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

SECOND SECTION

DECISION

Application no. 48818/17
CUMHURİYET HALK PARTİSİ
against Turkey

The European Court of Human Rights (Second Section), sitting on 21 November 2017 as a Chamber composed of:

Robert Spano, *President,*
Julia Laffranque,
Ledi Bianku,
Işıl Karakaş,
Paul Lemmens,
Valeriu Griţco,
Jon Fridrik Kjølbro, *judges,*
and Stanley Naismith, *Section Registrar,*

Having regard to the above application lodged on 4 July 2017 and the additional submissions submitted by the applicant party dated 10 October 2017,

Having deliberated, decides as follows:

THE FACTS

The applicant party, Cumhuriyet Halk Partisi (Republican People's Party), is a Turkish political party based in Ankara. It was represented before the Court by Mr Ç. Çağlayan, a lawyer practising in Ankara.

A. The circumstances of the case

The facts of the case, as submitted by the applicant party, may be summarised as follows.

1. On 16 April 2017, a nationwide referendum (the "Constitutional Referendum" or "Referendum") concerning the modification of

approximately fifty provisions and the repeal of twenty-one other provisions of the Constitution took place in Turkey. The changes were proposed by the governing Adalet ve Kalkınma Partisi (Justice and Development Party) ("the AKP") and the Referendum was of a binding nature. The principal question was whether the President of Turkey should be accorded extensive powers, including the following:

a) the power to dissolve parliament,

b) the power to appoint and dismiss vice-presidents and ministers, and the power to appoint and dismiss high-level State officials,

c) the power to veto laws and address the Grand National Assembly of Turkey,

d) the power to issue presidential decrees on issues relating to executive matters,

e) the power to appoint members of the Council of Judges and Prosecutors, and judges of the Constitutional Court,

f) the power to determine national security policies and take the necessary measures,

g) the power to declare a state of emergency,

h) the power to prepare the State budget.

2. The amendments also removed the requirement that the President of the Republic of Turkey be politically neutral, allowing the President to be a member or the leader of a political party at the same time. Moreover, the post of Prime Minister was abolished.

3. These amendments were put to the vote as a whole, and voters were given the option to vote yes or no.

4. On 16 April 2017, while some of the votes were being counted, the National Electoral Commission (*Yüksek Seçim Kurulu* – "the Commission") received the information that in some of the polling stations stamps imprinting the word "yes", instead of the official word "choice", had been used. As a result, the Commission delivered a decision on the same day declaring valid the use of stamps imprinting the word "yes".

5. The voting procedure in the eastern provinces ended at 4.00 p.m. on the same day. At approximately 4.10 p.m., the AKP representative to the Commission informed the latter that in some polling stations, ballot envelopes and ballot papers that lacked the obligatory seals had been used. He accordingly requested the Commission to declare those envelopes and ballot papers valid.

6. At approximately 4.45 p.m. on the same day, that is to say fifteen minutes before the end of the voting in the western provinces, the Commission declared the ballot envelopes and ballot sheets lacking the obligatory seals valid throughout the country.

7. According to the results announced by the Commission on 27 April 2017, the turnout was 85.43 %, with 54.41 % of people voting "yes" and 48.59 % against.

8. On 18 April 2017 the applicant party requested that the Commission invalidate the results and outcome of the Referendum, arguing, *inter alia*, that the Commission had breached the statutory provisions according to which envelopes and ballot papers must bear the necessary seals in order to be considered valid. Referring to the clear provisions of Law no. 298, the applicant party alleged that the Commission had no authority to declare those envelopes and ballots valid.

9. The applicant party further submitted that the rationale behind the requirement that ballot envelopes be sealed by the District Election Boards and Ballot Box Committees and ballot sheets by Ballot Box Committees was to avoid fraudulent voting. In that connection, it pointed out that several envelopes and ballot sheets might have been deposited in ballot boxes after having been stolen and stamped outside the authorised polling stations. The applicant party pointed out that this was a realistic possibility since it had been found, earlier on the day of the Constitutional Referendum, that some envelopes and ballot sheets had gone missing in a number of polling stations. The right course to follow should therefore have been to establish the quantity of unsealed ballot papers during the counting procedure and to determine their validity thereafter. Thus, the Commission's hasty decision on the day of the Constitutional Referendum to declare those ballot papers valid had caused the ballot box committee members to apply the necessary seals retrospectively, after the voting had ended. As a result, it had become impossible to remedy the above-mentioned irregularities. Lastly, the applicant party complained that unlawful and unfair conduct during the Referendum process had impaired the legitimacy of the results[1]. Accordingly, the applicant party requested that the Commission annul the Referendum results.

10. On 19 April 2017, the Commission rejected the applicant party's request, stating, *inter alia*, the following:

> "Although Article 3 of Protocol No. 1 provides for the right to vote in respect of the election of Members of Parliament, [the article] attaches importance to and, in essence protects the right, to free elections. That is because the right in question is, without a doubt, a fundamental feature of a political democracy. The Court distinguishes between 'active' and 'passive' rights to free elections, the former being the right to participate in an election by way of voting and the latter being the right to stand as a candidate in the elections. 'Passive' rights to free elections are given less protection than active rights. ...
>
> In the event of a breach of a rule in the course of exercising a fundamental right protected by the Constitution and international conventions, it is expected that in the

1. For detailed information on the alleged procedural irregularities and the media coverage of the Constitutional Referendum, see "the Limited Referendum Observation Mission Final Report on the Constitutional Referendum of 16 April 2017" of the Organisation for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights.

course of examining a given case, the protection of the essence of a right and the interpretation of a rule should be in line with the aim pursued.

What really matters is the protection of the right, whereas the procedural rules describing the ways of exercising the rights are the tools that aim to secure the exercise of such rights. Where it can be seen that the right accorded to an individual has been exercised securely, it is not possible to interpret any breaches of procedural rules so as to impair the very essence of that right.

...

If Article 67 of the Constitution and Article 3 of Protocol No. 1 are examined together in respect of the right to free elections, the acceptance as valid of envelopes or ballots that had not been stamped correctly – as a result of an omission or a mistake by the members of certain ballot box committees – did not obstruct the aim of the provisions of the [above-mentioned] law and the Circular [No. 135/I on the organisation, duties and powers of ballot box committees during the Constitutional Referendum]."

11. Since, pursuant to Article 79 of the Constitution, no appeal lies against the decisions of the Commission to any other body, that decision became final on the date of its delivery.

B. Relevant domestic law

12. Article 7 of the Constitution provides:

"Legislative power is vested in the Turkish Grand National Assembly on behalf of the Turkish Nation. This power cannot be delegated."

13. Article 67 of the Constitution, as amended on 23 July 1995 and 17 October 2001, provides:

"Citizens shall have the right to vote, to stand for election, to engage in political activities independently or as members of a political party and to take part in referendums in accordance with the rules laid down by law.

Elections and referendums shall be conducted under the administration and supervision of the judiciary and in accordance with the principles of free, equal, secret and universal suffrage, in a single round of voting, the votes cast being counted and recorded in public. Nevertheless, the law shall make suitable provision for Turkish citizens resident abroad to be able to exercise their right to vote.

Every Turkish citizen of at least eighteen years of age shall have the right to vote and to take part in referendums.

The exercise of these rights shall be regulated by law.

Serving members of the armed forces, officer cadets and persons serving prison sentences, other than those convicted of an unintentional offence, shall be deprived of the right to vote.

The National Electoral Commission shall determine the measures to be taken to guarantee the security of the operations to count and record the votes in prisons and remand centres, and those operations shall be conducted in the presence of the competent judge, who shall take charge of and supervise them.

Electoral laws must reconcile fair representation with governmental stability.

Amendments to electoral laws shall not be applicable to elections taking place during the year following their entry into force."

14. Article 79 §§ 2 and 6 of the Constitution, as amended on 21 October 2007, provides:

"The National Electoral Commission shall execute all the functions necessary to ensure the fair and orderly conduct of elections from beginning to end, shall carry out investigations and take final decisions, both during and after the elections, on all irregularities, complaints and objections concerning electoral matters, and shall hold the electoral records of the members of the Grand National Assembly of Turkey and presidential election.

No appeal shall lie against the decisions of the National Electoral Commission to any other authority."

15. Following the Constitutional Referendum, Article 104 of the Constitution has been amended as follows:

"The President of the Republic is the head of the State. Executive power belongs to the President.

In this capacity, he/she shall represent the Republic of Turkey and the unity of the Turkish Nation; he/she shall ensure the implementation of the Constitution, and the regular and harmonious functioning of the organs of the State.

If he/she deems it necessary, he/she shall deliver the opening speech of the Turkish Grand National Assembly the first day of the legislative year.

He/she shall deliver messages to the Assembly about the domestic and foreign policy of the country. He/she shall promulgate laws.

He/she shall return laws for reconsideration to the Turkish Grand National Assembly.

He/she shall lodge actions for annulment with the Constitutional Court for the whole or certain provisions of enacted laws, the Rules of Procedure of the Turkish Grand National Assembly on the grounds that they are unconstitutional in form or in content.

He/she shall appoint and dismiss Vice-Presidents and ministers.

He/she shall appoint and dismiss high-level State officials, and regulate the procedures and principles relating to the appointment of these, by presidential decrees.

...

He/she shall ratify and promulgate international treaties.

He/she shall hold referendums, if he/she deems it necessary, regarding laws amending the Constitution.

He/she shall determine national security policies and take the necessary measures. He/she shall represent the Office of Commander-in-Chief of the Turkish Armed Forces on behalf of the Turkish Grand National Assembly.

He/she shall decide on the use of the Turkish Armed Forces.

...

The President may issue presidential decrees on matters relating to the executive power. The fundamental rights, individual rights and duties included in the first and second chapters, and the political rights and duties listed in the fourth chapter of the second part of the Constitution, shall not be regulated by presidential decrees.

No presidential decrees shall be issued on matters to be regulated specifically by law embodied in the Constitution.

No presidential decrees shall be issued on matters explicitly regulated by law. In the event of a conflict between presidential decrees and the laws due to differences in provisions on the same matter, the provisions of law shall prevail. If the Turkish Grand National Assembly introduces a law on the same matter, the presidential decree shall become null and void.

The President may issue by-laws in order to ensure the implementation of laws providing that they are not contrary to these laws and regulations. Decrees and by-laws shall come into force on the day of their publication in the Official Gazette unless a date later than publication is determined.

The President of the Republic shall also exercise powers of election and appointment, and perform the other duties conferred on him/her by the Constitution and laws."

16. Following the Constitutional Referendum, Article 116 of the Constitution has been amended as follows:

"The Grand National Assembly may decide to hold new elections with a three-fifths majority of the total number of members. In this case, the general election of the Grand National Assembly and presidential elections shall be held together.

In the event that the President decides to hold new elections, the general election of the Grand National Assembly and presidential elections shall be held simultaneously.

Where the holding of new elections is decided by the Grand National Assembly during the President's second term, he/she may run [for the presidency] once again.

The powers of the Assembly and the President of the Republic of which the holding of new elections is decided together, shall continue until these organs take office.

The terms of office of the Assembly and the President elected in this manner shall also be five years."

17. Section 1 of Law no. 298 on Basic Provisions Concerning Elections and on Registers of Voters (Law no. 298 of 1961) provides:

"The provisions of this Law shall apply to ... referendums on laws related to amending the Constitution."

18. Relevant parts of Section 98 of the Law no. 298 provide:

"Envelopes that are not the same shape and colour as those provided by ballot box committees, or that lack the seals of the provincial election board and the ballot box committee, or that have been torn open, or that have seals other than that of the provincial election board and ballot box committee, or that bear signatures, writing, finger prints or any other marks, shall be considered invalid".

19. Relevant parts of Section 101 of Law no. 298 provide:

"...

3. Ballot papers that do not bear a ballot box committee seal on the reverse ...

... are not valid."

20. On 14 February 2017 the Commission issued Circular No. 135/I on the organisation, duties and powers of ballot box committees during the Constitutional Referendum. Paragraph (c) of Article 43 of that Circular provides that ballot papers that do not bear the ballot box committee seal on their reverse are not valid. According to paragraph (h) of Article 43, ballot papers of which the front is stamped with a word other than "choice" or are stamped with any special mark, name, signature stamp, seal or finger print instead of the word "choice", are not valid.

C. Relevant Council of Europe material

21. The European Commission for Democracy through Law (the Venice Commission) made the following observations – in its opinion of 13 March 2017 (CDL-AD(2017)005) – on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to the national referendum on 16 April 2017:

"...

V. Conclusions

124. Every State has the right to choose its own political system, be it presidential or parliamentary, or a mixed system. This right is not unconditional, however. The principles of the separation of powers and of the rule of law must be respected, and this requires that sufficient checks and balances be inbuilt in the designed political system. Each constitution is a complex array of checks and balances and each provision, including those that already exist in the constitution of another country, needs to be examined in view of its merits for the balance of powers as a whole.

125. When a presidential system is chosen, as is the case in Turkey under the proposed constitutional amendments adopted by the Turkish Grand National Assembly on 21 January 2017 and to be submitted to a national referendum on 16 April 2017, particular caution is called for, as presidentialism carries an intrinsic danger of degenerating into an authoritarian rule. In a presidential system, the executive and the legislative powers both derive their powers and legitimacy from the people, through elections held at fixed intervals. The two powers are rigidly separate, so that conflicts between the two inevitably arise. Governing requires mediation of these conflicts. To be meaningful, separation of powers requires therefore that the different powers should be constituted in a way which also allows for divergent approaches and political emphases.

126. The proposed constitutional amendments aim to establish what the Turkish authorities have described as a "Turkish-style" presidential system, although they in no way reflect the well-rooted tradition of parliamentarism in Turkey but would constitute a decisive break in the constitutional history of the country. They are not based on the logic of separation of powers, which is characteristic for democratic presidential systems. Presidential and parliamentary elections would be systematically held together to avoid possible conflicts between the executive and the legislative powers. Their formal separation therefore risks being meaningless in practice and the

role of the weaker power, parliament, risks becoming marginal. The political accountability of the President would be limited to elections, which would take place only every five years.

127. The following features of the proposed regime raise particular concern with regard to separation of powers:

- The new President would exercise executive power alone, with an unsupervised power to appoint and dismiss ministers, who do not form a collegiate government, and to appoint and dismiss all the high officials on the basis of criteria determined by him or her alone.

- The President would be empowered to choose one or more Vice-presidents; one of them, without any democratic legitimacy and without validation by parliament, would be called to exercise presidential functions in case of vacancy or temporary absence of the presidential position.

- The President, Vice-presidents and ministers would be accountable only by the procedure of impeachment, which is a very weak tool of parliamentary supervision;

- The President would be allowed to be a member and even the leader of his or her political party, which would give him or her influence over the legislature.

- The principle of compulsory synchronization of presidential and parliamentary elections would be introduced.

- The President would be given the power to dissolve parliament on any grounds whatsoever, which is fundamentally alien to democratic presidential systems, while being obliged to call in this case also early presidential elections. This way of resolving political problems is, at best, rudimentary.

- The President would have the opportunity to obtain a third mandate, if parliament decides to hold new elections during his or her second mandate. This is an unjustified exception to the limitation to two presidential mandates provided in the Turkish constitution and also corresponding to good European practice.

- The President would also have an extensive power to issue presidential decrees without the need for an empowering law which the Constitutional Court could review; although in principle laws would prevail over presidential decrees, the amendments fail to introduce effective mechanisms to ensure such prevalence in practice.

- The President would be given the exclusive power to declare a state of emergency and could issue presidential decrees without any limitation during the state of emergency.

128. In a presidential regime, a strong, independent judiciary is essential to settle the conflicts between the executive and the legislative powers. However, the proposed amendments weaken, instead of strengthen the Turkish judiciary. The Council of Judges and Prosecutors, whose current composition largely meets international standards, would be immediately reformed by providing that six of the thirteen members are appointed by the President, who would no more be a *pouvoir neutre*, while seven members would be chosen by the Grand National Assembly, over which the President would have influence and which, due to the synchronization of elections, would very probably represent the same political forces as the President. No member of the Council would be elected by peer judges anymore. On account of the Council's important functions of overseeing appointment, promotion, transfer, disciplining and dismissal of judges and public prosecutors, the President's control over the Council

would extend to all the judiciary. Control over the Council of Judges and Prosecutors would also indirectly enhance the President's control over the Constitutional Court.

129. The enhanced executive control over the judiciary and prosecutors which the constitutional amendments would bring about would be even more problematic, in the context in which there have already been longstanding concerns regarding the lack of independence of the Turkish judiciary. The amendments would weaken an already inadequate system of judicial oversight of the executive.

130. In the light of the above, the Venice Commission finds that the proposed constitutional amendments would introduce in Turkey a presidential regime which lacks the necessary checks and balances required to safeguard against becoming an authoritarian one. The welcome abolition of the military courts and the provision that Presidential emergency decrees automatically lose their validity if they are not approved by the Grand National Assembly do not suffice to change this conclusion.

131. In addition, the process of parliamentary debate and adoption of the constitutional amendments took place in a context where several deputies from the second largest opposition party were in jail. The breach of the secrecy of vote cast a doubt on the genuine nature of the support for the reform and on the personal nature of the deputies' vote. Regrettably, the parliamentary procedure did not provide a genuine opportunity of open discussions with all the political forces present in parliament.

132. The whole process of parliamentary adoption and submission for approval by referendum of the constitutional amendments is taking place during the state of emergency, when very substantive limitations on freedom of expression and freedom of assembly are in force. In particular the extremely unfavourable environment for journalism and the increasingly impoverished and one-sided public debate that prevail in Turkey at this point question the very possibility of holding a meaningful, inclusive democratic referendum campaign about the desirability of the amendments.

133. In conclusion, the Venice Commission is of the view that the substance of the proposed constitutional amendments represents a dangerous step backwards in the constitutional democratic tradition of Turkey. The Venice Commission wishes to stress the dangers of degeneration of the proposed system towards an authoritarian and personal regime. In addition, the timing is most unfortunate and is itself cause of concern: the current state of emergency does not provide for the due democratic setting for a constitutional referendum.

134. The Venice Commission remains at the disposal of the Turkish authorities for any further assistance."

COMPLAINTS

22. Relying on Article 3 of Protocol No. 1 to the Convention, the applicant party complained that the Government had failed to ensure the free expression of the opinion of the people in the choice of legislature, the separation of powers, the independence of the judiciary and the rule of law, which it considered to be the prerequisites of a democracy. It also argued that the national authorities had overlooked the allegation that the

systematic consideration as valid of ballots without seals was capable of having influenced the outcome of the Constitutional Referendum.

23. The applicant party argued that the Constitutional Referendum entailed the complete abolition of the fundamental principles of the separation of powers and the end of parliamentary democracy in Turkey because the amendments were aimed at the creation of a "one-man" regime by providing the President with unfettered power and dominance over the three powers without any effective check and balance mechanism. It maintained that the amendments made the judiciary dependent on the President whilst weakening the legislature to an extent that it would be compelled to adjust its activities according to the wishes of the President. It argued that the member States' margin of appreciation does not extend to introducing constitutional amendments that undermine democracy through referendums.

24. As regards the applicability to the Constitutional Referendum of Article 3 of Protocol No. 1, the applicant party submitted the following three main arguments. Firstly, it argued that the nature of the changes introduced by the Constitutional Referendum and their direct connection with democracy made that Article applicable to the Constitutional Referendum. Secondly, it alleged that the same conclusion might be inferred from the line of reasoning adopted by the Commission's decision. Lastly, the applicant party invited the Court to consider the role of the President's office in the overall legislative process to reach the same conclusion.

25. The applicant party further developed its main arguments for the applicability of Article 3 of Protocol No. 1 in the following manner.

26. The applicant party firstly maintained that the word "legislature" had to be interpreted in the light of the constitutional system of the State in question. It submitted that in order for Article 3 of Protocol No. 1 to apply to referendums, consideration had to be given not only to the legislative powers of a given body but also to that body's role in the overall legislative process. In support of its argument, the applicant party cited numerous decisions and judgments of the Court, such as *Matthews v. the United Kingdom* ([GC], no. 24833/94, ECHR 1999-I); *Vito Sante Santoro v. Italy*; (no. 36681/97, ECHR 2004-VI); *Py v. France*, (no. 66289/01, ECHR 2005-I (extracts)); *Georgian Labour Party v. Georgia*, (no. 9103/04, ECHR 2008); *Sejdić and Finci v. Bosnia and Herzegovina* ([GC], nos. 27996/06 and 34836/06, ECHR 2009); and *Krivobokov v. Ukraine* ((dec.), no. 38707/04, 19 February 2013). Although all those cases were concerned with elections to various bodies, legislative or otherwise, the applicant party did not argue whether and under what conditions referendums could be considered as "elections".

27. Relying on the Court's line of reasoning in *McLean and Cole v. the United Kingdom* ((dec.), nos. 12626/13 and 2522/13, 11 June 2013), namely that "... there was nothing in the nature of the referendum at issue to lead the

Court to reach a different conclusion than those so far reached", the applicant party suggested the possibility of Article 3 of Protocol No. 1 being applied to referendums of a different nature, such as the one in Turkey. The applicant party's main argument for that contention was the nature of the amendments to the Constitution which, in their view, had directly affected the operation of political democracy in Turkey. The applicant party referred to the fact that the referendum had increased the President's powers to appoint and dismiss vice-presidents, ministers and high-level state officials; to dissolve parliament; to issue presidential decrees; to appoint members of the Council of Judges and Prosecutors, and judges of the Constitutional Court; and had strengthened his power to veto laws enacted by Parliament, which in turn required an absolute majority to be adopted. It had also given him the power to prepare the budget, to declare a state of emergency, and created the possibility that the President could also be the leader of the governing political party. In addition, presidential elections and general elections would now be held at the same time. The applicant party suggested that such crucial facts had rendered Article 3 of Protocol No. 1 applicable to the referendum in Turkey.

28. As to the merits, the applicant party alleged that the Commission had delivered a decision that completely disregarded the electoral provisions. In that connection, it alleged that the Commission:

a) had committed a gross breach of the very clear electoral rules;

b) had shown no genuine concern about its allegations regarding the fraudulent acts;

c) had failed to conduct a proper examination of its allegations;

d) had not concerned itself with the lawfulness of the referendum campaign;

e) by approving a particular amendment that had been introduced on 9 February 2017, had acted contrary to Article 67 of the Constitution, which states that "amendments made to the electoral laws cannot be applied to elections held within a year of the amendments coming into force";

f) had found that the Referendum fell within Article 3 of Protocol No. 1 as a result of its referring to that Article in its decision.

29. Relying on Article 11 of the Convention, the applicant party further alleged that it had been a victim of the unfavourable and undemocratic conditions during the referendum campaign, which had taken place during a state of emergency.

30. Relying on Article 13 of the Convention, the applicant party lastly complained that there was no effective remedy at its disposal in respect of the Commission's decisions, since no appeal lay against its decisions to any other body.

THE LAW

A. Article 3 of Protocol No. 1

31. At the outset, the Court considers that in the light of the substance of the applicant party's complaint under Article 11 of the Convention, that complaint should be examined together with the complaint under Article 3 of Protocol No. 1 to the Convention, the latter provision providing as follows:

> "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."

32. In the present case, the Court is first called upon to decide whether Article 3 of Protocol No. 1 is applicable to the Constitutional Referendum in Turkey.

33. The text of Article 3 of Protocol No. 1 refers to the Contracting Parties' obligation to hold free "elections at reasonable intervals". The obligation also extends to holding such elections under conditions which will ensure the free expression of the opinion of the people in the "choice of the legislature". It cannot be inferred from the ordinary meaning of the term "elections" in Article 3 of Protocol No. 1 that a "referendum" would fall within the scope of that provision. Firstly, referendums, unlike elections, are not held "at reasonable intervals" owing to the fact that in most, if not all, cases they represent a system of ascertaining the opinion of the people on a matter that is not a recurrent subject, such as the Constitutional Referendum in the present case, which is limited to a particular time and a particular subject. Secondly, and importantly, referendums are not usually organised as a means of electing citizens to certain posts, in other words as an election giving the electorate the possibility to choose the legislature. In the present case, although the Constitutional Referendum introduced many significant changes to the Constitution, the people of Turkey were clearly not choosing any particular person or persons for a legislative post or posts.

34. It follows, as the Court has previously held, that the ordinary meaning of the language used in Article 3 of Protocol No. 1 limits its application to elections concerning the choice of the legislature, held at reasonable intervals, and does not apply to referendums (see *X. v. the United Kingdom*, no. 7096/75, Commission decision of 3 October 1975, Decisions and Reports (DR) 3; *Bader v. Austria*, no. 26633/95, Commission decision of 15 May 1996, unreported; *Nurminen v. Finland* (dec.), no. 27881/95, 26 February 1997; *Castelli and Others v. Italy*, nos. 35790/97 and 38438/97, Commission decision of 14 September 1998, Decisions and Reports 94, p. 102; *Hilbe v. Liechtenstein* (dec.), no. 31981/96, ECHR 1999-VI; *Borghi v. Italy* (dec.), no. 54767/00, ECHR 2002-V (extracts)); *Z. v. Latvia* (dec.),

no. 14755/03, 26 January 2006; *Niedzwiedz v. Poland* (dec.), no. 1345/06, 11 March 2008; *McLean and Cole v. the United Kingdom* (dec.), nos. 12626/13 and 2522/13, 11 June 2013; and *Moohan and Gillon v. the United Kingdom* (dec.), nos. 22962/15 and 23345/15, 13 June 2017).

35. However, the applicant party argued before the Court that the Constitutional Referendum should be considered to fall within the scope of Article 3 of Protocol No. 1 as a result of the far-reaching nature of the changes it introduced into the Turkish parliamentary system. In other words, without specifically referring to the Court's doctrine that the Convention is a living instrument, the applicant party invited the Court to reformulate its approach so as to take account of present-day conditions, in particular the nature of the Constitutional Referendum. In the view of the applicant party, referendums which sought the expression by citizens of their opinion about the choice of legislature had a direct connection with democracy and should be considered as part of the right to free elections. In sum, the applicant party called on the Court to adopt a purposive approach to the term "elections" in Article 3 of Protocol No.1 so as to cover the Constitutional Referendum, owing to the nature of the changes it introduced and their inextricable link to the concept of effective political democracy in Turkey.

36. Having considered the applicant party's arguments, the Court reiterates that it is true that Article 3 of Protocol No. 1 enshrines a characteristic principle of an effective 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). Democracy constitutes a fundamental element of the "European public order", and 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 (see, among many other authorities, *Ždanoka v. Latvia* [GC], no. 58278/00, §§ 98 and 103, ECHR 2006-IV, and *Yumak and Sadak v. Turkey* [GC], no. 10226/03, § 105, ECHR 2008). The Court has furthermore emphasised the role of the State as ultimate guarantor of pluralism and has previously stated that, in performing that role, the State is under an obligation to adopt 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" (see *Mathieu-Mohin and Clerfayt*, cited above, § 54; see also, *mutatis mutandis*, *Informationsverein Lentia and Others v. Austria*, 24 November 1993, § 38, Series A no. 276; and *Yumak and Sadak v. Turkey*, cited above, § 105).

37. However, the Court once again emphasises that the text of Article 3 of Protocol No. 1 clearly suggests that its ambit is limited to elections – held at reasonable intervals – determining the choice of the legislature, and its wording is a strong indication of the limits of an expansive, purposive interpretation of its applicability. In other words, the object and purpose of the provision have to be ascertained by reference to the wording used in the

provision. Importantly, such a textual interpretation of Article 3 of Protocol No. 1 was recently reconfirmed by the Court in *Moohan and Gillon* (cited above), which concerned a secession referendum, namely the Scottish independence referendum, where the Court held that "the choice of legislature" does not necessarily include "the type of legislature" and rejected the argument that the referendum, albeit of vital importance for an effective political democracy, fell within the scope of Article 3 of Protocol No. 1.

38. In the light of the above considerations and its settled case-law on the applicability of Article 3 of Protocol No. 1, the Court thus concludes that the wording of that provision – taking into account its ordinary meaning in context as well as its object and purpose – precludes the possibility of the Court's adopting an expansive interpretation of the provision which would include referendums, as explained in paragraph 33 above.

39. As described in detail above (see paragraph 1), the purpose of the Constitutional Referendum in Turkey was, in substance, to decide whether the President of Turkey should be accorded extensive powers within a new constitutional system of government. Accordingly, the Referendum did not amount to an "election" within the meaning of Article 3 of Protocol No. 1, organised as a part of a system of elections held at reasonable intervals providing the electorate in Turkey with the opportunity to express its views on the "choice of the legislature".

40. It follows that the applicant party's complaints are incompatible *ratione materiae* with the provisions of the Convention and its Protocols, within the meaning of Article 35 § 3 (a), and must be rejected pursuant to Article 35 § 4.

B. Article 13 of the Convention taken in conjunction with Article 3 of Protocol No. 1

41. Relying on Article 13 of the Convention, the applicant party also complained that there was no effective remedy in respect of its above-mentioned complaints, given that no appeal lay against the decisions of the Commission to any other body.

42. Article 13 applies only where an individual has an "arguable complaint" under the Convention (see *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, § 207, ECHR 2016; and *De Tommaso v. Italy* [GC], no. 43395/09, § 180, ECHR 2017 (extracts)). Accordingly, it is not applicable in cases where the main complaint lies outside the material scope of the Convention (see *Kaukonen v. Finland*, no. 24738/94, Commission decision of 8 December 1997, DR 91, p. 14). In view of its conclusion concerning the applicant party's complaints under Article 3 of Protocol No. 1 to the Convention, the Court thus considers that this

complaint is also incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must accordingly be rejected in accordance with Article 35 § 4.

For these reasons, the Court, by a majority,

Declares the application inadmissible.

Done in English and notified in writing on 30 November 2017.

Stanley Naismith
Registrar

Robert Spano
President