

21. The Court reiterates that, in order to be able to lodge a petition by virtue of Article 34, a person, non-governmental organisation or group of individuals must be able to claim to be the victim of a violation of the rights set forth in the Convention. In order to claim to be a victim of a violation, a person must be directly affected by the impugned measure: the Convention does not envisage the bringing of an *actio popularis* for the interpretation of the rights it contains or permit individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention. However, it is open to a person to contend that a Law violates his rights, in the absence of an individual measure of implementation, if he is required either to modify his conduct or risks being prosecuted or if he is a member of a class of people who risk being directly affected by the legislation (see *Tănase v. Moldova* [GC], no. 7/08, § 104, ECHR 2010; and *Burden v. the United Kingdom* [GC], no. 13378/05, §§ 33 and 34, ECHR 2008).

22. In the present case, although no individual measures were taken against the applicant, namely no criminal proceedings were initiated against him, the examination of the case-file reveals that the law as it was in force at the time caused the applicant to refrain from playing a Kurdish song during his election campaign. Consequently, as the applicant complied with the impugned law, and did not play the song in question, this could be considered as having a direct impact on his campaign. In view of the foregoing, the Court dismisses the Government's objection regarding the victim status of the applicant.

23. The Court notes that this part of the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

2. *Regarding the remaining complaints raised under Article 3 of Protocol No. 1*

24. The applicant further complained under Article 3 of Protocol No. 1 that as an independent candidate, his name had not appeared on equal footing with the political parties on the ballot paper, that strict security measures had been applied during his campaign, and that he had had to hold

his campaign meeting in a sports centre which was far away from the city centre.

25. The Court observes that the applicant's complaint regarding the irregularities of the ballot paper was effectively examined by the domestic authorities and it was established that the ballot papers were in line with the domestic law (see paras. 13-15). Moreover, the applicant has not submitted any information which would indicate that any prejudice was caused by the alleged irregularities. Furthermore, regarding the allegations that strict security measures were applied to his campaign meetings and that he had to hold his campaign rally in a sports centre which was far from the city centre, the Court takes note of the fact that these complaints were never raised before the domestic authorities.

26. The Court therefore finds that an examination of the material submitted to it does not disclose any appearance of a violation of this provision. It follows that this part of the application is manifestly ill-founded and must be declared inadmissible pursuant to Article 35 §§ 3 and 4 of the Convention.

B. Merits

27. The applicant complained about the lack of clarity as to whether he could play a Kurdish song during his election campaign.

28. The Government argued that the applicant had not suffered any damage due to the alleged restriction and that his right to free elections had not been breached. They submitted that even if the Court were to consider that there had been an interference in the present case, it had been based on section 58 Law no. 298 and it had pursued the legitimate aim of protecting public order. The Government further stated that restrictions might be imposed on the right to vote and to stand for election, however these restrictions should not breach the principles of a democratic society. In the present case, they underlined the fact that the applicant had been able to participate in the election and maintained that there was no breach of Article 3 of Protocol No. 1.

29. Finally, the Government referred to the amendment of the relevant domestic legislation in 2014, according to which all kinds of propaganda disseminated by political parties and candidates may be made in different languages and dialects as well as Turkish.

30. The Court reiterates that Article 3 of Protocol No. 1 differs from other rights guaranteed by the Convention and its Protocols as it is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom. However, having regard to the preparatory work to Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the Convention as a whole, the Court has

established that this provision also implies individual rights, including the right to vote and to stand for election (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, §§ 46-51, Series A no. 113).

31. The Court refers, in particular, to the principles established in its case-law on Article 3 of Protocol No. 1, as summarised in its recent judgment *Mugemangango v. Belgium* ([GC], no. 310/15, §§ 67-73, 10 July 2020). Accordingly, in accordance with the subsidiarity principle, it is not for the Court to take the place of the national authorities in interpreting domestic law or assessing the facts. In the specific context of electoral disputes, the Court is not required to determine whether the irregularities in the electoral process alleged by the parties amounted to breaches of the relevant domestic law. Nor is the Court in a position to assume a fact-finding role by attempting to determine whether the alleged irregularities took place and whether they were capable of influencing the outcome of the elections. Owing to the subsidiary nature of its role, the Court needs to be wary of assuming the function of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case.

32. The rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law. Nonetheless, these rights are not absolute, there is room for "implied limitations", and Contracting States must be given a margin of appreciation in this sphere. The Court reaffirms that the margin in this area is wide. There are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe (see *Mugemangango*, cited above, § 73).

33. It is, however, 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 rights to vote or to stand for election do not curtail the exercise of those rights to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate. In particular, any such conditions must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage (see *Ždanoka v. Latvia* [GC], no. 58278/00, § 104, ECHR 2006-IV).

34. Turning to the present case, the Court notes that the applicant complained of a breach of his right to free elections due to the lack of clarity on the part of the authorities regarding the use of a Kurdish song during his election campaign. In this connection, the Court observes that by applying to the Ardahan District Electoral Council, the applicant was merely making an enquiry before the national authorities to determine whether playing a

song in Kurdish would constitute a crime. It also observes that the applicant explicitly referred to the decision of the Court of Cassation (cited above in paragraph 18), which had concluded that playing or singing a Kurdish song did not constitute a crime under domestic law. In reply, the District Electoral Council concluded that this matter did not fall within its jurisdiction but fell within the jurisdiction of the public prosecutors and the criminal courts. The Court considers that as the applicant is a lawyer he should have known that the Electoral Council had no authority to give an approval to his request. His complaints before the Court as well as the domestic authorities were therefore purely abstract. Even if, at the material time, Section 58 of Law No. 298 stipulated that the election campaign could only be done in the Turkish language and that this provision applied to all political parties and candidates without any exception, it appears that playing a song in Kurdish would not have constituted a criminal offence. This is supported by the decision of the Court of Cassation, referred to above, of which the applicant was fully aware. In any event, the Court notes that no criminal proceedings were initiated against the applicant (see, *a contrario*, *Şükran Aydın and Others v. Turkey*, nos. 49197/06 and 4 others, 22 January 2013). In particular, he was able to stand in the elections as an independent candidate and there is no allegation that the applicant was prevented from conveying his political and social opinions to the public during the election campaign.

35. In view of the foregoing considerations, the Court finds that the applicant's electoral rights were not curtailed to such an extent as to significantly impair their effectiveness. The case file does not reveal any disproportionate acts that would undermine the very substance of free expression of the opinion of the people or of the applicant's right to stand in elections for the purposes of Article 3 of Protocol No. 1.

36. There has accordingly been no violation of Article 3 of Protocol No. 1 to the Convention.

37. The Court takes note of the fact that Section 58 of Law no. 298 was amended in 2014 and accordingly now all kinds of propaganda disseminated by political parties and candidates may be made in different languages and dialects as well as Turkish (see paragraph 17 above).

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaint raised under Article 3 of Protocol No. 1 about the applicant's alleged inability to play a Kurdish song during his election campaign admissible and the reminder of the application inadmissible;

2. *Holds*, by five votes to two, that there has been no violation of Article 3 of Protocol No. 1 to the Convention.

Done in English, and notified in writing on 10 November 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Jon Fridrik Kjølbro
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge E. Kūris joined by Judge D. Pavli is annexed to this judgment.

J.F.K.
S.H.N.

DISSENTING OPINION OF JUDGE KŪRIS, JOINED BY JUDGE PAVLI

1. There has clearly been a violation of Article 3 of Protocol No. 1 to the Convention. Let us have a look at the facts of the case and the way in which they have been addressed in the instant judgment. I wish they had been assessed adequately, that is to say, more critically.

2. Some three weeks before the 2007 parliamentary elections, Mr Yılmaz, an independent candidate, asked the Ardahan District Electoral Council whether playing a song in Kurdish (alongside Turkish) would constitute a breach of Turkish law. He referred to two decisions of the authorities. The first was the decision of the Court of Cassation of 27 April 2005, which stated that playing a song in any language other than Turkish would not constitute a crime under domestic law. The second decision was that of the Supreme Electoral Council of 8 May 2007, which concluded that no language other than Turkish could be used in an election campaign. That blanket ban was copy-pasted from section 58 of decades-old Law no. 298.

The District Electoral Council provided no answer on the merits of the request. Instead, it decided that it had no jurisdiction on the matter of which it was seised and which could be determined only by a criminal court in the course of criminal proceedings.

The applicant tried his luck again by challenging the District Electoral Council's decision before the Ardahan Provincial Electoral Council, which dismissed the objection and upheld the reasoning of the District Electoral Council. The Provincial Council too directed the applicant to the criminal courts.

Mr Yılmaz's last attempt did not come to fruition either. The Supreme Electoral Council upheld the decision of the Provincial Electoral Council. Its own decision was adopted on the eve of the elections; so even if it had explained that playing a song in Kurdish constituted an exception to its recently reiterated absolutist rule and was not against domestic law (or at least not a criminal offence), Mr Yılmaz would not have been able to benefit from that explanation. Dates matter – or so they should.

3. In the absence of a final ruling, Mr Yılmaz did not take any chances. Who would? The applicant simply did not play the song in Kurdish, and no criminal court was seised of this matter. Whether playing the song would have helped him in his campaign or not would be guesswork. At the end of the day, he garnered less than 10 percent of all votes cast, so I guess that most likely no song would have helped him to win. But that is a matter of third-rate significance. I could accept that the applicant might also have had other reasons (whatever they could be) for abandoning his wish to play the song in Kurdish, but that too would be irrelevant for this case. What *is* of primary importance is that, as we shall see, domestic electoral law as it

stood in 2007 *certainly needed clarification* – clarification which he requested from the authorities in charge of the elections. This was not illegitimate, was it?

4. Why can it reasonably be asserted that the legislation in question was not sufficiently clear? The decision of the Court of Cassation of 27 April 2005 came across as friendly to the potential players of songs in Kurdish. Could it be that the applicant, by requesting determination of whether he could play a song in Kurdish, in fact put an unnecessary burden on the authorities? If so, he could be said to have abused, in a peculiar form, his right of application to the authorities, who duly rejected his request. But no.

It depends on how one looks at it. Whatever statutes say is made real by court decisions: for it is the courts which say what the law is. The decision of the Court of Cassation of 27 April 2005, which interpreted section 58 of Law no. 298, could be understood as having curbed, to some extent, the absolutist drive of the prohibition on using a language other than Turkish in an election campaign and thus as having rendered that prohibition not all-embracing. On the other hand, dates indeed matter, as well as the circumstances in which a legal provision has been formulated.

This brings us to the relation between the two decisions referred to by the applicant in his initial request – that of the Court of Cassation of 27 April 2005 and that of the Supreme Electoral Council of 8 May 2007.

5. For the foreign readership (but not exclusively) that relation is not instantly obvious, especially given: (i) that the decision of the Court of Cassation was adopted in the concrete circumstances of the case examined by criminal courts and might not compulsorily have had a precedential value in each and every situation where a song in languages other than Turkish was to be played during an election campaign; and (ii) that the decision of the Supreme Electoral Council, adopted right before the 2007 elections and intended to instruct those who stood in them, was subsequent to the first one by two years.

The latter – and later – decision merely reiterated a ban which was not novel, but a replica of the one which had for a long time been present in section 58 of Law no. 298. None of these twin provisions provided any specificities as to whether the term “language” (non-Turkish) covered all tongues of the world – those used in Turkey and those not, and those alive and those extinct; or whether the word “use” covered all imaginable forms of campaigners’ recourse to non-Turkish, including, say, their greetings to people at rallies, or quotes from foreign texts, or the Oscars-style shouting (in English, which, to be sure, is not Turkish) “and the winner is!”, or wearing a cap, a pea-jacket or a T-shirt with an inscription in non-Turkish, or, for that matter, the crooning of the lyrics of a foreign tune. Casuistics aside, if the decision of the Court of Cassation had really neutralised some of the initial excessiveness of section 58 of Law no. 298, the Supreme Electoral Council would have had no trouble in at least hinting to that in its

decision of 8 May 2007. As it had not even dropped such a hint, any electoral council, top-to-bottom or bottom-to-top, should have been entitled and able to explain that neutralisation to all those in need of that explanation – or even *urbi et orbi* (for example, on television). That would have been not only in the inquirers' interests, but also in the general interest. In a democracy, electoral authorities are meant to act in the general interest of the people, are they not? This is called good governance.

From the perspective of good governance, a reference (even a brief one) to the fact that the decision of the Court of Cassation of 27 April 2005 rendered the blanket prohibition of the above-mentioned section 58 of Law no. 298 not so absolute, despite the absolutist terms in which it was couched, would have been desirable, if not in the Supreme Electoral Council's decision of 8 May 2007, then at least in the subsequent explanations by electoral authorities when they were seised of this matter, or even *proprio motu*. Good governance is intrinsically related to the rule of law, the principle underlying the European legal area and enshrined in the Convention. It requires that where an issue in the general interest is at stake it is incumbent on the public authorities to act in good time, in an appropriate manner and with the utmost consistency (see, for example, *Megadat.com S.r.l. v. Moldova*, no. 21151/04, § 72, 8 April 2008, and *Moskal v. Poland*, no. 10373/05, § 51, 15 September 2009). It is also incumbent on them to put in place internal procedures which enhance the transparency and clarity of their operations and minimise the risk of mistakes (see, for example, *Rysovskyy v. Ukraine*, no. 29979/04, § 70, 20 October 2011, with further references).

Against this background, the Supreme Electoral Council copy-pasted the impugned blanket ban from section 58 of Law no. 298 two years after the somewhat restrictive interpretation of the latter by the Court of Cassation. That jurisprudential development notwithstanding, the ban was repeated in its initial form, chilling as it was to those campaigners who would have wanted to play a song in a language other than Turkish. No wonder the applicant requested that the electoral authorities clarify the law *as it stood at that time*.

6. It is unlikely that the Supreme Electoral Council, when adopting its decision of 8 May 2007, had been unfamiliar with the decision of the Court of Cassation of 27 April 2005. Such a doubt must therefore be rejected; otherwise it could be held that the Supreme Electoral Council's decision of 21 July 2007 in Mr Yılmaz's case was unlawful, on the ground (if not any other) that the body which adopted it was incompetent to rule on the matter before it.

But could the Supreme Electoral Council wilfully disregard (for whatever reason) the decision of the Court of Cassation? To give credence to this supposition, exceptionally weighty reasons would have to be adduced, yet I see none. I proceed on the assumption that the Supreme

Electoral Council was guided by the intention to follow the law (whatever that law was and however it understood that law), not to undermine it.

So why then did the Supreme Electoral Council merely reiterate, in its decision of 8 May 2007, the blanket ban enshrined in section 58 of Law no. 298, without even hinting that that ban, per the case-law of the State's highest court, might have been inapplicable in some situations?

We do not know.

Was it because that decision was applicable only in certain specific, exceptional, or even one-off, situations and thus left the blanket ban in question virtually intact and still almost all-encompassing?

Maybe this was so, maybe not. Again, we do not know for sure.

Very little information has been provided to the Court about that decision of the Court of Cassation, which nonetheless has served as a principal factor in substantiating the finding of no violation of Article 3 of Protocol No. 1.

7. But let us explore one more hypothesis as to what the reasons for the Supreme Electoral Council's silence on the ostensible two-year-old jurisprudential exception to the impugned blanket ban could be. Not wanting to be too assertive, I nevertheless think that such a hypothesis merited some exploration by the Chamber, especially given the fact that it is insistently suggested by the Court's most pertinent over-seven-year-old judgment, which in the instant case should have been given much greater prominence than it has actually received. That is to say, between 27 April 2005 and 8 May 2007 *something of jurisprudential significance* happened which prevented any hint about, so to say, the "gap in the ban". That "something" *had already been dealt with* by the Court in *Şükran Aydın and Others v. Turkey* (nos. 49197/06, 23196/07, 50242/08, 60912/08 and 14871/09, 22 January 2013). That case has much in common with the instant one, but is mentioned in the present judgment only once, in paragraph 34, and moreover from an angle which does not seem instructive.

In *Şükran Aydın and Others* five applicants were convicted for speaking Kurdish during an election campaign. Kurdish was their mother tongue, but also that of the population whom they were addressing. They complained under Articles 6, 9, 10, 11 and 14, and Article 3 of Protocol No. 1 (the latter was invoked by three of them). The Court examined their grievances under Article 10, which alone was invoked by all applicants, and found a violation of that Article, but held that it was not necessary to rule on the complaints under Article 14, not invoked by all applicants, in conjunction with Article 10. It held that the blanket ban, as contained in section 58 of Law no. 298 and entailing criminal sanctions for breaches of that provision, deprived the domestic courts of their power to exercise proper judicial scrutiny, did not meet a pressing social need, was not proportionate to the legitimate aim of "prevention of disorder" (adduced by the Government), and was not necessary in a democratic society. The Court skipped the

examination of whether the above-mentioned aim was legitimate – which is telling.

What is relevant to the hypothesis explored here is that in *Şükran Aydın and Others* the applicants were sentenced at various times both before and *after* 27 April 2005, the date of the ostensibly restrictive interpretation of section 58 of Law no. 298 by the Court of Cassation. Moreover, some convictions were upheld by that very court *after* that date.

It follows that the presumption that the decision of the Court of Cassation of 27 April 2005 amounted to decriminalisation of some forms of the use of Kurdish during an election campaign (so Mr Yılmaz had nothing to fear if he chose to play a song in Kurdish) *was not set in stone*. It was *rebuttable*, in view of the fact that the applicants in *Şükran Aydın and Others* (and maybe other persons) *were* convicted for using Kurdish in election campaigning.

True, they were convicted not for playing songs in Kurdish, but for using Kurdish in their speeches. That notwithstanding, the *real* extent of the statutory ban in question, as reiterated by the Supreme Electoral Council, was insufficiently clear. In general, the line between singing (or playing a song) and speaking (relaying a recorded speech) is a very fine one with regard to some forms of expression (is rap singing or speaking?). Even more so, there is no clear-cut water-divide between playing a song in another language and speaking in that language. One of the applicants in *Şükran Aydın and Others* maintained that he had spoken in Turkish but may have greeted some people in the audience in Kurdish – and he was convicted. If, per the decision of the Court of Cassation of 27 April 2005, someone had been allowed to play a song in Kurdish, would he or she have been allowed also to announce it in Kurdish? It would seem natural for a song in Kurdish to be announced in Kurdish, would it not? But was that natural under Turkish law in 2007? Or was such an announcement to be prosecuted – criminally or otherwise?

Again, the ostensible curbing, by the Court of Cassation, of the absolutist complexion of the blanket ban in question *was not so radical* as it is portrayed in paragraph 34 of the instant judgment, where it has been given undue prominence. This may allow for some understanding as to why the Supreme Electoral Council two years later simply repeated the statutory formula of the ban.

That ban is no longer in place. *Şükran Aydın and Others* contributed to this development. In 2014 the ban was removed (see paragraph 17). But even before that, in 2010, the infamous section 58 of Law no. 298 was amended, providing that "[d]uring election campaigns political parties and candidates shall primarily use Turkish" (see *Şükran Aydın and Others*, cited above, § 51).

8. But now is now, and then was then. In 2007 it was merely consequential for someone standing for election to ask for clarification of

insufficiently clear electoral legislation. Mr Yılmaz did just that: *he requested that the electoral council(s) explain what the decision of the highest of them meant*, no less, no more. In legal theory this is called *authentic interpretation*. Did he apply to the wrong institution?

The judgment's "Relevant legal framework and practice" section does not deal with the powers of electoral councils. I wish it did. This omission may be legitimate on one condition, namely that Turkish electoral councils are competent in their knowledge of electoral law (including the related judicial practice), and able to properly advise those in need. Otherwise, why on earth do they exist? If electoral councils are entitled to adopt binding decisions, they must have both the jurisdiction and the ability to explain the meaning of those decisions *before* the law is violated. What other body could be better placed for preventing in this way the commission of offences?

9. The facts of the case suggest a far-fetched answer to this seemingly rhetorical question: the electoral authorities' decisions were to be clarified *not by themselves, but by the criminal courts*.

Criminal courts in all States *do indeed* clarify various matters, including those related to offences committed during elections. The petty triviality is that they do so *ex post facto*. Turkish criminal courts, too, could have satisfied Mr Yılmaz's curiosity, if curiosity it was, on the condition that they had been seised of the matter, which was possible if criminal proceedings had been initiated against him. Thus, to have electoral legislation clarified, Mr Yılmaz had to commit an act which might turn out to be a criminal offence and result in his conviction (or any other offence resulting in another form of liability). He, however, abstained from the act which he was not sure was lawful – to the detriment of the clarity and certainty of domestic electoral legislation. How ungenerous!

There is no such thing as a free lunch; all learning comes at a price. It appears that the price for satisfying curiosity may be such as to resolve that remaining in ignorance is not so bad after all.

The Turkish electoral councils' stance in Mr Yılmaz's case meant that they (in addition to their main function) were seen as *sui generis* "advisory bodies" – at least in some election-related disputes. This innovative idea could make a strong showing in the competition for the Ig Nobel Prize or some other parody award, because the "effective remedy to be exhausted" for the purposes of the request for "advice" to be accepted by the "judicial advisory body" is the commission of an offence, for which the "inquirer" may be convicted – as a side-effect of the *ex post* provision of the "advice".

The idea would be amusing, were it not rueful.

This is how Turkish (bottom-to-top) electoral councils saw that things had to evolve in the applicant's case. If he wanted to be sure whether playing a song in Kurdish was allowed, he had to play it and wait for a conviction or an acquittal. *Instead of preventing the possible offence, the*

electoral councils suggested that the applicant commit the act which might be an offence (even a criminal one). No act meant no clarification on what the law said. The legislation applied in Mr Yılmaz's case had already been torn to shreds by this very Court in *Şükran Aydın and Others* (cited above). What is now obvious is its other fault – the impossibility of obtaining an interpretation. The Chamber did not budge on that front.

This brings back to mind the notion of good governance, in particular the requirement that public authorities put in place internal procedures which enhance the transparency and clarity of their operations and minimise the risk of mistakes (see paragraph 5 above). Forget that, says this judgment.

10. The finding of no violation of Article 3 of Protocol No. 1 in this case renders "good governance" mere empty words, justifies the oddball approach to the prevention of offences in general and the functions of the criminal courts in particular, and whitewashes the discriminatory, undemocratic practices long ago condemned by this very Court. Only at this high price could the said finding of no violation be substantiated. In my opinion, Article 3 of Protocol No. 1 *has been violated*. A violation of Article 10 could also have been found, had the Chamber examined this case from the same standpoint as *Şükran Aydın and Others* (cited above).

11. The doctrinal basis for that substantiation is set out in paragraphs 31-33, where the Court recalls the principles established in its Article 3 of Protocol No. 1 case-law, as summarised in *Mugemangango v. Belgium* ([GC], no. 310/15, 10 July 2020), *inter alia*, that the Court, confined to its subsidiary role, must not take the place of the national authorities in interpreting domestic law or assessing the facts, in particular in the context of electoral disputes. Paragraphs 34-36, which deal with the application of the said principles to the facts of the case, do not cite either *Mugemangango* or any other case referred to in that judgment (the only case cited is *Şükran Aydın and Others*, cited above).

Mugemangango is a great judgment. However, though being about elections, it concerned a matter very different from the one examined in the instant case. To put it bluntly, it concerned the recount of ballot papers, i.e. *(ir)regularities in an election procedure*, where the threshold for the Court's intervention is indeed very high.

The instant case has *nothing to do with the election procedure as such*, let alone the counting of ballots. It is about the *ability to campaign freely*. Restrictions on campaigning are hard to quantify and are not easily (if at all) translated into electoral impact (for their assessment, the outcome of the election is of little, if any, relevance; compare paragraph 3 above). The Court's case-law to be followed naturally in a case on restrictions imposed on campaigning is not *Mugemangango* (whatever its virtues), but rather *Article 10 case-law*, including *Şükran Aydın and Others*. In this regard Article 3 of Protocol No. 1 and Article 10 are joined at the hip. By the way, had the Chamber followed *Şükran Aydın and Others*, it would not have

engaged in something which its subsidiary role commanded it to avoid in cases dealing with *(ir)regularities* in an election process, but would have engaged in matters which were not only dealt with, but had already been decided upon from the standpoint of Article 10, for the *domestic law in question and analogous facts had already been assessed* in *Şükran Aydın and Others*.

The failure to follow its own case-law is artificial and leaves the Court open to a charge of *inconsistency*.

12. On the subject of inconsistency, the present judgment displays more of that quality in the reasoning which directly substantiates the finding of no violation of Article 3 of Protocol No. 1. That reasoning, leading as it does in the opposite direction from that of the Court's earlier views, is contained in a single paragraph, the remarkable half-page paragraph 34. It can be summed up in a few lines.

The impugned ban is interpreted as being "applied to all political parties and candidates without exception". Prominence is given to the fact that Mr Yılmaz was a lawyer, who "should have known" not only "that the Electoral Council had no authority to give an approval to his request", which was "purely abstract", but also that "playing a song in Kurdish would not have constituted a criminal offence [owing to] the decision of the Court of Cassation [of 27 April 2005]". Moreover, "it appears [from the decision of the Court of Cassation of 27 April 2005] that playing a song in Kurdish would not have constituted a criminal offence"; "[i]n any event ... no criminal proceedings were initiated against the applicant" (here the *a contrario* comparison with *Şükran Aydın and Others*, cited above, is brought in). And it is concluded that the applicant "was able to stand in the elections ... and there is no allegation that [he] was prevented from conveying his political and social opinions to the public during the election campaign".

That's it. Truth to tell, these factually and legally misleading arguments raise more questions than they give answers. The questions are as follows, one by one.

13. The attempted *justification* of the impugned ban as applicable equally to all (in particular, Turks equally with Kurds) does not hold water. In 2013 the Court made mincemeat of that provision. The Turkish State itself got rid of it years ago. Why would anyone even want to embellish that shameful ban?

14. Contrary to the majority's plainly erroneous assessment, *the applicant's request was not "purely abstract"*, that is to say, not an *actio popularis* born out of mere curiosity. Let us separate cutlets from flies: an abstract interpretation of legislation does not render *the request* for an interpretation abstract. The request in question must be assessed *on its own merits*, account being taken of its *context* and of whether the requested interpretation would be *dispositive for the further actions* that the inquirer

may or may not take. The context of Mr Yılmaz's request was as concrete as could be. He stood for election. He campaigned. He intended to play a song (in two languages). I surmise that he knew where and when he would play the song and even had the equipment ready for that purpose (the campaign vehicle was explicitly mentioned in his request). And, having not received an answer from the electoral authorities, he abstained from playing that song. What was "purely abstract" here?

15. Contrary to what the judgment says, the applicant had *not* asked the District Electoral Council (and subsequently the superior electoral councils) for any "approval" of a request. What he did request was *not that the authorities "approve"* of his playing a song in Kurdish, but that they *provide an interpretation of the electoral legislation as to the possible sanctioning* for playing the song in Kurdish, which was not sufficiently clear to those to whom it might have been applied. In the Court's language, such legislation is called *unforeseeable* or *unpredictable*, often leading it to find a violation of the relevant Article.

16. Mr Yılmaz did *not* ask the authorities whether playing a song in Kurdish would constitute a *criminal* offence. He requested that they "determine whether playing a song ... in both the Turkish and Kurdish languages from his campaign vehicle would constitute *a breach of domestic law*" (paragraph 6; emphasis added). This fact, correctly noted in the "Facts" section, is distorted in paragraph 34, *inter alia*, by underlining that domestic law carried no risk of the applicant's criminal prosecution, owing to the decision of the Court of Cassation of 27 April 2005. This is *a substitution*: playing a song in Kurdish might not have been contrary to criminal law, but *still against the law and entailing another form of liability*. To everyone's great relief, criminal law is not all law.

17. *Can any significance at all be attached to the fact that the applicant was a lawyer*? He certainly had a law degree, but what does the Court know about the field of his legal practice or, for that matter, whether he practised law at all? Does it flow from being a lawyer that one is knowledgeable in all fields of law, including electoral law? To claim that whoever has a law degree "should know" all law would amount to holding that if one is a sportsman, he or she should be skilled in track and field, weight-lifting, swimming, horseracing, football, aerobics and so on. In a similar vein, the applicant might well have been a family lawyer, or an insurance lawyer, or a real estate lawyer, or a tax lawyer, or an international lawyer, etc., he might have been specialising in legal sociology or comparative legal history, you name it – but of that the Court knows nothing. Why should it know? And since when have lawyers been deprived of the right to address authorities with requests?

18. In addition to being "fully aware" of the decision of the Court of Cassation of 27 April 2005, the applicant may also have been aware *of the subsequent practice of that court of apex jurisdiction*, in particular the

convicting of persons in situations similar to his own, which pointed to a stance by that court that was *opposite* to the one taken in the said decision. These convictions were dealt with by the Court in *Şükran Aydın and Others* (cited above) and found to be contrary to Article 10. It is the Chamber that chose *to ignore that practice*. Had there not been this other line of judicial practice, there would have been less (if any) need to request that the authorities clarify the law. This merely demonstrates that the applicant's request was not inconsequential.

19. The majority claim that the applicant should have known that the electoral council(s) had no authority to give an "approval to his request". As mentioned in paragraph 8 above, the judgment does not deal at all with the powers of electoral councils. The legal basis for the presumed absence of authority to give a requested instruction (not to "approve a request") *has not been demonstrated* to the Court. Wherefrom does the Chamber know that the dismissal of the applicant's request was not *arbitrary*, if it has *not analysed* the legislation on the powers of the electoral councils?

20. It is rightly noted that no criminal proceedings were initiated against the applicant. But so what? They were not initiated because the applicant did not take any chances and did not play the song in Kurdish. It is bewildering and sad to see the Court rationalising that it is an *asset* that a person was not criminally prosecuted for an act which could have been an offence, but an act that he or she, wishing to stay on the safe side, *did not commit*.

21. Last but not least, the majority are satisfied that the applicant was not prevented from conveying his political and social opinions to the public during the election campaign. This is not much to be satisfied with. A campaigner seeks *not only* to "convey his political and social opinions to the public", but to do so in a certain way, which also means *freely*. In this regard Mr Yılmaz *was effectively prevented by the domestic authorities from doing what he legitimately sought to do*. He might have erred in the assessment of the effectiveness of the means chosen. But, if liberty means anything, that is not the business of any authority. Not even that of this Court.