

# ***FOREWORD***

## **PRESIDENCY AND THE PARTY CHAIRMANSHIP**

The quest for a return to the democratic rule of law state started following the approval-by a referendum on April 16, 2017-of the Constitutional amendment (Law No. 6771), which had been adopted by the Turkish Grand National Assembly. This quest gained momentum since July 9, 2018, when the change took effect. In the 4th year of the 27th legislative term, which started on October 1, 2020, many political parties started to present their proposals.

This introduction note does not aim to discuss the proposals regarding the “strengthened parliamentary regime”. Rather, the discussion will revolve around the respect for the Constitution that is already in force. One of the constitutional problems that arise with the current manner of application of the constitutional rules is whether the party chairmanship is compatible with the constitutional status envisaged for the President.

In this context, it would be appropriate to recall the expressions of the “Constitution made during the State of emergency” and “state of emergency of the Constitution”. The state of emergency, declared within the framework of constitutional authority, was abused for constitutional amendment. The emergency power, which was to be used subject to the restriction of the “constitution-abiding law” was abused and the Constitution became in a constant “state of emergency.” The legitimacy deficit because of the adoption process in a state of emergency was doubled by the content eradicating the constitutional checks-and-balances of the Constitution. Although the state of emergency ended on July 18, 2018, the emergency decrees were enacted as laws on every occasion. In short, the constitution, as amended by taking advantage of the 15 July coup attempt, is not respected even by the performers of the amendment. This fact proves that we are facing a "state of emergency of the Constitution”.

### **I.- PRESIDENT: FROM “POWER TO OVERSEE” TO “POWER TO ENSURE”**

The 1982 Constitution, which increased the powers of the President and reinforced its constitutional position, as compared to the 1961 Constitution, attached special importance to the neutral status of the Presidency. Power to oversee can be gauged within this framework. This power is arranged in such a way that it can be used by the President with a neutral status. According to this:

*“The President is the head of the State. In this capacity s/he represents the unity of the Republic of Turkey and the Turkish nation; S/he **oversees** the implementation of the Constitution and the orderly and harmonious functioning of the State organs.” (art. 104).*

Only a change of verb was made in 2017:

*“The President of the Republic, in his/her capacity as the Head of State, shall represent the Republic of Turkey and the unity of the Turkish Nation; he/she shall **ensure** the implementation of the Constitution, and orderly and harmonious functioning of the organs of the State.” (art.104/2)*

Thus, the President, whose power “to oversee” was strengthened by the “power to ensure”, shall:

-represent the **legal personality** of the Republic of Turkey. The state, as a public legal entity, is above all other public legal entities and includes them all.

- **It represents the unity of the Turkish nation. The framework of this representative duty and obligation is embodied in Art. 2:** The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble.

In this case, the President also represents the fundamental values that constitute the characteristics of the Republic.

- *S/he shall **ensure** the implementation of the Constitution,* The power to ensure is the corollary of respecting the hierarchy of norms, which is the basic structure of the rule of law and respecting the Constitution as the highest norm.

- *S/he shall **ensure the orderly and harmonious functioning of the organs of the State.*** This power can be defined as the duty of ensuring the harmonious functioning of all organs within the constitutional framework in the organization of the state, based on the rule of law and on the separation of powers.

In the following articles, Article 11 is the foremost provision that reinforces these regulations: *Supremacy and binding force of the Constitution*

In general, the following four principles outline the constitutional framework of the President’s status: Impartiality, power to ensure, non-responsibility, and beyond-politics nature.

These characteristics of the President coincide with the duties and powers stipulated in article 103 and article 104.

## II.- THE CONSTITUTIONAL STATUS OF THE PRESIDENT AND THE PARTY CHAIRMANSHIP

The titles of the President are enumerated in the Constitution: Head of State, President of the State, or Commander in Chief. However, the party chairmanship is not one of them.

The 2017 amendment removed the following rule: *“the person elected as the President is dismissed from his/her party membership, if any.”* However, other provisions relevant to the neutral status of the President are kept intact, despite the fact that the executive power is vested exclusively in the President. Even if the condition of *“dismissal from the membership of his/her party”* was abolished, that does not necessarily permit the President to become the chairman of a political party. Because membership and the chairmanship are two different statuses in terms of legal nature. This view is confirmed by the provisions in the first text of the Constitution and the provisions stipulated by Law No. 6771.

The provisions relevant to the incompatibility of the Presidency and the party chairmanship may be grouped under three headings.

- **Oath of the President:** *“I swear upon my honour and integrity...to abide by the Constitution, the rule of law, democracy, ... and do my utmost to... perform without bias the functions that I have assumed. Art.103)*

-The **Characteristics of the Republic:** These are among the unamendable provisions of the constitution. (**Art.2**) According to this, The Republic of Turkey is a democratic, secular and social state governed by rule of law

- **“Impartiality” of the judiciary** (art.9): Appointing powers to the high courts and council of judges and prosecutors. (art.146 and 159).

These and other constitutional duties render the party chairmanship of the President impossible. It is clear that party chairmanship is at odds with these duties.

While these constitutional provisions allow a President to be a member of a political party, they however, prohibit him/her from being the Chairman of that party. Because when a President simultaneously acts as the chairmanship of a political party, s/he will be in violation of the imperative Constitutional provisions. Among such provisions, the “neutrality(oath-taking), and “ensuring the orderly and harmonious functioning of the organs of the State” may be reminded. The normative framework of these is founded upon the “state governed by rule of law” ( Art.2).

## III.- RESULTS OF THE PARTY CHAIRMANSHIP

During the past two-year period of constitutional practice, the incompatibility of the chairmanship with the Presidency has been manifestly verified.

Moreover, the very authority responsible for the respect for the Constitution, has become the main actor of the violation of the Constitution. The incompatibility may be explained under six headings:

**- As the executive:** The president became the sole component of the executive, since the government and Council of Ministers have been abolished. The “one-man-rule” is not limited to the executive function but brought about certain rule making powers with the Presidential decrees.

**-Regarding the legislative:** No law may be proposed without the pre-assent of the President, since the President is the chairman of the party of majority in the Turkish Grand National Assembly. On the contrary, the President takes the initiative for the law proposals, and the MPs take this initiative as an order and such bills become laws in practice.

**-Regarding the Judiciary:** In determining the members of the Council of Judges and Prosecutors and the Constitutional Court, either alone or through the support of the Turkish Grand National Assembly, the party chairmanship is decisive in the exercise of the authority granted to the President.

**Regarding the democratic political life:** The party chairmanship of the President not only eradicates the mechanisms of free and equal competition for political parties, but also damages the principle of free elections. The duties fulfilled by the President in accordance with his constitutional status and his activities as the party chair are often mixed together and this situation makes the violations of the constitution systematic. Concentrating the authority of “representing the state and chairing the party” in the same person eliminates the opportunity for political parties to compete under equal conditions, and also damages the principle of free elections with its potential to mobilize public means in favor of his party in elections. The long-term consequence of this is shutting of the roads to the political change. This situation is in contradiction with the democratic rule of law principle.

**A shift to the partisan state institutions:** The fact that vice president and ministers are appointed and dismissed by the president, participating in activities and doing politics, although they are not elected and do not have any parliamentary accountability, is due to the fact that the President is the party chairman; and this is incompatible with the Constitution.

Participation of vice president and ministers in party group meetings, as well as the participation of ministers in the election campaigns with the President, violates the principles of "free election and equal voting", which is contrary to Articles 67, 68 and 69 of the Constitution.

**Regarding the democratic society:** Particularly the freedoms of speech and association, which are guaranteed by the Constitution, are the cornerstones of the democratic society. Principle of democratic state and society can be reminded here implying that the activities and actions of the rulers can be criti-

cized. The application of the Article 299 of the Turkish Penal Code, which regulates the crime of defamation the President, exposes the inconvenience of putting the presidency and party presidency status in the same person on the one hand, and it endangers the democratic society, on the other.

Namely, the Turkish Penal Code regulates the offenses of defamation in general and defamation of the President separately. According to Article 125 of the Turkish Penal Code, the crime of defamation (in general) may be committed by anyone to the detriment of anyone. The Article 299 that regulates the defamation of the President provides a stronger protection mechanism for the President. Moreover, vague wording of the Article 299 undermines the principle of legal security, since it is devoid of predictability. Plus, whether a given statement is a defamation against the President is left to the discretion of the executive, which clearly eliminates the predictability. Because, according to Article 299/3, prosecution for this crime depends on the permission of the Minister of Justice. In practice, the main problem is the use of the Art.299 as a reprisal against the criticisms made due to the discourse and actions carried out as the party leader rather than the President.

The criticism of speeches and actions made in the capacity of the party chairman is subject to the sanctions for defamation of the President. It creates a "thoughtcrime", thereby damaging the principle of equal race of political parties. This restricts the society's right to be informed about the actions and actions of the rulers, by worsening the already-deteriorated balance of the equal race of the political parties.

#### **IV.- A FIRST STEP FOR THE RETURN TO THE CONSTITUTIONAL ORDER**

The President's party chairmanship has undermined the supremacy of the Constitution and the orderly and balanced functioning of constitutional institutions. In other words, just as it was the case for the amendments as an "abusive practice", the Republic of Turkey has been drifting away from constitutional government. Against this backdrop, the first step for "democratic rule of law" should be the withdrawal of the President from the party chairmanship.

The supremacy and binding provisions of the Constitution are indeed valid even during the Constitutional period, which is called the Presidential Government system. As such, some constitutional provisions have come to the fore for the President, which became more prominent than in the earlier period.

Article 11 can be cited as a typical example of this:

*The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals.*

Considering that the executive is represented by the President, as per the Law no 6771, the President, has the duty to ensure the compliance, by all state institutions, with the Constitution. Since the party chairman cannot fulfill this obligation, the withdrawal of the President from the party chairmanship is a requirement of the Constitution.

However, the main goal should be reverting to the separation of the Presidency (Head of State) and the Prime Ministry (Head of Government), taking into account the historical development line, and re-enforcement of the "democratic state governed by rule of law" envisaged by the Article 2 of the Constitution.

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