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TURKISH CONSTITUTIONALISM: ANALYZING TURKEY'S DEMOCRATIC DEFICIT USING HISTORY, CULTURE, AND CONSTITUTIONAL THEORY

The Republic of Turkey possesses a rich cultural, political, and constitutional history. Turkey's constitutional history began during the Ottoman Empire, which ruled the geographic area covering modern-day Turkey from the fifteenth through the early twentieth century.¹ Turkey has changed significantly since the Ottoman Empire. Modern Turkey is a presidential republic, comprising eighty-one provinces with a population of over 82 million.² The country's highest legislative and judicial bodies are the Grand National Assembly and the Turkish Constitutional Court.³ Turkish constitutional history reflects common themes and tensions from the Republic's founding through today.

This paper discusses the history, themes, and purposes of Turkish constitutionalism. Part II summarizes Turkey's constitutional history beginning with the Ottoman Empire. Turkey's constitutional history and culture contextualize the country's modern democratic failures. Part III analyzes issues that exacerbate Turkey's democratic deficit, including Turkish nationalism and the Kurdish conflict, authoritarianism, a lack of public participation in constitution building, and Turkey's transition from strict to weak secularism. Part IV considers theoretical purposes of constitutions and applies that theory to the Turkish constitution. Although the constitution has failed to secure full international acceptance, the Turkish constitution is not a sham. Indeed, constitutional norms constrain Turkey's political elites. Still, elites have repeatedly used authoritarian constitutionalism to further their interests. Finally, the paper

¹ Halim Alperen Çitak, *A Brief History of Turkish Constitutionalism*, LMDP (Jan. 4, 2019), <http://lm-dp.org/a-brief-history-of-turkish-constitutionalism/>.

² *Turkey Summary*, CIA WORLD FACTBOOK, <https://www.cia.gov/the-world-factbook/countries/turkey/>.

³ *Id.*

examines how Turkish constitutional issues mutually reinforce one another and proposes strategies to improve Turkish democracy.

II. HISTORICAL DEVELOPMENT OF TURKISH CONSTITUTIONALISM

Politics, social culture, and historical context shape a country's constitution making.⁴ Namely, "constitutions are the products of political and ideological struggles and negotiations ... reflect[ing] the sociopolitical contexts from which they emerge."⁵ Turkish constitutionalism is no exception. Therefore, contemporary flaws in Turkish constitutionalism stem from Turkey's history, culture, and politics. This Part discusses the sociopolitical and historical context surrounding each of Turkey's constitutions. It contextualizes particular provisions in each constitution within the relevant historical and cultural landscape. Recurrent issues in Turkish constitutionalism have deep historic roots.

A. Turkey's Pre-Republican Constitutional History and First Republican Constitution

Turkish constitutional history dates to the end of the Ottoman Empire. In 1876, Sultan Hamid II proclaimed a new constitution inspired by the 1831 Belgian constitution.⁶ The 1876 constitution formally established an elected parliament, but because the parliament lacked authority to check the sultan, the government remained "absolutist" rather than democratic.⁷ Hamid II abolished the elected parliament in 1878.⁸ In 1908, the Party of Union and Progress convinced Hamid II to re-adopt the constitution, incorporating several amendments that established a parliamentary monarchy.⁹ Briefly, "associational and political pluralism" flourished in Turkey.¹⁰ During World War I, the Turkish parliament functioned under

⁴ See Yesim Bayar, *Constitution-writing, Nationalism, and the Turkish Experience*, 22 *NATIONS AND NATIONALISM*, 725, 728 (2016).

⁵ *Id.* at 726.

⁶ Mustafa Erdodan, *Religious Freedom in the Turkish Constitution*, 89 *THE MUSLIM WORLD*, 377, 377 (1999); K. Sarwar Hasan, *The Political Organization of Turkey*, 2 *PAK. INST. OF INT'L AFFS.*, 68, 71 (1949).

⁷ See Erdodan, *supra* note 6, at 377; Hasan, *supra* note 6, at 71-72.

⁸ Erdodan, *supra* note 6, at 377; see Hasan, *supra* note 6, at 72.

⁹ Erdodan, *supra* note 6, at 377; Hasan, *supra* note 6, at 72.

¹⁰ Erdodan, *supra* note 6, at 377.

the sultan's supervision until the sultan dissolved the parliament in April 1920.¹¹ After the Allies defeated the Ottoman Empire, Mustafa Kemal Atatürk led a national-liberationist movement against the Allied forces that had occupied Turkish cities during the war.¹² Kemal established the Grand National Assembly, Turkey's first national democratic body, to give the Turkish people a voice in the new government.¹³

The Grand National Assembly passed Turkey's first republican constitution on January 20, 1921.¹⁴ The assembly consisted of "different groups and ideologies [and] represented the national will at that time and place."¹⁵ This heterogeneous political coalition intended the 1921 constitution to temporarily resolve the most serious constitutional issues.¹⁶ Despite its emergency nature, the 1921 constitution arguably represents Turkey's most democratic constitution-building process because a variety of stakeholders actively participated in its drafting.¹⁷ Furthermore, the 1921 constitution established the principle of national sovereignty, which became a core principle of Turkish constitutionalism.¹⁸ However, despite embracing national sovereignty, the 1921 constitution did not abolish the monarchy.¹⁹

Unlike later Turkish constitutions, 1921 constitution accepted the "plural and conflictual character" of the Turkish people because it emerged during a unique political context.²⁰ Namely, the 1921 constitution embraced democratic pluralism as a byproduct of the "Congress Government Period,"

¹¹ *Id.*

¹² *See id.*; Çitak, *supra* note 1.

¹³ Erdodan, *supra* note 6, at 377.

¹⁴ Ertug Tombus, *The People and Its Embodiment: Authoritarian Foundations of Constitutions in Turkey* at 67 in *THE FAILURE OF POPULAR CONSTITUTION MAKING IN TURKEY: REGRESSING TOWARDS CONSTITUTIONAL AUTOCRACY* (Felix Petersen & Zeynep Yanasmayan 2020), <https://www-cambridge-org.proxy.wm.edu/core/books/failure-of-popular-constitution-making-in-turkey/32106A0B1EEB87CF2917724F617BB912>; *see* Nilay Arat & Asli Topukcu, *The Turkish Constitution of 1921: An Assessment of the "Double Constitution Period"*, IACL-AIDC BLOG (Mar. 9, 2021), <https://blog-iacl-aidc.org/2021-posts/2021/3/9/the-turkish-constitution-of-1921-an-assessment-of-the-double-constitution-period> (dismissing the "double-constitution period" theory and arguing instead that the 1921 constitution was a new constitution, not merely an amendment to the 1876 constitution).

¹⁵ Şule Özsoy Boyunsuz, *The Revolutionary Constitution of 1921*, IACL-AIDC BLOG (March 4, 2021), <https://blog-iacl-aidc.org/centenary-of-the-turkish-constitution/2021/3/4/the-revolutionary-constitution-of-1921-hbd7d>.

¹⁶ Tombus, *supra* note 14, at 67; *see* Çitak, *supra* note 1 (describing the 1921 constitution as "short, flexible, and transitory").

¹⁷ Boyunsuz, *supra* note 15.

¹⁸ *See id.*; Tombus, *supra* note 14, at 69; Çitak, *supra* note 1.

¹⁹ Tombus, *supra* note 14, at 68; *see* Çitak, *supra* note 1.

²⁰ Tombus, *supra* note 14, at 69.

which lasted from 1918-1920.²¹ During this period, localized congresses seized control after the Ottoman Empire lost in World War I.²² The congresses governed based "on the principles of representation, delegation, and participation."²³ Inspired by the congresses, the 1921 constitution prioritized localized power by codifying principles of political autonomy, grassroots direct democracy, and decentralization.²⁴ Thus, the 1921 constitution reflected relatively liberal democratic principles and a populist conception of governance.²⁵ However, Turkish pluralism remained transitory, as the 1924 constitution rejected localized government and direct democracy.²⁶

B. The 1924 Constitution

The Turkish Second Grand National Assembly ratified another constitution in 1924.²⁷ Notably, the 1924 constitution included a bill of rights inspired by France's Declaration of the Rights of Man and the Citizen.²⁸ The 1924 constitution reflected a democratic text and spirit: it codified a natural individual right to freedom, provided for popular sovereignty, and established the concept of constitutional supremacy.²⁹ Still, Kemal and the Republican People's Party used the 1924 constitution to establish a "pervasive institutional and ideological hegemony" in Turkish politics, such that the constitution's codified liberal democratic principles had little practical effect.³⁰ Unlike the 1921 constitution, which embraced localism and pluralism, the 1924 constitution imposed a "monolithic and homogenous political

²¹ *Id.*; see Arat & Topukcu, *supra* note 14 (noting that "local assemblies" governed during the period immediately preceding the 1921 constitution); Hasan, *supra* note 6, at 74 (describing how Kemal had to gain the support of district governors to establish his People's Party and the Grand National Assembly).

²² Tombus, *supra* note 14, at 69.

²³ *Id.*

²⁴ *Id.* at 69-70.

²⁵ See Boyunsuz, *supra* note 15.

²⁶ Tombus, *supra* note 14, at 69-71.

²⁷ *Id.* at 71; Çitak, *supra* note 1.

²⁸ See Turkuler Isiksel, *Between Text and Context: Turkey's Tradition of Authoritarian Constitutionalism*, 11 INT'L J. CON. L. 702, 712 (2013).

²⁹ *Id.*; Bayar, *supra* note 4, at 726; Çitak, *supra* note 1.

³⁰ Isiksel, *supra* note 28, at 712; see Felix Petersen & Zeynep Yanasmayan, *Explaining the Failure of Popular Constitution Making in Turkey (2011-2013)* in THE FAILURE OF POPULAR CONSTITUTION MAKING IN TURKEY: REGRESSING TOWARDS CONSTITUTIONAL AUTOCRACY 34 (Felix Petersen & Zeynep Yanasmayan 2020), <https://www-cambridge-org.proxy.wm.edu/core/books/failure-of-popular-constitution-making-in-turkey/32106A0B1EEB87CF2917724F617BB912>.

identity—the nation—that denied the existence of a plurality and internal conflict based on class or ethnic identities."³¹ Thus, a unitary concept of Turkish nationalism emerged.

Furthermore, because the 1924 constitution did not provide for checks and balances on majority rule, this constitution enabled Kemal's party to exert authoritarian control over the government.³² Indeed, the Republican People's Party leveraged the lack of constitutional minority protections to silence its opposition from 1923-1945.³³ Ultimately, scholars credit the 1924 constitution with establishing the authoritarianism that has remained "the main political logic" in Turkey.³⁴ Therefore, the 1924 constitution represented a democratic backsliding from the liberal democratic ideals codified in 1921. Authoritarianism became the rule in Turkish politics.

C. The 1961 Constitution

Turkey's next constitution emerged as a byproduct of such authoritarianism. During the 1950s, the Turkish Democratic Party developed and modernized Turkey in an attempt to join the growing international community of democracies.³⁵ Led by Prime Minister Adnan Menderes, the Democratic Party loosened government restrictions on businesses, removed travel restrictions, and shortened the period of compulsory military service.³⁶ Despite these liberal reforms, the Turkey experienced an economic crisis in 1955.³⁷ When the public criticized the Menderes government's economic policy response to the crisis, the government cracked down on the media, civil servants, academics, and opposing political parties.³⁸ The government's censorship spawned public protests, which in turn led to a military coup on May 27, 1960.³⁹

³¹ Tombus, *supra* note 14, at 71.

³² *Id.* at 63, 73; Petersen & Yanasmayan, *supra* note 30, at 35 (describing how the 1924 constitution did not codify "a strong separation of powers" and "facilitated and perpetuated the dominance of one political party and elite over society").

³³ Tombus, *supra* note 14, at 72.

³⁴ *Id.* at 72; *see* Isiksel, *supra* note 28, at 712; Çitak, *supra* note 1 (discussing how the Democratic Party established an authoritarian government under the 1924 constitution in the late 1950s).

³⁵ Joseph S. Szyliowicz, *The 1961 Turkish Constitution—An Analysis*, 3 ISLAMIC STUD. 363, 363 (1963).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 364; Tombus, *supra* note 14, at 73 (explaining how the government maintained control by "suppressing intraparty opposition and public protest").

³⁹ Szyliowicz, *supra* note 35, at 364; Tombus, *supra* note 14, at 73.

The coup's military leaders claimed to be restoring democracy in the wake of the Menderes government's authoritarian shift.⁴⁰ Thus, the military created the National Unity Committee, tasked with drafting a new constitution.⁴¹ After a public referendum, the military government adopted the constitution on July 9, 1961.⁴² Despite its military origins, the 1961 constitution became Turkey's most liberal constitution.⁴³

In particular, the 1961 constitution codified a "remarkable spectrum of liberal safeguards, democratic freedoms, and labor-friendly social and economic provisions," inspired by the European Convention on Human Rights, the Universal Declaration of Human Rights, and the 1949 German Constitution.⁴⁴ The 1961 constitution contained a bill of rights encompassing fundamental human rights as well as social and economic rights and established a "modified system of checks" that included a bicameral legislature.⁴⁵ Importantly, the constitution granted citizens inalienable individual rights—rather than revocable legal privileges derived from the state.⁴⁶ Moreover, the 1961 constitution removed qualifying language regarding citizens' rights and granted new freedoms, such as "the right of equality before the law ... immunity from unusual punishment ... the privacy of the domicile, the inviolability of the person ... freedom of communication ... freedom of travel and residence."⁴⁷ The new constitution prioritized freedom of the press, even requiring the government to provide facilities to newspaper, and proactively condemned media censorship.⁴⁸ Additionally, the 1961 constitution made the judicial system more independent by instituting a constitutional court with judicial review power, and it granted fair trial rights to citizens.⁴⁹ Therefore, the 1961 constitution shifted Turkey towards liberal democracy by expanding individual rights and codifying additional democratic safeguards.

⁴⁰ Szyliowicz, *supra* note 35, at 364; *see* Tombus, *supra* note 14, at 73 ("[T]he military purged the political system and reconstituted itself as the 'true representative' of the nation.").

⁴¹ Szyliowicz, *supra* note 35, at 364.

⁴² *Id.*; Tombus, *supra* note 14, at 73.

⁴³ Tombus, *supra* note 14, at 73.

⁴⁴ Isiksel, *supra* note 28, at 714.

⁴⁵ Szyliowicz, *supra* note 35, at 364.

⁴⁶ *Id.* at 367.

⁴⁷ *Id.*; *see* Çitak, *supra* note 1.

⁴⁸ Szyliowicz, *supra* note 35, at 364.

⁴⁹ *Id.*; Isiksel, *supra* note 28, at 714.

On the one hand, the military's role in the 1961 constitution-building process could represent an act on behalf of the Turkish people—rather than a naked power grab by military elites.⁵⁰ Thus, some scholars view the 1961 constitution as a compromise between the military leaders and civilian intellectuals.⁵¹ The military leaders furthered their influence while retaining the formal norm that civilians controlled the government.⁵² On the other hand, the 1961 constitution reflected authoritarianism in that the military "reiterated the claim that it occupies the place of power, no matter who wins the election."⁵³ Ultimately, the 1961 constitution's substantive commitment to liberal democratic principles obscured the extent of the military's influence.⁵⁴ Turkey's next constitution left no confusion regarding the military's authority.

D. The 1982 Constitution

Similar to the 1924 constitution, the 1982 constitution revolutionized Turkish politics by rejecting "social and political pluralism."⁵⁵ The military again seized control of the government following political unrest in the 1960s and 1970s, imposing a new constitution in 1982.⁵⁶ The 1982 constitution reflected authoritarianism both in substance as well as process.⁵⁷ Substantively, the 1982 constitution reversed some of the 1961 constitution's liberalism and restricted citizens' individual rights.⁵⁸ Procedurally, as in 1961, Turkey's military leaders claimed authority from the Turkish people for their intervention and new constitution.⁵⁹ In reality, the 1982 constitution lacked democratic legitimacy because the military controlled the drafting process.⁶⁰

⁵⁰ Tombus, *supra* note 14, at 73.

⁵¹ Szyliowicz, *supra* note 35, at 365.

⁵² *Id.*

⁵³ Tombus, *supra* note 14, at 75.

⁵⁴ Isiksel, *supra* note 28, at 713.

⁵⁵ Erdodan, *supra* note 6, at 378.

⁵⁶ Tombus, *supra* note 14, at 76; Çitak, *supra* note 1.

⁵⁷ Tombus, *supra* note 14, at 61.

⁵⁸ *Id.*

⁵⁹ *Id.* at 76; Çitak, *supra* note 1.

⁶⁰ Tombus, *supra* note 14, at 61; *see* Çitak, *supra* note 1 (discussing how military drafters intended the 1982 constitution to be "less libertarian" and to impose a "less participatory democracy" than the 1961 constitution).

Moreover, Turkey's military leaders never reestablished civilian control over the government, instead the military imposed an "agenda of complete social and political hegemony."⁶¹ For example, the military elites created the National Security Council, composed of five generals, designed to further entrench the military's power.⁶² The National Security Council acted as "a *de facto* higher cabinet in charge of setting the government's agenda, directing sensitive policy matters, and surveying the conduct of the civilian cabinet."⁶³ Military judges in State Security Courts became more powerful, and the 1982 constitution provided that civilians no longer controlled the military's budget.⁶⁴ Therefore, the 1982 constitution remains arguably the most authoritarian inflection point in Turkish constitutional history.⁶⁵

E. Select Constitutional Amendments to the 1982 Constitution

The Turkish constitution provides for a fairly liberal amendment process. The government has used this process to amend the 1982 constitution multiple times, ostensibly to resolve Turkey's democratic deficit.⁶⁶ Article 175, which prescribes the amendment process, requires one third of the members of the Grand National Assembly to propose constitutional amendments and three fifths of the members to adopt the proposed bill for an amendment.⁶⁷ If a majority of the members adopt the proposed amendment, the President may submit the amendment to a public referendum.⁶⁸ Article 104 allocates the power to propose public referenda on amendments to the President.⁶⁹

Turkey's ruling elites have amended the constitution in ways that further Turkey's commitment to liberal democracy. For example, in 1995, the government lifted a ban on political associations and

⁶¹ Isiksel, *supra* note 28, at 717.

⁶² Erdodan, *supra* note 6, at 378.

⁶³ Isiksel, *supra* note 28, at 717.

⁶⁴ *Id.* at 717-18.

⁶⁵ *See id.* at 716 (describing the 1982 Constitution as "a paradigmatic instance of authoritarian constitutionalism").

⁶⁶ Tombus, *supra* note 14, at 61.

⁶⁷ Türkiye Cumhuriyeti Anayasası [Constitution] Nov. 7, 1982, Madde 175, (Turk.), https://constituteproject.org/constitution/Turkey_2017?lang=en [hereinafter T.C. Ana.].

⁶⁸ *Id.*

⁶⁹ *Id.* at m. 104.

permitted political parties, political associations, and civil society to collaborate.⁷⁰ Additionally, the 1995 amendments strengthened the rights of labor unions, lowered the voting age to 18, and increased the number of parliamentary members.⁷¹ Furthermore, in 2007, Turkey held a constitutional referendum that provided for direct presidential elections by popular vote and a four-year presidential term limit.⁷² Recep Tayyip Erdoğan became Turkey's first popularly elected president in 2014.⁷³ Thus, elites have occasionally used the amendment process to move Turkey towards democracy.

On the other hand, Turkey's political elites have also leveraged the amendment process to consolidate power rather than to resolve Turkey's democratic deficit. Beginning in 2003, Erdoğan and the Justice and Development Party (AKP) have used Turkey's constitutional amendment process to disempower the military elite and entrench the AKP in power.⁷⁴ Indeed, the AKP has used the constitutional process to defeat "constitutional obstacles to its own bid to dominate ... the bureaucracy, judiciary, military, and the public education system."⁷⁵ For example, in July 2016, a military coup attempted—and failed—to overthrow Erdoğan's government.⁷⁶ In response, the AKP supported a constitutional referendum proposing eighteen amendments.⁷⁷ On April 16, 2017, 51.3 percent of the population voted in favor of the amendments, which replaced the office of the Prime Minister and Turkey's parliamentary system with an Executive Presidency and a presidential system.⁷⁸ Called "arguably the most important development in the country's history,"⁷⁹ the 2017 referendum removed

⁷⁰ FRIEDRICH EBERT STIFTUNG, *ON THE WAY TO A NEW CONSTITUTION IN TURKEY: CONSTITUTIONAL HISTORY, POLITICAL PARTIES, AND CIVIL PLATFORMS* (2011).

⁷¹ *A Timeline of Turkish Constitutional History*, TRT WORLD (Apr. 12, 2017),

<https://www.trtworld.com/turkey/turkeys-constitutional-history-a-timeline-334848/amp>

⁷² *Id.*; *Turkey Profile - Timeline*, BBC (June 24, 2019), <https://www.bbc.com/news/world-europe-17994865>.

⁷³ *A Timeline of Turkish Constitutional History*, *supra* note 71.

⁷⁴ *See* Isiksel, *supra* note 28, at 725.

⁷⁵ *Id.* at 725.

⁷⁶ Adnan Khan, *The Turkish Constitution in the 20th and 21st Centuries*, UNIV. OF BIRMINGHAM (May 17, 2017), <https://www.birmingham.ac.uk/schools/historycultures/research/news/2017/turkish-constitution.aspx>.

⁷⁷ *Id.*

⁷⁸ Kareem Shaheen, *Erdoğan Clinches Victory in Turkish Constitutional Referendum*, THE GUARDIAN (Apr. 16, 2017), <https://www.theguardian.com/world/2017/apr/16/erdogan-claims-victory-in-turkish-constitutional-referendum>; Khan, *supra* note 76.

⁷⁹ Shaheen, *supra* note 78.

checks on the executive branch and rendered the Turkish Parliament essentially powerless.⁸⁰ The amendments gave the President "authority to appoint ministers and judges without parliament's approval, design a state budget and dissolve parliament."⁸¹ Therefore, instead of furthering Turkish democracy, the 2017 amendments enhanced Turkey's authoritarianism by consolidating power in the executive branch.⁸² Part III explores pervasive flaws in Turkish constitutionalism, including authoritarianism, in more depth.

III. ANALYSIS OF TURKISH CONSTITUTIONAL ISSUES

This Part examines recurrent issues with Turkish constitutionalism. Namely, it considers Turkish nationalism and its impact on the Kurdish question, authoritarianism, lack of public participation in Turkey's constitution-building, and the role of secularism versus religion in Turkish constitutionalism. These constitutional themes interact with each other, exacerbating Turkey's democratic deficit. The first section explores the history and textual basis of Turkish nationalism before analyzing how nationalism threatens Turkey's Kurdish population. Namely, Turkey's constitution codifies a unitary vision of nationalism, rooted in Mustafa Kemal Atatürk's efforts to create a modern, secular republic, that erases the Kurds' identity.

A. Turkish Nationalism and the Kurdish Question

Turkish constitutionalism reflects nationalism, both historically and textually. Turkish nationalism began "as a linguistic and cultural movement" of the Ottoman Empire during the late nineteenth century.⁸³ By the early twentieth century, Turkish nationalism evolved into "a strategy of political integration."⁸⁴ During Turkey's unification, Kemal prioritized nationalist reforms that favored a

⁸⁰ Angela Dewan, *How Erdogan Transformed Turkey's Democracy in a Decade*, CNN (Apr. 16, 2017), <https://www.cnn.com/2017/04/15/europe/turkey-erdogan-referendum-politics/index.html>.

⁸¹ *Id.*

⁸² Isiksel, *supra* note 28, at 726.

⁸³ Mesut Yegen, *Turkish Nationalism and the Kurdish Question*, 30 *ETHNIC & RACIAL STUD.*, 119, 120 (2007).

⁸⁴ *Id.* at 120.

centralized, secular state rather than multiculturalism and decentralization.⁸⁵ Indeed, Kemal used the 1924 constitution to create a new "Turkish identity" designed to distance the Republic of Turkey from the Ottoman Empire.⁸⁶ Kemal used nationalism to establish a secular, Europeanized state distinct from its Muslim Ottoman roots.⁸⁷ In particular, Kemal abolished honorary titles, encouraged European clothing, enacted a civil code, formally instituted the Turkish as the national language, and passed other reforms designed to secularize Turkey.⁸⁸ These reforms symbolically created a Turkish national identity that aligned Turkey with the Western world.⁸⁹ As discussed in Part II, the 1924 constitution established a political system that prioritized a unitary conception of nationalism and rejected ethnic or social pluralism.⁹⁰ Since the 1924 constitution, whichever entity holds power has used nationalism to claim sole authority "to embody the people as a unitary and monolithic entity."⁹¹ Turkish nationalism remains the "prevailing narrative in Turkish politics."⁹²

Reflecting Turkey's history of Kemalist nationalism, the constitution's text prioritizes a unitary Turkish national identity over pluralism. Nationalist language permeates the constitution's preamble. For example, the preamble "affirms the eternal existence of the Turkish Motherland and the indivisible unity of the Sublime Turkish state ... in line with the concept of nationalism introduced by the founder of the Republic of Turkey, Ataturk, the immortal leader and the unrivaled hero."⁹³ Furthermore, the constitution condemns activities that threaten "Turkish national interests, the Turkish existence ... historical and moral values of Turkishness; the nationalism, principles, reforms, and civilization of Ataturk."⁹⁴ The preamble

⁸⁵ Ozan O. Varol, *Alien Citizens: Kurds and Citizenship in the Turkish Constitution*, 57 VA. J. INT'L L. 769, 776 (2018).

⁸⁶ Khan, *supra* note 76.

⁸⁷ *Id.*; Mustafa Akyol, *Turkey's Troubled Experiment with Secularism: Lessons from Turkey's Struggle to Balance Democracy and Laiklik*, THE CENTURY FOUND. (Apr. 25, 2019), <https://tcf.org/content/report/turkeys-troubled-experiment-secularism/?agreed=1> ("Ataturk's ideological blueprint ... rested on two main pillars: Turkish nationalism and secularism. Both represented a clean break from the Ottoman past.").

⁸⁸ *See* Khan, *supra* note 76.

⁸⁹ *See id.*

⁹⁰ Tombus, *supra* note 14, at 71.

⁹¹ *Id.* at 67.

⁹² Yegen, *supra* note 83, at 120.

⁹³ T.C. Ana., *supra* note 67, preamble.

⁹⁴ *Id.*

states, "every Turkish citizen has an innate right, to lead an honourable life ... under the aegis of national culture" and "all Turkish citizens are united in national honor and pride, national joy and grief, in their rights and duties regarding national existence ... in every manifestation of national life."⁹⁵ Read literally, the preamble's nationalist rhetoric establishes a single Turkish identity. The constitution expects all Turkish citizens to assume this monolithic national identity. Thus, the constitution's text eliminates the possibility for citizens to possess complex identities.

Constitutions often express a restrictive definition of nationalism while simultaneously expressing a commitment to democratic principles of "equality and justice."⁹⁶ Turkey's constitution exemplifies that theory. Thus, Article 1 establishes that Turkey is a Republic, while Article 6 says, "Sovereignty belongs to the nation."⁹⁷ Article 2 states that the characteristics of the Turkish Republic include secularism, rule of law, and respect for human rights—but also loyalty "to the nationalism of Atatürk."⁹⁸ On the one hand, the constitution codifies freedom of communication (article 22), religion (article 24), freedom of science and the arts (article 27), freedom of association (article 33), and numerous other civil rights.⁹⁹ Still, Article 66 defines Turkish citizenship in narrow nationalist terms, stating, "Everyone bound to the Turkish state through the bond of citizenship is a Turk."¹⁰⁰ Thus, Turkey's constitution both provides Turkey's citizens with democratic freedoms *and* circumscribes their identities using nationalist rhetoric. Unfortunately, Turkish nationalism has eclipsed the constitution's formal commitment to individual rights, especially regarding Turkey's Kurds.

Nationalism exacerbates "the Kurdish question," Turkey's most infamous political, ethnic, and cultural cleavage.¹⁰¹ The Kurds, Turkey's largest ethnic minority, possess a unique "language, culture, and

⁹⁵ *Id.*

⁹⁶ Bayar, *supra* note 4, at 728.

⁹⁷ T.C. Ana., *supra* note 67, at m. 1, 6.

⁹⁸ *Id.* m. 1, 2.

⁹⁹ *See e.g., id.* m. 22, 24, 27, 33.

¹⁰⁰ *Id.* m. 66.

¹⁰¹ *See Yegen, supra* note 83, at 119 ("Having been an omni-present issue throughout the twentieth-century Turkish politics, the Kurdish question has constantly bothered Turkish nationalism of the same era.").

history.¹⁰² Turkey's majority ethnic group, the Turks, have long attempted to assimilate the Kurds.¹⁰³ Indeed, the Kurdish conflict has existed since the Ottoman Empire period.¹⁰⁴ During the 1924 constitutional period, the Turkish government formally recognized the country's minority ethnic groups.¹⁰⁵ In reality, Kemalist nationalism rejected minority groups' "cultural" rights.¹⁰⁶ In response, the Kurds rebelled against the Kemalist government in 1925.¹⁰⁷ The Kurds perceived Kemal's reforms as threatening their cultural identity.¹⁰⁸ The government retaliated by prohibiting schools from teaching in Kurdish, requiring the use of Turkish script, and, eventually, prohibiting Kurds from giving their children Kurdish names.¹⁰⁹ Successive Turkish governments combined nationalism with authoritarianism to deny that the Kurds constituted a distinct ethnic group.¹¹⁰ Turkish nationalism, representing the modern, secular republic, rejected the Kurdish identity as a reflection of primitive social structures.¹¹¹ Even today, the Turkish government excludes the Kurds from the official census.¹¹²

Some Kurds have responded to the government's constant oppression with extremist tactics. In 1978, a group of Kurds established the Kurdistan Worker's Party ("PKK").¹¹³ Beginning in 1984, the PKK committed terrorist attacks under a mission of "violent secessionist struggle against the Turkish state."¹¹⁴ The PKK and the Turkish government have since remained in violent conflict, worsening the majority-minority ethnic division.¹¹⁵ Moreover, the PKK's terrorist approach has alienated Kurdish politicians in the Turkish Parliament.¹¹⁶

¹⁰² Varol, *supra* note 85, at 771.

¹⁰³ *Id.*

¹⁰⁴ Firat Cengiz & Lars Hoffman, *Rethinking Conditionality: Turkey's European Union Accession and the Kurdish Question*, 51 J. COMMON MKT. STUD., 416, 416 (2013).

¹⁰⁵ Yegen, *supra* note 83, at 127.

¹⁰⁶ *Id.*

¹⁰⁷ Varol, *supra* note 85, at 771.

¹⁰⁸ *Id.* at 776.

¹⁰⁹ *Id.* at 776-77.

¹¹⁰ *Id.* at 777-78; Yegen, *supra* note 83, at 127.

¹¹¹ Yegen, *supra* note 83, at 129.

¹¹² Varol, *supra* note 85, at 778.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *See id.* at 772.

¹¹⁶ *Id.*

The Turkish constitution's nationalist provisions further deepen the Kurdish conflict.¹¹⁷ Specifically, many Kurds reject Article 66 on the grounds that its citizenship provision imposes a Turkish ethnicity on them.¹¹⁸ These Kurds view Article 66 as erasing their Kurdish identity by declaring all citizens to be Turks.¹¹⁹ Moreover, Turkey's ruling majority has relegated the Kurds to "second-tier citizenship" by restricting the Kurds' individual rights.¹²⁰

In particular the government's repeated restrictions on Kurds' freedom of expression treat the Kurds as de facto second-class citizens. Article 301 of the Turkish Criminal Code criminalizes public denigration of the "Turkish Nation, the State of the Turkish Republic or the Grand National Assembly of Turkey and the judicial institutions of the state."¹²¹ Turkish authorities charged Orhan Pamuk, a famous Turkish writer and Nobel laureate, under Article 301 after Pamuk publicly stated, "Thirty thousand Kurds have been killed here, and a million Armenians. And almost nobody dares to mention that."¹²² Additionally, Turkey's provincial governors have used public safety concerns as an excuse to limit Kurds' assembly rights.¹²³ Finally, the national government has charged Kurdish journalists and media organizations in southeastern Turkey with amorphous offenses such as "'spreading terrorist propaganda'" and "'membership of a terrorist organization.'"¹²⁴ By silencing Kurdish voices, the Turkish majority government furthers a version of nationalism that rejects Turkish society's pluralist reality.

The AKP's nationalist ideology and authoritarian tactics have exacerbated the Kurdish conflict. Like its Kemalist predecessors, the AKP has shown "hostility towards pluralistic civic engagement and democratic dissent in the public sphere."¹²⁵ In 2009, the AKP proposed a "Kurdish Opening" (later called

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *See id.*

¹²¹ *Id.* at 787 (quoting Turkish Penal Code art. 301, Law No. 5237, Official Gazette, Oct. 12, 2004 No. 25611, enacted Sept. 26, 2004).

¹²² *Id.* at 787-88.

¹²³ *See Turkey: Events of 2019*, HUM. RIGHTS WATCH, <https://www.hrw.org/world-report/2020/country-chapters/turkey#>.

¹²⁴ *Id.*

¹²⁵ Isiksel, *supra* note 28, at 726.

a "'Democratic Opening' and then 'National Unity Plan') to address the Kurdish question.¹²⁶ However, the AKP intended the initiative to increase its political support in the majority Kurdish regions, not actually resolve the conflict.¹²⁷ Observers described the opening process, which coincided with the failed constitutional drafting of 2011, as "nationalist and intolerant."¹²⁸ Simultaneously, the government began investigating and arresting "over 2,000 individuals, including elected Kurdish politicians, intellectuals and members of the press" for exercising their freedom of expression.¹²⁹ The government ended the failed initiative without resolving the Kurdish dilemma.¹³⁰

Furthermore, President Erdoğan and the AKP have refused to differentiate between the PKK and the Peoples' Democratic Party (HDP).¹³¹ In reality, the HDP formed in 2013 from an alliance of Kurds, women's, environmental, leftists, and other minority groups, and remains distinct from the PKK.¹³² The HDP possess roots in the Kurdish nationalist movement, but the party's platform has expanded and now prioritizes pluralism, democracy, and inclusivity.¹³³ By equating the HDP with the terrorist PKK, Erdoğan's government likely incited violent attacks on HDP offices before Turkey's 2015 elections.¹³⁴ Not all Kurds are members of PKK, yet the AKP government conflates the PKK with the Kurdish identity. The government's inability to acknowledge that the HDP can support the Kurds while condemning the PKK's tactics illustrates the government's intolerance to pluralism.

Turkish nationalism has consistently exacerbated the Kurdish conflict. Indeed, Turkey's military, bureaucratic, and judicial elites have long perceived the Kurds as a threat to national sovereignty.¹³⁵ Turkish nationalism marginalizes the Kurds both through the constitution's text and as a political ideology. Specifically, Article 66 of the constitution threatens the Kurds' identity, while the government's

¹²⁶ Cengiz & Hoffman, *supra* note 104, at 424; *see* FRIEDRICH EBERT STIFTUNG, *supra* note 70.

¹²⁷ *See* Cengiz & Hoffman, *supra* note 104, at 424.

¹²⁸ FRIEDRICH EBERT STIFTUNG, *supra* note 70.

¹²⁹ Cengiz & Hoffman, *supra* note 104, at 424.

¹³⁰ *Id.*

¹³¹ *Turkey: Events of 2019*, *supra* note 123.

¹³² U.K.: HOME OFF., COUNTRY INFORMATION AND GUIDANCE: TURKEY: HDP (PEOPLES' DEMOCRATIC PARTY) 4, 9 (2016), <https://www.refworld.org/docid/56fb817c4.html>.

¹³³ *See id.* at 10.

¹³⁴ *Id.* at 13.

¹³⁵ Cengiz & Hoffman, *supra* note 104, at 425.

commitment to ideological nationalism has repeatedly treated the Kurds as second class citizens by restricting their individual rights. In addition to rejecting pluralism, Turkey's constitution exhibit authoritarianism.¹³⁶

B. Turkey's Authoritarian Constitutionalism

Authoritarianism pervades Turkish constitutionalism despite the constitution's codified democratic principles.¹³⁷ "Authoritarian constitutionalism" refers to when authoritarian leaders use constitutionally prescribed processes to exploit a country's "constitutional order."¹³⁸ Indeed, "Turkey's functioning system of competitive elections, representative institutions, and constitutional discipline deceives many observers ... into thinking that Turkey has crossed a rigorous threshold of modern liberal democracy."¹³⁹ For example, the 1924 constitution established popular sovereignty and a right to freedom, yet this constitution also enabled the Kemalist political elite to control Turkish politics for decades.¹⁴⁰ In 1961, the military created an upper legislative chamber—seemingly a democratic reform—but the military simultaneously gave lifetime senator positions to military leaders, enabling the military to oversee the legislative process.¹⁴¹ During the 1960s and 1970s, the Turkish military exerted both direct and indirect control over the civilian government, which repressed civil society and restricted freedom of expression.¹⁴² As discussed in Part II, the military coup of 1982 further shifted Turkey towards authoritarianism.¹⁴³

The 1982 constitution's emergency rule provisions exemplify Turkey's authoritarian constitutionalism.¹⁴⁴ The emergency rule provision, "Olağanüstü Hal," which translates to "state of

¹³⁶ See Tombus, *supra* note 14.

¹³⁷ See Isiksel, *supra* note 28, at 710.

¹³⁸ Melissa Crouch, *Pre-Emptive Constitution-Making: Authoritarian Constitutionalism and the Military in Myanmar*, 54 LAW & SOC'Y REV. 487, 487-88 (2020).

¹³⁹ Isiksel, *supra* note 28, at 710.

¹⁴⁰ See *supra* Part II(C).

¹⁴¹ Isiksel, *supra* note 28, at 714.

¹⁴² *Id.* at 715-16.

¹⁴³ See *id.*

¹⁴⁴ *Id.* at 718.

exception," permits the government to temporarily "suspend basic rights and due process guarantees."¹⁴⁵ Technically, the emergency rule provision is temporary, but the government can prolong the state of emergency "indefinitely" and can declare nation-wide emergencies.¹⁴⁶ Furthermore, Article 148 of the constitution prohibits the Constitutional Court from ruling on the constitutionality of presidential decrees during a state of emergency.¹⁴⁷ The Turkish government has used the emergency rule provisions to declare forty-six emergencies in several Kurdish provinces that lasted approximately fifteen years, from 1987 through 2002.¹⁴⁸ Tragically, this period of "constitutionally mandated emergency rule deprived millions of citizens of basic rights protections, allow[ed] rampant extrajudicial killings, disappearances, torture, ill-treatment, forcible displacement, and countless other grave abuses."¹⁴⁹ Thus, the government has abused the constitution's emergency rule provision to further marginalize Turkey's Kurds.

Moreover, the AKP government has worsened Turkey's authoritarian constitutionalism. As discussed in Part III, the AKP has targeted opposing political parties, censored the media—especially Kurdish voices—and controlled the courts.¹⁵⁰ The AKP is merely the most recent example of political elites leveraging Turkey's constitutional processes to serve elites' interests rather than the Turkish people.

C. Lack of Public Participation in Turkish Constitution Building

Public participation remains critical to building a democratic constitution.¹⁵¹ "Popular constitution making" requires "direct and free election of a constituent assembly through all citizens, irrespective of gender, property, race, or other criteria."¹⁵² Ideally, a constitution-building process involves drafting by elected delegates, participation by civil society, and a popular referendum.¹⁵³ The process can involve the

¹⁴⁵ *Id.*

¹⁴⁶ *See id.*

¹⁴⁷ T.C. Ana., *supra* note 67, at m. 148.

¹⁴⁸ Isiksel, *supra* note 28, at 718.

¹⁴⁹ *Id.*

¹⁵⁰ Akyol, *supra* note 87; *see also* Cengiz & Hoffman, *supra* note 104, at 429 (contending that Turkey's civilian governments have used authoritarian tactics, particularly in dealing with the Kurdish conflict).

¹⁵¹ Petersen & Yanasmayan, *supra* note 30, at 23 ("Modern constitution-making processes usually involve public participation of one kind or another at some stage.").

¹⁵² *Id.* at 21.

¹⁵³ *Id.* at 22, 32.

public at various points, including "framing and legitimizing," drafting, and ratifying.¹⁵⁴ Turkey's constitutional history has lacked public participation, inhibiting the political legitimacy of Turkey's constitutions.¹⁵⁵

The Turkish people have had little input into Turkey's constitution-building processes.¹⁵⁶ Instead, Turkey's elites, including intellectuals, politicians, and military officers, have shaped Turkish constitutionalism.¹⁵⁷ Indeed, "Turkey has been a dysfunctional constitutional regime in which constitution making has never been democratic, popular, or inclusive."¹⁵⁸ For example, a group of male elites controlled the 1921 and 1924 constitution-building processes, women were excluded from drafting the constitutions, and neither constitution provided for "free and fair elections open to all citizens."¹⁵⁹ Although the drafters' homogeneity helped the Grand National Assembly agree at the time, the Turkish public lacked any substantive input in the 1921 constitution.¹⁶⁰ Furthermore, the Kemalist Grand National Assembly ratified both the 1921 and 1924 constitutions—neither involved public referenda.¹⁶¹

Despite being Turkey's most liberal constitution, the 1961 constitution also did not represent the peoples' preferences.¹⁶² Rather, the military and political elites proposed the 1961 constitution as a vehicle to reaffirm and extend their influence.¹⁶³ Turkey's military has frequently acted as a "supraconstitutional actor" beyond civilian control.¹⁶⁴ Thus, military leaders and the military's favored politicians dominated the 1961 and the 1982 constitution-building processes by controlling the drafting processes.¹⁶⁵ Turkish

¹⁵⁴ *Id.* at 24.

¹⁵⁵ *Id.* at 33.

¹⁵⁶ Varol, *supra* note 85, at 83.

¹⁵⁷ Bayar, *supra* note 4, at 726.

¹⁵⁸ Petersen & Yanasmayan, *supra* note 30, at 33.

¹⁵⁹ *Id.* at 34-35; *see* Boyunsuz, *supra* note 15.

¹⁶⁰ *Id.* at 35.

¹⁶¹ *Id.* at 34.

¹⁶² Bayar, *supra* note 4, at 726.

¹⁶³ *Id.*

¹⁶⁴ Isiksel, *supra* note 28, at 713 (describing how the Turkish military "has controlled the drafting of every constitutional document to date, a prerogative which it justifies with reference to its self-ascribed guardianship role over the Republic's founding principles"); *see* Crouch, *supra* note 138, at 510 (noting that Turkey is among several countries where "the military remains a key political actor").

¹⁶⁵ Petersen & Yanasmayan, *supra* note 30, at 35.

citizens did not elect the assembly members that drafted these constitutions.¹⁶⁶ The public lacked substantive input into the constitution-building processes, even though citizens formally ratified the 1961 and 1982 constitutions.¹⁶⁷ In 1961, the military threatened citizens who opposed the referendum, while in 1982, the National Security Council prohibited "negative campaigning" during ratification.¹⁶⁸ Thus, all of Turkey's twentieth-century constitutions lacked popular participation.¹⁶⁹

Moreover, lack of public input has shaped Turkey's recent constitutional history. For example, in 2010, the AKP formed the "Constitution Platform Initiative," which called for a new constitution created using a participatory process.¹⁷⁰ Most of Turkey's political parties and a majority of the public supported the initiative.¹⁷¹ In 2011, the parliament created the Constitutional Conciliation Commission, composed of "democratically elected framers who represented the various segments of society" to draft the new constitution.¹⁷² The AKP promised to incorporate Turkish civil society in the drafting process.¹⁷³

In reality, Turkey's political elites involved the public for two self-interested reasons.¹⁷⁴ First, none of Turkey's political parties possessed sufficient political power to unilaterally impose a constitution.¹⁷⁵ Second, all parties viewed public participation as a way to increase their political legitimacy.¹⁷⁶ Given the elites' motives, the 2011 drafting process failed to effectively involve the public. For example, several civil society organizations consulted with the Constitutional Conciliation Commission, but no Kurdish organizations were present.¹⁷⁷ Furthermore, the Commission did not publicize the results of its consultations with civil society.¹⁷⁸ Additionally, the different political parties

¹⁶⁶ *Id.* at 36.

¹⁶⁷ *Id.* at 35.

¹⁶⁸ *Id.*

¹⁶⁹ *See* Isiksel, *supra* note 28, at 717.

¹⁷⁰ Petersen & Yanasmayan, *supra* note 30, at 38; FRIEDRICH EBERT STIFTUNG, *supra* note 70.

¹⁷¹ Petersen & Yanasmayan, *supra* note 30, at 38.

¹⁷² *Id.* at 38; *see* FRIEDRICH EBERT STIFTUNG, *supra* note 70.

¹⁷³ FRIEDRICH EBERT STIFTUNG, *supra* note 70.

¹⁷⁴ Petersen & Yanasmayan, *supra* note 30, at 45.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

on the Commission did not use public opinion to overcome their substantive disagreements.¹⁷⁹ For example, while the majority AKP party proposed a presidential system, most of the Turkish population preferred the presidential-parliamentary system favored by the other political parties.¹⁸⁰ Yet, these parties did not use input from civil society or the public to resolve the dispute with the AKP.¹⁸¹ Ultimately, the Commission did not draft a complete constitution and only agreed on provisions that contradicted public opinion.¹⁸² Thus, elites' self-interest prevented the government from preparing a constitution that received public approval, and the constitution-building process failed.

In early 2021, Erdoğan and the AKP committed to drafting a new civilian constitution and encouraged all political parties to participate.¹⁸³ Stakeholders and legal experts have welcomed the AKP's announcement and called for citizens and civil society to participate.¹⁸⁴ However, it remains unclear whether Erdoğan and the AKP will be transparent and actually incorporate opposing views in the drafting process. Therefore, to date, Turkey's constitutional history has lacked authentic public participation. The absence of popular constitution-making has furthered Turkey's democratic deficit—the gap between codified liberal democratic principles and Turkey's constitutional reality.

D. The Role of Religion in Turkish Constitutionalism

Turkish constitutionalism's treatment of religion provides another example of discrepancies between Turkey's official and unofficial constitutionalism.¹⁸⁵ Turkey's constitution formally codifies state secularism. In defining the characteristics of the Turkish Republic, Article 2 provides, "The Republic of

¹⁷⁹ *Id.* at 47.

¹⁸⁰ *Id.* at 46.

¹⁸¹ *Id.*

¹⁸² *Id.* at 49.

¹⁸³ Şeyma Nazlı Gürübz, *New Turkish Constitution a Necessity, Must Be Inclusive: Experts*, DAILY SABAH (Feb. 4, 2021), <https://www.dailysabah.com/politics/news-analysis/new-turkish-constitution-a-necessity-must-be-inclusive-experts>.

¹⁸⁴ *Id.*

¹⁸⁵ See Albert H.Y. Chen, *Constitutions and Constitutionalism and the Case of Modern China 4-5* (Univ. of Hong Kong Faculty of L. Research Paper No. 2017/023) (Aug. 27, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3027562.

Turkey is a democratic, secular, and social state.¹⁸⁶ Secularism is adjacent to—and as important as—democracy. Moreover, Article 24 prohibits "partially basing the fundamental, social, economic, political, and legal order of the State on religious tenets."¹⁸⁷ So, while the majority of Turkey's population is Muslim, the constitution's text prioritizes secularism.¹⁸⁸

Importantly, Turkey's history of secularism is as long as Turkey's Islamic roots.¹⁸⁹ For example, in the fifteenth century, Ottoman Empire's sultans passed secular laws that were "legitimized by sharia, but also separate from it." The Ottomans' 1876 constitution laid the foundation for secularism in Turkish constitutionalism.¹⁹⁰ Namely, the 1876 constitution rejected some "illiberal aspects of sharia" and proclaimed equal citizenship for all regardless of religion.¹⁹¹ Later, Kemal formally established secularism as a founding principle of the Turkish republic, equally important to nationalism.¹⁹² Kemal and his followers perceived religion in general, and Islam in particular, as "an 'obstacle to progress.'"¹⁹³

From the 1950s to the 1990s, a series of conservative political parties promoted a "more religion-friendly secularism" without explicitly rejecting Kemalist secularism.¹⁹⁴ The majority of Turkish voters did not support the most secular political candidates but publicly opposing secularism remained taboo.¹⁹⁵ During the 1980s, the Islamic headscarf symbolized "Turkey's culture war."¹⁹⁶ At the time, female Islamic students had begun attending universities wearing the Islamic headscarf.¹⁹⁷ In response, Turkey's

¹⁸⁶ T.C. Ana., *supra* note 67, at m. 2.

¹⁸⁷ *Id.* at m. 24; *see* 15

¹⁸⁸ Cem Tecimer, *Rethinking Turkish Secularism: Towards "Unofficial" Islamic Constitutionalism?*, VERFASSUNGSBLOG (Sept. 26, 2017), <https://verfassungsblog.de/rethinking-turkish-secularism-towards-unofficial-islamic-constitutionalism/>; *see* Mine Yildirim, *Are Turkey's Restrictions on Freedom of Religion or Belief Permissible?* 15 RELIGION & HUM. RTS., 172, 173, 176-77 (2020); INT'L IDEA, RELIGION-STATE RELATIONS 15 (2014).

¹⁸⁹ Akyol, *supra* note 87.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*; *see* Roff Smith, *Why Turkey Lifted Its Ban on the Islamic Headscarf*, NAT'L GEOGRAPHIC (Oct. 12, 2013), <https://www.nationalgeographic.com/history/article/131011-hijab-ban-turkey-islamic-headscarf-aturk> (discussing Kemal's modernization efforts, including "restrictions on wearing overtly religious-oriented attire" such as the fez).

¹⁹⁴ Akyol, *supra* note 87.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*; *see* Smith, *supra* note 193.

¹⁹⁷ Akyol, *supra* note 87.

secularists repeatedly attempted to ban headscarves in various public spaces.¹⁹⁸ The Constitutional Court sided with the secularists in 1989, when the Court held that a law that permitted the wearing of religious head coverings was unconstitutional because the law violated "the constitutional principle of secularism."¹⁹⁹ Thus, strict secularism reigned supreme in Turkish politics until the AKP came to power.²⁰⁰ In recent years, the AKP's relaxed secularism and the Constitutional Court's liberal ideological shift have raised questions concerning the implicit role of Islam in Turkey's constitution.²⁰¹

Indeed, Turkish constitutionalism may be shifting towards Islamic principles.²⁰² An "'unofficial' mode of Islamic constitutionalism" might become "constitutional reality" even though the text codifies secularism.²⁰³ Recent court decisions suggest that Islam has become an unofficial constitutional principle.²⁰⁴ For example, in 2012, the Constitutional Court upheld a law that permitted the mandatory teaching of Islamic classes in public schools and adopted a "'more flexible and liberal interpretation of secularism."²⁰⁵ Additionally, Turkish courts have struck the headscarf ban in universities and relaxed other restrictions on religious dress.²⁰⁶ In 2016, the Constitutional Court affirmed the cultural importance of the Islamic call to prayer.²⁰⁷

Moreover, Turkish politics also show signs of a trend towards Islamic constitutionalism.²⁰⁸ While Erdoğan has publicly affirmed secularism, Erdoğan also said that he supported a ban on alcohol sales because the ban aligned "with what religion commanded."²⁰⁹ The national budget also favors Islam: the

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*; Tecimer, *supra* note 188 ("Secularism, which has accelerated modernity and which is the foundation of the Turkish revolution, ensures that society is saved from irrational and unscientific notions ... [Our] Republic and democracy are the opposite of Sharia rule.").

²⁰⁰ Akyol, *supra* note 87.

²⁰¹ *See id.*; *see also* Tecimer, *supra* note 188 ("The change in Turkey's political landscape throughout more than a decade has unsurprisingly witnessed a complementary change in the judicial landscape.").

²⁰² Tecimer, *supra* note 188; *see* Smith, *supra* note 192 (discussing some observers' fear that the lifting of Turkey's headscarf ban "could herald a stealthy march toward an Islamic state").

²⁰³ Tecimer, *supra* note 188.

²⁰⁴ *See id.*

²⁰⁵ *Id.*; *see also* Akyol, *supra* note 87; Yildirim, *supra* note 188, at 177.

²⁰⁶ Tecimer, *supra* note 188; *see* Yildirim, *supra* note 188, at 188-90.

²⁰⁷ Tecimer, *supra* note 188.

²⁰⁸ *See id.*

²⁰⁹ *Id.*

government funds all mosques with tax revenue.²¹⁰ Thus, perhaps "the AKP government is indeed trying to 'tilt' society toward its own understanding of Islam."²¹¹

On the other hand, the government may be promoting religious freedom and permitting public expressions of religiosity.²¹² The government could be "remedying a past full of animus against Islam and its social visibility" rather than adopting a form of Islamic constitutionalism.²¹³ In other words, the government neither opposes nor supports Islam, but is repairing its relationship with Turkish Muslims. In fact, Erdoğan's government has incentives to loosen Turkey's constitutional secularism.²¹⁴ By not overtly rejecting secularism, the AKP can cater to the party's religious base on important issues.²¹⁵ Unlike the strict secularism of the twentieth century, Turkey's contemporary secularism does not require "imposing a 'way of life'" with "no visible trace of religion."²¹⁶ Modern Turkish secularism remains "[s]oft secularism [or] freedom *of* religion" rather than "freedom *from* religion."²¹⁷ Thus, the Constitutional Court's lifting the headscarf ban may represent "religion-state neutrality" in which Turkey has transitioned from strict secularism to a form of weak secularism that permits some pluralism.²¹⁸ Turkey likely will continue balancing secularism and religion in politics, the legal system, and society for years to come.²¹⁹

IV. FUNCTIONS OF TURKISH CONSTITUTIONALISM

This Part analyzes the purpose of Turkey's constitution in light of the recurrent issues that cripple Turkish democracy. Turkey's constitution represents more than a sham but less than a credible

²¹⁰ Akyol, *supra* note 87; *see also* Khan, *supra* note 76.

²¹¹ Akyol, *supra* note 87.

²¹² Tecimer, *supra* note 188.

²¹³ *Id.*

²¹⁴ *See* Akyol, *supra* note 87.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*; *see* Yildirim, *supra* note 188, at 176-77 (discussing the Turkish Constitutional Court's recent transition to "liberal secularism" (internal quotation marks omitted)).

²¹⁸ INT'L IDEA, *supra* note 188, at 4-5; *see* Smith, *supra* note 193 (contending that Turkey's post-headscarf ban challenge is transitioning "from a rigid, state-controlled public space into a pluralistic society that can accommodate different ethnicities and beliefs").

²¹⁹ Akyol, *supra* note 87 ("Today, Turkey finds itself at another moment in which the definitions of secularism and the relationship between the government, religion, and the public sphere are all in flux.").

commitment to democratic values and ideals. Furthermore, Turkey's politicians have expressed the desire for international acceptance, but Turkey's politicians and the Turkish constitution have not yet secured the international community's respect. Arguably, the constitution primarily secures elite interests.

A. Turkey's Constitution Represents More than "Window Dressing"

Constitutions often enable governments to make credible commitments to citizens.²²⁰ Alternatively, governments sometimes adopt constitutions as mere "window dressing," falsely signaling that the governments remain committed to democratic values.²²¹ One could perceive Turkish constitutionalism as a sham rather than a credible commitment to democratic principles. Under this view, Turkey's constitution "manifests a disjuncture between the formal aspect of a constitution ... and the normative commitments [people] expect constitutions to realize." The constitution provides for a formal democratic framework, yet Turkey's elites have repeatedly used this framework to deviate from liberal democratic principles.²²²

Still, Turkish constitutionalism, though replete with authoritarianism and nationalism, represents more than mere window dressing. Arguably, the Turkish constitution *matters* in that politicians and citizens view the constitution "as a binding source of normative authority in the conduct of ordinary political life."²²³ Turkish politicians work through the constitutional processes to further their own interests.²²⁴ In other words, rather than ignoring the constitution, Turkey's political elites instead amend the constitution for their benefit.²²⁵ Turkey's elites use the amendment process to make democratic commitments to the public in response to previous government failures, but those amendments ultimately serve elites.²²⁶

²²⁰ Chen, *supra* note 185, at 6.

²²¹ *Id.* at 50.

²²² See Isiksel, *supra* note 28, at 720.

²²³ *Id.* at 705.

²²⁴ See *id.*; see also Shaheen, *supra* note 78.

²²⁵ See Isiksel, *supra* note 28, at 705.

²²⁶ See Szyliowicz, *supra* note 35, at 368; Omer Faruk Genckaya, Politics of Constitution Making in Turkey 7 (ECPR Joint Workshops Apr. 11-16 2008) (unpublished manuscript) (discussing several constitutional amendments)

Moreover, Turkey's political elites respect the constitutional process enough not to ignore opposing voices.²²⁷ For example, during the failed constitution-drafting process of 2011, the AKP gave opposing political parties and civil society groups that disagreed with the AKP input in the drafting process.²²⁸ The 2017 constitutional referendum results also demonstrate how Turkish constitutionalism represents more than window dressing. Namely, the AKP passed the constitutional amendments that consolidated Erdoğan's power, yet the AKP also permitted opposing political parties to challenge the referendum's results.²²⁹ Opposing parties monitored the referendum process and validated the results at polling locations.²³⁰ Furthermore, the voter turnout rate, over 80 percent of the population, demonstrates that most of Turkey's citizens believe the constitutional process is legitimate.²³¹ Thus, Turkish constitutionalism remains both authoritarian and somewhat committed to democracy.

B. Turkey's Constitution Has Failed to Secure International Acceptance

Constitutions also secure international acceptance.²³² Namely, countries use their constitutions "to gain legitimacy and respectability among the community of nations."²³³ Under this theory, countries enact constitutions so that more powerful, prosperous nations welcome them into the international community.²³⁴ Thus, Turkey's 1921 and 1924 constitutions represented Turkey's first bid for international acceptance as a nation-state after the war for independence.²³⁵

between 1985 and 2007 designed "to improve the protection of fundamental rights, to bolster the rule of law, and to limit the military's prerogatives in government"); *see also* Tombus, *supra* note 14, at 77 (describing the multiparty commission that amended the constitution during the 1990s "in line with liberal democratic principles" as part of Turkey's attempt to secure EU membership).

²²⁷ *See* Petersen & Yanasmayan, *supra* note 30, at 38; Shaheen, *supra* note 78.

²²⁸ Petersen & Yanasmayan, *supra* note 30, at 38.

²²⁹ Shaheen, *supra* note 78.

²³⁰ *Id.*

²³¹ *Id.*

²³² Chen, *supra* note 185, at 9.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *See* Çitak *supra* note 1.

Indeed, Turkey's desire for international acceptance, particularly by the European Union ("EU"), has prompted Turkey to shift towards a more liberal, democratic constitutionalism.²³⁶ Turkey's relationship with the EU dates to 1963, when Turkey became a member of the European Economic Community.²³⁷ In 1999, Turkey became a candidate for EU membership, and the government subsequently formed a commission to propose constitutional amendments to secure EU membership.²³⁸ In response to European Council recommendations, Turkey codified multiple liberal constitutional amendments in 2001 and 2004.²³⁹

However, to date, Turkey has not acceded to the EU.²⁴⁰ Moreover, Turkish nationalism and its impact on the Kurdish conflict have impeded Turkey's ability to secure EU membership. During the early 2000s, the European Commission refused to grant Turkey membership largely because Turkey had failed to "adopt an 'integrated strategy' to address the Kurdish question from legal, economic and social angles."²⁴¹ In particular, the Commission condemned the Turkish government's national education policy which prohibited the teaching of languages besides Turkish and the policy's impact on the Kurds' "access to public education, public services and political life."²⁴²

The relationship between Turkey and the EU further deteriorated prior to the constitutional referendum in 2017, when the AKP's controversial victory "set the stage for a further split between Turkey and its European allies."²⁴³ Post-referendum, Turkey's relationship with the EU decayed further.²⁴⁴ By 2019, Human Rights Watch reported, "Turkey's political relationship with the European Union and EU member states remains limited though it maintains its stated aim is to accede to the EU."²⁴⁵ Thus,

²³⁶ See Cengiz & Hoffman, *supra* note 104, at 416 (describing the lengthy and incomplete process of Turkish accession to the EU); Genckaya, *supra* note 226, at 7.

²³⁷ Cengiz & Hoffman, *supra* note 104, at 416.

²³⁸ *Id.*; Tombus *supra* note 14, at 77.

²³⁹ FRIEDRICH EBERT STIFTUNG, *supra* note 67; Genckaya, *supra* note 226, at 7 (discussing how in 2001 Turkey committed itself to a "National Program to meet the [European Council's] political criteria with special reference to democratization and human rights").

²⁴⁰ See *Turkey: Events of 2019*, *supra* note 123.

²⁴¹ See Cengiz & Hoffman, *supra* note 104, at 423.

²⁴² See *id.*

²⁴³ Shaheen, *supra* note 78.

²⁴⁴ *Id.*

²⁴⁵ See *Turkey: Events of 2019*, *supra* note 123.

recurrent issues including nationalism and elite manipulation of the constitutional amendment process have inhibited Turkey's ability to secure international acceptance.

C. Turkey's Constitution Promotes Elite Interests

Ultimately, the primary purpose of Turkey's constitution has been—and remains—securing the interests of elites. Turkey's elites, rather than ordinary citizens, have consolidated power through manipulating the constitution-building and amendment processes.²⁴⁶ For example, a homogenous group of male elites drafted the 1924 constitution, and the military elite controlled every aspect of the 1961 and 1982 constitution-building processes.²⁴⁷ Even when the AKP has used populist rhetoric to distinguish itself from the former military-elite rule, the AKP's actual policies have not been populist.²⁴⁸ For example, the 2007 and 2017 amendments, in which the AKP transformed Turkey's system of government from a "de facto semi-presidentialism" to a "hyper-presidentialism" illustrate elites' manipulation of the constitution for their own ends.²⁴⁹ Erdoğan used these amendments to consolidate the executive's power over the judicial and legislative branches.²⁵⁰ Therefore, Turkey's elites consistently use the constitutional processes to retain power, even though the constitution's text codifies liberal democratic principles.

CONCLUSION

Turkish constitutional history is complex, contradictory, and dynamic. Each constitution has shifted Turkey either toward or away from codified liberal democratic principles. Nationalism, authoritarianism, lack of public participation, and varying degrees of secularism are recurrent themes in Turkish constitutionalism. Importantly, these themes act in concert, mutually reinforcing each other. For example, Kemal combined nationalism with strict secularism to modernize Turkey. And, Turkey's elites

²⁴⁶ See *supra* Part III(C).

²⁴⁷ See *supra* Part III(C).

²⁴⁸ See Tombus, *supra* note 14, at 61.

²⁴⁹ See Çitak, *supra* note 1.

²⁵⁰ See *id.*; see also Shaheen *supra* note 78.

have historically excluded the public from constitution-building processes, maintaining Kemal's unitary version of nationalism and rejecting cultural pluralism. Additionally, the Turkish majority has used authoritarian tactics, such as censorship and the constitution's state of emergency provision, to marginalize the Kurdish minority—rejecting the Kurds' plural identity as both ethnic Kurds and Turkish citizens. Thus, Turkey's recurrent constitutional issues reinforce each other in ways that further Turkey's democratic deficit.

The Turkish constitution reflects multiple theoretical purposes of constitutions. First, the constitution acts as more than window dressing because the constitution's codified individual rights and democratic principles represent credible commitments. Constitutional norms somewhat constrain Turkey's politicians. For example, the AKP has oppressed political opposition, yet the AKP has also permitted the opposition to have a role in drafting amendments and during the referendum process. The AKP has worked within the formal amendment process—not extralegally—to secure the party's interests. Moreover, citizens believe the constitutional process remains legitimate, demonstrated by their high turnout rate in the 2017 referendum. Additionally, Turkey's political elites have attempted to use the constitution to gain international respect and legitimacy. However, the Turkish government has failed to secure EU membership by exacerbating the Kurdish conflict. Turkey's deteriorating relationship with the EU indicates that codified democratic principles remain insufficient to secure international acceptance. Ultimately, the primary purpose of Turkish constitutionalism remains securing the interests of Turkey's elites.

Turkey must address the issues that render Turkish constitutionalism both undemocratic and illiberal.²⁵¹ Because the Turkish military orchestrated the 1982 constitution-drafting process, one solution would be a new, civilian constitution.²⁵² Indeed, if Erdoğan and the AKP's recent commitment to a new constitution remains authentic, then Turkey will have a new civilian-authored constitution in the near

²⁵¹ This paper assumes that liberal democratic principles remain a normative goal for the Turkish people (regardless the political elites' actions), because the Turkish constitution codifies democracy as a characteristic of the Republic of Turkey. See T.C. Ana., *supra* note 67, at m. 2.

²⁵² Tombus, *supra* note 14, at 61.

future.²⁵³ Legal experts contend that the constitution must reflect Turkey's unique political and social history.²⁵⁴ Still, a civilian constitution may improve Turkish democracy, but civilian authorship likely remains insufficient to remedy Turkey's democratic deficit.²⁵⁵

Turkey should implement the following democratic safeguards, either in conjunction with the new constitution or within the existing constitutional framework. First, the government must develop and implement a comprehensive strategy to resolve the Kurdish question. In particular, Kurdish civil society should assume a key role in drafting the new constitution. Additionally, Article 66 should be revised to clarify that Turkish citizenship remains separate from ethnicity. This amendment would reassure the Kurds that the government respects their identity. Furthermore, the government must formally recognize the Kurds as an ethnic group with a distinct language and count the Kurds in the national census. Second, Turkey must amend the constitutional state of emergency provision. Limiting the executive branch's emergency powers would be an important step towards fixing Turkish authoritarianism.

Moreover, the government must commit to weak secularism, rather than adopt a religion-state relationship of strong secularism or unofficial Islamization. Indeed, "[a] pluralist form of religious recognition or establishment may help to signal co-operation and interfaith harmony in a fragmented society."²⁵⁶ Turkish society remains fragmented and would benefit from a religion-state relationship that prioritizes pluralism. Weak secularism would allow the Turkish government to accommodate religious minorities, while recognizing Turkey's Islamic roots and respecting Muslim culture. Therefore, the government should cease funding national mosques, and politicians should not publicly suggest that laws are motivated by religious reasons. On the other hand, the government should continue protecting religious dress and public religious expression.

²⁵³ See Gürübz, *supra* note 183.

²⁵⁴ *Id.*

²⁵⁵ See Tombus, *supra* note 14, at 61; see also Isiksel, *supra* note 28, at 725 (expressing skepticism that a civilian authored constitution would overcome authoritarian constitutionalism).

²⁵⁶ INT'L IDEA, *supra* note 188, at 11.

By adopting these reforms, Turkey could avoid future democratic backslides. If Turkey fixes its democratic deficit, the country could secure international acceptance and legitimacy. International respect may enable Turkey to form more robust trade relationships with other countries, which would strengthen the Turkish economy. More importantly, the Turkish government would fulfill the democratic commitments codified in Turkey's constitutions since 1921.