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# Who Will Protect Human Rights in Turkey? Why the Birth of the 2013 Constitution May Not Be the Answer

LESLIE ESBROOK\*

*Vakitsiz öten horozun başını keserler. (They will cut off the head of a cock that crows before it is time).<sup>1</sup>*

## I. INTRODUCTION

Over the past two years, the leading parliamentary parties in Turkey have been in negotiations to re-write the 1982 Constitution that is currently in effect. This constitutional override claims to be the definitive birth of a new system to shake off the final vestiges of military dictatorship.<sup>2</sup> While nearly every group recognized the insufficiency of the 1982 Constitution from its inception, until now, the farthest the government has gone to rectify the ailing constitution has been the enactment of packets of constitutional amendments that chip away at the existing order. However, despite all of the fanfare, it remains unclear whether the elongated process of negotiation will lead to any sustained overhaul. What is clear, though, is that the protection of human rights has become a unified concern.

I submit that the nationalization of the debate on human rights over the past decade has acted both as a test case for the consensus

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1. S. Sadi Seferoglu, *Turkish Proverbs*, TÜRKİYE ON THE WEB, <http://www.columbia.edu/~sss31/Turkiye/proverbs.html> (last updated May 7, 1997).

2. Eray Akdag, *Creating A New Turkish Constitution: An Opportunity For Arab Spring?*, GERMAN MARSHALL FUND (Aug. 09, 2011), <http://www.gmfus.org/archives/creating-a-new-turkish-constitution-an-opportunity-for-arab-spring>.

necessary for constitutional reform, and has itself advanced broad reform that has empowered various actors in the existing constitutional system to serve as defenders of these rights. A standard practice of rights—guarantees by the judiciary—is the best means of protecting human rights, with or without a new constitution. Only in so far as rights currently on paper are enforced in practice can future rights granted embody a true import.

In a spring 2013 news conference, the head of the Turkish Parliament along with Prime Minister Recep Tayyip Erdoğan announced with confidence that the *Uzlaşma Komisyonu* (Reconciliation Commission), the group of twelve parliamentarians<sup>3</sup> charged with drafting the country's new constitution, would anticipatorily finish their preliminary draft by the end of May 2013.<sup>4</sup> This announcement came after a year and a half of negotiation, during which the drafters postponed the proposed completion date at least twice.<sup>5</sup> Despite political wrangling, hopes run high for the new constitution to instantiate liberal and democratic values that are common to Turkey's western allies but which are fundamentally absent from the 1982 Constitution.<sup>6</sup> In 2023, the country will celebrate its centennial anniversary.<sup>7</sup> The ruling Justice and Development Party (AKP) intend to stay in office at least ten more years to witness the centennial celebrations.<sup>8</sup> During the ensuing decade, the AKP hopes to accomplish several ambitious policy goals, the most important of which is the drafting of a new constitution.<sup>9</sup>

The success or heartbreak of the current constitutional writing experiment will reveal itself in due time. Much of the outcome will depend on concurrent attempts to maintain a ceasefire with the homegrown Kurdish terrorist group, the Kurdistan Workers' Party

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3. *Komisyon Üyeleri* [Commission Members], TÜRKİYE BÜYÜK MİLLET MECLİSİ, <https://yenianayasa.tbmm.gov.tr/uyeler.aspx> (last visited Oct. 10, 2013).

4. Ahmet Dönmez, *Uzlaşma Komisyonu için son tarih mayıs sonu* [Reconciliation Commission's End Date Set for End of May], ZAMAN (Apr. 2, 2013), [http://www.zaman.com.tr/politika\\_uzlasma-komisyonu-icin-son-tarih-mayis-sonu\\_2072864.html](http://www.zaman.com.tr/politika_uzlasma-komisyonu-icin-son-tarih-mayis-sonu_2072864.html).

5. *Id.*

6. See ERGUN ÖZBUDUN, THE CONSTITUTIONAL SYSTEM OF TURKEY: 1876 TO THE PRESENT 17, 21 (2011).

7. See Murat Ketkin, *Erdoğan wants to rule for at least ten more years*, HÜRRİYET DAILY NEWS (Oct. 1, 2012), <http://www.hurriyetdailynews.com/erdogan-wants-to-rule-for-at-least-ten-more-years.aspx?pageID=238&nid=31367&NewsCatID=409>; Akparti, *Hedef 2023* [2023 Objective], ADALET VE KALKINMA PARTİSİ, <https://www.akparti.org.tr/site/hedefler> (last visited May 1, 2013).

8. *Id.*

9. *Id.*

(PKK), and to bring the neglected Kurds into the folds of Turkish nationalist constitutional identity.<sup>10</sup> This sub-story, saddled with baggage from centuries past, is even larger and more consequential than the drafting of the constitution.<sup>11</sup> The outcome will also depend on consensus-building around the place of Islam in the new constitution, the role of the military, and the type of presidential or parliamentary voting system proposed for review. However, regardless of the outcome, the debates that have encircled the constitutional drafting as well as the extra-constitutional political rhetoric demonstrate a focus on the commitment to universal human rights and show that the outside world perceives the country's attempts to conform to universal human rights norms favorably.<sup>12</sup> This shift, from a State defending its title as sovereign *against* the private individual to a State advocating *in favor of* the individual against universal human rights abuses by political and private actors, has come to the forefront precisely because of the heavily publicized constitutional revision.<sup>13</sup>

This paper will examine the development of human rights protections in Turkey through the lens of executive, parliamentary, and judicial reforms. The constitution currently under review does not conform to the model of constitutional achievement that has taken root in most Western countries; even if the project becomes law in the next two to three years it may not be the best place from which to protect human rights in Turkey. Statutory and judicial reforms, along with incorporation of internationally recognized standards and practices, may offer a better path. Still, near-constant media reports of cultural and intellectual elite found guilty of insulting the State, and the

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10. For a look at the most recent cease-fire details and the Kurdish party's stance on what further needs to be done to reconcile the Kurds and Turks, see Nese Duzel, *Selahattin Demirtaş: Demokrasi olmadan PKK dağdan inmez* [Turkish Kurdish Leader: PKK's Exist Alone Won't Bring Peace], TARAF (Apr. 24, 2013), <http://www.taraf.com.tr/nese-duzel/makale-selahattin-demirtas-demokrasi-olmadan-pkk-dagdan.htm>.

11. For recent articles related to the prospective implementation of a cease-fire and normalization of relations, see Abdullah Ayasun, *Ocalan's Cease-Fire Call and Rethinking the Nation-State Paradigm*, TODAY'S ZAMAN (Mar. 28, 2013), [http://www.todayszaman.com/blogNewsDetail\\_getNewsById.action?newsId=311064&columnistId=140](http://www.todayszaman.com/blogNewsDetail_getNewsById.action?newsId=311064&columnistId=140); Selim Kuvel, *PKK'lilar yurtdışına çıkartken hangi hukuk kuralı uygulanack?* [What Rule of Law Will Be Applicable When the PKK Leaves the Country?], ZAMAN (Apr. 3, 2013), [http://www.zaman.com.tr/politika\\_pkklilar-yurtdisina-cikarken-hangi-hukuk-kurali-uygulanacak\\_2073256.html](http://www.zaman.com.tr/politika_pkklilar-yurtdisina-cikarken-hangi-hukuk-kurali-uygulanacak_2073256.html).

12. Kuvel, *supra* note 11.

13. Ayasun, *supra* note 11.

continued subservience of judges to the whim of the AKP, appear to nullify any claims of advancement to human rights.<sup>14</sup> Most recently, the Gezi Park Protests<sup>15</sup> struck a huge blow to Turkey's burgeoning international image as human rights protector and advocate.<sup>16</sup>

While empirical evidence cuts both ways, there are enough concrete examples of reform to suggest that the struggle towards ultimate human rights protections has moved forward rather than backwards in the last ten to twenty years.<sup>17</sup> This article argues that the build-up to today's constitutional hype has created an inter-agency mechanism to give and protect fundamental rights that have yet to be fully enforced. Now, various governmental and non-governmental interests have the power to significantly ensure protection of human rights now, sans constitutional change. Enforcement of existing practices, particularly by the judiciary, will determine the true importance accorded to fundamental rights in the future.

The nationalization of human rights as one of the AKP's political objectives allows for the discussion of human rights to reach the entire populace, not as an issue foisted onto the country through international or diplomatic means, but rather as an issue of domestic concern. Greater human rights protections can be more successfully realized in discrete methods of improvement via implementation, without revolutionary societal overhauls such as membership in the European Union (EU) or the ratification of a new

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14. Orhan Kemal Cengiz, *Real injustice in Ergenekon and Balyoz cases*, TODAY'S ZAMAN (Mar. 21, 2013), [http://www.todayszaman.com/columnistDetail\\_getNewsById.action?newsId=310371](http://www.todayszaman.com/columnistDetail_getNewsById.action?newsId=310371); Nils Muiznieks, *CoE commissioner: HSYK bill represents regression of judicial independence in Turkey*, TODAY'S ZAMAN (Feb. 17, 2014), <http://www.todayszaman.com/news-339646-coe-commissioner-hsyk-bill-represents-regression-of-judicial-independence-in-turkey.html>; *Turkish government moves for more control on judiciary*, HÜRRİYET DAILY NEWS (Jan. 9, 2014), <http://www.hurriyetdailynews.com/turkish-government-moves-for-more-control-on-judiciary.aspx?pageID=238&nID=60766&NewsCatID=338>

15. *Turkish police disperse Gezi Park protesters*, BBC NEWS (July 8, 2013), <http://www.bbc.co.uk/news/world-europe-23234294>.

16. Matthew Brunwasser, *Turkey as model democracy for Middle East*, PRI (Feb. 21, 2011), <http://www.pri.org/stories/2011-02-21/turkey-model-democracy-middle-east>.

17. See, e.g., *Erdogan'da 'İnsan Hakları Günü' mesajı*, [Erdogan's Message on International Human Rights Day] POSTA (Dec. 9, 2012) (in which the Prime Minister affirms the AKP's commitment to modern democratic values). A study of numerical change is not in the scope of this particular study but one that could be undertaken in several different forms, from assessment of the number of freedom of press cases in certain judicial districts' variance over the years to the number of times Parliamentarians or members of the AKP have used human rights as a standard-bearer and launching pad in public addresses.

constitution. However, this can be a double-edged sword, as normalization of human rights discussions risks the rights being bargained for, negotiated against, and otherwise horse-traded in a way that diminishes their foundational and unimpeachable quality. Facial compliance with international standards by executive or statutory acts, even if there are reasons to be skeptical of their current application, raises the bar for other actors, like the courts, to utilize the language of human rights in their discourse and judgment.

Full implementation of fundamental rights envisioned by foreign governments, the media, scholars, and state actors through statutory codification or high court judicial guarantee provides an extra-constitutional route to human rights protections. The constitution, if not created pursuant to a standard of higher law, cannot guarantee active execution of rights. Human rights have become the least common denominator in constitutional infighting—a compromise taken from external norms that bides time for the thornier problems of Turkish identity and choice of electoral system.<sup>18</sup> The more consequential struggle for human rights exists at the extra-constitutional level.

## II. THE MAKING OF A CONSTITUTION IN 2013: ACHIEVEMENT, OR EXERCISE IN BRAINSTORMING?

Who will advocate for human rights in Turkey? There are several possibilities: the executive, legislative, judiciary, foreign nations, international law and rulings from the European Court of Human Rights (ECHR), the press, academics, non-governmental organizations, or some combination of the above. The first and most natural place to find entrenchment of human rights would be in the constitution. As we will see, the current constitution's absence of nearly all rights prompted the initial discussion of human rights, which has carried forward through the collective action of many actors to become the baseline for current constitutional

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18. See generally Yusuf Celebi, *Turkey to have semi-presidentialist system*, ANADOLU AGENCY (July 26, 2012), <http://www.aa.com.tr/en/ana-manset-haberleri/67877--s> (noting the need for a constitutional compromise on the ruling AKP Party's desire for a semi-presidentialist system); see also Hadi Uluengin, *Başkanlık sistemine hayır!* [Against a Presidentialist System], TARAF (Nov. 9, 2012), <http://www.taraf.com.tr/hadi-uluengin/makale-baskanlik-sistemine-hayir.htm> (decrying the political debates on a presidentialist system as a means for current Prime Minister Erdogan to cement his power rather than promote an effective democratic agenda).

promotions.<sup>19</sup>

### A. A Brief History of Constitution-Making in Turkey

Turkey's current constitution has been in force since the military coup of 1982.<sup>20</sup> It came after a period of constitutional rule, spanning from the early 1960s, that offered a meaningful space for dissent, discussion, peaceful protest, and the security of basic rights.<sup>21</sup> From the moment of its enactment, the 1982 Constitution elicited discontent from nearly every political party and interest group.<sup>22</sup> Amendment proposals and entire revisionary drafts poured into the office of the executive from various civil liberties groups and constitutional law professors, leaving no dearth of options for future parties to build on.<sup>23</sup>

The main provisions of the 1982 Constitution found unsavory by the majority of civil liberty defenders are the first three unamendable articles invoking 1) the sanctity of the nation and secularism; 2) the constitution's general "statist republicanism" references that presume an interventionist role of the State, and 3) the narrowing of various social, economic, and fundamental rights with general and specific restriction clauses.<sup>24</sup> Then President and Commander of the Military, Kenan Evren, expressed the

19. Turkuler İşiksel, *Between Text and Context: Turkey's Tradition of Authoritarian Constitutionalism*, 11 INT'L J. CONST. L. (forthcoming 2013).

20. TÜRKİYE CUMHURİYET ANAYASASI [CONSTITUTION OF THE REPUBLIC OF TURKEY] 1982, (turk.) [hereinafter TÜRKİYE CUMHURİYET ANAYASASI 1982].

21. TÜRKİYE CUMHURİYET ANAYASASI [CONSTITUTION OF THE REPUBLIC OF TURKEY] 1961, (turk.) [hereinafter TÜRKİYE CUMHURİYET ANAYASASI 1961].

22. One scholar has described both the 1961 and 1982 Constitutions as military-made, noting that the 1961 Constitution allowed for civilian life to resume once power was restored to democratic institutions, whereas in 1982 the constitution acted as a placeholder for military rule even when soldiers left the halls of government. See İşiksel, *supra* note 19, at 28.

23. ERGUN ÖZBUDUN & ÖMER F. GENÇKAYA, DEMOCRATIZATION AND THE POLITICS OF CONSTITUTION-MAKING IN TURKEY 26, 31 (2009) (listing civil society groups who turned in constitutional drafts including the Union of the Turkish Bar Association, Union of Chambers and Commodity Exchanges of Turkey, the Association of Turkish Businessmen and Industrialists, and political opposition parties the Social Democratic Populist Party and the True Path Party).

24. Mehmet F. Bilgin, *Constitution, Legitimacy and Democracy in Turkey*, in CONSTITUTIONAL POLITICS IN THE MIDDLE EAST 123, 130–38 (Said A. Arjomand ed., 2008) (giving the example of how the Article 13 right might be restricted with the "aim of safeguarding the indivisible integrity of the state with its territory and nation" or by limiting individual rights where an individual infringes on another's freedoms in pursuit of his own interests). For a detailed explanation of the constitution's unamendable articles, see ÖZBUDUN, *supra* note 6, at 21–22, 131–37.

constitution's philosophy best when he declared, "Individual freedoms can be protected to the extent that the will and sovereignty of the state are maintained. If the will and sovereignty of the state are undermined, then the only entity that can safeguard individual freedoms has withered away."<sup>25</sup> Evren's quote is a prime example of the statist republican underpinnings of the 1982 Constitution. The 1982 Constitution was the military's reaction to the 1961 Constitution, which was largely viewed as radically liberalist. Despite the narrowing and curtailment of many fundamental rights provisions through military reforms in 1971, the 1961 Constitution still left much open to individual dignity and freedoms.<sup>26</sup> Slowly, each subsequent coalition in power adopted modest constitutional reforms. Beginning with aesthetic, technical reforms in the 1993 and 1995 amendments, the reforms slowly widened to include and turn on questions of fundamental rights.<sup>27</sup>

By 2001, Articles 13 and 14 of the constitution protecting human rights were altered from restrictive clauses to protective clauses. Their amendment clarified that human rights abuses could be perpetrated both by individuals *and* State actors.<sup>28</sup> The 2004

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25. Hootan Shambayati, *The Guardian of the Regime: the Turkish Constitutional Court in Comparative Perspective*, in CONSTITUTIONAL POLITICS IN THE MIDDLE EAST 99, 110 (Said A. Arjomand ed., 2008).

26. ÖZBUDUN, *supra* note 6, at 44; ÖZBUDUN & GENCKAYA, *supra* note 23, at 18.

27. See ÖZBUDUN & GENCKAYA, *supra* note 23, at 34–36 (noting constitutional changes to include a repeal of the legitimacy of the 1980 military intervention, a repeal on the ban of trade unions, and a grant of the right to unionize and collectively bargain).

28. *Id.* at 51. See also Shambayati, *supra* note 25, at 109–10. The 1982 draft Article 14 declared:

None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the State with its territory and nation, of endangering the existence of the Turkish state and Republic, of destroying fundamental rights and freedoms, of placing the government of the State under the control of an individual or a group of people, or establishing hegemony of one social class over others, or creating discrimination on the basis of language, race, religion, or sect, or of establishing by any other means a system of government based on these concepts and ideas.

See also the amended shortened version: "[n]one of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation, and endangering the existence of the democratic and secular order of the Turkish Republic based on human rights." TÜRKİYE CUMHURİYET ANAYASASI 1982, *supra* note 20 (as translated). The 2001 amendments also expanded specific provisions that the ECHR had ruled violated fundamental rights, such as Article 21's freedom of communication, and narrowed many of the restrictions placed on rights such as listing a limited number of reasons to restrict the right to privacy for national security, public order, prevention of offenses, protection of public health and public morals, or



amendments resulted in stronger human rights safeguards that had been debated but not passed just three years prior, including most importantly, the amendment of Article 90 which establishes superiority of international human rights conventions in cases of conflict with domestic legislation.<sup>29</sup> A close second in importance was another amendment which stipulated that, in cases without opportunity for monetary redress adjudicated at the ECHR finding Turkey in violation of fundamental rights, defendants could be granted a retrial in domestic courts within one year of the ECHR ruling.<sup>30</sup> The latter amendment exemplified a theme of the constitutional changes—namely, passing the responsibility of enforcing and ultimately applying the protection of human rights to the national court system. Like in 2001, several specific provisions responsive to recent ECHR rulings against Turkey were also amended.<sup>31</sup>

The most recent passage of twenty-six constitutional amendments in 2010 further expanded certain rights provisions and incrementally boosted judicial legitimacy by expanding the Constitutional Court to seventeen members. Four of the Court's justices will be chosen by an independent High Council of Judges and Public Prosecutors (HSYK), which was similarly enlarged.<sup>32</sup> In sum, the 1982 Constitution, since its inception, has undergone revision 17 times, and has a total of 113 article amendments.<sup>33</sup> These amendments have largely been praised as a success story, though Turks and civil society organizations also stress that these

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protection of the rights and freedoms of others. *Id.* at 53. See also Levent Gonenc, *The 2001 Amendments to the 1982 Constitution of Turkey*, 1 ANKARA L. REV. 89 (2004).

29. ÖZBUDUN & GENCKAYA, *supra* note 23, at 66–67.

30. *Id.* at 77.

31. *Id.* at 66, 74. These rights included extradition of citizen-defendants to the International Criminal Court, abolition of the death penalty, and expansion of the right to freedom of expression.

32. Asli Bali, *Unpacking Turkey's "Court-Packing" Referendum*, MIDDLE EAST RESEARCH AND INFORMATION PROJECT (Nov. 5, 2010), [http://www.merip.org/mero/mero110510?ip\\_login\\_no\\_cache=6129693b54b0fb73cc330c36ed5b20ae](http://www.merip.org/mero/mero110510?ip_login_no_cache=6129693b54b0fb73cc330c36ed5b20ae). For a comprehensive analysis of the 2010 amendments, see İBRAHİM O. KABOĞLU, DEĞİŞİKLİKLER İSİĞİNDA 1982 ANAYASASI HALK NEYİ OYLAYACAK [How will the people vote on amendments to the 1982 Constitution] (2010); *Breaking Down What's at Stake in Turkey's Referendum*, HÜRRİYET DAILY NEWS (Sept. 9, 2010), <http://www.hurriyetdailynews.com/default.aspx?pageid=438&n=breaking-down-turkeys-referendum-2010-09-07>.

33. Çiçek Announces Constitutional Commission's 15-Point Roadmap, TODAY'S ZAMAN (Nov. 3, 2011), <http://www.todayszaman.com/news-261831-cicek-announces-constitutional-commissions-15-point-roadmap.html> [hereinafter *15-Point Roadmap*].

reforms are not enough to stem the constitution's military legacy undergirding.<sup>34</sup> The constitutional amendment route has shown that cooperation between ideologically distinct parties is repeatedly possible, especially when coalescing around the expansion of human rights.<sup>35</sup> For that reason, naturally, the first and favored route to subsequent long-term reform is today's current constitutional overhaul.

*B. Constitution-Making versus Constitutionalism: Can the Constitution Protect Human Rights?*

As many scholars have aptly noted, constitution-making often has little to do with the art of constitutionalism.<sup>36</sup> Some hold high hopes that Turkey's new constitution will serve as a shining example to other Middle Eastern countries undergoing their own societal shifts.<sup>37</sup> Yet the unique events that have forged Turkey's current year and a half and its constitutional moment movement do not feature the hallmarks of constitutionalism. Simply geographic and predominantly religious similarities cannot and should not automatically make Turkey a contender to lead by example; the procedure and substance of its constitutional experiment must form the hallmark of constitutionalism to command successful copy. Several features of the new constitution-making process give pause to the proposition of a Middle Eastern democratic model. These same features also give pause to advocating for a new constitution in the face of more practical, measurable alternatives that exist in

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34. *Id.* For a description of the popular movement "Yetmez, Ama Evet!" [Not Enough, but Yes!], see Kadri Gursel, 'Yetmez ama evet' ne demektir?, *MİLLİYET* (Sept. 6, 2010), <http://www.milliyet.com.tr/-yetmez-ama-evet-ne-demektir-/kadri-gursel/dunya/yazardetay/06.09.2010/1285590/default.htm> (last accessed Mar. 23, 2014).

35. See ÖZBUDUN & GENCKAYA, *supra* note 23, at 73; Bali, *supra* note 32 ("In light of the poisonous political climate that surrounded [the 4th passage of judicial amendments], this . . . represents something more than prior rounds. . . . [T]here is much to celebrate for Turks as . . . a welcome set of amendments [] confirms the ongoing commitment of the Turkish electorate to the path of political liberalization.").

36. Said A. Arjomand, *Introduction*, in *CONSTITUTIONAL POLITICS IN THE MIDDLE EAST* 1 (Said A. Arjomand ed., 2008).

37. Eray Akdağ, *Creating a New Turkish Constitution: An Opportunity for Arab Spring?* THE GERMAN MARSHALL FUND OF THE UNITED STATES 4 (Aug. 9, 2011), <http://www.gmfus.org/archives/creating-a-new-turkish-constitution-an-opportunity-for-arab-spring>. He notes that Turkey's macroeconomic success lures more tourists from the Middle East and North Africa region each year and fosters correlative ideas of constitutionalism and business; the government's ability to lubricate business transactions holds great appeal for Turkey's neighbors in the midst of their own constitutional draftings. *Id.*

the shared powers of judicial and non-governmental actors.

First, the new constitution comes about as a result of parliamentary negotiations, without an impetus of revolution or reversal of an immediately preceding ruling party. As Hannah Arendt expounded, “from the very beginning, the recovery of ancient liberties was accompanied by the reinstitution of lost authority and lost power.”<sup>38</sup> The reclamation of both power and authority post-collective action necessitated constitutional reform and acted as a prerequisite in the most successful moments of constitutionalism—particularly the American and French post-revolutionary cases.<sup>39</sup> Turkey’s constitutional moment neither attempts to restore lost power nor reorder authority; the ruling party confidently boasts that it will remain at the top until at least 2023.<sup>40</sup> Celebrated as the first Turkish constitution not imposed under military or quasi-dictatorial agendas, the absence of revolution may limit the urgency of this round’s drafting and blind drafters from a clear vision of the grossest inequities plaguing the 1982 Constitution.

Second, the parliament’s new constitutional drafting mechanism, reminiscent of statutory proposals, questions the heightened track accorded to constitutional clauses that has imbued the most successful constitutions with staying power. Ackerman’s dualist democracy track, supporting constitutional politics precisely because they exhibit moments of popular consent codified into a body of higher law,<sup>41</sup> predicates itself on the belief that the entire body politic is engaged in the discussion of rights and that said discussions culminate in the creation of supreme law. The first point speaks to the process of constitution-making; the current constitutional debates in Turkey resonate with Ackerman’s dualist theory and may serve as models of procedure for Middle Eastern counterparts.<sup>42</sup> The constitution-making process employed thus far

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38. HANNAH ARENDT, ON REVOLUTION 155 (1965).

39. *Id.* at 148.

40. See generally Akparti, *supra* note 7 (affirming the ruling party’s desire to remain in power for at least ten years time). But see Prashant Jha, *Nepal’s CA fails to write Constitution*, THE HINDU (May 28, 2012, 03:04 IST), <http://www.thehindu.com/news/international/nepals-ca-fails-to-write-constitution/article3463109.ece> (describing the situation in Nepal wherein a ten year civil war and the creation of a Constituent Assembly specifically charged with drawing up a post-revolution constitution failed in its mission).

41. BRUCE ACKERMAN, WE THE PEOPLE, VOLUME 1: FOUNDATIONS 7, 18–19 (1993).

42. See Arjomand, *supra* note 36, at 10 (noting the main downfall of the Iraqi Constitution was the unprincipled and excessively politicized manner of constitution-

has demonstrated inter-party dialogue through the Reconciliation Commission, apt following and surveillance of the committee's progress by the media and press, and active engagement in drafting by academics and leading luminaries.<sup>43</sup> The Reconciliation Commission has laid out a fifteen-point plan and periodically updates all major media outlets with news of progress and approaching deadlines it has set upon itself.<sup>44</sup> In addition, there is a strong push from the non-governmental organization community to ensure that a period of deliberation is set aside for civilian commentary and input.<sup>45</sup> At least on the surface, the constitution-making prong, incorporating voices not simply from elite actors, seems to be satisfied.

Yet the codification of ideas into supreme law, Ackerman's second step,<sup>46</sup> has yet to manifest. The manner in which constitutional drafts come from the heart of the parliament and have, after nearly two years, yet to be revealed to the public, suggests a track of law-making more reminiscent of statutory construction. Concerns abound related to the AKP's motivation to implement major constitutional reform. The harshest critics style it as a move to instantiate the party's power via a new presidentialist-type system and tack on human rights provisions to distract from their power-grab.<sup>47</sup> Ackerman's key constitutional moment reference to America's Founding and its Civil War Amendments affirm Arendt's first prerequisite for an effective constitutional

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making, and the bifurcated process of negotiation amongst elites instead of the "Round Table" model favored by the UN. Turkey's constitution-making structurally does not have these faults and may make a better contemporary model, if only as a least-worst option for neighbors to look towards). See ACKERMAN, *supra* note 41, at 7.

43. See *The Constitution Reconciliation Committee Continues its Work*, THE GRAND NATIONAL ASSEMBLY OF TURKEY, <http://global.tbmm.gov.tr> (last visited May 1, 2013); see also WISE MEN CENTER FOR STRATEGIC STUDIES, EXPECTATIONS OF THE TURKISH SOCIETY FROM THE NEW CONSTITUTION (2011), available at [http://www.academia.edu/2491836/Expectations\\_of\\_the\\_Turkish\\_Society\\_from\\_the\\_New\\_Constitution](http://www.academia.edu/2491836/Expectations_of_the_Turkish_Society_from_the_New_Constitution).

44. *15-Point Roadmap*, *supra* note 33; Dönmez, *supra* note 4.

45. İnsan Hakları Ortak Platformu, *İHOP'un yeni Anayasa ile ilgili çalışmaları yürütecek olan Komisyonun işleyişine dair önerileri*, [Suggestions for the Work of the Commission to Study the New Constitution] (Oct. 18, 2011), [http://www.ihop.org.tr/index.php?option=com\\_content&id=484:hopun-tbmmde-yeni-anayasa-ile-ilgili-calmalar-yueruetecek-olan-komisyonun-ileyiine-dair-oenerileri&catid=13:yaynlar&Itemid=109](http://www.ihop.org.tr/index.php?option=com_content&id=484:hopun-tbmmde-yeni-anayasa-ile-ilgili-calmalar-yueruetecek-olan-komisyonun-ileyiine-dair-oenerileri&catid=13:yaynlar&Itemid=109).

46. See ACKERMAN, *supra* note 41, at 7.

47. See İşiksel, *supra* note 19, at 43–44; Uluengin, *supra* note 18.

change: conflict, confusion, and rebirth.<sup>48</sup> Stated more clearly, in Turkey's case, there is reason to worry about the *achievement* of Constitutionalism, as defined by leading constitutional scholar, Dieter Grimm.<sup>49</sup> The modification of pre-existing public power, the origin of the new constitution's language emanating from the *pouvoir constitué* rather than the people's *pouvoir constituant*, and uncertainty as to the status of the constitution as higher law all present reasons to believe Turkey's new constitution may be more a process of constitution-making than constitutionalism.<sup>50</sup>

With all the doubts surrounding the new constitution's ability to adequately protect human rights, we are left asking the question: "Is there another way?" I submit that the answer is yes. While members of the Reconciliation Commission and the AKP insist on a new constitution to boost human rights, rebalance civilian military power, and ameliorate outstanding historical concerns, those watching Turkey from outside the fold continually advocate concrete measures that do not directly implicate the need for an entirely new constitution.<sup>51</sup> Part III will examine other extra-constitutional actors that may protect human rights. I argue that constitutional amendments up to today, coupled with the ability of the various branches to continue passing measures consistent with

48. See ACKERMAN, *supra* note 41, at 19.

49. Dieter Grimm, *Types of Constitutions*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 98, 103–04 (M. Rosenfeld & A. Sajó eds., 2012).

50. *Id.* Grimm lists five conditions to consider a constitution an achievement: 1) It is a set of legal norms rather than a "philosophical construct," 2) The norms are not a modification of pre-existing power, 3) The regulation is comprehensive, 4) It is higher law, and 5) Its origin lies "with the people." *Id.* Progress on Turkey's constitution shows that only parts of all five requirements currently exist: the constitution, if passed, will lie somewhere on the spectrum between achievement and exercise in constitution-making. See also Ibrahim Ö. Kaboğlu & Stylianos-Ioannis G. Koutnazis, *The Reception Process in Greece and Turkey*, in A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS 451, 468 (Alec Stone Sweet & Helen Keller eds., 2008) (stating that Article 90 of the 2004 amendments elevating international law to supra-legislative status in practice has not been exercised as higher law by the courts).

51. See Report by the Commissioner for Human Rights of the Council of Europe citing Report by Thomas Hammarberg Following his Visit to Turkey from 10 to 14 October 2011 (Jan. 10, 2012), *available at* <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2005423&SecMode=1&DocId=1842380&Usage=2> [hereinafter Hammarberg Report]; ÖZBUDUN & GENÇKAYA, *supra* note 23, at 117–27 (charting unimplemented reforms that could be implemented via statute or ratification of international human rights covenants); Selçuk Gültaşlı, *EU calls for new Turkish constitution to sort out entrenched problems*, TODAY'S ZAMAN (June 21, 2012), <http://www.todayszaman.com/news-284214-eu-calls-for-a-new-constitution-to-address-chronic-problems.html> (quoting from the Turkey-EU Association Council report that "constitutional reforms provide[] a *useful* framework" [emphasis added]).

fundamental rights best practices, have a better chance, in a practical sense, to supplement the human rights revolution. Courts, in particular, have unique powers to interpret existing law in light of human rights standards absent constitutional change.<sup>52</sup> Instead of placing stock in constitutional change from above, which raises concerns of legitimacy and implementation, these national extra-constitutional levers should be exercised to their natural limits.

### III. EXTRA-CONSTITUTIONAL HUMAN RIGHTS PROTECTION

#### A. *The Role of the Executive and the Parliament*

Parliament and the executive, while separate branches, possess joint and individually similar powers to influence human rights policy. They wield great power to strengthen the role of the judiciary, to direct public opinion, and to pass new laws to protect previously vulnerable fundamental rights. The executive speaks as the voice of the government, internally and externally.<sup>53</sup> He serves as the voice of human rights in press statements and at international conferences, for better or for worse.<sup>54</sup> He can also direct non-governmental actors to concentrate their energies on certain reforms.<sup>55</sup> For example, Erdogan started working on the constitutional reforms before the 2007 elections by reaching out to constitutional law professors and other scholars to solicit advice and commentary on how to bolster fundamental freedoms in concrete, paragraph-by-paragraph edits.<sup>56</sup>

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52. Hammarberg Report, *supra* note 51; Levent Gonenc, *The 2001 Amendments to the 1982 Constitution of Turkey*, 1 ANKARA L. REV. 89, 106 (2004) (Tr.).

53. See Thomas Seibert, *The rise of Recep Erdogan, from street snack seller to Middle East Muslim champion*, THE NATIONAL (Sept. 14, 2011), <http://www.thenational.ae/news/world/europe/the-rise-of-recep-erdogan-from-street-snack-seller-to-middle-east-muslim-champion>.

54. See, e.g., Umit Kozan, *Erdogan'da 'Insan Haklari Günü' mesajı* [Erdogan gives address for Human Rights Day], POSTA (Dec. 9, 2012), <http://www.posta.com.tr/turkiye/HaberDetay/Erdogan-da--Insan-Haklari-Gunu--mesaji.htm?ArticleID=151791>; Ibrahim Varlik, *Erdogan receives Gaddafi human rights award*, TODAY'S ZAMAN (Dec. 1, 2010), [http://www.todayszaman.com/newsDetail\\_getNewsById.action?newsId=228386](http://www.todayszaman.com/newsDetail_getNewsById.action?newsId=228386); *Turkey's Erdogan Calls Zionism a "Crime Against Humanity" at UN Conference*, UN WATCH (Feb. 28, 2013), <http://blog.unwatch.org/index.php/2013/02/28/turkeys-erdogan-calls-zionism-a-crime-against-humanity-at-un-conference> (detailing the President's remarks in human rights language that caused a wave of backlash against Turkey across the globe).

55. See, e.g., ÖZBUDUN & ÖMER F. GENÇKAYA, *supra* note 23, at 44.

56. *Id.*; Saadet Yuksel, *Turkey's Procedural Challenges to Making a New Constitution*, 58 ANNALES XLI 119, 120–21 (2009).

The executive can establish claims commissions for monetary reparations in outstanding fundamental rights cases; and he can direct the release of classified information on rights abuses—this is another example of reaching out to the civilian population via disclosure and primacy of government accountability.<sup>57</sup> The executive branch's several agencies also focus their attentions on the development of international norm compliance, information-sharing with NGOs, and internal monitoring of governmental practices to ensure commitment to fundamental rights.<sup>58</sup>

Parliament, aside from constitutional-drafting, can sign into law international treaties and EU agreements on fundamental rights protections. For example, Parliament has already passed ECHR Protocols 1, 2, 3, 5, 6, 8, 11, 13, and 14.<sup>59</sup> It has approved but not yet deposited instruments for Protocol 4, and has signed but not ratified Protocols 7 and 12.<sup>60</sup> It has signed the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and has been encouraged to further enter into international agreements and European Commission internal framework statutes.<sup>61</sup> Parliament may also pass laws to change judicial code provisions that affect basic rights of procedure, such as the right to a fair hearing.<sup>62</sup>

57. *Hearing at PACE for implementation of ECHR decisions by Turkey*, FAMAGUSTA GAZETTE (May 1, 2013), <http://famagusta-gazette.com/hearing-at-pace-for-implementation-of-echr-decisions-by-turkey-p17849-69.htm> (last visited May 1, 2013).

58. *See Human Rights: Policy Objectives and Developments*, REPUBLIC OF TURKEY MINISTRY OF FOREIGN AFFAIRS, [http://www.mfa.gov.tr/humanrights\\_policy-objectives-and-developments.en.mfa](http://www.mfa.gov.tr/humanrights_policy-objectives-and-developments.en.mfa) (last visited Apr. 29, 2013) (listing commissions and monitoring groups that have as their missions monitoring of human rights practices internal to the government).

59. ANAYASASI HALK NEYİ OYLAYACAK, *supra* note 32; *see also* ÖZBUDUN & GENÇKAYA, *supra* note 23, at 93 (suggesting Parliament can increase its commitment to human rights protection through ratification of ECHR Protocol 12 on the general prohibition of discrimination by public authorities).

60. Council of Europe, List of the treaties coming from the subject matter: Human Rights (Conventions and Protocols Only), <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?MA=3&CM=7&CL=ENG> (last visited Mar. 25, 2014).

61. ÖZBUDUN & GENÇKAYA, *supra* note 23, at 85–91. Further protocols to ratify include the European Charter for Regional or Minority Languages, the Assembly Recommendation 1201 on the additional protocol of rights of national minorities to the ECHR, and the Charter for Regional and Minority Languages to the ECHR.

62. *See Turkey's 4th judicial package passes into law with critical last-minute amendment*, HÜRRIYET DAILY NEWS (Apr. 11, 2013), <http://www.hurriyetdailynews.com/turkeys-4th-judicial-package-passes-into-law-with-critical-last-minute-amendment.aspx?pagerID=238&nid=44768> (addressing many of the concerns brought up in the Hammarberg Report, *supra* note 51, related to violations of

In order to implement newly given fundamental rights protections, Parliament passes wide-sweeping reform packages that direct the judiciary to better focus on both procedural and substantive issues of fundamental rights in court proceedings.<sup>63</sup> The most recent Fourth Packet of Judicial Reforms, which entered into force in March 2013, exemplifies this legislative power to direct the judiciary.<sup>64</sup> Even so, outside pressure by international NGOs, the EU, and Western governments to conform to EU standards will consistently ask for more. Human rights activists relentlessly state that one step completed only calls for immediate progress to the next.<sup>65</sup> Still, continued media spotlights to deficits of fundamental rights protections should not discount results achieved since 1982.<sup>66</sup> The executive and legislative branches in tandem have passed many measures designed to protect human rights and have the means in their power for additional future reforms.

### B. The Role of the Judiciary

The judiciary has been granted an expanding palette of powers contingent upon subsequent constitutional and statutory amendments.<sup>67</sup> In part, the judiciary's strong ties to the executive have frightened several leading Turkish constitutional scholars who fear that its strength has become a usurpation of power by the executive in favor of the status quo.<sup>68</sup> Several scholars assert that

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fundamental rights entrenched in the Anti-Terror Act).

63. *Yargı Paketi, Meclis'te* [The 4th Judicial Reform Package at the Parliament], ZAMAN (Mar. 7, 2013), [http://www.zaman.com.tr/politika\\_4-yargi-paketi-mecliste\\_2062215.html](http://www.zaman.com.tr/politika_4-yargi-paketi-mecliste_2062215.html).

64. *Id.* Changes include many indirect enforcement measures for fundamental rights, such as an expansion of freedom of the press, limitation of the jurisdiction of military courts, more equitable remedial packages with accrued interest on the payments, a heightened burden of proof in terror publication cases, a laxer procedural standard for release from interrogation, a presumption of equality in defendant and prosecution arguments at terror trials, lowered standards for the use of a retrial, and allowance of repeated attempts to receive a public defender in cases of hardship.

65. See, e.g., *Turkey's judicial reform falls short on conscientious objection: EU commissioner*, HÜRRİYET DAILY NEWS (Apr. 12, 2013), <http://www.hurriyetdailynews.com/turkeys-judicial-reform-falls-short-on-conscientious-objection-eu-comissionner.aspx?pageID=238&nid=44843>.

66. See Hammarberg Report, *supra* note 51, at 25–27 (praising the “remarkable efforts undertaken by the Turkish authorities in order to reform the Turkish justice system in recent years”).

67. See Hootan Shambayati & Esen Kirdis, *In Pursuit of “Contemporary Civilization”: Judicial Empowerment in Turkey*, 62 POL. RESEARCH Q. 767 (2009); Murat Yetkin, *Government's 5th and 6th Judiciary Packages on the Way*, HÜRRİYET DAILY NEWS (Apr. 12, 2013) (prognosticating a short-term future gain of power for the judiciary).

68. ÖZBUDUN & GENÇKAYA, *supra* note 23, at 109.



the judiciary, if left in its current form, will be the main roadblock to human rights reform, particularly after the Constitutional Court struck down an amendment allowing for headscarves in public institutions as contrary to the national values of secularism.<sup>69</sup>

Despite fears of an unjust juristocracy, interplay between the branches has resulted in constitutional reform via amendment over the past two years that could begin to chip away at the executive's puppeteering of the judiciary and its excessive power of constitutional interpretation.<sup>70</sup> These reforms include adding additional seats to the Constitutional Court chosen through an inter-branch ratification process, and the revocation of the Court's power to adjudicate constitutional amendments.<sup>71</sup> The Court will still, however, have jurisdiction over cases touching on matters of legislative and executive action that would otherwise be preempted in systems like that of the United States by the political question doctrine, thereby preserving a place for the Court in governmental oversight that many praise as necessary for the judiciary in separation of power disputes.<sup>72</sup>

For a long while, the Constitutional Court had very little direct influence over the citizenry, and to date, still remains the most

69. ÖZBUDUN, *supra* note 6, at 31–32; ÖZBUDUN & GENÇKAYA, *supra* note 23, at 106–09. Shambayati, *supra* note 25, generally lays out this idea that political empowerment of courts is a form of “hegemonic preservation,” whereby political elite that are losing dominance try to protect their values and interests by empowering a sympathetic judiciary (citing RAN HIRSCHL, ON JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004)). Many also worry because of the frequent party closing cases in the mid-2000s, some of which were upheld at the ECHR. This is out of the scope of my research but a key distinguishing factor of the Turkish court system and facially troublesome for open political dialogue. See *id.*; Refah Partisi & Others v. Turkey, 2003-X Eur. Ct. H.R., available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60936>.

70. Ibrahim Asalioglu, *AK Parti'den yeni anayasa için sürpriz teklifler* [Surprise Offers for the New Constitution from AK Party], TODAY'S ZAMAN (Feb. 7, 2013), [http://www.zaman.com.tr/politika\\_ak-partiden-yeni-anayasa-icin-surpriz-teklifler\\_2050700.html](http://www.zaman.com.tr/politika_ak-partiden-yeni-anayasa-icin-surpriz-teklifler_2050700.html).

71. *Id.* See also Guliz Sutçu, *Revising the Turkish Judiciary's Role Through a New Constitution*, NEAR E. Q. (Dec. 17, 2011), <http://www.neareastquarterly.com/index.php/2011/12/17/revising-the-turkish-judiciarys-role-through-a-new-constitution/?output=pdf> (arguing that the recent reforms to the judiciary actually disempower it to an unwarranted degree).

72. ÖZBUDUN, *supra* note 6, at 34; ÖZBUDUN & GENÇKAYA, *supra* note 23, at 109. For the U.S. comparative perspective, see Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597 (1976); HAROLD KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 224 (1990) (arguing the court's acquiescence in matters of foreign affairs particularly by means of dismissing cases at the pleadings using the political question doctrine and other procedural hooks disenfranchises the court and affronts the balance of separation of powers historically envisioned in the U.S. system).

passive branch of the government. Standing to bring cases to the Constitutional Court was curtailed by the 1982 Constitution,<sup>73</sup> and the courts themselves did not have the power to review interpretation of laws by trial courts absent the lower court's submission of a claim for review.<sup>74</sup> Certain Turkish constitutional scholars view decisions that the Constitutional Court takes on behalf of its own structure as self-serving and troublesome, though in other Constitutional systems, the results appear commonplace.<sup>75</sup> Past and contemporary reforms have structured the judiciary in a manner that, while still open to major improvements, suggest the Court's influence to be more wide-reaching and influential today.<sup>76</sup> How the Court decides to rule in light of international rights norms will certainly be dependent on its composition, yet it is the very composition of the court that has come under such heavy criticism by scholars and outside directors alike.<sup>77</sup> However, as a matter of internal governmental oversight, recent amendments have, on paper, given the Court a better chance to oversee and adjudicate cases of import.

Having passed an abundance of statutory and constitutional changes protecting human rights, the judiciary is now in a prime position to serve as a model of enforcement. The court system is being restructured to streamline all civil claims previously divided at the provincial level by various administrative courts; an additional appellate level court is being contemplated to add

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73. Shambayati, *supra* note 25, at 106–07. In 1961 a smaller portion of the Grand National Assembly was needed to bring standing, any political party that had ten percent of the last national election's votes could bring a case, and universities were allowed to bring cases under Article 149. The 1982 Constitution removed standing for universities and political parties that were not the main opposition party, and required one-fifth of the members of the Parliament to bring a case.

74. *Id.* at 109.

75. See ÖZBUDUN, *supra* note 6, at 136 (citing the case *Anayasa Mahkemesi* [Const. Ct.] E.2010/49, K.2010/87, July 7, 2001, striking down the presidential power to choose four members of the High Council of Judges and Prosecutors among professors of economics, political science and "high level administrators," and ruling instead that he must only choose among practicing lawyers and law professors. See also THOMAS GIEGERICH, REPORT ON THE TURKISH HIGH COUNCIL OF JUDGES AND PUBLIC PROSECUTORS: ASSESSMENT OF ITS INITIAL TRACK RECORD OF OPERATION (Feb. 4, 2013), available at <http://typo3.p147163.mittwaldserver.info/fileadmin/Content/Files/DelegationDocuments/en/Report04022013.pdf> (praising the expansion of the council and recommending that the council not increase its non-judicial membership).

76. ÖZBUDUN, *supra* note 6, at 137.

77. For a discussion on the (lack of) real change occasioned by the 2010 amendments' restrictions on the judiciary and the HSYK, see *infra* Section IV-B.

further review and consolidate disparate provincial level rulings; and the shadow state security court system for military and terror-related claims was eliminated by the 2004 constitutional amendment.<sup>78</sup> The court system, now more than ever before, has the potential to achieve structural uniformity, expediency, and clarity in its rulings.

On September 23, 2012, the personal jurisdiction of the Constitutional Court widened to accept any individual applications alleging fundamental rights violations.<sup>79</sup> In a move explicitly touted to publicize cases of fundamental rights, members of the Constitutional Commission hailed this jurisdictional expansion as one in which to protect basic rights and freedoms, and one to bring Turkey in line with the Western world and its former Ottoman territories, which already apply the individual application at the constitutional level.<sup>80</sup> The Turkish Justice Academy trains all constitutional and state judges on how to apply fundamental rights protections.<sup>81</sup> This is part of an ongoing campaign to train judges on how to incorporate respect for human rights into their substantive evaluations of claim, particularly with respect to new cases that will substitute for ECHR consideration.<sup>82</sup> Practically, this training

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78. Asalioglu, *supra* note 70; ÖZBUDUN, *supra* note 6, at 65, 98 (explaining that the system before was composed of a Yargitay, the apex of criminal and civil courts, and the Danistay, the apex of the administrative justice system, and a separate military court). For information related to the new appellate review court, see Bulent Sarioglu, *Temyiz Mahkemesi Geliyor* [The Appellate Court is Coming], HÜRRİYET GÜNDEM (Feb. 7, 2013), <http://www.hurriyet.com.tr/gundem/22540377.asp>.

79. AIHM, *Artik Anayasa Mahkemesi'ni Adres Gösteriyor* [ECHR To Defer to Constitutional Court], ZAMAN (Feb. 18, 2013), [http://www.zaman.com.tr/politika\\_ahm-artik-anayasa-mahkemesini-adres-gosteriyor\\_2054448.html](http://www.zaman.com.tr/politika_ahm-artik-anayasa-mahkemesini-adres-gosteriyor_2054448.html); Huseyin Hayatsever, *Individual Access to Top Court Begins as Question Mark Lingers*, HÜRRİYET DAILY NEWS (Sept. 25, 2012), <http://www.hurriyetdailynews.com/individual-access-to-top-court-begins-as-question-marks-linger.aspx?pageID=238&nid=30911>.

80. TURKISH BAR ASSOCIATION CENTRE OF RESEARCH AND PRACTICE FOR HUMAN RIGHTS (TÜRKİYE BAROLAR BİRLİĞİ İNSAN HAKLARI ARAŞTIRMA VE UYGULAMA MERKEZİ), İNSAN HAKLARI ULUSLARARASI SÖZLEŞLERİNİN İÇ HUKUKTA DOĞRUDAN UYGULANMASI [THE DIRECT APPLICATION OF INTERNATIONAL HUMAN RIGHTS CONVENTIONS IN DOMESTIC LAW] (Ankara, 2004). President of the Turkish Bar Association Bahadır Kilinc lists Germany, Austria, Spain, Poland, Hungary, Czech Republic, Latin America, Eastern Europe, South Korea, Switzerland, Belgium, and Mexico as countries that have already successfully embraced the individual application, counting Turkey now as one of its progeny.

81. *Yayinlari* [Publications], TÜRKİYE ADALET AKADEMİSİ [Turkish Justice Academy], <http://www.taayayinlari.gov.tr/> (last visited Mar. 23, 2014).

82. *Yayinlari*, *supra* note 81; see also *Turkey: Towards an Effective and Professional Justice Academy*, LUDWIG BOLTZMANN INSTITUTE, <http://bim.lbg.ac.at/en/eunip-projects-turkey/turkey-towards-effective-and-professional-justice-academy-twinning> (last visited Mar. 23, 2014) (detailing a partnership project between the Turkish Justice Academy and

includes sessions on how to uniformly implement mechanisms to adjudicate claims brought asserting different fundamental rights, and how to give deference to ECHR rulings and cite to international law.<sup>83</sup> A website established by the HSYK translates ECHR cases into Turkish and makes them publicly available online to boost judges' awareness of ECHR decisions as well as the public's awareness of the types of rights infringements to which they could petition the Constitutional Court for future redress.<sup>84</sup>

Given the changing court structure and the consolidation of all rulings of last resort from civil, criminal, military and administrative branches to the Constitutional Court, the Court's decisions carry unprecedented weight.<sup>85</sup> The Court, in its first three months, received 1,300 applications and only expects the number to increase.<sup>86</sup> The high number of applications may not be a good thing; reports indicate that the number of applications to the ECHR in the 2000s, measured in toto and by individual right, never declined, despite the ECHR returning several judgments that should have held precedent in subsequent Turkish provincial cases.<sup>87</sup> Still, there is reason to believe that the proximity and influence of the Constitutional Court's decisions may stem the tide of repeated, non-precedential decisions.<sup>88</sup>

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the German Foundation for International Legal Cooperation to improve the Academy's training capabilities).

83. *Yayınları*, *supra* note 81. See the notes that lay out the corresponding numerical references for ECHR fundamental rights clauses and their parallel protections in the Turkish constitution. *How Influential is International Law on the Constitutional Level?: The Turkish Case*, UNAM (2008), available at [www.juridicas.unam.mx/wccl/ponencias/15/346.pdf](http://www.juridicas.unam.mx/wccl/ponencias/15/346.pdf) (listing the ECHR protocol numbers and their corresponding Turkish Constitutional Articles).

84. See *AIHM Kararları* [ECHR Decisions], İNSAN HAKLARI DAİRE BAŞKANLIĞI, <http://www.inhak.adalet.gov.tr/mevzuat/mevzuat.html> (last visited Apr. 28, 2013); Ali A. Kiliç, *Turkish Judiciary Poised to Boost ECHR Compliance*, TODAY'S ZAMAN (Mar. 20, 2012), [http://www.todayszaman.com/newsDetail\\_getNewsById.action?newsId=274625](http://www.todayszaman.com/newsDetail_getNewsById.action?newsId=274625).

85. Kiliç, *supra* note 84; Abdullah Bozkurt, *Steps to align Turkey with ECtHR*, TODAY'S ZAMAN (Jan. 21, 2013), [http://www.todayszaman.com/mobile\\_detailc.action?newsId=304721](http://www.todayszaman.com/mobile_detailc.action?newsId=304721).

86. *Over 1,300 Individual Applications Made to Constitutional Court in First 3 Months*, TODAY'S ZAMAN (Feb. 18, 2013), <http://www.todayszaman.com/news-307449-over-1300-individual-applications-made-to-constitutional-court-in-first-3-months.html>.

87. Serkan Cengiz, *AIHM Kararlarının İç Hukuka Etkisi* [The Effect of ECHR Decisions on Domestic Law]; 79 TBB DERGİSİ 334, 341 (2008), available at <http://portal.ubap.org.tr/AppThemes/Dergi/2008-79-473.pdf>.

88. This is especially true given the overwhelming number of cases which deal with the right to a fair hearing, a procedural right that has been addressed in recent legislative packages and which, when adjudicated, should more easily serve as instruction to lower courts rather than case-by-case interpretation. See 24 Eylül-31 Aralık 2012 Tarihleri

*C. The Role of the ECHR and External Impetus by Non-Governmental Actors*

The judiciary's newly strengthened position to protect fundamental rights comes largely as a response to external pressure from the EU and the ECHR. Nationalization of fundamental rights protection as a result of repeated chastisement from the ECHR has come both at the judicial and executive levels. As public opinion in Turkey slowly turns away from membership in the EU, these internal imports of fundamental rights protections divest themselves of their token entrance fee status and become a national concern that internal actors have the capacity and know-how to address.<sup>89</sup>

The ECHR's excessively high caseload from Turkey and the resultant exorbitant reparation fees forced upon the Turkish government were major influences on the decision to open the individual application route to the Turkish Constitutional Court.<sup>90</sup> Turkish officials clearly stated that the 19,000 applications pending against Turkey at the ECHR made it difficult for the country to talk about its success in upholding universal standards of fundamental rights.<sup>91</sup> Officials underlined the fact that the individual application would not simply be window-dressing as in neighboring Azerbaijan, where the application exists but is not a precursor to filing at the ECHR.<sup>92</sup> In so doing, the judiciary made a commitment to

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*Arasinda Yapilan Basvurulara Göre Hazirlanan Bireysel Basvuru İstatistikleri* [Prepared Statistics on the Individual Applications Filed Sept. 24–Dec. 31 2012], ANAYASA MAHKEMESİ (Mar. 25, 2013), [http://www.anayasa.gov.tr/files/bireysel\\_basvuru/2012\\_istatistik/haklaragore.pdf](http://www.anayasa.gov.tr/files/bireysel_basvuru/2012_istatistik/haklaragore.pdf) (noting that of the 1,300 applications received in the first three months, 1,137 dealt with the right to a fair hearing).

89. See, e.g., Emre Peker, *Turks to European Union: No, Thanks*, EMERGING EUROPE: WALL ST. J. (Aug. 29, 2012 1:53 PM), <http://blogs.wsj.com/emergingeuropa/2012/08/29/turks-to-eu-no-thanks>.

90. Metin Arslan, *Anayasa Mahkemesi, bireysel başvuruda AİHM'yi model alacak* [The Constitutional Court's Individual Application takes the Model of ECHR], ZAMAN POLİTİKA (Mar. 29, 2012), [http://www.zaman.com.tr/politika\\_anayasa-mahkemesi-bireysel-basvuruda-aihmyi-model-alacak\\_1265447.html](http://www.zaman.com.tr/politika_anayasa-mahkemesi-bireysel-basvuruda-aihmyi-model-alacak_1265447.html); Adem Y. Aslan, *AİHM Yolu Kapaniyor* [The Road to the ECHR Closes], BUGÜN GÜNDEM (Sept. 22, 2012), <http://gundem.bugun.com.tr/aihm-yolu-kapaniyor-haberi-206074>. See also CARLA BUCKLEY, *TURKEY AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A REPORT ON THE LITIGATION PROGRAMME OF THE KURDISH HUMAN RIGHTS PROJECT 174–84* (2000) (presenting a schedule of claims and compensatory awards in cases at the ECHR for an example of monetary pay-outs forced upon the Turkish government).

91. Arslan, *supra* note 90.

92. *Id.*

effectuating change that the universal community would view as legitimate.<sup>93</sup>

The Court also distanced itself from neighbors undergoing other democratic-looking reforms, thereby holding itself to a higher standard than that of its ethnically and culturally similar Eastern neighbors.<sup>94</sup> The Court sent six rapporteurs to the ECHR to examine its means of decision-making,<sup>95</sup> and passed internal regulations mandating the promotion of judges be dependent on examining whether their rulings were made in compliance with ECHR decisions.<sup>96</sup> Ultimately, the impact of the ECHR rests on its ability to positively affect the judiciary's internal mechanisms for fundamental rights protection.

ECHR judgments and international opinions have also directly influenced the executive to protect fundamental rights. Certain ECHR decisions that mandated reparations to a large number of similarly situated applicants prompted the executive to set up claims commissions to pay reparations and mediate ongoing claims in place of the ECHR.<sup>97</sup> Signing off on these claims commissions, the ECHR noted that it "was satisfied with this domestic remedy"; describing the commission as "effective and the compensation reasonable."<sup>98</sup> In particular, the case of *Ummuhan Kaplan v. Turkey* prompted the founding of a claims commission for victims of excessively long proceedings.<sup>99</sup> The case also prompted the legislature to pass Law No. 6234 to codify the domestic remedy.<sup>100</sup> The ECHR noted that the Turkish legislature had already taken several steps to shorten the length of proceedings in recent years. This is an important testament to the power of multiple actors protecting fundamental rights and a reason the Court looked

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93. *Id.*

94. *Id.*; Umut Uras, *EU renews Turkey talks despite Taksim tension*, AL-JAZEERA (July 7, 2013), <http://www.aljazeera.com/news/europe/2013/07/201375144547728327.html>.

95. *Over 1,300 Individual Applications Made to Constitutional Court in First 3 Months*, *supra* note 86.

96. Arslan, *supra* note 90; Kiliç, *supra* note 84.

97. Bozkurt, *supra* note 85 (describing how claims commissions were set up for land and property claims from Greek Cypriots and also for terrorism victims).

98. *Id.*

99. *Id.*

100. *Id.* See also *Kaplan v. Turkey* (No. 24240/07), 116 Eur. Ct. H.R. (2012) (detailing the Court's use of the pilot judgement procedure, which allows for the nation in question to set up its own effective remedy to be assessed by the Court and, if deemed reasonable, applied to future cases alleging similar facts, and noting the pilot system's consistent success in Turkey).

favorably upon the use of the pilot judgment system to remand most excessively long proceedings back to Turkey for remedial application.<sup>101</sup> To date, Turkey has complied with the remedial requirements proposed by the ECHR in contested cases,<sup>102</sup> which indicates that the ECHR's jurisprudence commands a strong level of respect in Turkey.

NGOs have catalyzed the judiciary's impending reforms through use of ECHR judgments. Groups such as the Kurdish Human Rights Council (KHRP) began bringing trial cases to Turkish courts with the intention of appealing to the ECHR for final decisions in cases that exhibited clear rights violations.<sup>103</sup> For example, as of KHRP's most recent report in 2009, a majority of the grievances in their cases have been addressed through legislation and executive reforms in the form of constitutional amendments.<sup>104</sup> Their cases, appealed to the ECHR, added to the strain Turkey felt at both the international and national levels, which helped prompt the grant of an individual application for the judiciary and refocused both foreign and internal debates by other civil society actors on human rights reforms.<sup>105</sup> The media and academic institutions also provide roles as external impetus to reform. They keep the public informed

101. *Kaplan*, 116 Eur. Ct. H.R. (describing the general measures the legislature has taken in recent years including increasing the number of judges (Law No. 6110 on Feb. 14, 2011), issuing inheritance certificates via public notary instead of after a court proceeding, and the decriminalizing of certain crimes related to military and commercial matters).

102. *See Loizidou v. Turkey*, (No. 15318/89) Eur. Ct. H.R. (1998), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58201>, (detailing how, although it took four harshly worded memoranda before the Turkish government agreed to give reparations, Turkey still chose to comply, only having passively protested the ruling by withholding reparation payments); *but see Hearing at PACE for Implementation of ECHR Decisions by Turkey*, *supra* note 57 (discussing a pending Cypriot property case that has not been paid out by the Turkish government to date).

103. *See, e.g., BUCKLEY*, *supra* note 90, at 169 (Table of Contents listing cases KHRP brought to ECHR from 1990–2000).

104. *See id.* at 1, 157, 163 on stated goals, progress and the impact of cases, including the creation of a new body of EHCR case law to clarify the scope of fundamental rights, and the manner in which Turkey has tailored domestic law to fit EHCR rulings. *See also BUCKLEY*, *supra* note 90, at Part II, on constitutional reforms. For the most recent cases brought on behalf of KHRP to the ECHR, *see KURDISH HUMAN RIGHTS PROJECT IMPACT REPORT, KURDISH HUMAN RIGHTS PROJECT 86–90 (2009)*, *available at* <http://www.khrp.org/litigation-advocacy.html>.

105. For a list of leading human rights groups in Turkey, *see World Movement for Democracy: Confronting the Challenges to Democracy in the 21st Century, List of Turkish NGOs Working on Human Rights and Democracy*, WORLD MOVEMENT FOR DEMOCRACY: CONFRONTING THE CHALLENGES TO DEMOCRACY IN THE 21ST CENTURY, <http://www.wmd.org/resources/whats-being-done/human-rights-democracy-turkey/list-turkish-ngos-working-human-rights-and-> (last visited Apr. 28, 2013).

of egregious governmental practices and the international community engaged in active, continual dialogue that reflects pressure back onto the government for policy change.<sup>106</sup>

These external impetuses provide checks on all three governmental actors in their own considerations of human rights protections. If we take rights that have been granted by the legislative and executive by means of amendment and statute into account, the judiciary then takes the lead for execution. An examination of this execution, detailed in Part IV, is necessary to understand whether the immediate future of human rights protection should focus on the creation of rights per a new constitution, or as I posit, the expansion into force of rights currently granted.

#### IV. EMPIRICAL APPLICATION OF HUMAN RIGHTS NORMS-A LESS PALATABLE PORTRAIT

##### *A. Nuanced Realities: Putting the Reforms in Perspective*

One need only look to the media coverage's headlines on Turkey to see the disconnect between human rights discourse and current practice. First, in April 2013, world-renowned pianist Fazil Say was arrested and promptly charged with insulting the values of the state through a Twitter post.<sup>107</sup> After a swift trial, he was promptly carted off to serve a ten-month jail sentence.<sup>108</sup> Then, in May 2013, what began as a peaceful protest against the AKP's new plans to build a shopping mall/mosque complex in the place of the popular Gezi park turned into a scene of horror as thousands of protestors were systematically arrested, tear gassed and injured by

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106. See generally ÖZBUDUN, *supra* note 6 (related to the various constitutional drafts submitted by public interest groups post-1982 Constitution).

107. Meltem Akyol, *Fazil Say'dan 'tweet' açıklaması* [Explanation of the Tweet from Fazil Say], Sabah (Apr. 18, 2013 2:12 PM), [http://www.sabah.com.tr/kultur\\_sanat/muzik/2013/04/18/fazil-saydan-tweet-aciklamasi](http://www.sabah.com.tr/kultur_sanat/muzik/2013/04/18/fazil-saydan-tweet-aciklamasi)

108. *Id.* AKP's Prime Minister himself served jail time on similar charges years earlier. As such, claims that he is using the threat of jail time as revenge on outspoken critics of his regime abound. See Constanze Letsch, *Turkish composer and pianist convicted of blasphemy on Twitter*, THE GUARDIAN (Apr. 15, 2013), <http://www.guardian.co.uk/world/2013/apr/15/turkish-composer-fazil-say-convicted-blasphemy>. For international commentary on this incident as an example of Turkey's backwardness, see Marc Champion, *Turkey's Shameful Prosecution of Pianist Fazil Say*, BLOOMBERG (Apr. 15, 2013), <http://www.bloomberg.com/news/2013-04-15/turkey-s-shameful-prosecution-of-pianist-fazil-say.html>.



the police's excessive use of force.<sup>109</sup> In what will surely cost the Turkish government millions in reparations at the ECHR for violations of the right to peaceful assembly,<sup>110</sup> these month-long protests undermined any international goodwill towards Turkey's human rights reforms. Erdogan's obstinate refusal to bow towards calls of restraint<sup>111</sup> made it painstakingly apparent that the heavy hand of the executive remains the principle roadblock to future change. For all that the AKP has given, it seems, it may just as quickly take it away.

When the summer, and with it the protests and media frenzy, wound to a close, the EU stated that it would resume accession talks with Turkey and focus on the region's "long-term goals."<sup>112</sup> Observers must ask if these two recent egregious human rights violations leave any hope for real reform, constitutional or extra-constitutional. We might think of freedom of association and freedom of speech as two rights not yet featured in the recent reform discussions. Despite all of the attention the rights to freedom of speech<sup>113</sup> and association<sup>114</sup> attract in the international

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109. Ian Traynor and Constanze Letsch, *Turkey divided more than ever by Erdogan's Gezi Park crackdown*, THE GUARDIAN (June 20, 2013), <http://www.guardian.co.uk/world/2013/jun/20/turkey-divided-erdogan-protests-crackdown>.

110. Fatma Dişli Zıbak, *Tear gas use against Gezi protesters might cost Turkey much at ECtHR*, TODAY'S ZAMAN (July 10, 2013), <http://www.todayszaman.com/news-320532-tear-gas-use-against-gezi-protesters-might-cost-turkey-much-at-ecthr.html>.

111. *Turkey Protests: PM Erdogan issues stern warning*, BBC NEWS (June 11, 2013), <http://www.bbc.co.uk/news/world-europe-22859959>.

112. Uras, *supra* note 94.

113. *Free speech in Turkey crucial for peace: Amnesty International*, HÜRRİYET DAILY NEWS (Mar. 27, 2013), <http://www.hurriyetdailynews.com/free-speech-in-turkey-crucial-for-peace-amnesty-international.aspx?pageID=238&nid=43799>. But see Thomas Hammarberg, *Comments on the Turkish Bill on Judicial Reform of January 2012*, COM 2 (Feb. 20, 2012), available at [http://www.coe.int/t/commissioner/Source/CommHR\\_comment\\_on\\_Turkish\\_Bill\\_on\\_judicial\\_reform.pdf](http://www.coe.int/t/commissioner/Source/CommHR_comment_on_Turkish_Bill_on_judicial_reform.pdf) (noting in the recent case, *Ürper and others v. Turkey*, allegations of a freedom of the press violation resulted in the deletion of Article 6 paragraph 5 of the anti-terrorism act that allowed for the ban of future editions of a periodical. It also annulled previous decisions that confiscated, prohibited, and otherwise prevented the sale and distribution of printed materials declared terror articles under the act). See also Gültaşlı, *supra* note 51 (noting particular concern with freedom of the press reforms).

114. For a recent report on the status of the freedom of association, most frequently violated in respect of minority rights to assembly before the Gezi Park protests, see CAMILLE OVERSON HENSLER AND MARK MULLER, FREEDOM OF EXPRESSION AND ASSOCIATION IN TURKEY, KURDISH HUMAN RIGHTS PROJECT (2005). The closure of political parties, briefly discussed in the Hammarberg Report, *supra* note 51, also falls under the umbrella of freedom of association violations.

media, they will almost surely be two of the last bastions of reform. External pressure from media sources and repeated findings of violations of Article 10 at the ECHR underline the omnipresence of these breaches.<sup>115</sup> For example, in the 2013 World Freedom Press Index, Turkey dropped to 154th in the world for protection of freedom of expression, and has consistently fallen in the rankings since the AKP gained power in 2002.<sup>116</sup>

Guaranteeing rights to freedom of expression is a place for statutory reform. As we have seen thus far, such rights can only be fully protected with extensive executive and parliamentary changes.<sup>117</sup> For purposes of this paper, we will focus our attention on the possibility of reform through judicial activism: how have courts handled their heightened power of judicial review with respect to human rights assurances already codified?<sup>118</sup> If they are not using their given power to its full extent, we might expect the emphasis placed on future codification of rights, such as expression and assembly, to be equally empty.<sup>119</sup> The institutionalization of rights already given force on paper is a prerequisite for future rights creation, especially for rights espoused by any future constitution. This part will outline how the recent statutory and judicial procedural reforms have been applied in practice, bearing in mind the novelty and infancy of the majority of reforms as well as

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115. See MARIA OETHEIMER, COUNCIL OF EUROPE, FREEDOM OF EXPRESSION: CASE-LAW CONCERNING ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2007). This also highlights the limited role of the media and press outlets as candidates to protect human rights. See generally *The press in Turkey: Not so free*, THE ECONOMIST (Apr. 6, 2013), <http://www.economist.com/news/europe/21575823-government-finds-different-ways-intimidate-free-media-not-so-free> (emphasizing the difficulties of accurate investigative reporting for Turkish media).

116. REPORTERS WITHOUT BORDERS, WORLD PRESS FREEDOM INDEX (2013), available at [http://fr.rsf.org/IMG/pdf/classement\\_2013\\_gb-bd.pdf](http://fr.rsf.org/IMG/pdf/classement_2013_gb-bd.pdf).

117. To some extent, the grant of additional protections for the right to freedom of the press have already manifested. See Hammarberg Report, *supra* note 51.

118. As the Commissioner for Human Rights recognized in recent comments on the January 2012 judicial reform packages, the decisive factor will be the practical implementation of the article as interpreted by judges. Hammarberg Report, *supra* note 51, at 2.2.

119. The power of the courts is evident in the Gezi Park protest developments as well. Erdogan's compromise to the protestors after three weeks with no settlement was to let the courts decide on the fate of the redevelopment project. As of this paper, an administrative court had overruled an injunction imposed by a first instance court to allow the project to continue per Erdogan's plans, potentially creating a situation for renewed street conflict. See *Court Lifts Injunction Against Controversial Taksim Project*, TODAY'S ZAMAN (July 22, 2013), <http://www.todayszaman.com/news-321528-court-lifts-injunction-against-controversial-taksim-project.html>.

the relative paucity of available data.<sup>120</sup>

### *B. Are Human Rights Really Being Enforced?*

While all branches of Turkish government have ostensibly enlarged their toolkits of human rights protection options, enforcement remains lackluster.<sup>121</sup> At the legislative level, several pieces of revised legislation, post-ECHR findings, regarding fundamental rights violations re-appeared at the ECHR under contest of perpetual violation.<sup>122</sup> Despite continuous reform, the Venice Commission, NGOs, and other similar groups call for increased rights protections due to the persistently high number of fundamental rights still not protected under current Turkish law.<sup>123</sup> Nowhere is this more apparent than with the Gezi Park protests.<sup>124</sup> Whether reforms are implemented via traditional law-making or constitutional higher law-making channels, the judiciary will be the place to look for enforcement of fundamental rights for all. In this respect, recent rulings by the Constitutional Court and lower courts particularly shed light on the nationalization of fundamental rights.

The individual application, still too new to accurately assess for its long or short-term effects, has already drawn critique in the highest levels of government from those who fear that the Court's case overload and the fee associated with applications (non-existent for ECHR applications) will result in unequal treatment of cases and lower quality of decision-making for the Constitutional Court's purview of cases.<sup>125</sup> Thus far, growing pains have created bureaucratic headaches: the Court dismissed ninety-five percent of the first three months' applications for inaccurate filing.<sup>126</sup> Of the

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120. Recall that the Fourth Judicial Reform Package was implemented in February 2013. The individual application for the Constitutional Court came into force September 23, 2012. See *supra* Part III-A of this article.

121. Hammarberg Report, *supra* note 51.

122. Cengiz, *supra* note 87, at 7.

123. See, e.g., BUCKLEY, *supra* note 90, at 10; ÖZBUDUN & GENÇKAYA, *supra* note 23, at 117–23 (checklist on the status of legislative changes envisioned and changes actually realized from 2001 to 2003). Many of the charts highlighting proposed and actual changes are hard to follow given the perpetual expansion of rights and great growth achieved since the 2001 amendments.

124. See *supra* Part IV-A of this article for the discussion on the events of Gezi Park.

125. Ekin Karaca, "Anayasa Mahkemesi'ne Bireysel Başvurudan Umudum Yok" [I Have No Hope for the Individual Application to the Constitutional Court], BAĞIMSIZ İLETİŞİM AĞI (Sept. 24, 2012), <http://www.bianet.org/bianet/hukuk/141039-anayasa-mahkemesine-bireysel-basvurudan-umudum-yok>.

126. *Top Turkish Court swamped by incomplete individual applications*, HÜRRİYET DAILY NEWS (Jan. 2, 2013), <http://www.hurriyetdailynews.com/top-turkish-court-swamped-by->

remaining 130 cases, the Court published 45 verdicts as of May 1, 2013; all of which were dismissed at the pleadings stage for various procedural bars (lack of standing, *ratione temporis*, or lack of subject matter jurisdiction).<sup>127</sup>

In one of the few cases to allude to the merits, the Court delivered a blow to fundamental rights, arguing that in a case of commercial sport arbitration, constitutional provision Article 59, mandating certain requirements for entrance into an international sports leagues, trumped fundamental rights.<sup>128</sup> Many question whether the application to the Constitutional Court before final arbitration at the ECHR is just another hoop rights-seekers will have to jump through to prove domestic remedies are “illusory, ineffective, and inadequate” in order to bring a case at the ECHR final appellate stage.<sup>129</sup>

From the perspective of accessibility to judicial processes, access to courts for indigent rights-seekers remains difficult. Leading NGOs and non-profit advocacy groups seeking to represent those clients maintain offices outside of the country for safety and security reasons.<sup>130</sup> The recent arrest of seven top human rights lawyers on charges under the anti-terrorism act struck another blow to the civil society groups and the possibility of bringing cases to trial at all.<sup>131</sup> In Gezi, over fifty lawyers were arrested for protesting the police’s exorbitant violation of human rights.<sup>132</sup> This

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incomplete-individual-applications.aspx?pageID=238&nid=38154.

127. See, e.g., *Anayasa Mahkemesi* [Constitutional Court] 12/2/2013, 2012/947; *Anayasa Mahkemesi* [Constitutional Court] 03/05/2013, 2012/883; *Anayasa Mahkemesi* [Constitutional Court] 02/12/2013, 2012/171. For a complete list of decisions, see *Kararlar Bilgi Bankasi* [Database of Decisions], T.C. ANAYASA MAHKEMESİ, <http://www.anayasa.gov.tr/Kararlar/KararlarBilgiBankasi/> (last visited July 1, 2013).

128. *Akyuz v. Türkiye*, 2012/620, *Anayasa Mahkemesi* [Constitutional Court] (Turk. 2013), available at [http://www.kararlar.anayasa.gov.tr/kararYeni.php?l=manage\\_karar&ref=show&action=karar&id=10000323&content=](http://www.kararlar.anayasa.gov.tr/kararYeni.php?l=manage_karar&ref=show&action=karar&id=10000323&content=).

129. See BUCKLEY, *supra* note 90, at 36–38 (reporting the futility of “exhausting” domestic remedies prior to the individual application at provincial court levels).

130. BUCKLEY, *supra* note 90, at 1; *Frequently Asked Questions: Why Aren’t You Based in the Kurdish Regions?*, KURDISH HUMAN RIGHTS PROJECT, <http://www.khrp.org/about-khrp/faq.html#12> (last visited Apr. 15, 2013).

131. *Turkey: Anti-terror arrests target prominent human rights lawyers*, AMNESTY INTERNATIONAL (Jan. 18, 2013), <http://www.amnesty.org/en/news/turkey-anti-terror-arrests-target-prominent-human-rights-lawyers-2013-01-18>. In relation to the Gezi Park protests, see *Turkish journalists fired over coverage of Gezi Park protests*, THE INDEPENDENT (July 23, 2013), <http://www.independent.co.uk/news/world/europe/turkish-journalists-fired-over-coverage-of-gezi-park-protests-8727133.html>.

132. *New Blow to Rule of Law in Turkey: more than 50 lawyers arrested for denouncing*

is an attestation to both the lawyers' potential for revolutionary influence and the State's active suppression of said influence. Similarly, the press does not have the tools necessary to condemn inefficient or ineffective human rights protection practices lest it incur the possibility of prosecution itself.<sup>133</sup> These exogenous factors also play a great role in the ability of the courts to exercise their interpretive powers. Cases that are not brought for procedural reasons independent of legal hurdles cannot be decided, and hence cannot create precedent for best practices or future rights-guarantees at all. Success in the courts would also translate into an increase in accessibility by raising media awareness of major or local cases and anecdotally increase the perception of the court as an appropriate place for just arbitration.

In fundamental rights cases other than the individual applications, deference is given to the ECHR and Article 90; Article 90 stipulates that in a conflict between national and international law, the Court should look to the latter.<sup>134</sup> From 1963-2003, Turkish high courts cited ECHR opinions directly only thirty-eight times, and of those, jurisprudential hooks were invoked a mere five times.<sup>135</sup> Usually, scholars, concerned with the low number of references, stop their analysis there and mark the statistic down as another example of Turkey's troublesome relationship with fundamental rights. When jurisprudential hooks are invoked, however, the language of the opinions underscore the values of the ECHR, and indicate a respect for the Court and an understanding of its universal application under which Turkey falls. In a 1999 decision regarding the alleged unjust taking of a plot of land to build an elementary school, the Court poetically stated, "Contemporary democracies are regimes that guarantee basic rights and freedoms

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*the repression of protesters*, INTERNATIONAL FEDERATION FOR HUMAN RIGHTS (FIDH) (June 12, 2013), <http://www.fidh.org/en/europe/turkey/new-blow-to-rule-of-law-in-turkey-more-than-50-lawyers-arrested-for-13438>.

133. See *The press in Turkey: Not so free*, *supra* note 115.

134. Kaboğlu & Koutnazis, *supra* note 50, at 468.

135. *Id.* at 504. This does not include lower provincial court decisions. See also Basak Cali, *Turkey's Relationship with the European Court of Human Rights Shows That Human Rights Courts Play a Vital Role, But One that can Often Be Vastly Improved*, LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE (Mar. 14, 2012), <http://blogs.lse.ac.uk/europpblog/2012/03/14/turkey-echr> (suggesting means of improvement in Turkish courts for citing ECHR decisions); Gerek Sahnaz and Ali Riza Aydin, *Türk Anayasa Yargısında İnsan Hakları Avrupa Sözleşlerinin Yeri* [The position of the ECHR in the case of law of the Constitutional Court], 37 AMME İDARESİ DERGİSİ 83 (2004) (displaying a table of Constitutional Court judgments citing ECHR case law).

to the widest degree. Limitations that restrict or completely limit the essence of these fundamental rights and freedoms cannot be accepted as consistent with the requirements of the democratic social order.”<sup>136</sup> Application of Article 90 has been minimal.

Similarly, in *Unal Tekeli v. Turkey*, a 2011 case decried by many as a retrogressive flaunting of an ECHR decision, the Court noted its commitment to the ECHR and fundamental rights, but read the provision on rights of men and women to change their surnames at marriage as a matter of family law that required overturning by means of legislative action.<sup>137</sup> The Court pleaded for the legislature to change the law in its opinion, again agreeing with the majority of the ECHR’s findings on the persistent stigmatization of women as a class based on their submission of their surnames, but finding the Court itself unable to usurp its power by making new law.<sup>138</sup>

Ultimately, the *Unal Tekeli* case brings to light the most outstanding remaining impediment and source for non-constitutional reform in the hands of the judiciary: attitudes and practices of judges. While the case alighted an international uproar, the nine to eight verdict of a court that typically gives unanimous decisions suggests that there was a struggle of interpretation in the bowels of the Court’s chambers.<sup>139</sup> In cases not tied to the Turkish political system (such as the foundation of electoral parties), the Court hesitates to take a strong position on the application of fundamental rights.<sup>140</sup> The Turkish Justice Academy has not yet published public data on the trainings’ effects or its reception by the judges.<sup>141</sup> Still, the few citations to ECHR decisions in national jurisprudence documented above suggest that training has not yet resulted in noticeable change. Yet this struggle of interpretation to balance fundamental rights is ripe for the triumph of rights over state independence. If nothing else, the nine to eight verdict in *Unal Tekeli* shows the debate in its basic form is already underway.

Evidence suggests that first-instance courts outside major cities make use of ECHR case law more often than the paltry

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136. Anayasa Mahkemesi [Constitutional Court], 1999/33, 1999/51, (Turk. 1999).

137. Anayasa Mahkemesi [Constitutional Court], 2009/85, 2011/49, (Turk. 2011) Appeal from Fatih 2nd Family Court, Ankara 8th Family Court, Kadikoy 1st Family Court.

138. *Id.*

139. *Id.* Part VI.

140. See *id.* Part III-B (providing evidence contrary to the fears of Turkish constitutional scholars of the judiciary as juristocracy).

141. See *How Influential is International Law on the Constitutional Level?: The Turkish Case*, *supra* note 83.

statistics presented earlier.<sup>142</sup> These, along with the cases in the highest courts citing ECHR jurisprudence, tend to be written by and large by younger judges, offering a glimmer of hope for the near-future generation of judges' reliance on international legal interpretation.<sup>143</sup> A report by a member of the European Commission, responding to recent reforms noted that the major factor holding back progress appeared to be "established attitudes and practices followed by judges and prosecutors at different levels giving precedence to the protection of the state."<sup>144</sup> This statist allegiance of judges is part of the larger hurdle of judicial independence that, despite the structural reforms described in Part III, remains in arrears.

Attitudes and practices of judges may change if there is willingness to implement new types of legal reasoning that balance international law norms, as discussed above. They may also change with the initial selection of judges chosen to adjudicate constitutional cases. The current non-independent administration of the judicial system plays a major role in hampering the progress of constitutional or statutory reform. The UN,<sup>145</sup> the European Commission,<sup>146</sup> and Turkish non-governmental legal organizations<sup>147</sup> agree that the 2010 amendments restructuring the Constitutional Court and separating the HSYK from the Ministry of Justice (known as an arm of the AKP) did not amount to a fundamental reform of the type necessary to promote an independent judiciary. Principal complaints about the lack of actual change cite the HSYK's purely administrative role,<sup>148</sup> the continued

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142. Kaboğlu & Koutnazis, *supra* note 50, at 505.

143. *Id.*

144. Hammarberg Report, *supra* note 51, at 24 (commenting that this is particularly true in relation to claims of violation of freedom of expression, freedom of association, and freedom of assembly).

145. U.N. GA REPORT OF THE SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS ADDENDUM, MISSION TO TURKEY, A/HRC/20/19/ADD.3 ¶¶ 26–50 (4 May 2012) (Gabriel Knaul) [hereinafter U.N. GA REPORT].

146. OPINION ON THE DRAFT LAW ON JUDGES AND PROSECUTORS OF TURKEY, EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), CDL-AD 4 (2011) (Mar. 29, 2011).

147. THE HIGH COUNCIL OF JUDGES AND PROSECUTORS IN TURKEY: ROUNDTABLE DISCUSSION ON ITS NEW STRUCTURE AND OPERATIONS, TESEV DEMOCRATIZATION PROGRAM POLICY REPORT SERIES 6–12 at 36 (2012). This report is based on discussions attended by representatives of YARSAV (the Association of Judges and Prosecutors) and Demokrat Yargi (the Democratic Judiciary Association).

148. *Id.* at 34. A representative of the defense bar also noted how little the system respects the rights of defense attorneys, most notably because judges and prosecutors hold

submission of those elected to the HSYK to the Ministry of Justice and fears of executive pandering to further job prospects,<sup>149</sup> and the inapplication of the 2010 amendment's grant of an independent HSYK budget separate from that of the Ministry's.<sup>150</sup>

As of 2013, the AKP has proposed further changes to the HSYK that retract the broad election by non-executive branch members of judges from ten to six and expand the number directly appointed by the prime minister.<sup>151</sup> The most comprehensive Turkish legal NGO report on the HSYK reconfiguration includes a nine-point checklist of recommendations that sums up the greatest challenges currently facing the judiciary.<sup>152</sup> The judiciary's ability to enact reform in accordance with international and newly granted national rights will live or die by its progress vis-a-vis the report's structural and interpretory reform recommendations.<sup>153</sup>

Statutory and constitutional tools on paper have been given to the judiciary to find in favor of fundamental rights; the judiciary's

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interchangeable positions and work in close physical proximity in state-funded offices. *Id.* at 34–40.

149. OPINION ON THE DRAFT LAW ON JUDGES AND PROSECUTORS OF TURKEY, *supra* note 146, at 6. The EU Commission report also remains wary of celebrated reforms, noting that despite many advances made, the wording of the laws remain imprecise and undefined in scope. *See, e.g., id.* at 14–16 (referring to a new policy for judicial inspectors).

150. U.N. GA REPORT, *supra* note 145, at 8. Amongst other concerns, the UN report particularly notes that the appointment and transfer system for judges and prosecutors is still governed primarily by officials of the Ministry of Justice, whose ties run close to Erdogan and the whim of the AKP. *Id.* at 11.

151. Abdullah Bozkurt, *EU's stake in Turkey's judicial council*, TODAY'S ZAMAN (May 17, 2013), [http://www.todayszaman.com/newsDetail\\_openPrintPage.action?newsId=315704](http://www.todayszaman.com/newsDetail_openPrintPage.action?newsId=315704). Additional proposals include the removal of seats appointed to the senior courts and the Justice Academy, both reforms added in the 2010 Amendments, and the re-division of the HSYK with the heads of each branch either Ministry of Justice officials or people appointed by the Ministry of Justice. All of these changes directly rescind the modicums of judicial independence that have developed in the course of the most recent constitutional amendments and legislative reforms.

152. TESEV DEMOCRATIZATION PROGRAM POLICY REPORT, *supra* note 147, at 52. The list is reproduced here: 1) judges and prosecutors need to have separate councils, 2) in the recruitment of judges, a committee dominated by the Ministry of Justice plays a determining role. This needs to change, 3) the Justice Academy, as it stands now, falls short of meeting the need for professional training. The Academy must be reformed, 4) the election system in effect at HSYK must be changed. The method of election must be decided upon after broad-based discussion, 5) the reflex to safeguard the state is very powerful at the judiciary, and existing precedents reinforce it. Novel interpretations are necessary especially in regards to organized crimes and terrorist crimes, 6) judges need to act and decide independent of the state, 7) judicial law-enforcement force must be established as soon as possible, 8) Appellate Courts must be established, 9) court budgets and courtrooms must become autonomous.

153. TESEV DEMOCRATIZATION PROGRAM POLICY REPORT, *supra* note 147, at 56.



internal resistance to embracing these rights most directly stunts future growth.<sup>154</sup> For now, international law and international courts must guide the interpretation of domestic law in accordance with universal terms. Article 2 of the current constitution makes it clear that “respecting human rights” and being “governed by rule of law” are two unalterable characteristics of the Turkish state.<sup>155</sup> Thus, even without a change in the constitutional law, the current state of law in Turkey mandates judicial interpretation favorable towards and consistent with human rights.<sup>156</sup> Simple numerical calculations of citations to ECHR jurisprudence may be too crude a measure of the judiciary’s nod to international law as more cases are adjudicated at the Constitutional Court via the individual application.<sup>157</sup> However we choose to measure and interpret the judiciary’s application of international law norms, the rise or fall of this measurement will be the most telling figure of Turkey’s human rights protection as the country marches forward.<sup>158</sup>

#### V. CONCLUSION: AN EXTRA-CONSTITUTIONAL MODEL FOR SAFEGUARDING HUMAN RIGHTS, OR ALL THINGS IN THEIR TIME

The 1982 constitutional vise-grip on civil liberties began discussions of human rights reform and the need to empower certain institutional actors to protect fundamental rights and basic freedoms.<sup>159</sup> That rallying cry has been slowly expanded over the past thirty years.<sup>160</sup> Now, with the Reconciliation Commission reportedly working five days a week on a new constitutional draft, the most natural place to codify fundamental rights protections is

154. See, e.g., *Anayasa Mahkemesi* [Constitutional Court], 1967/10, 1967/49 (Turk. 1967) (interpreting the “right to property” in Article 36 of the Constitution and finding that property in the Turkish constitution embodies a different meaning than the ECHR-used term “possession,” thereby invalidating the protection of intellectual property rights found in ECHR jurisprudence because of the Turkish Constitutional Court’s narrow interpretation of the constitution).

155. TÜRKİYE CUMHURİYET ANAYASASI [CONSTITUTION OF THE REPUBLIC OF TURKEY] art. II (“The Republic of Turkey is a democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble.”) (as translated).

156. *‘Yetmez ama evet’ ne demektir?*, *supra* note 34.

157. Aslan, *supra* note 90, at 1.

158. International Relations Page, CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY, <http://www.anayasa.gov.tr/index.php?l=template&id=233&lang=1&c=1> (last visited July 29, 2013)

159. TÜRKİYE CUMHURİYET ANAYASASI 1961, *supra* note 21, at 1.

160. Akdag, *supra* note 2, at 1–2.

the future constitution.<sup>161</sup> Yet, concerns remain because of the major lingering disagreement between various political parties.<sup>162</sup> Even if a compromise can be reached, concerns related to the value of the constitution's tenets to stand for higher law and to serve the citizenry in the manner of truly successful constitutions remain.<sup>163</sup>

Yet fundamental rights receive protection in two basic manners: through their creation in the national sphere, or through the security and safeguarding of existent rights via internal and external impetus.<sup>164</sup> A new constitution may provide the former type of protection. However, executive and legislative reforms, similar to those developed over the past decade, may continue to grant new rights absent the much larger constitutional reform. The foregoing survey of the application of rights has shown that the second pillar—safe-guarding existent rights granted—is not fully in force. Human rights protection will benefit infinitely more from a reconception of the second pillar absent a new constitution.

Media, academic institutions, and NGOs may play a role in promoting and publicizing the protection of existing rights. Foreign institutions, including the ECHR, may play a role in helping to concretely define the scope of rights and the dialogue that civil actors should use in discussing such rights. Most importantly, the judiciary now sits at the forefront of human rights protection. Passage of statutory and executive reforms have empowered the Court and provided it with a basic level of independence; foreign actors have instructed the Court on how to use its newfound power; and NGOs and other civil service actors help provide cases to fuel the Court's jurisprudential acumen.<sup>165</sup> What remains is the test of time—crucially, the two-year test period of the individual application—and the test of independence, still cast into doubt by insufficient separation of the Ministry of Justice and the HSYK board of judicial oversight.

In a recent speech given at the Turkish Bar Association, one lawyer sketched out the history of human rights, tracing the concept back to the Magna Carta of 1215, the wars of independence

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161. *Anayasa Uzlaşma Komisyonu Haftada 5 Gün Çalışacak*, ZAMAN [Constitutional Commission Will Work 5 Days a Week] (Feb. 19, 2013), [http://www.zaman.com.tr/politika\\_anayasa-uzlasma-komisyonu-haftada-5-gun-calisacak\\_2055765.html](http://www.zaman.com.tr/politika_anayasa-uzlasma-komisyonu-haftada-5-gun-calisacak_2055765.html).

162. Jha, *supra* note 40, at 1–2.

163. 'Yetmez ama evet' ne demektir?, *supra* note 34.

164. Akdag, *supra* note 2.

165. Kiliç, *supra* note 84, at 1–3.

in the U.S., France, and Holland, terminating the line of human rights sentinels with modern-day Turkey.<sup>166</sup> There is a Turkish proverb that says: the cock who crows too soon will pay with its head; it represents the Turkish culture's implicit sense of a geo-spatial order of things not to be disturbed artificially. For a long time, the subject of human rights in Turkey was like the proverbial cock, cowed from fear of premature decapitation.<sup>167</sup> The current constitutional debates have shown that no actor in society believes it is too early for a human rights revolution.<sup>168</sup> Human rights protections have been the underlying compromise of constitutional debates, with the more difficult issues left unsolved until the final hours before the Commission's mandate expires.<sup>169</sup> These other concerns mandate constitutional change and dominate debates.

Human rights protection, however, does not need a new constitution to grow and flourish. Extra-constitutional actors can secure existent human rights, and the judicial branch can enforce national and international norms with tools already in place. Thousands of judicial officials have the potential to influence the zeitgeist of hundreds of thousands of citizens, provided they are independent enough to use these tools. Here, at the fiftieth anniversary of the Constitutional Court's existence, the Court celebrates by coordinating symposia and conferences representing a commitment to idea-sharing and embracing universal norms.<sup>170</sup> There is no better time than the present to make those commitments transparent through the national implementation of human rights norms.

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166. Ender Çetinkaya, *Insan Hakları Uluslararası Sözleşmelerinin İç Hukukta Doğrudan Uygulanması* [The Direct Application of Human Rights on Domestic Law] (Türkiye Barolar Birliğince 2004), available at [http://www.danistay.gov.tr/1%20-%20baskan\\_konusma.htm](http://www.danistay.gov.tr/1%20-%20baskan_konusma.htm).

167. Seferoglu, *supra* note 1, at 2.

168. International Relations Page, *supra* note 158.

169. Dönmez, *supra* note 4.

170. See generally International Relations Page, *supra* note 158.