

FOREWORD

RECONSIDERING CONSTITUTIONAL LAW

The April 2020 issue of the *Constitutional Law Journal* was prepared at a time when we witnessed important historical and contemporary constitutional issues. From a historical perspective, April 23, 2020, was the centennial of the *original constituent power*. As to the contemporary constitutional agenda, the COVID-19 pandemic has turned the globe into a “human prison” posing a danger to human life. This global pandemic makes it necessary to reconsider the Constitution.

What is current are the preventive and protective extraordinary measures that every state is taking to overcome threats and dangers while waiting return to normal social life and everyday routine. Current measures in force, within the framework of the “health emergency”, however, often blur the line between the legal and actual situation. For this reason, it is imperative that the urgent measures taken to protect the right to life and yet which push the limits of the constitutional boundaries do not create “permanent illegal areas” and remain subject to a vigilant appraisal in all branches of law. This issue consists of articles that mainly respond to such concerns about law at the national level.

In this respect, it should be noted that the *Constitutional Law Journal* will include the articles on the centennial of the *original constituent power* or on the new constitutional trends in the aftermath of COVID-19 in its upcoming issues. In this issue, only general and preliminary observations will be made – here in this Foreword – on the general contours of constitutionalism at the centennial of the *original constituent power* and in the shadow of COVID-19.

I. CENTENNIAL OF THE ORIGINAL CONSTITUENT POWER IN TURKEY

Turkey has a unique place in comparative constitutional law with respect to constituent power. Indeed, the Turkish Grand National Assembly, founded in 1920, fulfilled the functions of constitution making and the struggle for independence simultaneously. In other words, the

external aspect of sovereignty (independence) and the internal aspect (establishing the state through the Constitution) emerged together. In this regard, the maxim “the State is born with the constitution and lives with the constitution” captures the association of the 1921 Constitution (prepared by the 1920 Assembly) with the establishment of the Republic of Turkey well.

The second unique aspect of this process was that the State of Turkey was then governed by the Government of the Turkish Grand National Assembly (TGNA). In other words, Parliament was decisive in the establishment of the Republic of Turkey. The fact that the Council of Ministers was elected by the TGNA by an absolute majority on May 2nd confirms this.¹

The third unique aspect is the direct relationship between the Assembly of 1920 (the most pluralist assembly in Turkish history) and the principle of popular sovereignty solemnly declared by the Constitution of 1921, prepared by this Assembly.²

The 1924 Constitution moved away from the 1921 Constitution in its government system: a mix of parliamentary system and an assembly government. The Constitution of 1961 provided for a classical parliamentary regime; whereas, the 1982 Constitution envisaged a parliamentary regime in which the executive was strengthened. These three Constitutions of the Republic can be described, regarding the form of government, through the following three concepts:

- The general policy of the government is determined by the council of ministers.
- Ministers are responsible individually and collectively to the Turkish Grand National Assembly.
- The executive is divided into two separate elements: The President, representing the state, and the government.

¹ “İcra Vekilleri Büyük Millet Meclisinin ekseriyet-i mutlakası ile aralarından intihap olunur” (TBMM İcra Vekillerinin Suret-i İntihabına Dair Kanun, Kanun no:3, 2.5.1336 (1920), md.2).

² “Hakimiyet bila kayd ü şart milletindir. İdare usulü halkın mukadderatını bizzat ve bilfiil idare etmesi esasına müstenittir” (Teşkilat-ı Esasiye Kanunu, Kanun no:85, 20.1.1337 (1021),Art 1).

However, the constitutional amendment of 2017 shifted wholly from this common feature: “*The President is the head of the State. The executive power belongs to the President*” (art. 104/2).

This post-2017 constitutional provision brought about the following four defects in the governing of the State:

- There is no collective political decision-making mechanism in the Constitution.³

- Although many duties and powers are granted to the President, the principle of accountability is absent.

- There is no ministerial accountability to the Turkish Grand National Assembly.

- There is practically no accountable government due to the lack and /or deficiency of constitutional balance and supervision mechanisms.

In summary, the amendment to the Constitution in 2017 largely eliminated the constitutional and political principles, rules and institutions spanning over 150 years of State administration – including the Ottoman era.

Turning back to the centennial, on its 100th birthday, the TGNA has been left without a government, as it is the case with Turkey.

There is one thought-provoking coincidence at this point: The “health emergency” caused by COVID-19 has prevented the centennial celebrations, except for symbolic commemorations in the Turkish Grand National Assembly. The 2017 constitutional amendment, by which the government was abolished and parliament's supervisory power over the executive was eliminated, were also carried out in extraordinary settings and conditions.

This coincidence reveals the following: The President held most of his meetings with the ministers of the entire two-year period following the 2017 constitutional amendment during the 3-month COVID-19 period. Although such a collective procedure is not provided by the Constitution, these regular meetings have clearly confirmed the need for a collective political decision-making method.

³ In this regard, the only constitutional unit of political nature, in which some ministers also participate, is the National Security Council (NSC).

This practice and other *de facto* practices, albeit not provided by the Constitution, can be criticized for the sake of respect for the supremacy of the Constitution. In fact, the Constitution and the *de-facto*-practice conundrum has existed throughout the two years of practice and have merely come to light in the “health state of emergency” period. However, entering into such a discussion is not the objective of this note. Rather, we wish to point to the governability crisis of Turkey created by the “one-person executive” – and thus the consolidation of the legitimacy of a search for a new constitutional order, where political accountability is secured with a workable political decision process.

This current reality can also be expressed as follows: The amendment to the Constitution in 2017 has damaged the founding will. For this reason, it is also legitimate and necessary to consider the struggle for a way back to the founding will in its centennial.

II. COVID-19: BREAKING THRESHOLD IN THE CONSTITUTIONALISM?

The liberal constitutionalism and socialist constitutional movements in the 19th and the 20th centuries respectively, social constitutionalism after the Second World War, and environmental constitutional trends in the last quarter of the last century, are the processes that outline the constitutional developments in general. Will there be a new wave of constitutionalism in the aftermath of the COVID-19?

Here it is useful to remember: Liberal constitutionalism evolved in the 19th century within the framework the duties of the state for its legitimate existence. Separation of tripartite state powers i.e. legislative-executive and judiciary and its non-intervention shaped the understanding of freedom and rights.

The number of socialist constitutions put into effect after the First World War increased in number as a result of the division of the world ideologically into the Western Bloc and the Eastern Bloc after the Second World War.

The Non-Aligned Movement on the India-Yugoslavia and Egypt axis, which emerged outside the West and East blocks, brought about constitutional pursuits that pushed the limits of the boundaries drawn by the West and East bloc.

Social constitutionalism in the post-WWII era took that name since it imposed the positive duties on the states instead of “non-intervention. Namely, the social state and the social rights.

Towards the end of the twentieth century, that is half a century after the post-World War II wave of constitutionalism, as the liberal constitutional geography expanded, issues related to the environment and territoriality became visible in the constitutions: **environmentalist constitutionalism**. In this regard, the constitutions of the South American States took the lead.⁴

The driving force of the constitutional transformations mentioned here was the **evolution in the understanding of human rights**, determined by social needs and conflicts. It is worth mentioning briefly these concepts:

- **The age of personal security** coincides with the period of individualist approach on the basis of security and freedom.

- **The age of social security** can be defined as the reflection of the view that social rights can only be realized by the positive duties of the state.

- **The ecological era** coincides with the last decade of the 20th century, when discussions began to move from a “anthropocentric” (*égocentrique*) conception of freedom to the “environment-centric” (*écocentrique*) conception of rights.

The concept of health, on the other hand, spans these eras of constitutionalism, even exceeds them, with a conceptual intersection of human health and the healthy environment. In this context, the relationship between genetics and freedom added a new dimension to the discussions: will scientific developments be limited to being in the service of the natural structure of the human, or should freedom of science be used to change the human species? In short, humanity greeted the new millennium with the discussions of medicine and ethics. Some experts even suggested the concept of a 4th **generation of rights**, a proposal based on the view that a new understanding of human rights could prevent the

⁴ See: J. R. May/ E. Dalin, *Dünyada Çevresel Anayasacılık*, çev. Tolga Şirin/ N. Umut Orcan, Ekoloji Kolektifi, 2018.

potential risks posed by new developments in the medical science: medical science and human rights⁵.

Since the early 2000s, avian and swine influenza or coronavirus infections (SARS in 2003, MERS in 2012, and SARS-Cov2 in 2019-2020) have been growing steadily, each time with heavy consequences on humanity and civilization. In the face of these threats, the lifestyle and organization of modern societies remained inadequate and helpless.

While trying to protect human life against environmental disasters and armament (as well as war) or even scientific and technological advances, the 21st century began to turn into a **century of “germs”** that the eye cannot see but cause mass deaths.

Human health, like the ecosystem, forms the basis for the survival of humanity. Therefore, the concepts of health and environment are often uttered jointly; similarly, we speak of the right to live in a healthy environment.

Humanity, entering the new millennium with the fetishism of economic globalization, is facing a **“global viral threat”**. Science and technology as the driving forces of globalization remain defenseless against the covid-19 pandemic.

It is obvious how we came here today: With the industrialization based on the capital and with the conception of “sovereignty on the nature” and on the way to capitalism, neo-liberalism and economic globalization; **the globe has been looted**. In this process, law and democracy always remained in the secondary position. Let us recall the dirty war, which still remain in the memories, where the US administration attacked against Iraq, with its *aide-de camp* the United Kingdom. In March 2003, troops were sent from Texas to Baghdad with a dual function: to act as a watchdog of the guns produced in the USA and act as the proxy of the traders who were coveting the oil in the region. The result was to mass murder of the peoples of the Middle East and eradication of their natural-historical-cultural heritage.

⁵ See for an example: S. Marcus-Helmons, “La quatrieme génération des droits de l’homme”, Les droits de l’homme au seuil du troisieme millénaire, Bruyland, 2000, pp.549-559.

However, COVID-19 originating from Wuhan produced more devastating effects and results than US weapons in terms of the speed at which it spread and its lethal effects.

The US and European states, which even consider it legitimate to use weapons to close their borders to South Americans, Africans and Asians, and disregard the life of the peoples who are not their citizens, are unable to question the origin of the virus.

III. TRANS-BORDER CONSTITUTIONALISM AND WORLD-WIDE PURSUITS

The massive destruction caused by the Second World War was the driving force of multi-layered developments. The establishment of the United Nations Organization (UN) and the preparation of the Universal Declaration of Human Rights were justified by the need for humanity not to experience a similar disaster once again. The trio of peace, development and human rights should be secured together for the safe future of humanity. In other words, the organizations such as the UN and the Council of Europe, the humane documents such as the Universal Declaration of Human Rights (UDHR) and the European Convention on Human Rights (ECHR) are the product of the aftermath of the devastating consequences of World War II. The common goal, in brief, is that humanity should not once again experience such a devastating war.

It is, however, worth mentioning that, despite these organizations and documents, for ideological reasons the constitutions of the world do not adhere to a common standard. It is indeed very exceptional for the “right to peace” appear in the constitutions, and constitutions do not reflect a common understanding in their conception of human rights.

If we return to the current situation, the different constitutional generations and movements did not face the catastrophe that caused such a common sense of victimhood as is experienced now:

In the war against COVID-19, states are fighting against a common enemy, not with each other, unlike world wars. This is so much so that, instead of the philosophy of existentialism of the 20th century, the crude reality of the 21st century is that of survival.

As a matter of fact, in discussions on teaching politics, the “territorial-sphere” will be added to the “human-society-state” trio. Human

health will become meaningful in such a context. The framework of all these will be the constitutions of the period after COVID-19.

While reviewing the general theory of human rights, it is also possible that priorities, criteria and concepts differ in the legalization process of freedoms. For example, the general outlines of freedom and limits of research in the relationship between medicine and human rights are expected to be designed according to the cause-effect relationship before and after COVID-19. Regarding this, the reason and way in which the COVID-19 has emerged may also be relevant. If, for example, it is a lab-borne disease, then freedom of research may be subject to certain limitations. As such, ethical boundaries and legal registration criteria seem to be shaped again in the light of medical science data.

Just as it is the case with the treaties of the post-Chernobyl nuclear disaster regarding the obligation to inform of nuclear danger, there will probably be a need to prepare and enforce similar treaties after COVID-19, led by the UN World Health Organization.

In the face of new waves of COVID-19 or new pandemics, regulations that emphasize “ecological balance” vis-a-vis the tripartite system *flora+fauna+homo sapiens* will be needed on a world scale, as well as on a national scale. Within this framework, it is hoped that the Climate Agreement will be approved and put into effect in the first place.

While health and environmental planning will probably have to be considered together, it is also possible that there will be a shift in the understanding of sovereignty in the context of the right to development and peace because the conditions will make it necessary to shift the share allocated for spending arms in the budget to health expenditures.

Such pursuits on national and international levels will have a deep impact on the conceptions of freedom and human rights, as well as constitutionalism. Also, the "Universal Declaration of the Rights of Humankind Project" to replace the Universal Declaration of Human Rights will likely secure its place as a subject of human rights studies in the near future.

There is no doubt that, such probable developments will not render futile the question: “Is it the end of constitutionalism?”. Indeed, the legal or *de facto* state of emergency measures, put into effect to combat the

COVID-19 pandemic, impose unconstrained restrictions on rights and freedoms, posing a risk of sliding into authoritarianism.

Therefore, the question “the end of constitutionalism?” presupposes the need for a constant and vigilant observation of the practices of “health emergency measures”, the resulting authoritarian tendencies and their undermining legal and constitutional effects. Because there is a risk of negative effects and consequences becoming permanent after COVID-19, even in the period of COVID-19, “constitutional awareness” should never lapse.⁶

This current effort, undoubtedly, does not prevent specialists from long-term intellectual pursuits on the future of the movement of constitutionalism, as well as on transnational constitutionalism.

“*Transnational constitutionalism*” or “*trans-constitutionalism*” may be defined as “horizontal investigation of constitutional norms and practices in different legal systems of various states without necessarily borrowing them”. In this context, the existence or emergence of intersection areas and common principles in different constitutional orders are investigated. The general principles of law constitute the driving force of transnational constitutionalism. This feature distinguishes transnational constitutionalism from comparative constitutional law. In this context, it is suggested that the transnational constitutionalism approach can contribute to the emergence of a truly universal constitutional culture. This is an understanding that tries to maximize human development and the restriction of state power. The problem of human rights has a central position in transnational constitutionalism.

As a result, the general theory of constitutional law is not a completed process, but the positive constitutional process is constantly evolving. While the development of social and political structures, and continuous changes in international relations are still relevant, the constant acceleration of intellectual works through constitutional institutions

⁶ These articles in this issue examine the Covid-19 in Turkey in its different aspects, thereby the “health emergency” : The Constitutional Struggle against Dangerous Epidemic Diseases (Tolga Şirin); The Crime of Acting in Violation of Measures Regarding Contagious Diseases (TCC Art. 195) (Murat Önok); Administrative Law in the Time of COVID-19: Considering Administrative Powers in Combating Pandemic (Çiğdem D. Sever); European Court of Human Rights and “The Disconnected” (Gözde Atasayan).

and case-law interactions can be seen as the driving forces of development. In addition, constitutional law is under the constant influence of technological advances and has to adapt its institutions and concepts to them.

Regarding the relationship between the post-COVID-19 era and trans-border constitutionalism, COVID-19 could be the driving force of trans-border constitutionalism. It could also contribute to the creation of solutions on the constitutional level to problems that existed before COVID-19.

All these efforts should, of course, not ignore the need to rethink and work on world constitutionalism, within the framework of the UN Charter, especially on the empowerment of the UN and the World Health Organization.

It is convenient to conclude this Foreword with a bit of nationalism and the nationhood aspect of constitutionalism: As a reminder of the historical duty and responsibility of the young in the repairing the founding will that was impaired by the 2017 Constitutional amendment: Happy 19 May Commemoration of Atatürk, Youth and Sports Day!

I hope you enjoy reading this issue.

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