THE PARADOX OF THE TURKISH CONSTITUTION: A HOLLOW IDOL?

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To the memory of Professor Ergun Özbudun (1937 – 2023)

ABSTRACT

In the past three decades, major reforms to the constitution have been continuously proposed in Turkey in one way or another by the main political actors. The answers to many political problems have been suggested to be found in formal constitutional redesign, and citizens have affirmed this position by engaging in constitutional debate and providing high turnout in constitutional referendums. While there is such continuous engagement with constitutional form and its refinement, constitutional actors in Turkey also brazenly violate the constitution—this article analyzes examples where the president, the Constitutional Court, the High Council of Judges and Prosecutors, and criminal courts have done so. With a view to assessing the true value of the formal constitution in the Turkish constitutional order and political actors' motivations and aims for promising constitutional reform, the article explores the apparent discrepancy between the preoccupation with formal

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constitutional design and outright disrespect for the constitution by constitutional actors.

KEYWORDS: *constitutional reform, constitutional value, unconstitutionality, presidentialism, Turkey*

I. INTRODUCTION

Four weeks before the centenary of the founding of the Republic of Turkey, the 2023 parliamentary session opened on October 1, 2023, with a discussion on a new constitution for Turkey (Yazıcıoğlu and Karabulut 2023). In his state opening speech, President Recep Tayyip Erdoğan suggested that the Republic should celebrate its centenary with a new constitution, which would also allow refinement of the new governmental system—Erdoğan's own version of strong presidentialism—the country adopted in 2017. With his Justice and Development Party (AKP) and its formal allies falling short of the required majority in the Turkish parliament for constitutional reform, Erdoğan suggested he would be open to reconciliation with opposition political parties. In response, Kemal Kılıçdaroğlu, at the time leader of the main opposition party Republican People's Party (CHP), retorted that Erdoğan should comply with the constitution himself before calling for constitutional reform.

Kılıçdaroğlu had a point. In the past decade, President Erdoğan has shown time and again he has little respect for the constitution and has not shied away from engaging in outright violations of the constitution, including refusing to comply with presidential term limits (Tokatli 2023), refusing to comply with judicial decisions (Presidency of the Republic of Turkey 2016), attacking judicial independence (Felter Jr and Aydin 2018, 34), and refusing to remain politically impartial in the period of 2014–2017 (*Hürriyet Daily News* 2014), to mention but a few. There is little evidence that suggests Erdoğan would comply with a new, improved constitution if it stood in his way. That said, this is hardly an attitude specific to Erdoğan. Long before Erdoğan had the political capital to brazenly violate the constitution, other constitutional actors violated or aided the violation of the constitution, including the CHP. From the Constitutional Court to first-instance criminal courts, and from the parliamentary opposition to the president, many constitutional actors have engaged in or encouraged unconstitutional acts.

A new constitution for Turkey has been suggested by all major political parties within the past three decades, and there is widespread conviction in Turkish society that the country needs a new constitution to replace the current 1982 Constitution

that was made by a military junta following the 1980 coup, which is regarded as lacking democratic legitimacy. Despite the near-universal appetite for a new constitution and belief in its transformative potential, the paradox of the Turkish Constitution lies in the simultaneous pattern of disregard for its text, principles, and norms by those very individuals and institutions that see an improved text as the key to a better constitutional order. This duality, in which the constitution stands as both a revered symbol of democratic governance and a document frequently violated for political expedience, points to a deeper systemic issue within Turkey's political landscape and the value of the Constitution in it. Moreover, this paradox extends beyond the realm of partisan politics and encompasses a collective failure among the branches of government and various political affiliations to consistently adhere to the Constitution. While calls for constitutional reform resonate across the political spectrum, the recurrent disregard for constitutional norms remains a constant.

In Part II, this article demonstrates the persistent violation of constitutional norms by focusing on four examples, discussing the motivation of the constitutional actor that violated the constitution and the significance of the violation for our understanding of the value of the Turkish Constitution. In Part III, examples of attempted or successful constitutional reforms from Turkey show how constitutional reform can be instrumentalized for political purposes, including the formal constitution catching up with preceding unconstitutional practice, symbolic constitutional reforms addressing nonconstitutional issues, and the marshalling or consolidation of political support. In Part IV, this article draws conclusions from the Turkish constitutional actors' tendency of overconstitutionalizing politics while engaging in continuous and flagrant violations of the Turkish Constitution, particularly pointing out the futility of treating the constitutional text as sacred and formal constitutional change as a solution to political ills, and the possibility of grappling many political issues without resorting to the difficult mechanisms of constitutional reform.

II. FOUR VIOLATIONS OF THE CONSTITUTION

The Turkish Constitution expressly stipulates in Article 6(3) that it is the source of all state authority in Turkey:

> No person or organ shall exercise any state authority that does not emanate from the Constitution.

It also establishes the supremacy and binding force of the Constitution in Article 11(1):

> The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals.

Apparently convinced of the significance and authority of the Constitution, the people of Turkey have long valued constitutional processes. This is manifested in high levels of turnout in all constitutional referendums since 1961,[2] as well as by the extensive input from individual citizens and civil society organizations to the failed 2011–13 constitution-making process (Petersen and Yanaşmayan 2020, 42–44). Such is the rhetorical power of the constitution and matters constitutional, the term *constitutional offense* is commonly—and incorrectly (Dinler 2016)—used in civic discourse to denote behavior that one considers to be in violation of the constitution. In another apparent nod to the significance and authority of the Turkish Constitution, political parties of all persuasions commonly find the document at the root of many political problems—whether because of its lack of democratic legitimacy (Arato 2016, 223–24), its official ideology (Isiksel 2013, 716), or the shortcomings of the constitutional structure that it set up—and see the solution in major reforms to it or in a completely new constitution, notwithstanding the fact that the 1982 Constitution has been amended nineteen times, some of them major reforms, especially in the 1995, 2001, 2004, 2010, and 2017 constitutional amendments.

At the same time, various political and constitutional actors in many instances over the past two decades have sought to exercise powers that are unconstitutional or those that do not have their source in the Turkish Constitution, thus violating Article 6(3) of the Constitution, or have engaged in behavior or made decisions that violate express provisions of the constitutional text, thus violating Article 11(1) of the Constitution, and they have been successful to different degrees. In this part, I identify and analyze four important manifestations of this, which, taken together, hollow out the idealized view of the significance and authority of the Constitution.

That these breaches of the Turkish Constitution have been successful and that they have not been found by the constitutional-legal system to be *unconstitutional* is beside the point. In a predominantly legal constitution, such as Turkey's, unconstitutionality might be understood to mean what is legally registered, or declared, to

2. Turnout was 80.96% in 1961, 91.27% in 1982, 93.64% in 1987, 88.82% in 1988, 67.51% in 2007, 73.71% in 2010, and 85.43% in 2017.

be unconstitutional by a constitutional authority—normally by the Constitutional Court in a binding judgment. However, the violations of the Constitution described in this article are violations that are not necessarily identified by the constitutional order as such. The actors violating the Constitution either disregarded an express provision of the Constitution or used a power that does not find its source in the Constitution. For instance, the two examples that follow in this part are violations of the Constitution committed by the Constitutional Court, which in each case engaged in one of these vices mentioned. That there is no legal remedy available against these unconstitutional acts by the Constitutional Court and that these acts, as a matter of constitutional legality, succeeded do not render them *constitutional*. Unconstitutionality, therefore, is understood in this article to include state actors' actions or decisions that disregard the constitutional text or use authority that does not find its source in the Constitution.

A. Violation by the Constitutional Court: The 367 Judgment

The year 2007 marked a significant turning point in Turkish constitutional history, characterized by an unconstitutional intervention by the Constitutional Court that had far-reaching consequences. The Turkish Constitutional Court's controversial 367 judgment,[3] made during the 2007 presidential election process, had significant implications for the place of the Constitutional Court within the constitutional order and set the stage for subsequent constitutional reforms that reshaped Turkey's political system.

In the lead-up to the 2007 presidential election, the ruling AKP proposed Abdullah Gül as their presidential candidate. However, this choice was met with widespread unease among the secularist political elite in Turkey (Migdalovitz 2007, 1–2). The primary cause of this was Gül's wife's choice to wear the Islamic headscarf (Erdil and Kaya 2007). Tensions escalated when the Turkish Armed Forces released a statement that was perceived as a thinly veiled threat of a military coup if Gül's candidacy moved forward (Turkish Armed Forces 2007).

A few months before the election was due, Sabih Kanadoğlu, a former chief public prosecutor who had previously initiated the party closure cases against the Islamist Virtue Party (FP) and the pro–Kurdish Democratic People's Party (DEHAP), published an article in the *Cumhuriyet* newspaper. In this article, Kanadoğlu argued that while the Turkish Constitution required only an absolute majority in the third round of elections if no candidate received two-thirds of the votes in the first two

3. Turkish Constitutional Court, E. 2007/45, K. 2007/54, May 1, 2007.

rounds, the parliament needed to have at least two-thirds of all the Members of Parliament (MPs) in attendance to be quorate in the first two rounds (Kanadoğlu 2006).

The first round of presidential elections took place in April 2007, but the CHP, the secularist main opposition party, refused to attend the parliament for the election. As a result, only 361 MPs were in attendance, falling short of two-thirds (367) of all 550 MPs. The CHP subsequently lodged an application with the Constitutional Court, arguing that the requirement for a two-thirds majority for election was also applicable as the quorum for parliamentary sessions for a presidential election. Despite an express constitutional provision in Article 96(1) of the Turkish Constitution setting the quorum at one-third of all MPs and previous constitutional practice suggesting otherwise, the Court decided in favor of the application and struck down the first round of voting in the Turkish Parliament, since it was inquorate, on the grounds that the first round of voting in the parliament was a "de facto amendment of the rules of parliamentary procedure" (i.e., changing the rule on quorum).

The decision by the Constitutional Court to invalidate the first round of voting in the parliament effectively created a stalemate in the presidential election process. This legal setback for the AKP government led to an early parliamentary election in 2007, resulting in a substantial majority for the AKP (Karakaya Polat 2009). Notably, the far-right Nationalist Movement Party (MHP) also entered the parliament, having stated the party's intent to participate in the presidential vote to help meet the quorum, although its members would not vote for the AKP's candidate.

In the meantime, the AKP proposed a constitutional amendment package. This package included provisions for the popular election of the president, the possibility of presidential reelection for a second term, and an express provision on the quorum for parliamentary decisions to one-third of all MPs, effectively overruling the Constitutional Court's 367 judgment. President Ahmet Necdet Sezer chose to put the proposal to a referendum, which was the only option available to him other than to directly approve it. The referendum resulted in a resounding victory for the AKP, with 68.95 percent of the voters supporting the constitutional amendments. With the adoption of popular election of a president with this amendment, Turkey took the first formal step toward presidentialism.

This episode involved, the CHP, the former chief public prosecutor, and the Constitutional Court acting collectively as a secularist bloc, interpreting the constitutional rule on quorum in what was seen by many as a bad faith manner and ultimately violating the text of the Constitution. It is worth noting that this violation succeeded in the sense that it was not registered in the constitutional-legal system as unconstitutional, although its political repercussions and the AKP's political

defiance resulted in a constitutional amendment overriding the 367 judgment, and Gül was elected as president following the 2007 parliamentary election.

B. Violation by the President: The De Facto Introduction of Presidentialism

Presidentialism was introduced de facto into the Turkish Constitution from 2014, with aspects of executive practice violating the Constitution during the 2014–17 period, as it expressly provided for a parliamentary system until the 2017 constitutional amendment.

Parliamentarianism has been a defining feature of Turkish democracy since the short-lived first Ottoman Parliament (1876–1878) was revived in 1908 following the Young Turk Revolution. Despite undergoing major reforms to its powers and composition, the parliament continued to be the exclusive law-making authority with an executive accountable to it, with parliamentarianism remaining the express choice of governmental system in the constitutions of 1924, 1961, and 1982.[4]

Initially, the AKP did not openly challenge parliamentarianism after it came to power in 2002. Although there have been suggestions to adopt presidentialism from prominent centre-right politicians in the 1990s, most notably by the eighth president Turgut Özal (Çağlıyan İçener 2015, 315–24), and there were well-known advocates of presidentialism within the party (Kuzu 1996), the AKP did not propose presidentialism officially until the failed 2011–13 constitution-making attempt. During that process, where all four major political parties were equally represented, the three other parties rejected the proposal in favor of parliamentarianism, and the lack of consensus on the system of government was one of the main reasons for the failure of the constitution-making process (Petersen and Yanaşmayan 2020, 51–52).

In the 2014 presidential election, Erdoğan was elected as president, for the first time by popular, rather than parliamentary, vote in Turkey. One of his election promises had been to be an "active" president, indicating that he would make full use of the constitutional powers previously regarded as having only symbolic value (Letsch 2014). Upon his election, he started to enjoy these powers, such as chairing cabinet meetings that were normally chaired by the prime minister, and moreover he did not feel bound by the constitutional limits on his mandate, such as remaining politically impartial (*Hürriyet Daily News* 2014). His full enjoyment of

4. The 1921 Constitution provided for an "assembly government" where all legislative and executive functions were united in the parliament (Özbudun 2011, 21), although some suggest that "assembly government" is a type of parliamentary system of government. For a discussion, see Özbudun (2008, 51–74).

the presidential powers effectively created a de facto presidential system, as was acknowledged even by him (Çelikkan 2015). This admission was followed by calls by Binali Yıldırım, the then-prime minister, and Devlet Bahçeli, the leader of the far-right MHP, to transform the current "de facto situation" into a "legal" one (Pitel 2016). In the lead-up to Bahçeli's forming a political alliance with Erdoğan following the failed coup attempt in July 2016, he called in October 2016 for Erdoğan to introduce a constitutional amendment to change the governmental system of Turkey to presidentialism (Gumrukcu 2016). Bahçeli's call was a crucial step toward this constitutional change, because the number of AKP MPs was insufficient to reach the required majority to adopt an amendment in the parliament.

Following Bahçeli's call, the MPs of the AKP and the MHP worked together to produce a draft bill to amend the Constitution, and the AKP MPs introduced the constitutional amendment proposal to the parliament on December 10, 2016. Thus began the process of the constitutionalization of the de facto practice of presidentialism, which had been a continuous violation of the constitution since 2014.

As mentioned, following the 2016 coup attempt, President Erdoğan, though required by the constitution to be impartial but de facto led the governing AKP, formalized an alliance with the far-right MHP and its leader Bahçeli in order to effect the constitutional changes necessary to strengthen his executive powers. The main purpose of the 2017 constitutional amendment was, therefore, the realization of Erdoğan's old project of a transition from parliamentarianism to presidentialism. Although there had been eighteen previous amendments to the 1982 Constitution, the 2017 constitutional amendment has been the most comprehensive one. This amendment made changes to sixty-nine articles of the 1982 Constitution and added a provisional article.[5] Most important is that this amendment put an end to the parliamentary system that dated back to 1876 and in its place adopted a governmental system that resembles a very strong presidential system—one that has been labeled as "presidentialism a la Turca" (Bahçeli 2017). This governmental system has been regarded as a sui generis one (Gözler 2018, 744–45). It is clearly not a parliamentary system, as it provides for a popularly elected president with exclusive executive power (Gözler 2018, 745). However, it is also not a presidential system in the proper sense, as both the president and the parliament have the power to cut each other's terms short by calling early simultaneous presidential and parliamentary elections (Gözler 2018, 745).

Only political justifications were offered for this practice of anti-parliamentarianism with little concern for constitutionality, complemented by explicit promises

5. The Venice Commission has published an English translation of the constitutional amendment (European Commission for Democracy through Law 2017).

to reform the constitution to recognise the de facto, yet hitherto unconstitutional, change. This approach succeeded in two ways: (1) between 2014 and 2017 the president exercised new powers, including the abandonment of the constitutional requirement of presidential impartiality; (2) a constitutional amendment formally introducing a strong presidential system instead of the parliamentary system was adopted in 2017 following a referendum.

C. Violation by the Constitutional Court and the High Council of Judges and Prosecutors: The Security of Judicial Tenure

The Turkish Constitution guarantees the security of judicial tenure. Article 139(1) stipulates that judges and public prosecutors cannot be dismissed from office or forced into retirement before the mandatory retirement age and that they cannot be deprived of their salaries and other benefits, even when a court or post is abolished. The only exceptions to this are provided in Article 139(2), which are conviction of an offense requiring dismissal from office, ill health, or unsuitability to remain in the profession, the terms of which must be provided in primary legislation.

The security of judicial tenure has been under attack since at least 2013. First, judges have been subjected to involuntary relocations or demotions on the basis of the judgments they delivered (Gözler 2016, 24–25). Second, following the failed coup attempt in 2016, thousands of judges were dismissed from office without a constitutional basis and hundreds of judges imprisoned on terror charges (*Daily Sabah* 2016). Judges on previously drawn-up lists were suspended immediately after the coup attempt (Human Rights Watch 2016). On August 4, 2016, the Constitutional Court dismissed from office two of its own justices, who were arrested immediately after the coup attempt.[6] This decision paved the way for the dismissal of other judges, including the dismissal of other Supreme Court justices.

The Constitutional Court's decision dismissing its two justices was unconstitutional for at least two reasons. First, the authority the court relied on in delivering the decision is unconstitutional, since this authority was granted to it by Decree-Law 667, an emergency decree-law after the coup attempt,[7] rather than by constitutional amendment, as stipulated by Article 148(10) of the Constitution, which requires any new powers to the Constitutional Court to be given by constitutional

6. Turkish Constitutional Court, E. 2016/6 (Miscellaneous file), K. 2016/12, August 4, 2016.

7. The Venice Commission has published an English translation of the Decree-Law 667 (European Commission for Democracy through Law 2016).

amendment (Olcay 2017, 574). No constitutional reform was made to provide for a constitutional basis for these dismissals. Second, given that lustration is categorized as a criminal sanction by the European Court of Human Rights in the case of *Matyjek v. Poland*,[8] in dismissing the justices without a criminal procedure and admittedly without any evidence—the Constitutional Court ruled that no evidence was required for dismissal other than the fifteen justices' *personal convictions* regarding the two justices—the decision violated the two justices' right to a fair trial and the presumption of innocence protected by the Turkish Constitution (Olcay 2017, 576–77).

Following this decision, the High Council of Judges and Prosecutors, the disciplinary body of the Turkish judiciary, in eight decisions spanning nine months, dismissed a total of 4,240 judges and prosecutors, using the new extraordinary powers given to it by the decree-law, consistently quoting major parts of the Constitutional Court's decision in full and without providing individual reasoning, by issuing blanket orders appended by lists of the dismissed judges and prosecutors (Olcay 2017, 577–78).

It might be speculated that the Constitutional Court was simply following orders or perhaps fighting for its own survival in the wake of a bloody and confusing episode of a suppressed coup attempt, having adopted a "play-it-safe" strategy (Turkut 2022). Nevertheless, this decision rendered the constitutionally guaranteed security of judicial tenure meaningless and still hangs over the entire judiciary, creating a chilling effect on what remains of the independent judiciary in Turkey.

D. Violation by the Judiciary: Disapplication of Constitutional Court Judgments *Berberoğlu* and *Atalay*

In October 2020, a criminal court in Istanbul refused to comply with a judgment of the Constitutional Court. The case in question involved Enis Berberoğlu, a member of the Turkish Parliament accused by the government of espionage, whose parliamentary immunity had been lifted with a constitutional amendment in 2016. In Berberoğlu's constitutional complaint, the Constitutional Court had found that as the criminal court of appeal handling his case, the Turkish Court of Cassation's failure to respect his parliamentary immunity, which had been restored after his reelection in 2018 as a member of the Turkish Parliament, had violated his political rights and right to liberty and security.[9] The Constitutional Court accordingly ordered the criminal court in Istanbul to initiate a retrial. However, in clear

8. *Matyjek v Poland* (dec), App no 38184/03, ECtHR, May 30, 2006.

9. Turkish Constitutional Court, *Kadri Enis Berberoğlu (2)* [GK], B. No: 2018/30030, September 17, 2020.

defiance of the constitutional text, which provides in Article 153 that "[t]he decisions of the Constitutional Court are final . . . [and] shall be binding on the legislative, executive, and judicial organs, on the administrative authorities, and on real persons and corporate bodies," the criminal court rejected Berberoğlu's request for a retrial (Kara 2020). This time, it was criminal court judges who refused to comply with the clear instruction of the constitutional text, no doubt with the confidence that the government would be on their side.

More recently, in November 2023, the Court of Cassation refused to comply with another judgment of the Constitutional Court;[10] and moreover, it raised a criminal complaint with the chief public prosecutor against the nine justices of the Constitutional Court who ruled for human rights violations for breaching the Constitution and unlawfully exceeding their powers (Hacaloğlu 2023). In the application of the Turkish Labor Party (TİP) MP Can Atalay, who had been convicted by the first-instance criminal court of the criminal offense of attempting to overthrow the government in the Gezi Park case, the Constitutional Court found that Atalay's constitutionally protected rights to be elected and to engage in political activity, and his right to personal liberty and security, had been violated.[11] Upon this judgment, Atalay sought to be released from prison to take oath in the parliament, but the criminal court refused this request and referred the case to the Court of Cassation. As noted, the Court of Cassation regarded the Constitutional Court's judgment as unconstitutional and refused to comply with it.

When journalists Can Dündar and Erdem Gül were released from prison by the criminal court upon a constitutional complaint judgment by the Constitutional Court finding violations of the right to liberty and the freedom of expression in February 2016,[12] Erdoğan had commented that he "would not comply with this judgment and did not respect it" (Presidency of the Republic of Turkey 2016). Undoubtedly aided by the unprecedented judicial purges post-2016, the Turkish courts have since come a long way to share Erdoğan's approach of resisting judicial findings of human rights violations, also manifested in the nonenforcement of the *Kavala*[13] and *Demirtaş*[14] judgments of the European Court of Human Rights.

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10. The Court of Cassation, 3rd Criminal Chamber, E. 2023/12611, K. 2023/6359, September 28, 2023.
11. Turkish Constitutional Court, *Şerafettin Can Atalay (2)* [GK], B. No: 2023/53898, October 25, 2023.
12. Turkish Constitutional Court, *Erdem Gül ve Can Dündar* [GK], B. No: 2015/18567, February 25, 2016.
13. *Kavala v. Turkey* App no 28749/18. ECtHR, May 11, 2020.
14. *Selahattin Demirtaş v. Turkey* [GC] App no 14305/17. ECtHR, December 12, 2020.

III. THE ENDURING SPECTRE OF CONSTITUTIONAL REFORM

A characteristic of the Turkish constitutional discourse is the near-universal consensus that the country needs a new constitution. This is mainly because the current 1982 Constitution was drafted by the military junta that carried out the 1980 coup. In addition, however, although the constitution has been amended many times, across the political spectrum is a shared feeling that the current constitution lacks democratic legitimacy (Tombuş 2020, 61). A result of this is that a new constitution has been constantly on the political agenda for at least three decades, and though this never materialized, significant constitutional reforms have been made and continue to be promised. As demonstrated by the wide interest in and public input to the 2011–13 constitution-making process, political actors and citizens alike hope that a new constitution will cure many of the defects of the current Constitution, in addition to boosting the democratic legitimacy of the Constitution (Petersen and Yanaşmayan 2020, 42–43).

As shown earlier, the political actors—including the executive, opposition parties in the parliament, and courts—engage in or encourage outright violations of the Turkish Constitution. Yet, the promise of reforms is, in many cases, not about curing any supposed defects that lead to such violations. Rather, it is more about high-level principles such as redefining citizenship, the fundamental tenets of the Constitution, or providing a constitutional solution to a political problem. Still, there exists a more important motive for promising constitutional reform: to marshal political support among both the public and the politicians ahead of such pivotal political moments as elections. The following section discusses (a) the reasons political actors give for promising constitutional reform, (b) three (overlapping) functional types of constitutional reform that recent constitutional practice in Turkey demonstrates, and (c) what political actors' promise of constitutional reform actually achieves.

A. The Reasons Political Actors Give for Promising Constitutional Reform

Political parties across the political spectrum continuously promise constitutional reform, usually in the form of a new constitution. Here, I explain through examples what such promises have sought to achieve in the past two decades, also pointing out that many political failures are chalked up to shortcomings in the constitutional framework.

In promising constitutional reform, political parties often refer to the democratically illegitimate founding moment, the patchwork nature of the constitution,

its institutions of tutelage, or its fundamental principles. However, although there is a shared discontent with the 1982 Constitution, the source of discontent varies according to one's politics. For instance, the AKP argued in its election manifesto in 2011 that the 1982 Constitution was imposed on the people through a military coup and thus should be replaced by a new individual-centric, rather than a state-centric, constitution through a democratic process (Justice and Development Party 2011). In its election manifesto in 2011, the CHP argued that the 1982 Constitution provided for an overly powerful executive and suggested Turkey needed a new constitution based on the principles of liberty, equality, social justice, democracy, and secularism that expanded the liberties of everybody living in Turkey and protected them from oppressive government policies (Republican People's Party 2011). The need for a new constitution was less emphasized in the MHP's 2011 manifesto, although it also provided a framework for constitutional reforms to remove anti-democratic elements from the constitution and help conceptualize the constitution as a social contract, making sure that the "national and unitary existence of the state" is preserved (Nationalist Movement Party 2011). The election manifesto of the Labor, Democracy, and Freedom Bloc, of which the pro-Kurdish BDP was a member, suggested that the 1982 Constitution had lost all its legitimacy and the country needed a new constitution that protected the social differences and the rights and freedoms of all elements of the society (*Ertugrul Kurkcu* 2011).

The fault lines in Turkish constitutional politics were crystallized during the failed 2011–13 constitution-making process that followed the 2011 elections. During that process, where the four major political parties, the AKP, the CHP, the MHP and the BDP, were equally represented in the Constitution Reconciliation Committee, the unamendable principle of secularism and the definition of national identity proved to be the most contentious points, along with the AKP's proposal of presidentialism (Petersen and Yanaşmayan 2020, 49–56). While the CHP insisted on a more aggressive conception of secularism, such as referring to it in the provision on the freedom of religion, the AKP advocated a more liberal approach and even suggested removing the reference to secularism, or *laïcité*, altogether as an unamendable principle, one the early modern Turkish state borrowed from France along with its conceptual baggage (Böcü and Petersen 2020, 165). The MHP, in contrast, staunchly opposed the proposals to remove the ethnic reference to "Turkishness" from the provision defining citizenship (Petersen and Yanaşmayan 2020, 51).

Although important, these fault lines are more psychological than practical. Constitutional practice has shown that radically different approaches to secularism have been able to be accommodated within the current constitutional framework, from a headscarf ban on university campuses to the expansion of public Islamic

secondary schools (Kuru 2023, 166), and it was hardly the text of the constitution that stood in the way of the success of the 2013–15 Turkish-Kurdish peace process (Savran 2020).

The most *substantively constitutional* reform, where reform meant a change in how the constitutionally stipulated operation of political practice would take place, was the 2017 presidentialism amendment. The AKP had formally campaigned for presidentialism at least since 2012, arguing that it provides more stable governments and, as explained earlier, aspects of presidentialism were introduced unconstitutionally from 2014. But even with this most substantively constitutional example, the change in governmental system had been introduced de facto three years before, showing that the text of the Turkish Constitution matters less in terms of how it regulates political practice than one might think.

Following the 2017 amendment, this time the CHP and its allies have focused their constitutional reform proposals on the governmental system, suggesting a constitutional framework called a "strengthened parliamentary system" (CHP et al. 2022), which they argue would restore the separation of powers and increase the powers of the legislature. It has been suggested that these proposals would mean a return to the system in place during 2014–2017—namely, having a popularly elected president with only ceremonial powers—the terms of which were in fact not observed by an overreaching president (Gözler 2022).

B. Three Functional Types of Constitutional Reform

An instrumentalist approach to constitutional change has been shown to be a common feature of populist governments (Blokker 2019, 545–48). Numerous case studies have shown that constitutional amendment procedures have been abused to advance antidemocratic or illiberal aims to consolidate power (Landau 2013). Others have suggested that improper uses of constitutional change, which substantially destroy a constitution's foundations, may amount to a constitutional dismemberment (Albert 2018) or an unconstitutional constitutional amendment (Roznai 2017). The typology offered here, through a study of the Turkish context but applicable to constitutional practice in other jurisdictions, does not aim to conceptualize instrumentalization for advancing an antidemocratic or illiberal agenda, though some of the manifestations presented do fit these characterizations, and does not necessarily require an attack on the fundamental principles or identity of the constitution. Examining constitutional reforms or proposals for constitutional reform that do not address the perceived defects of the 1982 Constitution but instead instrumentalize the constitutional amendment procedure for other political

motives, this section categorizes three functional types of constitutional reform, which are not mutually exclusive: (1) catch-up constitutional reform, (2) symbolic constitutional reform, and (3) marshaling constitutional reform.

1. Catch-Up Constitutional Reform

The first manifestation is the instrumentalization of the constitutional amendment process to put a certain unconstitutional practice on a constitutional footing. The 2017 amendment is an example of abusive constitutionalism not only because of its content, which provided for an unduly strong president with significant powers extending over the three branches of government (Özbudun 2019, 289), but also because of its nature of retrospective whitewashing of the unconstitutional practice of de facto presidentialism. The post-amendment constitutional order is, according to Landau (2013, 195), "significantly less democratic" in that it shows unconstitutional practice can legitimately serve as the first stage of constitutional change, without going through the necessary democratic process of constitutional amendment.

As described earlier, the 2017 constitutional amendment introducing the presidential system into the Turkish Constitution followed a period of unconstitutional practice by President Erdoğan, who exercised powers resembling presidentialism in a parliamentary system of government. The 2014–17 period in which he continued acting beyond his constitutional powers, including leading the AKP's election campaign in 2015, allowed him to consolidate power in a manner that went beyond the democratic norms and constitutional principles of checks and balances. By blaming the parliamentary system for slow decision-making and disproportional representation (Presidency of the Republic of Turkey 2015), Erdoğan not only sought to create a public perception of crisis but also used this as a pretext to justify his failure to observe the constitutional limits on the office he held. In the aftermath of the failed 2016 coup attempt, Erdoğan formed an alliance with the MHP to advocate more strongly for formal presidentialism, and the 2017 constitutional amendment caught up with and developed the preceding unconstitutional practice.

2. Symbolic Constitutional Reform

The second manifestation of this instrumentalization is the political actors' seeking of constitutional reform for symbolic reasons, where a solution to a political problem does not in fact lie in constitutional reform. A typical example of this can be seen in the various attempts and proposals to amend the constitution to guarantee freedom for Islamic headscarves to be worn on university campuses, which remained prohibited in Turkey for more than two decades.

In 2008, the AKP proposed a constitutional amendment to put an end to the headscarf ban for female students on university campuses that had been implemented since 1997. With the support of the MHP, the AKP passed an amendment to Articles 10 and 42 of the Turkish Constitution, which provide for the principle of equality before the law and the right to education, respectively. As the headscarf ban was a contentious issue between the religious conservatives and secularists at the time, MPs from the secularist CHP took the matter to the Constitutional Court, arguing that this was an unconstitutional constitutional amendment (Roznai and Yolcu 2012, 184). The court accepted that the amendment violated the unamendable principle of secularism and struck it down.[15] This judgment by the Constitutional Court was preceded by several judgments by the administrative courts upholding the ban over the previous decade, one of which had been unsuccessfully challenged before the European Court of Human Rights.[16] Notwithstanding this long-running conflict, when the political landscape shifted in 2010, the headscarf ban was lifted simply by a formal letter sent by the president of the Council of Higher Education to Istanbul University in 2010, with no need for constitutional reform (Goldoni and Olcay 2021, 272).

Ahead of the parliamentary and presidential elections in May 2023, the AKP and the MHP proposed that the freedom to wear the Islamic headscarf should be constitutionally protected, despite there being no suggestions as to a reintroduction of the ban, and even with the CHP, who formerly favored the ban, having distanced itself from its previous position. A formal proposal was introduced to the parliament in 2022 but was withdrawn after the devastating earthquake in southern Turkey in February 2023; following the May 2023 elections, a two-stage constitutional reform plan was put forward, with a headscarf amendment to be followed by a process for a new constitution (Sayın 2023). The continued attempts to constitutionalize this nonissue are symbolically important for the AKP as a reminder of their triumph over the secularist establishment, and these efforts also link to marshaling constitutional reform, introduced next.

3. Marshaling Constitutional Reform

The sole or main purpose of the constitutional reform proposal may be to marshal the public or politicians for political gain. This can occur ahead of an election to consolidate supporters, after an election to seek support in the parliament, or at

15. Turkish Constitutional Court, E. 2008/16, K. 2008/116, June 5, 2008.

16. *Leyla Şahin v. Turkey* [GC], App no 44774/98, ECtHR, November 10, 2005.

any expedient time to establish discipline within a political party. In the last two decades, examples where this motivation was apparent include the processes of the 2007 constitutional referendum, the 2008 constitutional referendum attempt, and the 2023 constitutional amendment proposals regarding headscarf, all of which have been used to marshal political support.

When the AKP could not elect its candidate as president in the parliament after the CHP's boycott and the Constitutional Court's 367 judgment in 2007, it rapidly tabled a constitutional amendment proposal that provided for popular election of the president. This was introduced to the parliament a few days after the Constitutional Court's judgment. President Sezer decided to refer it to a referendum; however, because of his veto of another piece of legislation, the referendum could not take place until after the 2007 general election. This gave the AKP the opportunity to use the 2007 constitutional referendum, in which a constitutional amendment proposal providing for popular election of the president would be put to a vote, to consolidate its political position against an aggressive secularist bloc of the military, the president, and the CHP in the run-up to the early general election triggered by the 367 crisis. The AKP won the 2007 elections comfortably, and the MHP also entered the parliament, which meant that the issue of the 2007 presidential election had been resolved politically, as the MHP had suggested that although they would not vote for the AKP's candidate, they would not boycott the election, ensuring the threshold of 367 MPs is met. Having resolved the issue, and indeed elected its candidate as president almost two months before it took place, the AKP then used the constitutional referendum to consolidate public support, ultimately achieving a 68.95 percent yes vote (Özbudun 2012, 3).

The symbolic constitutional reform described in the previous section is a distinct category, for although marshaling constitutional reform will usually have a constitutional issue at its core, not all marshaling constitutional reform will have a symbol that carries a constitutional project forward. Yet, some marshaling constitutional reforms are supported by such symbols, whereby symbolic constitutional reform is used to marshal political support. The 2023 proposals regarding the constitutional guarantees for the wearing of headscarf is not only a nonconstitutional issue—as had been the case in 2008—but a nonissue, with the CHP having reversed its previous position on the headscarf ban (Bostan Ünsal 2022). The AKP, however, has repeatedly brought forward a constitutional reform proposal that would provide a constitutional basis for the freedom to wear the Islamic headscarf, alleging that the CHP will seek to ban it again. The AKP, along with the MHP, now its formal ally, has therefore used the constitutional reform proposal to consolidate supporters against the CHP ahead of first the 2023 parliamentary and presidential

elections and then the 2024 local authority elections against a perceived threat of aggressive secularism that might seek to ban headscarves in public institutions.

C. What Promising Constitutional Reform Achieves

Given the simultaneous existence of persistent violations of the constitutional text and the continuous proposals for constitutional reform and having set out the functions of constitutional reform in this context, we can turn to the question of what political actors' promising constitutional reform actually achieves. Although the declared reasons and actual political motivations for constitutional reform often differ, reform processes, both successful and unsuccessful, might result in implications for both spheres. That the constitutional reform process is instrumentalized does not necessarily render it completely meaningless and ineffective. For instance, a successful constitutional reform can help the political actor who sought that reform to marshal political support and at the same time address a constitutional problem or effect a meaningful constitutional change.

For instance, the 2007 constitutional amendment was a battle between the AKP and what it considered the secularist bloc that stood in the way of electing its candidate as president. As explained, the AKP got what it wanted without the need for a formal constitutional change, but the process of constitutional referendum had been well underway by the time Gül was elected president. Consequently, the referendum went ahead and the proposals were approved by the electorate, meaning that Gül would be the last Turkish president elected by the parliament. The effect of the constitutional reform, although ultimately used as a vehicle for political consolidation, has been that it served as the first step in Turkey's journey to adopt presidentialism, since many considered a popularly elected president to be a characteristic, not of parliamentarianism, but of semi-presidentialism, even though no reforms were made to the president's powers at the time (Gönenç 2008, 521). It would be difficult to argue that this reform addressed any of the alleged defects of the 1982 Constitution; to the contrary, it created a tension within the structure of the constitution by introducing an alien element to the governmental system that, as explained earlier, turned into a constitutional crisis after Erdoğan's election in 2014. It is, however, a consequential reform, perhaps part of a larger project, that culminated in Turkey's transition into a strong presidentialist regime in 2017.

Conversely, looking at the unsuccessful reform proposals shows what purpose constitutional reform promises might serve despite their failure. Two examples are the failed 2008 headscarf amendment and the failed 2011–13 constitution-making process. Recall that the 2008 headscarf amendment was struck down by the

Constitutional Court and the issue was resolved by a simple administrative act two years later when the evolved political context allowed for this. It might be argued that the political consolidation achieved through the constitutionalization of the headscarf issue contributed to its resolution, despite the fact that constitutionalization initially failed when the Court invalidated the constitutional amendment.

The 2011–13 constitution-making process appeared to be a genuine attempt at making a new constitution—an endeavor undertaken by all four political parties (Olcay 2021, 776). All aspects of the constitution were debated over the course of two years, and at the end of the process, albeit on less contentious issues, a set of articles agreed upon by all four parties was published.[17] The process, therefore, showed both the extent and the limit of what agreement is possible. Still, the process might be viewed as further instrumentalization for short-term political gain, given that it was eventually overshadowed by the AKP's obviously futile insistence, in the Constitution Reconciliation Committee meetings, on a presidential system; it is nonetheless more difficult to argue that the process did not try to address the defects of the 1982 Constitution, given the lengthy, substantive constitutional debates (Yegen and Yanaşmayan 2020).

These examples illustrate the multifaceted nature of constitutional reform, where political motives often intertwine with attempts to address genuine constitutional deficiencies. Successful reforms may primarily serve party-political consolidation while initiating significant constitutional changes, albeit without directly tackling perceived constitutional defects. Conversely, unsuccessful attempts at reform may still contribute to eventual resolutions or highlight potential areas of agreement, even if they fall short of remedying constitutional issues. Still, in view of the wider constitutional context where violations of the constitution can succeed, whether through catch-up constitutional reform such as in the case of the de facto introduction of presidentialism, as a matter of lack of further legal remedies such as in the case of the 367 judgment and the post-2016-coup-attempt attacks on the security of judicial tenure, or through recalcitrance of lower courts in the case of the Court of Cassation's and criminal courts' disapplication of the Constitutional Court's judgments, the state actors may be expected to continue to disregard the constitution for expediency, no matter how much it is reformed. The shared practice and track record of constitutional violations by state actors render it too difficult to envisage constitutional reform as a cure to the Turkish Constitution's

17. A translation of the full text of these articles is available as an appendix in Petersen and Yanaşmayan (2020, 287–403).

defects and therefore serve almost as an incentive for politicians to instrumentalize the promise of constitutional reform for short-term political gain.

IV. CONCLUSION—A HOLLOW IDOL?

Formally speaking, there is belief in and respect for the Constitution in the Turkish society—by political actors and citizens alike. The focus on constitutional reform as the cure for constitutional or even political problems, and the fact that this is believed or at least taken seriously by political actors and citizens, is a prima facie indication that the constitutional text matters. That there occur flagrant and repeated violations of the Turkish Constitution and that the constitutional reform agenda is more symbolic and advanced to marshal political support show that the constitutional text does not matter as much as Turkish citizens might believe and political actors make it out to be.

When studying the operation of constitutional orders and what matters in them, in order to paint a more complete picture it has always been crucial to look beyond the formal text—to attitudes of constitutional actors, unwritten rules governing their behavior, and institutions that have no or little place in the canon yet a significant role in the way in which a state enjoys its sovereignty, such as militaries (Olcay 2023) and central banks (Menéndez 2023), as well as to evolving public perceptions of the constitution. This is even more crucial today, when the limits of formal constitutions are well documented (Jones 2020, 181), by way of both comprehensive surveys and case studies, and when it can be shown what fills the gaps in the formal constitution and what social forces often trump it (Goldoni and Wilkinson 2023).

The undue focus on constitutional reform and flagrant violations of the constitution together demonstrate two things. First, many of the possible solutions to political conflicts that are elevated to the constitutional level rest with political practice. Second, the process of constitutional amendment is not necessarily a solution to political problems. Especially the last two decades of Turkish constitutional practice show that in a constitutional jurisdiction where political questions tend to be constitutionalized and a good constitution seems to be perceived to be a solution to the political defects of the polity, and therefore there is widespread respect for the constitution—albeit not necessarily to the current one but to an idealized one—constitutional actors can still engage in continuous and outright violations of the constitution and be successful. The examples of the unconstitutional acts of the 367 judgment, the de facto introduction of presidentialism, the senior courts' attack on the security of judicial tenure, and the judicial disapplication of the

Constitutional Court's human rights judgments show that this is not simply a matter of executive overreach but one that permeates through the whole constitutional order. At the same time, constant calls come from almost all political sides for a new constitution to remedy the defects of the current constitution. This paradoxical setting where the ideal of a "good" constitution is idolized while the constitution is habitually violated renders this idol a hollow symbol—a paradox engrained within the fabric of Turkish constitutionalism.

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