# The Constitutional Referendum in Turkey: A far Stretch from Right to Free Elections to Referenda?

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The constitutional referendum of April 16 in Turkey left the "no" voters uncertain, if even doubtful, about the actual result. The main reason is the controversial decision of the Supreme Board of Election (SBE), which ruled to count unstamped ballots as valid. The SBE delivered the decision upon the petition, filed by the Justice and Development Party's representative in the SBE, who claimed he received some complaints from a number of voters in different regions: The ballots they cast had not been stamped by the Ballot Box Committees (BBC). There were no concrete pieces of evidence attached to the petition. The SBE decided, or rather instructed, the BBCs, while the voting process was continuing, that the ballots that were not (properly) stamped would nevertheless be accepted and counted as *valid*. The SBE's decision was clearly in conflict with the explicit legal provision of Art. 101/3 (of Act on Basic Provisions on Elections and Voter Registers, no 298) that stipulates: "ballots that are not stamped by the BBCs shall be counted as *invalid*." [1] Art. 101/3 was adopted on April 8, 2010, by taking into account the problems experienced in the earlier elections. It regulates, in a detailed manner, what kind of ballots shall be counted as valid and invalid. It clearly specifies, again in a detailed manner, the tolerable types of irregularity on ballot papers – an unstamped ballot was not among these tolerable types.

Following the decision, the 'no' voters protested against the SBE and complained about the result, as it was indicating a slim majority of 51.4 per cent of 'yes' votes. 'No' voters believe the SBE's decision on the referendum day may have distorted the outcome, or at the very least that, the decision left the situation completely indeterminable, since in the aftermath it is impossible to know how many unstamped ballots were cast and counted as valid.

In order to disregard Art. 101/3, the SBE had to find a legal basis to make its decision legally sound. The SBE could claim that Art. 101/3 was unconstitutional, but in that case, it had to take that claim to the Constitutional Court, which is the only court to settle the claim of unconstitutionality of laws in Turkey. This procedure would take time and legally make it impossible for the SBE to put aside Art. 101/3.

The SBE found the necessary legal support in para 5 of Art. 90 of the Turkish Constitution. According to this rule, in a case of conflict between an international convention on human rights, to which Turkey is a party, and a domestic law regulating the same matter, the international convention shall prevail. The SBE argued that Art. 101/3 is in conflict with Art. 3 of Additional Protocol (AP) No. 1 of the European Convention on Human Rights (ECHR) guaranteeing the right to free elections. Para 5 of Art. 90 does indeed allow the courts in Turkey to carry out a rights-based judicial review, but like every other legal rule, it is open to abusive employments or interpretations. This seems to hold true for the SBE's decision.

Even though Art. 3 of AP 1 is limited in scope to the election of legislature, and this has been so far affirmed by the case-law of the European Court of Human Rights (ECtHR), (namely, it does not apply to referenda), the SBE presented the following argument:

> *"Even though Art. 3 of AP 1 regulates the right to free elections relating to election of members of parliament only, it nevertheless, in its essence, gives importance to the right to free elections and protects it... In the case of a violation of the rules, while exercising a right protected by an international convention and the Constitution, the evaluation of the facts of the concrete situation and the interpretation of the rules shall be in conformity*

> *with the desired aim of the rules and in line with the protection of essence of the right… Procedural rules provided for exercising the right are kinds of measures or means to ensure the free and secure enjoyment of the right. A violation or neglect of one of these procedural measures or means cannot be construed and understood in the way that will brush away the essence of the right."*

In the SBE's view, stamped ballots are this type of procedural measure, and it is only one of the available measures that ensure the authenticity of ballots (others are an SBE's watermark on ballot papers, the SBE's logo on the envelopes of ballots, the composition of the BBC through representatives of different political parties, counting and recording the number of the remaining ballots etc). In short, the SBE held that the neglect of the requirement of *stamped ballots* can be ignored and those ballots shall be counted as valid.

Constitutional and human rights law scholars in Turkey have criticized the SBE's decision on several grounds including the incorrect and unconvincing use of Art. 3 of AP 1 of the ECHR. However controversial the SBE's decision, there is no way of accepting it as legally valid (or sound) other than by acknowledging that Art. 3 of AP 1 applies to referenda in Turkey.

Now the main opposition party, the Republican People's Party (CHP) is planning to apply to the ECtHR to challenge the outcome of the referendum. In that case, the legal argument needs to rely on Art. 3 of AP No. 1. In other words, it must be convincingly demonstrated that the Art. 3 of AP 1 shall apply to the Turkish constitutional referendum, and further that the protection of the right to free election has been violated.

Given the case law of the ECtHR, which has affirmed that Art. 3 of AP No.1 does not apply to referenda, some legal scholars have presented various views on the CHP's plan to apply to the ECtHR. The ECtHR case law does not *per se* suggest that the April 16 Referendum result cannot be challenged before the ECtHR, as mentioned by a constitutional law scholar, İbrahim Kaboglu. The problem is that, as pointed out by Kemal Gözler and Tolga Şirin, it is highly unlikely that the ECtHR would decide in favor of the CHP's request since Art. 3 of AP 1 does not apply to referenda.

One of the former judges of Turkey at the ECtHR, Rıza Türmen, has a different opinion on the matter. He argues that there is nothing in the ECtHR case law, and more specifically in the *McLean and Cole v. the United Kingdom* (nos. 12626/13 and 2522/12) decision, that prevents from successfully challenging the constitutional referendum result of April 16 and from gaining an affirmative decision. He suggests that *Mclean* decision should be understood in a way that so long as a referendum has significant impacts on the compositions and powers of legislature in a Contracting Party, Art. 3 of AP 1 can be applied to that referendum. In Türmen's view, the constitutional amendments adopted by the April 16 Referendum in Turkey has resulted in that sort of change. More precisely, Türmen points out that the President under the adopted constitutional amendments will have some legislative powers and influence on the Parliament. Therefore, Türmen believes that the ECtHR can perfectly deliver a decision in favor of the CHP's appeal. Kerem Altıparmak, human rights lawyer and expert on the ECHR, has presented a similar view. He argues that constitutional changes introduced and adopted by the April 16 Referendum put some risk on the future enjoyment of the right to free elections.

I argue that there may be another reason why the ECtHR can decide on the merit of the case. This hinges on the answer to the question: Can a contracting party unilaterally extend the scope of a right protected under the ECHR by its domestic law? May the ECtHR consider an interpretation of a right under the ECHR by the court(s) of a contracting party in a way that that state party has extended the scope of that right? Can such a unilateral extension be later applied by the ECtHR to that Contracting Party in a legal dispute? Can the SBE's decision be considered as such an act/interpretation? The answer to these questions is crucial for the Turkish referendum case as well as for the entire system of the ECHR.

One answer to the question may come from Art. 53 of the ECHR. Art. 53 states "Nothing in this Convention shall be construed as limiting or derogating from

any of the human rights and fundamental freedoms which may be ensured under the *laws of any High Contracting Party* or under any other agreement to which it is a party." Art. 53 is understood in the sense that "the guarantees enshrined in the ECHR are a minimum standard. While the Contracting Parties must not afford a level of human rights protection lower than that required by the Convention, they are free to exceed it. If the level of protection within a particular country is higher than the protection provided by the ECHR, the Convention must not be construed as limiting any of the rights entrenched in the domestic legal framework of that state." [2]

As seen in Art. 53, the extension of the scope of a right under the ECHR can be granted by two ways: domestic laws and other international conventions. As illustrated by the ECtHR in *Leyla Şahin v. Turkey*(§ 88), domestic laws or *laws of any High Contracting Party* "... must be understood to include both statutory law and judge-made "law" ... And "...the "law" is the provision in force as the competent courts have interpreted it." Now the question is whether the SBE's employment of Art. 3 of AP No. 1, which constitutes the essential legal ground of its decision, makes Art. 3 of AP No. 1 applicable to the April 16 Referendum. An affirmative answer to this question seems to be possible, given the following considerations: the SBE is the only state organ that is responsible for controlling the whole voting process in elections and referenda in Turkey. It is in charge of deciding all complaints and appeals concerning the election laws, and according to the Turkish Constitution (Art. 79), SBE's decisions are final and cannot be revoked in any other courts or state organs.

It would be inconsistent to claim that Art. 3 of AP 1 cannot be applied to the constitutional referendum. Considering otherwise will make the SBE's decision questionable, as, in that case, the legal basis of the SBE's decision would be undermined. This would lead to legal uncertainty and amount to an unacceptably selective way of applying the ECHR. Of course, once the ECHR decides that Art. 3 of AP can be applied to referenda in Turkey, it will further need to settle on whether the right to free elections has been violated or not in the April 16 Referendum.

I can say that as long as political matters are "legalized" and tried to be solved through the helpful (!) hands of the judiciary, the answer and/or remedy to the matter would be looked for in the law, accordingly.

[1] The Committee of Organization for Security and Cooperation in Europe (OSCE) reported, among many other things, irregularities, including the controversial SBE's decision, during the voting process in its Preliminary Report. On the same issues: *Observation of the referendum on the constitutional amendments in Turkey (16 April 2017)* (Doc. 14327, 29 May 2017) by the Parliamentary Assembly of the Council of Europe.

[2] Stelios Andreadakis, "The European Convention on Human Rights, the EU and the UK: Confronting a Heresy: A Reply to Andrew Williams", *The European Journal of International Law*, Vol. 24 no. 4, p. 1189.

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