

FOREWORD

ASSOCIATION OF THE RESEARCH ON CONSTITUTIONAL LAW (10TH ANNIVERSARY) /THE CONSTITUTION OF 1921(CENTENNIAL) AND THE REPUBLIC (TOWARDS THE CENTENNIAL)

In terms of the constitutional agenda, the first half of 2021 has been quite busy. Three issues will be highlighted here:

- 1) 10th Anniversary of the Association of the Research on Constitutional Law,
- 2) The Centennial of the 1921 Constitution.
- 3) Debates and works regarding the constitutional change: As of 1st February 1921, towards the Centennial of the Republic, a new rhetoric has been added to the debates on the “reinforced parliamentary system”: the incumbent government’s “civil constitution”.

Therefore, this foreword to the Journal of Constitutional Law -19 - has the following three headings:

- **THE ASSOCIATION OF THE RESEARCH ON CONSTITUTIONAL LAW IS 10 YEARS OLD**
- **THE CONSTITUTION OF 1921 IS 100 YEARS OLD**
- **WHAT KIND OF CONSTITUTION AT THE CENTENNIAL OF THE REPUBLIC?**

I.- THE ASSOCIATION OF THE RESEARCH CONSTITUTIONAL LAW IS 10 YEARS OLD

Founded on April 10, 2011, the Association of the Research on Constitutional Law (*ANAYASA-DER*) has completed 10 years. Because the Journal of Constitutional Law is a publication of the Association, it is appropriate to evaluate Turkey’s current constitutional agenda briefly here.

ANAYASA-DER was established approximately 6 months after the 12 September 2010 constitutional referendum. In the subsequent ten years Turkey's constitutional agenda has been very intense, although there was only one constitutional amendment in 2017. *ANAYASA-DER* and the Journal of Constitutional Law continued their activities during this period to contribute to society’s “**right to information on constitutional matters**”.

One may present the main activities carried out by *ANAYASA-DER* under five headings:

- Scientific events
- Journal publication
- Reports and books
- Activities to contribute to public opinion on the constitution
- 2021: Finalization of two projects.

1) Scientific events

ANAYASA-DER, a member of the International Association of Constitutional Law (IACL), held many national and international scientific meetings. The proceedings of these meetings were published, wholly or partially, in the Journal of Constitutional Law. It carried out major international events in cooperation with organizations and institutions covering a wide spectrum from IACL to the Council of Europe.

2) Journal of Constitutional Law

The internationally peer-reviewed Journal of Constitutional Law has been indexed in the "*TÜBİTAK ULAKBİM TR Index Law Database*" since its 7th issue. Since its 17th issue, English and French extracts of the articles in Turkish have been published for our non-Turkish speaking colleagues.

3) Reports and Books

-*The Constitutional Report*: The report submitted to the Turkish Grand National Assembly Constitution Reconciliation Commission was published as a book with the title of "*Association of Constitutional Research Constitutional Report*". (Legal/Anayasa-Der, March 2012).

-*Amicus Curiae Report*: *ANAYASA-DER*, in cooperation with the Turkish Criminal Law Association, prepared an "amicus curiae" report on Law No. 6638, known as the "Internal Security Package". This report was submitted to the President of the Constitutional Court on May 25, 2015. The report was published as a special issue in the Journal of Crime and Punishment (June 2015).

-*Turkey's Constitutional Agenda*: This edited volume was published in June 2016. An updated 4th edition was published in 2018 (*İletişim* Publishing).

- "*The Technical-Scientific Report on the Law on the Amendment of the Constitution of the Republic of Turkey, to be submitted to the Referendum on April 16, 2017*", was published in March 2017 (*ANAYASA-DER/The Democracy First Platform*).

4) Activities to contribute to public opinion on the constitution

ANAYASA-DER prepared information notes in order to inform the public about important constitutional problems and to contribute to the formation of

public opinion about constitutional matters on the basis of correct information. As a stakeholder of the “Democracy First” initiative, it carried out country-wide constitutional debates during 2016 and 2017.

5) 2021: Finalization of two large-scale projects

There are two works in progress that readers will receive in the forthcoming months. 1) “A Commentary on the *Universal Declaration of Human Rights* (UDHR)”. 2) “A Collection of Contributions in Honor of the Centennial of the 1921 Constitution”.

II.- THE CONSTITUTION OF 1921 IS 100 YEARS OLD

In its centennial, the 1921 Constitution is on the agenda of not only constitutional scholars, but also politicians. Although the “Contributions in the Honor of the Centennial” is forthcoming, it would be appropriate to briefly mention the 1921 Constitution here.

1) National Sovereignty and the Birth of the Nation-State

The Congresses in Erzurum and Sivas (7 August and 11 September 1919), where the declarations embodying the idea of national sovereignty were endorsed, paved the way for the Grand National Assembly that convened in Ankara on April 23, 1920. The Fundamental Law of 20 January 1921 (the 1921 Constitution) is unique in many ways and has many original and seminal elements. Unusually among world constitutions, the 1921 Constitution determined the legal principles of a legitimate struggle of a state, against occupation and for its independence. The Grand National Assembly of Turkey (GNAT), founded on the basis of a democratic grassroots model of organization, governed the national independence war in a relatively democratic way and respecting the principles of rule of law. In other words, the leaders of that time did not abuse the war as a pretext to resort to tyranny. This assembly also established a new state based on the idea of national sovereignty. The formation and operation of the GNAT as a constituent assembly and the principles of the founding constitution of the new state were revolutionary in terms of political and constitutional developments up to that day.

The importance of the 1921 Constitution is threefold: 1) Its value in Ottoman-Turkish constitutional developments; 2) Its identification of the key principles of constituent power of the Republic of Turkey such as democracy and the rule of law; and 3) The impact of the identification of these principles then and into the future.

2) The first and last constituent power.

Compared with other constitutional documents of the Ottoman Empire and the Republic of Turkey, the Constitution of 1921, was made by *an assem-*

bly that adequately represented the national will, in terms of preparation and adoption.

The Grand National Assembly, which convened on April 23, 1920, fulfilled the function of sociological representation in addition to its legal title as the representative of the nation. With its sociological and ideological diversity, the session of the first term of the GNAT resembled the multi-party parliaments, which was quite progressive for its era.

In this regard, the 1921 Constitution, is one of the most interesting documents of the political history of Turkey in terms of its content, as well as, in terms of the debates on and adoption of it.

The constitutional debates, which lasted for two months, on diverse issues ranging from professional representation to referendum and popular initiative, reveal the social and ideological diversity of the first GNAT. It is also noteworthy that in the constitutional talks, revolutionist representatives and conservatives were able to agree on the common minimum standards on fundamental questions for this transitory period. Besides being *the only constituent assembly elected by free will of the people*, the Assembly that made the 1921 Constitution also fulfilled a function of creation of the state.

With its 23 articles and one separate article, the 1921 Constitution is a typical example of a short constitution. There are two reasons for this. First, certain provisions of the Ottoman Constitution of 1876 that did not conflict with the 1921 Constitution still remained in force. These two constitutions co-existed for a transition period. Secondly, during this transition period different political tendencies in the Assembly co-existed and competed; it was a wise decision for the assembly to confine to the determination of common minimum standards during that time.

Therefore, the content of the 1921 Constitution, which did not regulate basic constitutional issues such as individual rights and freedoms and the judiciary, can be summarized through four components: state, sovereignty, parliamentary government and local governments:

-**“The State of Turkey”**: The Constitution of 1921, a constitution enacted on the territory of the then Ottoman Empire, said: *The State of Turkey is governed by the Grand National Assembly (Article 3)*. The term **the State of Turkey** “expressed the new state, which is the highest point of the political unification of people living within a certain political geography (the borders of National Oath) regardless of ethnic origin, language and culture.”¹

¹ B. Tanör, *Osmanlı-türk anayasal gelişmeleri*, 10. Baskı, YKY, s.254.

-**“Sovereignty”**: The 1921 Constitution adopted a conception of “mixed sovereignty” that combined the elements of direct and representative democracy and simultaneously reflected the ideas of popular and national sovereignty.

-**“Concentration of Power and Assembly Government”**: The 1921 Constitution endorsed the principle of concentration of power: *“Executive power and legislative responsibility is exercised by and concentrated in the hands of the Grand National Assembly which is the sole and real representative of the nation.”*(Article 2). Therefore, the GNAT assumed the executive power in addition to constituent power and the legislative. (Article 3)

-**“Decentralization”**: Most of the articles of the 1921 Constitution (art. 11-23) concerned the local units outside the central government. This reflects the importance it attaches to local participation and local democracy.

3) How was the practice?

Despite its short life, the 1921 Constitution was a hallmark in the great transformation in Turkish constitutional law and politics.

Following the victory of the War of Independence, in a three-year period and within the framework of the institutions established by the 1921 Constitution, several legal and political transformations took place that formed the system of new State such as abolition of the Sultanate, the proclamation of the republic, and the abolition of the caliphate.

The assembly government system, one of the most original aspects of 1921 Constitution, was successfully implemented. Ideological pluralism and the atmosphere of democratic debate marked this period. These assumptions, however, do not mean that there were no discrepancies between the Constitutional text and its practice.

Although the 1921 Constitution brought the principle of concentration of power, the Assembly did not assume a direct fulfillment of its executive competence; rather a separate body, the “Council of Ministers (*İcra Vekilleri Heyeti*)” exercised executive power. The gradual enablement of this council brought political practice closer to some sort of parliamentary system of government. This assimilation was further enhanced by different laws.

In the First GNAT, which consisted of members with very different views, political factions emerged under various names starting in the first days after the adoption of the Constitution: “Anatolian and Rumelia Defense of Rights Group” (10 May 1922), founded by Mustafa Kemal, then took the name of the “First Group”. About a year later, a “Second Group” was formed. The “revolutionary” and “conservative” tendencies crystallized around these factions.

The second Assembly, which started its work on August 11, 1923, declared the Republic on October 29. With a law passed by the Assembly on 3 March 1924, the caliphate was abolished. Significant steps were taken on the

path to secularism with the two laws adopted on the same day: The Law on the Annulment of the Ministry of the Islamic Law and Charitable Foundations (*Şeriye ve Evkaf*) and the Law on the Unification of Educational Instruction (*Tevhid-i Tedrisat*)

The implementation period of the 1921 Constitution was intense but short. However, it ignited a “constitutional movement” that had a deep impact on later periods and even in terms of today's debates. This is due not only to the “feature” of the single constituent assembly, elected by the free will of the people, but also to the fact that it was a constitution that created the State.

“Since National Independence has been achieved through democratic institutions, principles and methods-particularly the 1921 Constitution and the TGNA, new national-democratic values have also affected the upcoming constitutional developments. Principles such as the Republicanism, national sovereignty and the supremacy of the Grand National Assembly of Turkey are the legacies that infused from the “Constitutionalism of Liberation” to the “Constitutionalism of the Foundation (Creation of State).”²

III.- WHAT KIND OF CONSTITUTION AT THE CENTENNIAL OF THE REPUBLIC?

One may believe, without denying the constitutional legacy of the Ottoman Empire of course, that the Republic of Turkey began writing its constitutional and political history a century ago. The historical record shows remarkable evolution from the adoption of the 1921 Constitution to the 2017 constitutional amendment, with interruptions and continuities. Turkish constitutional developments in the 20th century generally followed a course parallel to world constitutional movements. The 2017 Amendments, however, brought a rupture in our constitutional history. Indeed, the “**search for a democratic constitution**” against the “**one man rule**”, envisaged by the 2017 Constitutional amendments, started in the immediate months following the amendment. Relevant activities were led by political parties that could be called “democratic opposition” such as Republican People’s Party (CHP), Democratic Party of the Peoples (HDP), the Good Party and the Felicity Party. While the democratic opposition's work on the “strengthened parliamentary system” continued, on the evening of February 1, 2021, the President of the Republic and the leader of the Justice and Development Party made his move by stating his intention for a “civil constitution”. Then, the constitutional debate suddenly took the 1921 Constitution as its main point of reference.

² B. Tanör, *a.g.e.*, s.289.

So how should we read the 1921 Constitution in its 100th year? Below is a brief explanation of the current works on the constitution, accompanied by the catchphrases such as “strengthened parliamentary system” and “civil constitution”. Then, a reminder will follow on the possible dangers that the Republic of Turkey may meet at its centennial.

1) How to Read the Constitution at its Centennial?

Reflecting the fact that “The state is born and lives with the constitution”, the 1921 Constitution, is distinctive, not only in Turkey but on a world scale, both in terms of its content and the relevant historical process. Leaving many historical constitutional moments (the making of the constitutions of 1924, 1961, and 1982) in Turkey aside, one bitter fact is quite valid for the year 2021: The Grand National Assembly of Turkey and the Government founded the Republic. Today, however, Turkey has lost his government with its Assembly rendered dysfunctional. In other words, the Assembly which created the State by means of the Constitution a century ago, may not operate as an autonomous legislative organ today. Thus, the search for a democratic constitution is legitimate - and a requirement - to respect the legacy of 1920 and 1921. Plus, whichever constitutional catchphrase one may promote, GNAT should be endorsed as the pivotal component of the constitutional system.

Finally, constitutional amendment within the framework of the principle of democratic rule of law should be designed in three stages in an environment of free debate and with the most participatory method possible. The first stage should include proposed texts or reports on basic principles as presented by different sections of the political spectrum. The second stage should be allocated to the writing of and reaching consensus on the text of constitutional proposals covering the legislative, executive and judicial powers. Finally in the third stage, a bill of rights should be drafted.

2) “Strengthened Parliamentary System” and “Civil Constitution”

The democratic opposition parties have been developing a “constitutional agenda” since late 2020. Invoking the concept of the “**strengthened parliamentary system**”, the opposition aims for a constitutional amendment that may bring back the democracy and the rule of law.

On the other hand, AKP and MHP, which constitute the “People’s Alliance”, expressed their disagreement with the “constitutional agenda” claiming that a new constitutional order had already been established under the name of “Government System of the President of the Republic” with the approval of the 2017 Amendment in the referendum. However, on the 1st of February, the President and the leader of the AKP, said “it’s now time for the constitution,” to create his own constitutional agenda. Therefore, a kind of “double or parallel constitutional agenda” has now emerged.

3) The Path to the Centennial: Discrepancies or Similarities?

There are several discrepancies between the government and opposition's approaches to the constitution both materially (content) and formally (method).

Materially: The political parties that defend the “strengthened parliamentary system” (SPA), revealed their preference for a government based on checks-and-balances and accountability, although they have not declared their amendment proposals yet.

On the other hand, ambiguity persists as to whether the two parties of the alliance in government have a concerted (shared) approach. AKP mentions a certain “collective roundtable”, whereas the MHP insists on maintaining the current governmental system, considering it as its “red line”.

Formally: Whereas the SPA supporters confine themselves to a constitutional amendment, those who defend the current presidential regime propose a total revision of the constitution.

These two separate constitutional agenda show that Republic of Turkey is now proceeding to its centennial with a great deal of division. The division is between those who defend the “**democratic Republic**” and the supporters of the “**one person rule**”

-Defenders of the Democratic Republic: Those who defend the SPA, consistently reveal their will to change the current constitutional provisions in line with the “**secular, democratic and social state governed by rule of law and based on the human rights.**”

-Supporters of One-Person Rule: They work towards consolidating the current presidentialist regime under the name of “Governmental System of President of the Republic” and a one-man rule by party leadership.

In short, Turkey is moving towards 2023 with double constitutional and electoral agenda.

-Double elections: Parliamentary elections and Presidential elections will be held on the same day.

-Double constitution: The search for two separate constitutions will dominate the electoral agenda.

Couldn't be there an agreement on a “joint constitutional project” at the centennial of the 1921 Constitution? Apparently, given the current political environment, it is quite hard to reach a “common sense”. So, for now, let's just point out the need for a transparent process on the basis of true information. In this respect, *ANAYASA-DER* has a historical duty regarding the “right to information” and “public opinion” on the constitutional matters.

I hope you enjoy reading this issue.

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