

# Presidential decrees and the principle of legality under Turkish law

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## **Abstract**

As of July 9, 2018, Turkey abandoned the parliamentary system and has adopted a *sui generis* kind of presidential system of government. The said new governmental system provides the President, the Executive Organ of the Turkish State, with the authority to issue presidential decrees on matters relating to executive function, and such authority that is conferred directly by the Constitution “is neither dependent on a prior parliamentary mandate nor subject to any subsequent approval”<sup>2</sup>. On the other hand, the principle of legality<sup>3</sup>, an important constitutional principle relating to “the rule of law” states that the Legislative power is “original/primary”, and that, as a rule, the Executive Organ possesses a *secundum legem* authority. As such, the prospective effects of the presidential decrees on the constitutional principle of legality will be reviewed in this study based on various discussions made by Turkish public law academics.

**Keywords:** Presidential decree, principle of legality, *secundum legem* authority of administration, “original/primary” powers.

**JEL Classification:** K23

## **1. Introduction**

As of July 9, 2018 Turkey abandoned the parliamentary system of government and Turkey is now being governed by a *sui generis*<sup>4</sup> presidential system. Accordingly, as of the aforementioned date, “one may safely claim that the executive organ of the Turkish State is now identified with the President”<sup>5</sup> since Article 104/1 and Article 8 of the Constitution of the Turkish Republic as recently amended set forth respectively that “The President of the Republic is the head of the State. The executive power shall be vested in the President of the Republic”, and that “Executive power and function shall be exercised and carried out by the President of the Republic in conformity with the Constitution and laws”.

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<sup>2</sup> See Bülent Sözer, *State Organs and Their Rule Making Powers Under the New Constitution of the Republic of Turkey*, Vedat Publishing, 2018, p. 49.

<sup>3</sup> Principle of legality is used for the Turkish legal term “kanuni idare” in this essay. A word-for-word translation of “kanuni idare” can be carried out as “lawful administration” but “principle of legality” is preferred in this essay since the latter is believed to correspond better to *secundum legem* and *intra legem* authorities of administration.

<sup>4</sup> There are material differences between the US and Turkish presidential systems of government. On the other hand, considering the limits of this academic paper, such differences should constitute the subject-matter of another academic paper.

<sup>5</sup> See Bülent Sözer, *op. cit.*, 2018, p. 49.

As such, the recently amended Turkish Constitution provides the President with vast (presidential) powers in line with presidential systems of government and therefore assigns the President to issue presidential decrees on executive related matters. In fact, Article 104/17 of the Turkish Constitution now states that “The President of the Republic may issue presidential decrees on the matters regarding executive power. The fundamental rights, individual rights and duties included in the first and second chapters and the political rights and duties listed in the fourth chapter of the second part of the Constitution shall not be regulated by a presidential decree. No presidential decree shall be issued on the matters which are stipulated in the Constitution to be regulated exclusively by law. No presidential decree shall be issued on the matters explicitly regulated by law. In the case of a discrepancy between provisions of the presidential decrees and the laws, the provisions of the laws shall prevail. A presidential decree shall become null and void if the Grand National Assembly of Turkey enacts a law on the same matter”.

As is seen from above, the authority of the President to issue presidential decrees is subject to “substantial limits”. On the other hand, it is claimed that the said authority “places the President to the position of a ‘co-legislature’ to a certain extent” since “the exercise of this power (i.e. authority to issue presidential decrees) is neither dependent on a prior parliamentary mandate nor subject to any approval”. In addition, presidential decrees “are subject to review by the Court of Constitution” as laws enacted by the Legislative power that is the Turkish Grand National Assembly.<sup>6</sup>

A fundamental constitutional principle known as the “principle of legality” must be underlined at this very moment. Precisely speaking, Article 123/1 of the Turkish Constitution stipulates that the administration shall be regulated by law as a whole with its formation and functions. The said fundamental principle has two meanings: First, the acts and actions of the administration must be derived from laws (i.e. *secundum legem* authority of the administration), and second, the said acts and actions cannot be contrary to the laws in force (i.e. *intra legem* authority of the administration).<sup>7</sup>

## 2. *Secundum legem* authority of administration

As known, “rule of law” necessitates “separation of powers”, and based on this “basic principle, the main rule making authority of the Republic of Turkey is the legislative organ, in other words the parliament (i.e. Turkish Grand National Assembly)”.<sup>8</sup> That is to say, “the legislative power belongs ‘exclusively’ to the

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<sup>6</sup> *Idem*, p. 48, 49.

<sup>7</sup> See Emre Akbulut, *Türk İdare Hukukunda Kanuni İdare İlkesi (The Principle of Legality under Turkish Law)*, Beta Publishing, İstanbul, June 2013, p. 12 ff; Kemal Gözler, *İdare Hukuku Dersleri (Administrative Law Courses)*, Ekin Publishing, Bursa, September 2018, p. 71; Bahtiyar Akyılmaz, Murat Sezginer, Cemil Kaya, *Türk İdare Hukuku (Turkish Administrative Law)*, Savaş Publishing, Ankara, September 2018, p. 100, 101.

<sup>8</sup> See Bülent Sözer, *op. cit.*, p. 57.

Turkish Grand National Assembly.”<sup>9</sup> This is because “the legislative power depends upon and derived from the sovereignty.”<sup>10</sup> In fact, Article 7 of the Turkish Constitution mentions that “Legislative power is vested in the Grand National Assembly of Turkey on behalf of Turkish Nation. This power shall not be delegated.” Likewise, Article 87 sets forth that “the duties and powers of the Grand National Assembly of Turkey are to enact, amend, and repeal laws” whereas Article 88 states that “deputies (i.e. members of parliament) are empowered to introduce bills.”

Accordingly, the legislative power “is both an ‘original/primary’ and ‘general/all embracing’ power, derived directly from the Constitution itself. Legislative power is ‘general and all embracing’ in the sense that it is not restricted to any subject matter or limited by content; the legislative organ has full authority and discretion to regulate any matter and/or area through issuing laws, provided always that it remains within the boundaries set by the Turkish Constitution.”<sup>11</sup>

Indeed, “there is no restriction on the issue or topic or subject matter which can be regulated through a law by the legislative power, nor a constraint on the scope and extent of a law and therefore the legislative power has the authority to go at any length it may think proper while planning the scope and content of any proposed legislation. As such, the legislative power is actually free to regulate any area even down to the last detail.”<sup>12</sup> This is understandable because “law in contemporary, modern and developed societies is a major force, ideally ought to be and remain the only force, instrument to direct and regulate social relations and to pursue whatever social goals are considered desirable within a society.”<sup>13</sup>

It can be alleged that the legitimacy of “law” as a major force and instrument to regulate social relations even down to the last detail if necessary has its source in two significant facts: First, the members of the legislative power that enacts laws take office upon general elections. As such, members of parliaments are considered legitimate representatives of the whole nation. And second, law making is a detailed and long procedure which allows long discussions between the government and the opposition.<sup>14</sup> It is highly likely that in most cases all members of the parliament including both the ruling party and the opposing parties would reach an agreement based on common sense. In addition, the said detailed and long procedures would make the media involved in law making process, and thus people would find an opportunity to have indirect control over the government.

That being the case, a reasonable question comes to mind: Is the President’s authority to issue presidential decrees on the matters regarding executive power in line with the *secundum legem* authority of the administration? Article 104/17 of the Turkish Constitution allows the President to issue presidential

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<sup>9</sup> *Idem*, p. 25.

<sup>10</sup> *Idem*, p. 25.

<sup>11</sup> *Idem*, p. 25, 26; also see Kemal Gözler, *op. cit.*, p. 72.

<sup>12</sup> See Bülent Sözer, *op. cit.*, p. 27.

<sup>13</sup> *Idem*, p. 27.

<sup>14</sup> See Turan Yildirim, Melikşah Yasin, Nur Kaman, H. Eyüp Özdemir, Gül Üstün, Özge Okay Tekinsoy, *İdare Hukuku (Administrative Law)*, On İki Levha Publishing, İstanbul, November 2016, p. 12.

decrees only on social and economic rights and duties. In other words, individual rights and duties and the political rights and duties cannot be regulated by presidential decrees. Besides, pursuant to Article 104/17, in case a social and economic matter is stipulated in the Constitution to be regulated exclusively by law, then the President does not have the authority to issue a presidential decree even if the matter falls within social and economic scope. Notwithstanding this, the Turkish Constitution provides the President with the authority to issue presidential decrees *without prior parliamentary mandate* on vast matters like family, children, education, land ownership, agriculture, expropriation, labour, health, environment, housing, social security, arts and others.<sup>15</sup>

Thus, the said provisions in Article 104/17 are indeed inconsistent with the aforementioned Article 123/1 (of the Turkish Constitution) that is the grounds for the *secundum legem* authority of the administration. The principle of legality includes the *secundum legem* authority of the administration and accordingly, acts and actions of the administration should normally be derived from laws. However, issuing presidential decree is an authority provided directly by the Turkish Constitution and therefore the President, as the executive power, holds an “original / primary” authority in that sense. Until the entry into force of the new governmental system on July 9, 2018, the legislative power was, as a rule, the only “original/primary”, but as of July 9, 2018, both the legislative and executive powers are “original/primary” to the extent permitted by the Turkish Constitution.<sup>16</sup>

Considering the fact that the President is directly elected by the whole nation in Turkey’s new sui generis presidential system, the President’s aforementioned “original/primary” authority to issue presidential decrees is as legitimate as the parliament’s “original/primary” authority to enact laws. On the other hand, issuing a presidential decree does not necessarily include long discussions among the relevant experts working for the Presidency of the (Turkish) Republic<sup>17</sup>. Precisely speaking, it is actually highly probable that the President would fully discuss the matters with the relevant experts working for him/her prior to issuing a presidential decree since the President needs to receive the absolute majority of the valid votes for re-election pursuant to Article 101 of the Turkish

<sup>15</sup> It should again be underlined that pursuant to Article 104/17, in case such matters are stipulated in the Constitution to be regulated exclusively by law, then the President does not have the authority to issue a presidential decree.

<sup>16</sup> See Bülent Sözer, *op. cit.*, p. 28, 29; Kemal Gözler, *op. cit.*, p. 73; Ergun Özbudun, *Türk Anayasa Hukuku (Turkish Constitutional Law)*, Yetkin Publishing, Ankara, 2018, p. 248, 249; Turgut Tan, *İdare Hukuku (Administrative Law)*, Turhan Publishing, Ankara, September 2018, p. 71, 72; Yasin Söyler, *Yeni Başkanlık Sisteminde Cumhurbaşkanlığı Kararnamesi (The Presidential Decree under the New Presidential System)*, Seçkin Publishing, Ankara, September 2018, p. 78 ff; Özen Ülgen, “*Cumhurbaşkanlığı Kararnamelerinin Niteliği ve Türleri (Quality and Types of Presidential Decrees)*”, Galatasaray University Law School Journal, 2018/1, p. 6 ff.

<sup>17</sup> For a similar opinion, see See Turan Yıldırım, Melikşah Yasin, Nur Kaman, H. Eyüp Özdemir, Gül Üstün, Özge Okay Tekinsoy, *İdare Hukuku (Administrative Law)*, On İki Levha Publishing, İstanbul, October 2018, p. 5.

Constitution<sup>18</sup>. That's to say, the re-election mechanism would most likely lead to a President with common sense. On the other hand, this is not a must foresee by the Turkish Constitution. The President may choose to behave otherwise and issue presidential decrees in a short span of time without prior in depth analysis, and the President does not have to confer with the opposing parties, either. In such a case, the media can only be involved in the process only after the presidential decree's entry into force.

Notwithstanding the above, there are scholars who allege that the administration may exercise its authority based directly on the constitutional provisions - rather than provisions stipulated in a law – provided that constitutional provisions should be both clear enough and therefore directly applicable. In that case, no violation of the principle of legality is in question.<sup>19</sup> Likewise, there are also scholars who mention that lack of *secundum legem* quality of administration is not contrary to rule of law since rule of law in fact necessitates the second aspect of the principle of legality, the *intra legem* quality of the administration, meaning the administration's respect for the law.<sup>20</sup>

## 2. *Intra legem* authority of administration

Acts and actions of administration should not be contrary to the laws in force. In other words, the administration has to act within the boundaries of existing laws and respect them. This is *intra legem* authority (and quality) of administration. Article 104/17 of the Turkish Constitution is actually in line with *intra legem* authority of administration since the said Article 104/17 sets forth that “no presidential decree shall be issued on the matters explicitly regulated by law. In the case of a discrepancy between provisions of the presidential decrees and the laws, the provisions of the laws shall prevail. A presidential decree shall become null and void if the Grand National Assembly of Turkey enacts a law on the same matter.” In addition, pursuant to Article 8 of the Turkish Constitution, “Executive power and function shall be exercised and carried out by the President of the Republic in conformity with the Constitution and laws.”

Nevertheless, it should absolutely be noted here that in addition to the constitutional provision stating that the President may issue presidential decrees on the matters regarding executive power, there are some specific constitutional

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<sup>18</sup> Pursuant to Article 101 of the Turkish Constitution, “a person may be elected as the President of the Republic for two terms at the most” and “in presidential elections conducted by universal suffrage, the candidate who receives the absolute majority of the valid votes shall be elected President of the Republic. If absolute majority cannot be obtained in the first ballot, the second ballot shall be held on the second Sunday following this ballot. Two candidates who received the greatest number of votes in the first ballot run for the second ballot, and the candidate who receives majority of valid votes shall be elected President of the Republic.”

<sup>19</sup> See Kemal Gözler, *op. cit.*, p. 73.

<sup>20</sup> See Emre Akbulut, *op. cit.*, p. 14; for a similar opinion, see Ergun Özbudun, *op. cit.*, p. 124, 125.

provisions that allow the President to issue presidential decrees on certain matters<sup>21</sup>. Such specific provisions of the Turkish Constitution are as follows:

- Article 104/9 sets forth that “the President shall regulate the procedure and principles governing the appointment of the high ranking executives.”

- Article 106/11 sets forth that “the establishment, abolition, the duties and powers, the organizational structure of the ministries, and the establishment of their central and provincial organizations shall be regulated by presidential decree.”

- Article 108/4 sets forth that “the functioning of the State Supervisory Council, the term of Office of its members, and other personnel matters relating to their status shall be regulated by presidential decree.”

- Article 118/6 sets forth that “the organization and duties of the General Secretariat of the National Security Council shall be regulated by presidential decree.”

- Article 123/3 sets forth that “public corporate bodies (i.e. public legal personalities) shall be established only (by law, or) by presidential decree.”

The President’s authority to issue presidential decrees on the matters regarding executive power is actually a general authority and such general authority can indeed be considered be inclusive of the authorities stipulated in Articles 104/9, 106/11, 108/4, 118/6 and 123/3 as mentioned above. Accordingly, one may ask as to whether the aforementioned specific constitutional provisions create a “reserved area” for the President to be able to regulate by issuing presidential decrees.

As previously mentioned, Article 104/17 of the Turkish Constitution states that the President “may” issue presidential decrees on executive power – related matters. Thus, it is obvious that the President does not hold a “reserved area” in this respect. Properly speaking, the legislative power “may” also enact laws on the matters regarding executive power since the legislative power is ‘general/all embracing’, therefore it has full authority and discretion to regulate any matter through issuing laws, provided always that it remains within the boundaries set by the Turkish Constitution<sup>22</sup>. Likewise, Article 123/3 sets forth that public corporate bodies (i.e. public legal personalities) shall be established only by law, *or* by presidential decree. As is seen, public legal personalities can be established by both executive (i.e. the President) and legislative powers, therefore this is not a “reserved area” for the President, either.<sup>23</sup>

The issue is to decide as to whether Articles 104/9, 106/11, 108/4, 118/6 create the President’s “reserved area” for exclusive regulation through presidential decrees. This is important indeed because if the idea of a “reserved area” that is established by the Turkish Constitution is adopted, then this means that the

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<sup>21</sup> See Yasin Söyler, *op. cit.*, p. 108 ff.

<sup>22</sup> See Bülent Sözer, *op. cit.*, p. 25, 26; also see Kemal Gözler, *op. cit.*, p. 72.

<sup>23</sup> See Kemal Gözler, *Türk Anayasa Hukuku (Turkish Constitutional Law)*, Ekin Publishing, Bursa, July 2018, p. 733.

legislative power's 'general and all embracing' authority in the sense that it is not restricted to any subject matter or limited by content no longer exists.<sup>24</sup>

In addition to the said change in the "general and all embracing" authority of the legislative power, adoption of the President's "reserved area" for exclusive regulation through presidential decrees would lead to dramatic changes in the principle of legality as well. This is simply because in that case the legislative power will no longer have the authority to regulate the matters stipulated by Articles 104/9, 106/11, 108/4, 118/6.<sup>25</sup> As such, the President will carry "original/primary" authority with regard to the aforementioned constitutional provisions. In other words, *secundum legem* authority (and quality) of administration no longer exists as for the matters stated in Articles 104/9, 106/11, 108/4, 118/6.<sup>26</sup>

However, considering *intra legem* authority (and quality) of administration, the President's "reserved area" for exclusive regulation through presidential decrees seems less likely to be argued. In fact, pursuant to Article 104/17 of the Turkish Constitution, "no presidential decree shall be issued on the matters explicitly regulated by law." Indeed, even though Article 106/11 sets forth that "the establishment, abolition, the duties and powers, the organizational structure of the ministries, and the establishment of their central and provincial organizations shall be regulated by presidential decree", the President has regulated the ministries by a presidential decree only after a decree law<sup>27</sup> repealed the relevant laws regulating the organizational structure of the former ministries, and the establishment of their central and provincial organizations. Accordingly, it is claimed that "such powers granted to the President (through Articles 104/9, 106/11, 108/4, 118/6 of the Turkish Constitution) cannot qualify as creating 'reserved area' for the President or bestowing exclusive power on certain matters. Any existing status created by a law may not be altered by a presidential decree. It will be up to the parliament to effect any change."<sup>28</sup>

Considering the fact that "in the case of a discrepancy between provisions of the presidential decrees and the laws, the provisions of the laws shall prevail" and that "a presidential decree shall become null and void if the Grand National Assembly of Turkey enacts a law on the same matter" as stipulated by Article 104/17 of the Turkish Constitution, it is actually obvious that "presidential decrees may be amended or repealed by laws, but laws may not be amended or repealed by presidential decrees."<sup>29</sup> Besides, Article 123/1 of the Turkish Constitution sets forth

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<sup>24</sup> See Ergun Özbudun, *op. cit.*, p. 249.

<sup>25</sup> See Yasin Söyler, *op. cit.*, p. 122.

<sup>26</sup> See Kemal Gözler, *op. cit. (Türk Anayasa Hukuku - Turkish Constitutional Law)*, pp. 727-729 and 732-733.

<sup>27</sup> Decree law was a decree with the effect of law, and the last decree law was published in the Official Gazette on July 9, 2018 since the new presidential system in Turkey does not include decree laws.

<sup>28</sup> See Bülent Sözer, *op. cit.*, p. 58 – 61.

<sup>29</sup> *Idem*, p. 60.

that “the administration is a whole with its formation and functions, and shall be regulated by *law*”.<sup>30</sup>

In addition, Articles 104/9, 106/11, 108/4, 118/6 of the Turkish Constitution and in particular Article 106/11 that sets forth that the establishment the duties and powers of the ministries (through presidential decrees) will highly likely restrict fundamental rights and freedoms of individuals. On the other hand, Article 13<sup>31</sup> of the Turkish Constitution underlines that “fundamental rights and freedoms may be restricted *only by law*” and Article 104/17 states that “no presidential decree shall be issued on the matters which are stipulated in the Constitution to be regulated *exclusively by law*.” Moreover, the discrepancy between Article 106/11 stipulating the establishment of ministries through *presidential decrees* and Article 123/1 stating that the administration shall be regulated by *law* is also underlined.<sup>32</sup>

Despite all the arguments mentioned above, existence of the President’s “reserved area” for exclusive regulation through presidential decrees is not explicitly stated in the Turkish Constitution and accordingly such issue is still being discussed among the relevant scholars and practitioners. The Constitutional Court will most probably will have the final word on this issue in case of any dispute.<sup>33</sup>

### 3. In case of state of emergency

The aforementioned explications made up to now did not include the periods of state of emergency. Considering the fact that state of emergency cases necessitates in-depth analysis and therefore should constitute a subject-matter of another academic paper, only the basics of the issue shall be viewed below.

Article 119/6 sets forth that “in the event of state of emergency, the President of the Republic may issue presidential decrees on matters necessitated by the state of emergency, notwithstanding the limitations set forth in the second sentence of the seventeenth paragraph of Article 104<sup>34</sup>. Such decrees which have the force of law shall be published in the Official Gazette, and shall be submitted for approval to the Grand National Assembly of Turkey on the same day.” And, pursuant to Article 119/7, “except in the case of inability of the Grand National Assembly of Turkey to convene due to war or force majeure events, presidential

<sup>30</sup> Yasin Söyler, *op. cit.*, p. 123.

<sup>31</sup> Article 13 of the Turkish Constitution is as follows: “Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant Articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality.”

<sup>32</sup> See Turgut Tan, *İdare Hukuku (Administrative Law)*, Turhan Publishing, Ankara, September 2018, p. 33.

<sup>33</sup> See Ergun Özbudun, *op. cit.*, p. 249.

<sup>34</sup> “The mentioned Articles of the (Turkish) Constitution relate to basic rights and individual freedoms.” See Bülent Sözer, *op. cit.*, p. 60.

decrees issued during the state of emergency shall be debated and decided in the Grand National Assembly of Turkey within three months. Otherwise presidential decrees issued during the state of emergency shall be annulled automatically.”

As is seen from above, the authority to issue presidential decrees regarding state of emergency cases arises directly from the (Turkish) Constitution but not the law, and “these decrees are equal in force and effect to laws”.<sup>35</sup> That’s to say, unlike the presidential decrees that are reviewed until state of emergency cases, the presidential decrees issued during state of emergency can amend or repeal laws.

#### 4. Conclusion

As of July 9, 2018 Turkey is being governed by a sui generis presidential system, and accordingly the authorities of the executive organ – the President – have been significantly increased due to the last constitutional amendments. The main instrument of the President in for him/her to use such vast authorities is the presidential decree. The president’s constitutional authority to regulate through presidential decrees on the matters regarding executive power is indeed a broad authority since “the matters regarding executive power” includes many issues, and it is actually difficult to draw the boundaries of “the matters regarding executive power.”

In addition, Articles 104/9, 106/11, 108/4, 118/6 of the Turkish Constitution include also ambiguous provisions as to whether such Articles create a reserved area for the President to regulate through presidential decrees. Since the Turkish sui generis system is actually “brand new”, all such matters are being discussed by the relevant scholars and experts. It is highly likely that the Turkish Constitutional Court will also be involved in those discussions in case of a dispute since pursuant to Article 148 of the Turkish Constitution, the Constitutional Court shall examine the constitutionality (in respect of both form and substance) of presidential decrees.

The constitutional position of presidential decrees vis-a-vis laws as well as the changes in the principle of legality are indeed vital since the checks and balance system between the legislative and executive powers will be determined accordingly.

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<sup>35</sup> See Bülent Sözer, *op. cit.*, p. 61.

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