

Yanas

mayan  
Excerpt  
[More Information](#)

PART I  
INTRODUCTION

---

Yanas

mayan  
Excerpt  
[More Information](#)

Yanas

mayan  
Excerpt  
[More Information](#)

## Introduction

Felix Petersen and Zeynep Yanaşmayan

*“Turkey is an unfinished symphony. We have been looking for a constitution for the last 150 years.”<sup>1</sup>*

### 1 APPROACH OF THE BOOK: STUDYING THE FAILURE OF CONSTITUTION MAKING

With the fall of the Iron Curtain and the dissolution of the Soviet Union, liberalism appeared to become the only game in town.<sup>2</sup> The political cataclysms of the late 1980s triggered a wave of scholarship in political science and constitutional law on the prospects of political change. In particular, constitutionalism, constitution making, and constitutional politics became dominant topics accompanying the debate on transformations in the socialist states of Eastern and Central Europe, and later South Africa and Latin American countries.<sup>3</sup> The enthusiasm of the historical moment made most contributions to this debate focus on the conditions that make transformation (i.e., constitutionalization or re-constitutionalization) successful. As most transitions were from some sort of authoritarianism or autocracy to democracy, the question at the heart of scholarship has been how to successfully

<sup>1</sup> Zühtü Arslan (current president of the Turkish Constitutional Court), as quoted in Gary J. Jacobsohn, *Constitutional Identity* (Cambridge, MA: Harvard University Press, 2010), 333.

<sup>2</sup> Francis Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992).

<sup>3</sup> The following are a few select contributions to this debate: Jon Elster and Rune Slagstad, eds., *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988); Bruce Ackermann, *We the People, Volume 1: Foundations* (Cambridge, MA: Harvard University Press, 1991); Jon Elster, “Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea,” *Public Administration* 71, nos. 1–2 (1993): 169–217; Andrew Arato, “Forms of Constitution Making and Theories of Democracy,” *Cardozo Law Review* 17, no. 1 (1995): 191–231.

Yanas  
Excerpt[More Information](#)

constitutionalize a liberal democratic state. Today, constitutional politics remains a hot topic, but there is one significant difference. In the course of democratization processes and democratic backsliding in a variety of countries (e.g., Russia, Turkey, Hungary, United States, and Brazil), scholars have shifted their attention toward conditions that can prevent a liberal democratic state from becoming autocratic.<sup>4</sup> What brings these perspectives together is their explicit focus on conditions that facilitate the establishment or maintenance of a constitutional system.

This book shares the overall epistemological interests of scholarship on political transformation and constitutionalization. However, our focus is on conditions that facilitate failure. Why is it interesting to study failure in the first place? Although failure is typically assumed to be bad, the reality of it is more ambiguous. Amy C. Edmondson argues that for organizations, in her case economic companies, failure is “sometimes . . . even good,” as it provides “valuable new knowledge that can help an organization.”<sup>5</sup> As successful social and political processes depend on the knowledge of potential pitfalls and mistakes to be avoided, studying failed social and political processes is a promising avenue for social research in general, and for research on constitutional politics in particular. The knowledge gathered in this book will deepen and expand scholarship on constitution making. It may also serve constitution makers to establish strategies and procedures that increase the likelihood of successful constitution making.

In constitutional scholarship, the study of failure has thus far not played a prominent role. With respect to the question of why constitutions fail, two contributions stand out. On the basis of his study of state constitutions in the United States, Donald Lutz shows that longer constitutions are more likely to be quickly replaced.<sup>6</sup> He identifies at least three reasons why a constitution might be replaced: new elites might prefer different values, institutions, or norms; constitutions might be outdated and not in sync with the times; extensive amendments might have altered a constitution to an extent that re-

<sup>4</sup> See Tom Ginsburg and Aziz A. Huq, “How to Lose a Constitutional Democracy,” *UCLA Law Review* 65 (2018): 78–169; Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Crown, 2018); David Waldner and Ellen Lust, “Unwelcome Change: Coming to Terms with Democratic Backsliding,” *Annual Review of Political Science* 21 (2018): 93–113; Roberto Stefan Foa and Yascha Mounk, “The Danger of Deconsolidation: The Democratic Disconnect,” *Journal of Democracy* 27, no. 3 (2016): 5–17.

<sup>5</sup> Amy C. Edmondson, “Strategies for Learning from Failure,” *Harvard Business Review* 89, no. 4 (2011): 48–55.

<sup>6</sup> Donald S. Lutz, “Patterns in the Amending of American State Constitutions,” in *Constitutional Politics in the States: Contemporary Controversies and Historical Patterns*, ed. G. A. Tarr (Westport, CT: Greenwood Press, 1996), 24–46.

mayan  
 Excerpt

[More Information](#)

constitutionalization is necessary.<sup>7</sup> In their expansive study on the endurance of national constitutions, Zachary Elkins, Tom Ginsburg, and James Melton find that the “average life expectancy” of constitutions is 19 years. Environmental factors and constitutional design choices are reasons that determine the longevity or endurance of constitutions.<sup>8</sup> Interestingly, economic crises do not have a significant impact on constitutional change, nor do “loss and gain of territory” or “defeat in war.”<sup>9</sup> With regard to constitutional design choices, they elaborate on three significant traits that characterize enduring constitutions: (1) the flexibility of a constitution, or its “ability . . . to adjust over time,”<sup>10</sup> matters for its survival throughout various historical situations; (2) the more specific a constitution is, the more easily it can be enforced, which prevents contestation around the constitution and makes it more likely to endure; and (3) inclusion of “important groups in society in the design and maintenance of the constitution”<sup>11</sup> increases the number of stakeholders, which makes it more likely that a constitution lives on. Looking at their findings from the other side, we can conclude that constitutions are likely to fail when they are rather rigid and unable to adapt over time; when they are vague, difficult to enforce, and hence easily contested; and when the constitution-making process and constitutional politics exclude important social groups.

Failure in constitution making is also rarely studied, although exceptions exist: Stefan Köppl has published a comprehensive study of the failure of constitutional reform in Italy, showing that disagreement among political parties and the two chambers of Parliament led to the failure of three reform attempts between 1983 and 1998.<sup>12</sup> Hélène Landemore, Jon Ólafsson, Alexander Hudson, and Thorvaldur Gylfason have all analyzed the failure of constitution making in Iceland in the 2010–2013 period. All four contributions illustrate that the disagreement and lack of communication between the constitution-making body and political elites and parties obstructed the coalition building that would have been necessary to push the constitution through

<sup>7</sup> Ibid., 30.

<sup>8</sup> They explain: “Consider design factors as those having to do with the content and drafting process of the constitution itself and environmental ones as those pertaining to the international and national environments that host the constitution.” See Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (New York: Cambridge University Press, 2009), 2.

<sup>9</sup> Ibid., 136.

<sup>10</sup> Ibid., 207.

<sup>11</sup> Ibid., 208.

<sup>12</sup> Stefan Köppl, *Italien: Transition ohne Reform? Gescheiterte Anläufe zur Verfassungsreform 1983–1998 im Vergleich* (Stuttgart: ibidem, 2003).

mayan  
Excerpt  
[More Information](#)

Parliament, which eventually led to the failure of popular constitution making in Iceland.<sup>13</sup>

Hanna Lerner studies the failed constitution-making processes in Israel and India. She concludes that constitution making failed in Israel in 1949 because constitution makers from different camps were unable to reconcile their conflicting ideals about “state institutions and Jewish religious tradition.”<sup>14</sup> In India, on the other hand, the constituent assembly was unable to draft a constitution for the united India in 1948 because the Congress Party and the Muslim League fundamentally disagreed on very general issues (e.g., national identity, role of religion). The conflict was “imported” into the constitution-making process, and debates were shaped by contestation between the two political rivals that was clothed in legal language, but only served “to push through [the two parties’] ideological agendas.”<sup>15</sup> This ultimately led to the partition of the country and the founding of India and Pakistan. In a more recent contribution, Lerner also shows that constitution making in Indonesia and Egypt failed for similar reasons. In Indonesia (1955–1957), disagreement between agents aiming to constitutionalize an Islamic state and agents “who envisioned an all-inclusive Indonesian national identity rather than an exclusively Islamic identity” persisted throughout the constitution-making process. In Egypt (2012), the “Islamist and secular leadership [could not] achieve any kind of agreement concerning controversial fundamental issues such as the role of Islam and the secular identity of the state.”<sup>16</sup> Mara Malagodi studies the failure of constitution making in Pakistan (1947–1954) and Nepal (2008–2012), showing that in “both countries, significant segments of the political establishment felt threatened” by constitution making and “the direction of constitutional restructuring.” As constitution makers and “key political actors” could not agree on constitutionalization, the latter “mobilized against the

<sup>13</sup> Hélène Landemore, “Inclusive Constitution-Making: The Icelandic Experiment,” *The Journal of Political Philosophy* 23, no. 2 (2015): 166–191; Jon Ólafsson, “The Constituent Assembly: A Study in Failure,” in *Iceland’s Financial Crisis: The Politics of Blame, Protest, and Reconstruction*, eds. V. Ingimundarson, P. Urfalino, and I. Erlingsdóttir (London: Routledge, 2017); Alexander Hudson, “When Does Public Participation Make a Difference? Evidence from Iceland’s Crowdsourced Constitution,” *Policy & Internet* 10, no. 2 (2017): 185–217; Thorvaldur Gylfason, “Chain of Legitimacy: Constitution Making in Iceland,” in *Constituent Assemblies*, eds. J. Elster, R. Gargarella, V. Naresh, and B. E. Rasch (New York: Cambridge University Press, 2018).

<sup>14</sup> Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge: Cambridge University Press, 2011), 196.

<sup>15</sup> *Ibid.*, 34.

<sup>16</sup> Hanna Lerner, “Constituent Assemblies and Political Continuity in Divided Societies,” in *Constituent Assemblies*, eds. J. Elster, R. Gargarella, V. Naresh, and B. E. Rasch (New York: Cambridge University Press, 2018), 68–71.

mayan  
 Excerpt

[More Information](#)

assemblies, sought to obstruct their proceedings, and put an end to their constitution-making work.”<sup>17</sup>

Summarizing the findings of these studies on failed constitution making, it can be concluded that, broadly speaking, deep disagreements over the content and form of projected constitutions and the incapacity of constitution makers to come up with strategies to overcome divisions and facilitate consensus usually lead to failed constitution-making processes. This book aims to contribute to the debate on failed constitutional engineering with an in-depth analysis of a largely understudied case, the failed popular constitution-making process in Turkey in the 2011–2013 period.<sup>18</sup>

### 1.1 *Popular Constitution Making in Turkey: Overcoming the Past or Back to the Future?*

In the fall of 2011 the Constitutional Conciliation Commission (*Anayasa Uzlaşma Komisyonu*, AUK) was established by the Turkish Grand National Assembly (*Türkiye Büyük Millet Meclisi*, TBMM) with the aim of drafting a new constitution for the country in consultation with civil society members and the participation of individual citizens. Hopes were high that through this process Turkish society could break with a largely undemocratic and exclusionary history of constitution making. In other words, in historical perspective this attempt at popular constitution making was an anomaly, and it seemed that the polarized Turkish society might finally find conciliation and re-constitutionalize the foundations of the Turkish state in a democratic manner. Divided by ideological predispositions and political preferences, however, delegates involved in the constitution-making process were

<sup>17</sup> Mara Malagodi, “Constituent Assembly Failure in Pakistan and Nepal,” in *Constituent Assemblies*, ed. J. Elster et al., 79–108, 106.

<sup>18</sup> Exceptions include Ergun Özbudun, “Constitution Writing and Religious Divisions in Turkey,” in *Constitution Writing, Religion and Democracy*, eds. A. Bali and H. Lerner (Cambridge: Cambridge University Press, 2016); Elif Gözler, “Turkey’s New Constitution-Making Attempt and the Participation of Minority Organizations during the Public Consultation Process,” in *Contemporary Turkey at a Glance II: Turkey Transformed? Power, History, Culture*, eds. M. Ersoy and E. Üzyürek (Wiesbaden: Springer, 2017); Bertil Emrah Oder, “The Much Awaited and Deeply Controversial Constitutional Process: Learning from Turkey’s Failure in 2013,” in *Themes of Conflict in Middle Eastern Democracies: A Comparative Perspective from Turkey and Israel*, ed. Friedrich Ebert Stiftung and Van Leer Jerusalem Institute (Istanbul and Jerusalem, 2014); Oğuz N. Babüroğlu and Gülrü Z. Göker, “Going Large Scale: The Polling Conference Process for Participatory Constitution Making in Turkey,” *Action Research* 12, no. 4 (2014): 374–391; Zeynep Yanaşmayan, “Oppositional Usages of Europeanization in Turkish Constitution-Making: Discussions on Religious Freedom,” *Turkish Studies* 18, no. 4 (2017): 644–664.

Yanaşmayan  
Excerpt  
[More Information](#)

eventually unable to agree on a significant number of constitutional provisions. Of 172 provisions initially slated for debate for the new constitution, the AUK reached agreement on only 60 articles. Consequently, in the fall of 2013 the constitution-making process was abandoned without a full draft having been agreed on, let alone a new democratic constitution having been enacted.

Following the turmoil of the violently repressed Gezi Park protests in 2013, the popular election of Recep Tayyip Erdoğan to the presidency in 2014, the collapse of the Kurdish peace process, and the snap elections of 2015, the political sphere became even more polarized. After the failed coup d'état in 2016, the ruling Justice and Development Party (*Adalet ve Kalkınma Partisi*, AKP), in coalition with the Nationalist Movement Party (*Milliyetçi Hareket Partisi*, MHP), adopted constitutional amendments in April 2017 that in effect transformed Turkey into a hyper-presidential political system in which checks and balances are significantly weakened. These amendments confirmed a “growing and unprecedented consensus” among scholars that Turkey is transitioning to a form of authoritarianism.<sup>19</sup> In other words, while in 2011 Turkish society was set to break with the legacy of undemocratic constitution making by organizing an inclusive and participatory constitution-making process, by 2017 the country had already returned to the established path of majoritarian imposition in constitution making.<sup>20</sup> But what happened in between? And why did the democratization effort initiated by the constitution-making process fail?

As expected by experts familiar with Turkish politics and Turkey's constitutional history, irreconcilable societal divides – or rather the ways in which they have been reflected in the “red lines” drawn by the various

<sup>19</sup> Zenonas Tziarras, “Erdoganist Authoritarianism and the ‘New’ Turkey,” *Southeast European and Black Sea Studies* 18, no. 4 (2018): 593–598, 594; see also Murat Somer, “Understanding Turkey's Democratic Breakdown: Old vs. New and Indigenous vs. Global Authoritarianism,” *Southeast European and Black Sea Studies* 16, no. 4 (2016): 481–503; Kerem Öktem and Karabekir Akkoyunlu, “Exit from Democracy: Illiberal Governance in Turkey and Beyond,” *Southeast European and Black Sea Studies* 16, no. 4 (2016): 469–480; Berk Esen and Şebnem Gümüüşçü, “Rising Competitive Authoritarianism in Turkey,” *Third World Quarterly* 37, no. 9 (2016): 1581–1606; Bahar Başer and Ahmet Erdi Öztürk, *Authoritarian Politics in Turkey: Elections, Resistance and the AKP* (London: I.B. Tauris, 2017).

<sup>20</sup> Hanna Lerner (*Making Constitutions in Deeply Divided Societies*, 36) identifies the 1924 constitution-making process as an act of constitutional imposition through secular elites. Andrew Arato (“The Constitutional Reform Proposal of the Turkish Government: The Return of Majority Imposition,” *Constellations* 17, no. 2 (2010): 345–350) defines the practice of constitutional amendment under the AKP since 2007 as a practice of majority imposition. For a general discussion of constitutional imposition, see Richard Albert, Xenophōn Kontiadēs, and Alkmēnē Phōtiadou, eds., *The Law and Legitimacy of Imposed Constitutions* (London: Routledge, 2019).

mayan  
Excerpt

[More Information](#)

political parties involved in the process – have played a significant role in the failure of popular constitution making in 2011–2013.<sup>21</sup> “Red lines” became particularly resilient over time, not least due to the growing suspicion of the process, which deteriorated immensely after the AKP’s presidentialism proposal was announced, and to then-Prime Minister Recep Tayyip Erdoğan’s regular interference in the work of the AUK. Moreover, the lack of experience with inclusive constitution making meant that the AUK did not always establish the most favorable procedures for its functioning. The initial deadline (end of 2012) turned out to be too ambitious and short-sighted; the predetermined time frame only served to increase external pressure. The unanimity rule for decision-making effectively impeded any meaningful coalition building, allowing the AKP to hijack the process with its insistence on presidentialism, a political system that the other three parties were unwilling to accept.

In hindsight, the party that benefited the most from the failure of popular constitution making was the ruling AKP, which ended up finding a partner in crime, the MHP, to help fulfill its aspirations. The failure of the constitution-making process allowed the regime to further discredit democratic politics and to justify a return to the tradition of majority imposition in constitution making. Many commentators, including some of the contributors to this book, argue that the process was actually never meant to succeed.<sup>22</sup> Clearly, the motivations and the power to influence the process were different for each actor involved. However, an in-depth look into the process reveals it to have been a significant missed opportunity, not only because of its break with exclusionary methods of constitution making, but also because of its “potential” break with (some of the) old statist-authoritarian ideas of Turkish constitutionalism (as evidenced by, for example, the agreement to make the concept of human dignity the founding principle of the constitution; agreement on constitutive rule-of-law principles; agreement to remove the politicized Council of Higher Education (YÖK) as a constitutional institution).<sup>23</sup>

<sup>21</sup> Ergun Özbudun, “Turkey’s Search for a New Constitution,” *Insight Turkey* 14, no. 1 (2012): 39–50; Burak B. Özpek, “Constitution-Making in Turkey after the 2011 Elections,” *Turkish Studies* 13, no. 2 (2012): 153–167.

<sup>22</sup> See Tombuş, Chapter 2 in this volume.

<sup>23</sup> Human dignity debates are analyzed in Yegen and Yanışmayan, Chapter 6 in this volume; rule-of-law debates and provisions are discussed in Böcü and Petersen, Chapter 5 in this volume; and debates on the removal of YÖK are elaborated in Abad Andrade, Chapter 7 in this volume.

mayan  
 Excerpt

[More Information](#)

Through an exhaustive analysis of party proposals, minutes of the Constitutional Conciliation Commission, contributions of civil society organizations and citizens, as well as public media discourse, this book analyzes the failure of the 2011–2013 constitution-making process. It sets out to explain the anomaly of popular constitution making in the context of the predominantly authoritarian past, present, and future of Turkish constitutional politics. The book complements the already strong scholarship on authoritarian constitutionalism by critically examining the mimicry of principles and practices of popular constitutionalism under autocratization and/or democratic deconsolidation in this understudied case. It also contributes to the heretofore scant literature on the reasons for the failure of constitution-making processes. Last but not least, it offers a missing piece to the scholarship on Turkish constitutionalism by discussing a recent chapter in Turkey's constitutional history that has been, up to now, relatively neglected.

## 2 STRUCTURE AND ARGUMENTS OF THE BOOK

The chapters in this book analyze the failure of popular constitution making in Turkey through a multidisciplinary prism that integrates political theory, comparative politics, sociology, constitutional and comparative law, and media and area studies. While pursuing different perspectives and developing different themes and arguments, all chapters historically embed the 2011–2013 constitution-making process with reference to past constitutions and constitution-making processes in Turkey. Overall, the chapters offer competing and yet complementary accounts of the process, relying on original data and different methodologies.

The book is divided into three parts: *Part 1: Introduction* provides a systematic analysis of why the 2011–2013 constitution-making process failed; *Part 2: Contextualizing Constitution Making in Turkey* situates the 2011–2013 process within Turkey's constitutional history as well as within the public debate in the media at the time; and *Part 3: Debating and Drafting the Constitution in 2011–2013* provides an in-depth analysis of the AUK debates on state organization principles, fundamental rights and freedoms, counter-majoritarian institutions, and the amendment-making rule. The appendix to the book includes a list of all AUK members (Appendix A) and lists of agreed and non-agreed articles produced by the AUK (Appendices B and C).

The first chapter provides a systematic analysis of the historical failing of democratic constitution making in Turkey and explains the failure of popular constitution making in 2011–2013. **Felix Petersen** and **Zeynep Yanışmayan** reconstruct minimal and maximal conditions of popular constitution making