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THE POSITION OF PRESIDENTIAL DECREES IN THE HIERARCHY OF NORMS IN TURKEY

Özge Çelebi, page 97-114

ABSTRACT

In Turkey, the parliamentary government system was abandoned in a 2017 referendum in favour of a system similar to a presidential one. This change saw presidential decrees, a previously non-existent procedure, enter the Turkish legal system. Following the 2018 presidential election, the new system was implemented and presidential decrees were applied within it. Prior to the 2017 constitutional amendment, the scope of decrees granted to the president under the parliamentary system was limited to appointment procedures. However, under the new political regime, the president has become head of the executive branch and his decree authority has changed. Presidential decrees derive their authority directly from the constitution and, within this remit, they can enact regulations that affect not only the executive sphere, but also social, cultural and economic rights. Additionally, presidential decrees may be issued on matters not regulated by the legislative power

According to Kelsen's 'hierarchy of norms', also known as the 'pyramid of norms', the structure of norms in the Turkish legal system has taken on a new form following the 2017 constitutional amendment. However, there is no consensus among legal scholars as to where presidential decrees, which derive their authority directly from the constitution, fit into this new regulatory framework. Determining the place of this new type of administrative act within the plurality of norms is also important for judicial review. This study examines the scope of presidential decrees, as well as the issues that have arisen or are likely to arise in this area, in light of decisions made by the Turkish Constitutional Court. The aim is to determine the position of these decrees within the hierarchy of norms.

Keywords: presidential decrees, constitutional review of presidential decrees, regulatory actions of the executive branch, hierarchy of norms, 2017 constitutional amendments.

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1. Introduction

In government systems based on the separation of powers, the president's authority to issue decrees is among the most important powers granted to the executive branch. However, this authority does not exist in every government system. In systems where the executive branch is strengthened, this authority tends to be granted more to heads of state. In half of parliamentary systems and 70% of semi-presidential and presidential systems, the president has this authority (Fallon, 2013, p. 178). In a parliamentary system, parliament is supreme, and the president's decree authority can alter the political system, shifting it towards a semi-presidential model. The president's power to issue decrees can manifest itself differently in each country. The head of state may issue decrees based on an authorization law passed by parliament, or they may have limited discretionary power in extraordinary circumstances (Metcalf, 2000, p. 660; Shugart & Carey, 1992, p. 160). Presidents may exercise their authority to issue decrees with the force of law, either temporarily and subject to various restrictions, or independently and without restriction (Ibid). Undoubtedly, all these enactments are regulated within the framework of constitutional authority. The authority of heads of state to issue decrees is also used as an important classification tool in characterizing political regimes. In parliamentary systems, the political system becomes more similar to a semi-presidential system when the head of state acts within the authority of the legislature. This is because, despite the fact that the head of state's power to issue decrees is subject to various restrictions, they can still sometimes encroach upon the constitutional domain of the legislature. For this reason, in parliamentary regimes — also known as regimes of parliamentary sovereignty — the authority of heads of state to issue decrees is rarely mentioned. When the authority of heads of state to issue decrees is mentioned in parliamentary regimes, it is usually limited for various reasons or periods of time. In the United States, where the presidential system first emerged, the president's authority to issue decrees does not stem from the Constitution. Rather, this authority has evolved through practice (Çelebi, 2022, 188). The power to make laws lies directly with Congress. However, the executive branch in the United States also engages in direct and indirect legislative actions. While presidential decrees are direct legislative actions, the interpretation of existing laws by presidential appointees is an indirect legislative function (Nomer, 2013, p. 75). Presidential decrees may be issued to implement a

legal provision contained in legislation, or based on such a provision (Corwin, 1953, p. 53-56).

Looking at the constitutional history of Turkey, it is seen that until the 2017 constitutional amendment, the systems of government were shaped around a parliamentary regime. Therefore, the powers of the heads of state in the constitutions of the republics were regulated according to this parliamentary system. However, the 1982 Constitution differs both in terms of the nature of the political regime and in terms of the position and powers of the president. Before the constitutional amendment, there was an empowered president with the authority to issue decrees. This is noteworthy because, until the 1982 Constitution, the president in Türkiye did not have the power to issue decrees. However, these decrees covered a very limited scope and, by their nature, did not have a strong enough impact to transform the political regime. The same cannot be said for the changes made by the derivative constituent power in 2017. This is because the political regime is now structured within a presidential system, whereby presidential decrees have acquired a function that rivals legislation in terms of scope and nature. If a law is enacted in an area that should be regulated exclusively by decree and this results in a conflict of norms, which authority is responsible for resolving it: the administrative authority carrying out the action in question or the relevant judicial power? Another issue is whether actions taken based on the decree would remain valid under the principle of non-retroactivity should the decree be annulled by the Constitutional Court. In order to answer these questions, it is important to clarify the structure of the hierarchy of norms. This study will examine these issues within the framework of the principle of the generality of legislation and determine the structure of the hierarchy of norms in light of the latest court decisions.

2. The period before the constitutional amendment in 2017

The legislative organ was the strongest in the 1921 and 1924 Constitutions. The original version of the 1921 Constitution did not regulate the office of the head of state, and the National Assembly held significant powers. This situation stems from the unity of powers and the parliamentary government system. The 1921 Constitution incorporated features similar to the Swiss parliamentary government system (Çelebi, 2021, p. 262). The Republic was proclaimed on October 29, 1923, as a result of the constitutional amendment made by the Grand National Assembly, and as a consequence of this amendment, the office of the

presidency was established. Accordingly, the President is elected by the Grand National Assembly of Turkey from among its members (Art. 10). Following this constitutional amendment, parliament will exercise executive power through the Council of Ministers. The process for appointing the Prime Minister and forming the Council of Ministers is similar to that in parliamentary systems (Art. 12). Therefore, this amendment constitutes the first step towards a parliamentary system.

In line with the needs of the newly established Republic of Turkey, a new constitution was needed to guarantee fundamental rights and freedoms and to regulate the judiciary; this constitution followed the 1921 Constitution, which was prepared to meet the needs of the extraordinary period the country was going through. These needs were met by the 1924 constitution. According to this constitution, the executive branch comprises the President and the Council of Ministers (Art. 7). While the Cabinet is accountable to Parliament, the President holds only symbolic Powers (Art. 7& Art. 32-44). However, despite the existence of the executive branch, Parliament holds the real power. This is because Parliament has the power to oversee and dismiss the Cabinet at any time (Özbudun, 2012, p. 49-50), whereas the Constitution does not grant Parliament the power to dissolve the Cabinet. Consequently, the 1924 Constitution also lacked a fully established separation of powers mechanism. As it incorporated elements of both a collegial government system and a parliamentary regime, the 1924 constitution represented a hybrid political system.

Unlike the two previous constitutions, the 1961 Constitution establishes the principle of separation of powers for the first time. The Grand National Assembly is responsible for legislation, while the executive branch comprises the President and the Council of Ministers (Art. 5&6). These bodies act within the framework of the Constitution and the laws. The Constitution stipulates that judicial power shall be exercised by independent courts on behalf of the Turkish nation (Art. 7). Accordingly, the legislative and executive branches are subject to oversight by the strengthened judicial branch. The 1961 Constitution marked a significant milestone in Turkish constitutional law by introducing judicial review of the constitutionality of laws for the first time. The Constitutional Court reviews the constitutionality of laws enacted by the legislature and ensures the supremacy and binding nature of the Constitution, according to the hierarchy of norms (Art. 147). The election process and the President's symbolic powers remain unchanged from the 1924 Constitution.

However, under the 1961 Constitution, the person elected from within the Assembly must sever ties with their party, thereby ensuring the independence of the office of head of state (Art. 95). The provisions preventing an individual from serving more than one term as President and extending the term of office to seven years also serve to weaken the President's direct political ties to the Assembly (Art. 95). The 1961 Constitution introduced new provisions regarding presidential powers and granted the president the authority to dissolve the National Assembly (Tanör, 2012, p. 15-17). The 1961 Constitution established the Republic's first and only bicameral legislature, and the President's authority to dissolve the National Assembly was subject to strict conditions (Art. 108). The position and powers of the Cabinet, the second branch of the executive, were organised in a manner similar to that set out in the 1924 Constitution. This design led to a parliamentary system. Thus, for the first time in Turkish constitutional history, a classical parliamentary system was established under the 1961 Constitution. However, significant constitutional amendments that strengthened the executive branch were made to the 1961 Constitution between 1971 and 1973. The Cabinet, the executive branch responsible for formulating policy, has been granted the authority to issue decrees with the force of law (Art. 64). However, the Cabinet may only exercise this authority within the framework of an enabling Act passed by Parliament. This is because Parliament can only grant the Cabinet the power to issue such decrees on specific matters through an enabling act (Art. 64). The Constitutional Court has carried out a judicial review of decrees with the force of law (Art. 147).

These constitutional amendments also foreshadow those to be made to the 1982 Constitution following the military coup (Özbudun, 2024, p.45). The 1982 Constitution placed the executive branch in the most powerful position of any in the Republican era. The fundamental reason for this is that the Chief of the General Staff and the commanders of the armed forces seized power through a military intervention that was contrary to the Constitution. They then became the main actors in state administration, shaping the drafting of the Constitution accordingly. Neither the drafting of the Constitution nor the referendum took place amid free debate. For this reason, the 1982 Constitution took a different approach to the classification of state powers than previous Republican constitutions (Teziç, 2016, p. 428). Just as it does with the legislative and judicial branches, the Constitution regulates the executive branch as an 'power' (Art. 8). Accordingly, the executive branch is not only a function, but also an power that directly possesses certain powers derived from the

Constitution. The President and the Council of Ministers exercise and implement these powers in accordance with the Constitution and the laws (Art. 8). However, the President's position within the executive branch has been significantly strengthened. In addition to the powers of election and appointment, the President has also been granted the authority to chair various councils. Taking into account all of these constitutional powers, it can be said that the 1982 Constitution marked the period during which the most powerful presidential powers in the history of the Republic came into effect. Despite the strengthened executive branch and office of the President, the 1982 Constitution is considered to be a parliamentary system in its original form. This is because, until the 2007 constitutional amendment, the president was elected by parliament. While the 2007 constitutional amendment established the office of a president elected by popular vote, the president does not possess the authority to unilaterally declare a state of emergency, as is the case in France, nor does he have the power to permanently chair the Council of Ministers. The Council of Ministers continues to be politically accountable to parliament. The 1982 Constitution granted the President the power to issue decrees. Presidential decrees regulate the establishment, organisation and working principles of the Office of the Presidential Secretary, as well as personnel appointment procedures (Art. 107). The Office of the General Secretariat of the Presidency was established for the first time as a constitutional institution under the 1982 Constitution (Özbudun, 2024, p. 261). This institution was created to support the President in exercising his/her powers and fulfilling his/her duties, and is classified as an auxiliary service organization (Tanör&Yüzbaşıoğlu, 2024, p. 353). This institution is regulated by Law No. 2879 and Presidential Decree No. 1. According to this legislation, the Secretary General is directly subordinate to the president and oversees service units directly subordinate to the president, including the chief advisor, advisory services, and security intelligence advisory services. The secretary general also oversees service units directly subordinate to him/her, including legal affairs, laws, and decisions (Ibid). As head of the presidential organization, the Secretary General is responsible for conducting correspondence and representing the president when necessary (Gözübüyük, 2003, p. 239). As can be seen, the scope of presidential decrees was quite limited in the initial version of the constitution. According to the parliamentary system, these decrees should only come into effect with the signatures of the prime minister and the relevant minister. However, in practice, this power was exercised solely by the president (Taşdöğen, 2016, p. 944-947; Tanör&Yüzbaşıoğşu, 2024,

p. 352). According to the 1982 Constitution, only actions taken by the President were exempt from judicial review. Consequently, these decrees also fall outside the scope of judicial review (Özyar, 2021, p. 161). Based on these reviews, these decrees have regulatory status. Within the hierarchy of norms, they are placed below the constitution, laws, statutes and regulations, alongside other regulatory acts.

Pursuant to Article 46 of Decree-Law No. 703 dated 2 July 2018, the Law dated 19 August 1983, No. 2879, was renamed the 'Law on Certain Regulations Concerning the Presidency of Administrative Affairs of the Presidency'. The amendment was not limited to the title of the law. As a result of the abolition of the Presidency General Secretariat organisation in Article 1, all temporary articles except the fourth temporary article were abolished, along with the staff and financial provisions. Article 4, which regulates provisions relating to personnel, was also amended. These amendments took effect on 9 July 2018, the date on which the President took office following the Turkish Grand National Assembly and presidential elections held on 24 June 2018.

3. The Constitutional Framework of Presidential Decrees and Their Position in the Hierarchy of Norms

The vote on Law No. 6771 of January 21, 2017, concerning amendments to various articles of the 1982 Constitution, paved the way for a mandatory referendum on constitutional amendments. Following the referendum held on April 16, 2017, the constitutional amendment was approved by a simple majority and, in accordance with transitional provisions, entered into force after the July 9, 2018 elections. With the constitutional amendment, the number of articles in the 1982 Constitution was reduced from 177 to 156. Fifty-four articles (including the first four) remained unchanged. With the 2017 constitutional amendment, the political regime, which had been shaped around a parliamentary system since the Ottoman Constitution, transitioned for the first time to a presidential system in which executive powers are vested solely in the President.

Following the 2017 constitutional amendment, many legal instruments, such as statutes and ordinary and extraordinary decrees with the force of law, ceased to exist. More importantly, the President was granted powers that could be used for different types of regulatory action during normal periods. Firstly, the President has the power to issue decrees during ordinary periods (Art. 104/9, 104/17, 106/final, 108/final,

118/final, 123/final). The second is the President's authority to issue regulations pursuant to Art. 104/18 and Art. 124. Furthermore, the Constitution stipulates that the President may be granted the authority to determine financial obligations, subject to the specified conditions; However, the type of regulatory action to be used for this purpose is not explicitly stated. This procedure, which was previously carried out by a type of decree, has been replaced by a presidential decision. These three types of regulations, which emerged with the constitutional amendment, do not occupy the same level in the hierarchy of norms.

Although issued by the President, regulations fall below laws in the hierarchy of norms, in accordance with the provision in Article 104/18 of the Constitution, which states, "The President may issue regulations to ensure the implementation of laws, but these regulations must not conflict with laws." Furthermore, pursuant to Article 124 of the Constitution, regulations are a type of regulatory act issued to ensure the implementation of laws and presidential decrees and cannot be contrary to them. While the Constitutional Court reviews laws, the State Council reviews regulations issued by the President. There are two different situations regarding the place of presidential decision in the hierarchy of norms. Presidential decision that determine financial obligations can only be regulated by authority granted by law and therefore occupy the same place in the hierarchy as regulations. However, decisions issued directly by the President are hierarchically superior to regulations because they derive their authority directly from the law. According to the section up to this point, the hierarchy of norms is as follows: law, presidential decision, regulation. Presidential decisions are reviewed by the Council of State (İba&Söyler, 2019, p. 198; Ülgen, 2018, p. 620). However, presidential decrees issued during ordinary periods differ from the other two in that they derive their authority directly from the Constitution. They also cover a much broader range of areas. Only presidential decrees are subject to judicial review by the Constitutional Court. The relationship between presidential decrees and laws should be defined in terms of the principle of the rule of law. The Constitution does not explicitly address this issue.

Although the concept of 'Presidential Decree' was initially regulated in Article 107 of the 1982 Constitution solely for the purposes of the Presidential General Secretariat, the legal nature, scope of regulation, and judicial review of presidential decrees introduced by the constitutional amendment are entirely different from the original version

of Article 107. The repeal of decrees that have the force of law and are at the same level as laws; the similarity of presidential decrees to these decrees; the replacement of the words 'Council of Ministers regulations' with 'presidential decrees' in Articles 124 and 137; and the fact that such an action derives its authority directly from the Constitution mean that presidential decrees occupy a special place in the hierarchy of norms. Article 137 has raised questions about the place of presidential decrees in the hierarchy of norms. The principle of 'finality,' defined in the decisions of the European Court of Human Rights and the Constitutional Court as an indispensable condition of the rule of law, necessitates determining the place of presidential decrees in the hierarchy of norms.

Examining the President's authority to issue decrees during ordinary periods (Articles 104/9, 104/17, 106/final, 108/final, 118/final and 123/final), it becomes apparent that the relevant paragraphs do not contain any provisions regarding the structure of the hierarchy of norms. To determine the position of such decrees in the hierarchy of norms, the provisions in Articles 7 and 8 must be interpreted systematically, together with the provision in Article 104/17. According to Article 7, legislative power belongs to the Grand National Assembly of Turkey on behalf of the Turkish nation. According to the principle of separation of powers, this power cannot be delegated. According to Article 8, amended in 2017, executive power is exercised by the President in accordance with the Constitution and laws. Article 104 stipulates that the president may issue presidential decrees on matters relating to executive power; however, certain restrictions have been imposed on this power. Accordingly, presidential decrees cannot regulate individual and political freedoms (Article 104/17). This article states that presidential decrees cannot be issued on matters that the Constitution stipulates can only be regulated by law or on matters that are explicitly regulated by law. Moreover, if presidential decrees and laws contain different provisions, the provisions of the law shall apply. If the legislature enacts a law on the same subject, the presidential decree becomes invalid. According to the Constitutional Court, matters that should be regulated solely by law include the regulation of fundamental rights and freedoms, the imposition of taxes and other financial obligations, the appointment of public officials, and personal rights.

According to Articles 104/9, 106/Final, 108/Final and 118/Final of the Constitution, the areas specified therein shall be regulated solely by presidential decree. The areas to be regulated by presidential decrees are as follows: the appointment and dismissal of senior public officials, and

the procedures and principles governing their appointment (Article 104/9); the establishment and abolition of ministries, their duties and powers, their organisational structure, and the establishment of central and regional organisations (Article 106/final);the functioning of the State Audit Board, the term of office of its members, and other personnel matters (Article 108/final); the organisation and duties of the General Secretariat of the National Security Council (Article 118/final). Conversely, presidential decrees do not have primary regulatory authority in matters covered by Articles 104/17 and 123 of the Constitution. The legislative power has primary regulatory authority in these matters. The statement in Article 123/3 that public legal entities shall be established by law or by presidential decree is unclear and unspecific. Based on what has been conveyed so far, not all presidential decrees issued during the ordinary period have the same regulatory scope. They can be divided into two categories: areas that can also be regulated by laws, and areas that are reserved solely for presidential decrees. The first distinction is made in Articles 104/17 and 123. Therefore, any potential conflict between laws and presidential decrees may arise from the relevant provisions of these articles. The second distinction is defined by Articles 104/9, 106/final, 108/final and 118/final. In the event of a potential conflict between presidential decrees and laws, the latter shall prevail in accordance with Article 104/17 of the Constitution. According to this paragraph, presidential decrees issued during ordinary periods are subordinate to laws in the hierarchy of norms. A restrictive interpretation should only be applied if the matter in question is intended to be regulated solely by presidential decrees. This is because parliament can legislate on any matter it wishes.

A common feature of all the regulatory decrees that have been examined so far is that they were issued in normal circumstances. However, according to Article 119/6, the President may issue presidential decrees in extraordinary circumstances relating to the state of emergency. Presidential decrees issued during a state of emergency are not subject to the restrictions in Article 104/17 and are published in the Official Gazette and submitted to Parliament for a vote on the same day. Except in cases of war or other compelling reasons preventing the Assembly from convening, these decrees must be debated and decided upon by the Grand National Assembly within three months. Otherwise, presidential decrees issued during a state of emergency automatically cease to be in force (Article 117/7). Presidential decrees issued during a state of emergency

and approved by Parliament have the force of law. As they become law upon approval, they may be reviewed by the Constitutional Court.

4. Judicial Review of Presidential Decrees

The Constitutional Court reviews presidential decrees solely for constitutionality. Their compliance with the law is not examined. During the ordinary period, pursuant to Articles 148, 150, 151, 152 and 153, presidential decrees are subject to abstract and concrete norm review by the Constitutional Court. Pursuant to Article 150, the authority to file a lawsuit with the Constitutional Court for these lies with the president, one-fifth of parliament and the two parties with the most members in parliament. The period for filing a lawsuit (in terms of both content and form) is 60 days after publication (Article 151). Pursuant to Article 152, they may also be subject to concrete norm review. In terms of content, the review examines whether the decree is unconstitutional in terms of its reason, purpose, and subject matter (Kaboğlu, 2024, p. 218). Presidential decrees issued under a state of emergency become law if approved by the Grand National Assembly within three months and are subject to review by the Constitutional Court.

The practical application of the above theoretical framework is undoubtedly reflected in the Constitutional Court's decisions on this matter. Therefore, the Court's decisions will be examined and analyzed. The Constitutional Court's initial rulings on the Presidential Decree was published on 12 May 2020 (Case No. 2018/125, Decision No. 2020/4). This was followed by other decisions. The first group of decisions issued in 2020 is extremely important because it clarifies the criteria to be used in reviewing presidential decrees. First, the Court conducted a review of compliance with the rules of jurisdiction, stating that the decrees must comply with the rules of jurisdiction with regard to the subject matter set out in Article 104/17 of the Constitution. If there is no inconsistency in this regard, a review of compliance with the Constitution with regard to content must be conducted (Case No. 2019/31, Decision No. 2020/5, 22.01.2020). This dual review of presidential decrees — first in terms of subject matter, then in terms of content — establishes the procedure for reviewing norms (Gençay, 2020, p. 4). If an inconsistency is found in terms of subject matter, the Court does not deem it necessary to review the content. This is because, in its decision dated 23 January 2020 (Case No. 2019/31, Decision No. 2020/5) it was found that implementing an area explicitly regulated by law (cash advances outside the budget) through a

presidential decree was contrary to Article 104/17 of the Constitution. The relevant decree was therefore annulled on grounds of authority, without the need for a substantive review (par. 20–22).

The Constitutional Court has characterised presidential decrees as 'primary regulatory acts of the executive branch (Case No. 2018/125, Decision No. 2020/4, 22.01.2020, § 28). However, despite this characterisation, the Constitutional Court emphasised Article 104/17 of the Constitution, stressing that there are areas that cannot be regulated by presidential decrees, even if they fall within the executive branch's remit (par. 8). Therefore, presidential decrees are exceptional and limited in natüre (Gençay, 2020, p. 5). In this respect, they differ from laws. However, laws can be enacted on any subject as long as they do not violate the Constitution. This is because legislative power is general, and laws are not limited in terms of subject matter except for their constitutionality. Nevertheless, the phrase "regulated only by law" in some articles of the Constitution means that the area of regulation specified in the relevant article is outside the scope of other regulatory acts (Gençay, 2019, p. 10). The Constitutional Court has also ruled that the president does not have the authority to issue decrees in areas specified in the Constitution as being regulated by law (Case No. 2019/31, Decision No. 2020/5, January 22, 2020, § 11). The Court ruled that the presidential decree, examined within the framework of the provision in Article 123 of the Constitution which stipulates that public legal entities shall be established by law or decree, is based on the authority in Article 106(last) of the Constitution. The Court also ruled that the regulation concerning the administrative organisational structure does not violate Article 104(17) of the Constitution (Case No. 2019/31, Decision No. 2020/5, January 22, 2020, § 29-31). However, given that the primary regulatory authority lies with the legislative body and bearing in mind the principle of legal administration, regulating some institutions by decree and others by law within this structure would lead to contradictions. This situation also goes against the principle of certainty.

This period, which began in 2020 and is referred to as the 'early period of case law', established important criteria for the subsequent review of decrees. As we assessed in the theoretical part of our study, our finding that decrees are positioned below laws in the hierarchy of norms is justified by the Constitutional Court's assessments regarding 'matters explicitly regulated by law' in its early-period decisions. In case no. 2020/6, for example, the Constitutional Court ruled that decrees with the

force of law were equivalent to laws when deciding whether such decrees could be issued on matters explicitly regulated by law (as granted to the executive branch in the previous government system). However, the High Court ruled that, according to Article 104/17 of the Constitution, a presidential decree cannot be issued on a matter explicitly regulated by a decree with the force of law (23.01.2020, Case No.2019/78, Decision No.2020/6).

The decisions made in 2020 regarding presidential decrees set a precedent for other decrees to be reviewed by the Constitutional Court. Between 2021 and 2025, numerous annulment lawsuits were filed concerning presidential decrees. As mentioned above, the grounds for annulment were that the decrees attempted to regulate matters already regulated by law and regulated areas that should have been regulated by law. In addition, incompatibility decisions were also made regarding areas related to fundamental rights and freedoms that are prohibited from being regulated by presidential decrees. According to the Supreme Court's decision dated November 11, 2021, the presidential decree regulating the Presidential State Supervisory Council was found to be unconstitutional in terms of its content. This was because the measure of dismissal that the head of the institution could apply to officials during audits conducted by the institution in associations, if the relevant conditions exist, constituted a restriction on the right to form associations. However, the freedom to form associations is an individual right, and therefore it is not possible to issue a presidential decree in this area (Case No.2018/121, Decision No. 2021/84, 11/11/2021). Another decision, dated November 26, 2023, was also issued by presidential decree and ruled unconstitutional by the Constitutional Court for regulating fundamental rights and freedoms that are prohibited by the Constitution. However, the entry into force of the decision has been postponed for nine months. The decision is also extremely important because it led to the annulment of numerous regulations in the first presidential decree issued (Case No. 2018/118, Decision No. 2023/180). The regulation allowing the collection of information about senior managers responsible for the management and administration of the state, as stipulated in the presidential decree, was found to be contrary to Article 104/17 of the Constitution and was annulled. Similarly, the authority granted to presidential policy councils to request “information necessary for their duties” from public institutions and organizations was also found to be unconstitutional in this context. Certain powers granted to the Ministry of Environment regarding immovable property were annulled due to violation of property rights.

Furthermore, the decision emphasized that the establishment of positions and the appointment of judges and prosecutors must be done exclusively by law, and the contrary provisions were annulled.

At the time of writing this article, the most recent decision was issued on 26.11.2025 (Case No.2024/215, Decision No.2025/238). The annulment case concerns the provision in Article 3 of the new decree amending Presidential Decree No. 166, which states: 'The positions listed in the attached Schedule I of the Ministry of National Defence, the National Defence University, the General Command of the Gendarmerie and the Coast Guard Command shall be reorganised by a Presidential Decree within three months of the entry into force of the Presidential Decree establishing this paragraph.' The 130 Members of Parliament who filed the lawsuit claim that this provision, which should be regulated by law, is unconstitutional because it is regulated by a presidential decree. The High Court first examined the norm in terms of subject matter and found that the regulation of the National Defence University's positions by decree was unconstitutional (Article 104/17). The case arose because a matter that should have been regulated by law was instead regulated by decree. The Supreme Court found the remainder of the case to be constitutional and proceeded to examine it in terms of jurisdiction (content). According to the Supreme Court, since the remaining part does not concern an area regulated by law, there is no inconsistency in terms of subject matter. However, the Supreme Court found that regulating an area that should be regulated by decree through a Presidential Decree is inconsistent with Article 106 of the Constitution. However, in our view, since the relevant personnel regulation directly concerns public legal entities, this area should be regulated by law in accordance with Article 128/2 of the Constitution. Therefore, the relevant decree should be annulled in terms of subject matter without the need for an examination in terms of jurisdiction. This is because most of the dissenting members also share this view.

In another decision issued on 11.02.2025, regarding the inconsistency of the first article of the presidential decree on the Establishment of Personnel Positions in Certain Public Institutions and Organizations, it was concluded that it was appropriate to regulate this area by decree in accordance with Article 106 of the Constitution, given the absence of clear legislation on the relevant subject. The relevant decree was also examined in terms of its content, and was found to align with the principle of certainty. Ultimately, the case was dismissed (Case No. 2025/22, Decision

No. 2025/31). Members who dissented from the decision argued that the decree was unconstitutional for the same reasons as in the previous case. We reiterate our view that issuing a decree in the area of personnel appointments, which must be exclusively regulated by law under Article 128 of the Constitution, is unconstitutional. Similar disputes have been observed in annulment lawsuits concerning decrees submitted to the Constitutional Court in previous years. The Constitutional Court examined one such dispute in its decision of 28.12.2023. (Case No. 2023/198, Decision No. 2023/225). This is because the decree is a regulation concerning the Immigration Administration and establishes positions. The Court found that the subject and content were not contrary to the Constitution and therefore dismissed the case. However, the decision was passed by a majority vote, with the dissenting members citing the requirement for regulations concerning the creation of positions to be made by law, meaning that the decree must be contrary to Article 104/17 of the Constitution. Examining the decisions of the Constitutional Court reveals that the large number of dissenting votes and similar criticisms concerning the creation of positions are noteworthy. These irregularities also indicate that the constitutional amendments that gave rise to the presidential decrees were rushed (Yıldırım, 2017, p. 28).

Conclusion

Legislative power is exercised primarily, generally, and directly. According to Article 7 of the 1982 Constitution, the scope of legislative power is clearly defined and cannot be limited. As stated in the rationale for Article 7 of the 1982 Constitution, the non-transferability of legislative power is not unique to any political regime; it is a requirement of the principle of separation of powers. In light of this information and these findings, the limitation in Article 104/17 of the Constitution, which states that presidential decrees can only relate to "subjects of executive power," and the restrictions imposed on the regulation of fundamental rights and freedoms, demonstrate that presidential decrees are not equivalent to laws, even though they derive their authority from the Constitution. According to Article 104/17 of the 1982 Constitution, in case of a conflict between a law and a presidential decree, the superior norm, i.e., the law, prevails. Presidential decrees cannot amend or repeal laws. For these reasons, presidential decrees are lower in the hierarchy of norms than laws.

Presidential decrees issued during extraordinary periods will become law if approved by Parliament within three months. In this sense, presidential

decrees issued during extraordinary periods and approved by Parliament have the same legal status as laws. However, presidential decisions that regulate individual transactions derive their legal basis from laws, not the Constitution. Therefore, they are neither primary nor general. Due to their legal basis, they are also placed below laws in the hierarchy of norms.

These analyses, conducted within the theoretical framework of the constitution, are supported by various Constitutional Court decisions. However, an examination of these decisions reveals certain problems regarding the regulation of the administrative structure through presidential decrees. In fact, although the Constitutional Court has ruled in many cases that these regulations are constitutional under Article 106, these decisions were made by majority vote, and opposing views consistently argue that regulations concerning the administrative organization, especially the creation of personnel, should be made by law. This is because presidential decrees are subordinate to laws in the hierarchy of norms. It is clear that the legislative body has primary authority. In this context, a constitutional amendment that leaves no room for ambiguity would be appropriate.

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