LEGALISM-MANAGERIALISM AND LEGALITY-EXPEDIENCY DEBATE WITHIN THE CONTEXT OF PUBLIC ADMINISTRATION/LAW DICHOTOMY

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ABSTRACT

LEGALISM-MANAGERIALISM AND LEGALITY-EXPEDIENCY DEBATE WITHIN THE CONTEXT OF PUBLIC ADMINISTRATION/LAW DICHOTOMY

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The thesis aims to analyze the legalism-managerialism tension in American public administration and the legality-expediency controversy in Turkish administrative law within the context of the overarching theme of the public administration/law dichotomy. The study, from the perspective of political science and public administration, explores the historical and intellectual foundations of these two discussions. It starts with scrutinizing the evolving manifestations of the tension between legalism and managerialism in American public administration within the context of the political processes of the United States. It then examines the historical tension between the Turkish Council of State and the executive, which forms the basis of the legality-expediency controversy and is often reflected in constitutional amendments. This examination is conducted by analysis of Turkish Constitutional Amendments, relevant legislation and their reasoning, parliamentary minutes, seminars on administrative and constitutional law, and precedents of the Council of State, illustrating historical friction between the Council of State and the executive.

These two discussions exemplify the dichotomous relationship between public administration and law. Despite originating from different disciplines and countries,

they share remarkable similarities, particularly in relation to separation of powers, legal limits of administrative discretion, and legitimacy of administrative power/administrative courts. However, they also exhibit differences shaped by their unique historical/political contexts. The primary divergence lies in their focal points: the American legalism-managerialism debate primarily questions the legitimacy of administrative agencies within the constitutional framework, whereas the Turkish discussion on legality-expediency questions the scope of the judicial review of executive and administration by the Council of State.

Keywords: Public Administration/Law Dichotomy, American Public Administration, Turkish Administrative Law, Turkish Council of State, Administrative Discretion, Judicial Review of Public Administration.

ÖZ

KAMU YÖNETİMİ/HUKUK İKİLİĞİ BAĞLAMINDA HUKUKSALLIK-İŞLETMECİLİK VE HUKUKİLİK-YERİNDELİK TARTIŞMASI

KARABULUT UÇAR, Emel
Doktora, Siyaset Bilimi ve Kamu Yönetimi Bölümü
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Bu tez, kamu yönetimi/hukuk ikiliği bağlamında, Amerikan kamu yönetimindeki hukuksallık-işletmecilik ve Türk idare hukukundaki hukukilik-yerindelik tartışmasını incelemeyi amaçlamaktadır. Çalışma, siyaset bilimi ve kamu yönetimi perspektifinden, bu iki tartışmanın tarihsel ve entelektüel temellerini araştırmaktadır. Amerikan kamu yönetimi literatürüne egemen olan hukuksallık-işletmecilik gerilimi, tezin başlangıç noktasını oluşturmaktadır. Çalışma, hukuksallık-işletmecilik geriliminin, Amerikan siyasi süreçleri doğrultusunda değişen tezahürlerini inceledikten sonra, Türk idare hukukundaki hukukilik-yerindelik tartışmasının temelinde yer alan ve anayasa değişiklikleri ile somutlaşan, Danıştay ile yürütme arasındaki tarihsel gerilime odaklanmaktadır. Bu inceleme, Türk Anayasa Değişiklikleri, ilgili mevzuat ve gerekçeleri, meclis tutanakları, idare ve anayasa hukuku seminerleri ve Danıştay ile yürütme arasındaki tarihsel sürtüşmeyi gösteren Danıştay içtihatlarının analizi doğrultusunda yapılmıştır.

Kamu yönetimi ve hukuk arasındaki dikotomi ilişkisini örnekleyen bu iki tartışma, farklı ülkelerde ve farklı disiplinlerde ortaya çıkmış olmalarına rağmen, özellikle kuvvetler ayrılığı, idarenin takdir yetkisinin hukuki sınırları ve idari otoritelerin/idare mahkemelerin meşruiyeti ile ilgili olarak dikkate değer benzerlikler sergilemektedir. Bununla birlikte, her iki tartışma, özgül tarihsel/siyasi bağlamları doğrultusunda

şekillenen farklılıklar da göstermektedir. İki tartışma arasındaki temel farklılık, odak noktalarıdır: Amerika'daki hukuksallık-işletmecilik tartışması, idari kurumların anayasal meşruiyetinin sorgulanması temelinde ortaya çıkarken, Türkiye'deki hukukilik-yerindelik tartışması, Danıştay'ın yürütme/idare üzerindeki yargısal denetiminin kapsamı ekseninde ilerlemiştir.

Anahtar Sözcükler: Kamu Yönetimi/Hukuk Dikotomisi, Amerikan Kamu Yönetimi, Türk İdare Hukuku, Türk Danıştayı, İdarenin Takdir Yetkisi, İdarenin Yargısal Denetimi.

To my beloved Ertan and our son, Erdem, who is the 'sun' and all the stars of our very own universe

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ABA	American Bar Association
APA	Administrative Procedure Act
AÜSBF	Ankara University Faculty of Political Science
CEE	Chamber of Electrical Engineers
CSRA	Civil Service Reform Act
CSC	Civil Service Commission
DP	Democratic Party
GNA	Great National Assembly
ICA	Interstate Commerce Act
ICC	Interstate Commerce Commission
JDP	Justice and Development Party
JP	Justice Party
MHAC	Military High Administrative Court
MND	Ministry of National Defense
MP	Motherland Party
MP	Member of Parliament
NPM	New Public Management
NSC	National Security Council
NUC	National Unity Committee
PAJA	Procedure of Administrative Justice Act
RPP	Republican Peoples Party
SCAL	Special Committee on Administrative Law
SCJP	Supreme Council of Judges and Prosecutors
SEE	State Economic Enterprises
SPO	State Planning Agency
TGNA	Turkish Grand National Assembly
TMEPAI	Turkish and Middle East Public Administration Institute
TRT	Turkish Radio and Television
WLA	Walter Logan Act

CHAPTER 1

INTRODUCTION

This thesis is about the relationship between public administration and law. The primary objective of the thesis is the analysis of the public administration/law dichotomy, which is one of the persisting dilemmas of the discipline of public administration. The thesis examines the dichotomous relationship between public administration and law by exploring the legalism-managerialism discussion in American public administration and the debate over legality-expediency review in Turkish administrative law. The research mainly concentrates on the historical and intellectual foundations of these discussions and the potential nexus between the two debates regarding public administration/law dichotomy. The inquiry was approached from the perspectives of political science and public administration.

The thesis is framed within the dual contexts of American public administration and Turkish administrative law with an interdisciplinary approach. The research takes the American public administration literature as its starting point and subsequently focuses on the legality-expediency debate in Turkish administrative law. The rationale for beginning with American public administration lies in the widely accepted view that the birth of public administration as a distinct discipline can be traced back to Woodrow Wilson's 1887 work, *The Study of Administration*. Consequently, American public administration is broadly recognized as the 'birthplace' of the independent discipline of public administration.

According to Üstüner (2002, p. 1), public administration, a relatively 'young discipline,' has struggled to find its identity since Wilson's essay. On the other hand, as highlighted by Wright (2011, p.96), it is an interdisciplinary field involving various disciplines, such as political science, law, and management, each offering unique perspectives on conceptualizing public administration (Rosenbloom, 1983, p.219).

Although early writers[1] acknowledged the connection between law and public administration, they approached public administration from a managerial perspective to distinguish it as an independent discipline, separate from neighboring fields of political science and law (Becket and Koenig, 2005, p. ix). Thus, since its genesis, American public administration has maintained a managerial orientation, describing managerialism and legalism as controversial approaches to public administration theory (Rosenbloom, 1983, p.219). This predominant perspective portrays public administration as a 'field of management' (Rosenbloom & Naff, 2008, p.1). Furthermore, it presents law as a barrier to managerial reforms and prioritizes managerial values, such as efficiency and performance, over legal principles of accountability and justice (Christensen et al. 2011, pp. i125-i126). This viewpoint continues to influence contemporary mainstream literature on public administration across the world.

Üstüner (2002, pp.1-2) argues that the quest for identity in public administration has resulted in various 'tension points' in the discipline, leading to what is referred to as the "dilemmas of public administration." In the public administration literature, these dilemmas are articulated as 'dichotomies,' which propose "binary alternatives to choose from." As Üstüner explains, these dichotomies of public administration, which indicate "'tension points' for defining the discipline," are politics/administration, administration/management, "administration 'as an art' versus 'science'" and "universality versus uniqueness of administration." These dichotomies and "the law/administration dichotomy," which is postulated by Green (1992, p. 4), raise fundamental 'ontological questions' for the field of public administration (Üstüner, 2002, p.1).

Despite a few exceptions[2], mainstream American public administration literature has historically given little attention to law-related subjects (Rosenbloom & Naff, 2008, p.1). The writings on the intersection of public administration and law focus on examining the legitimacy of the adjudicative and rulemaking power of administrative

[1] Wilson, 1887; Goodnow, 1900 and White, 1926.

[2] Rosenbloom, 1983, Rohr, 1986, Cooper, 1988 and others.

agencies and the legal boundaries of administrative discretion. The essence of this approach lies in protecting individual rights and freedoms against potential abuse of governmental power. However, this literature has not extensively addressed the law/administration dichotomy as compared to the emphasis on the 'politics/administration dichotomy' (Green, 1992, p.4) as the founding dichotomy of the discipline and intra-organizational processes dealing with the '3Es' of efficiency, effectiveness, and economy of public administration.

The literature on public administration associates the law and legal values with accountability and control, having a constraining impact on administrative discretion. In these studies, administrative discretion is equated with flexibility and expertise to ensure efficiency in public administrative processes. The ongoing debate between managerialism and legalism in American public administration theory revolves around this contrast between accountability, epitomized by legal values, and efficiency, embodied by managerial values. Consequently, the law is frequently seen as something 'static[3],' posing obstacles for management-based reforms, while public administration is depicted as 'dynamic' and more responsive to changing societal requirements.

The dichotomy between law and management, entrenched in American public administration literature, epitomizes the conventional Anglo-American perspective on the interplay between law and administration. In his 1936 work *The Co-ordination of Law and Administration,* Eaglesham asserted that law and administration are inherently opposed. He argued that this antagonism stems from the contrasting nature of the two, where administration demonstrates progressive orientation, while law tends to exhibit a conservative tendency. Furthermore, traditional Anglo-American jurisprudence tends to reject the idea of a distinct branch of administrative law and separate administrative courts, unlike the French *droit administratif*, which embodies a fusion of (administrative) law and public administration. This distance has its origins in the impact of British constitutional law scholar Albert V. Dicey's 1885 study *Introduction to the Study of the Law of the Constitution*, which depicted the French system as a tool for granting judicial privileges to civil servants. Thus, the idea of a

[3] Harlow (2005, p. 280), citing Dimock (1980) and O'Leary (1992), writes that managerial views of public administration see law as static while considering public administration as dynamic.

distinct court and branch of law for administrative matters was perceived as conflicting with the foundational Anglo-American principle of the rule of law.

However, the discussions within American public administration on the dichotomous relationship between law and management are not a purely abstract, *a priori*, theoretical issue. It is, in fact, a political and social phenomenon that has arisen in response to the changes the American State underwent within its historical and political-economic processes. In the American setting, the relationship between law and public administration, manifested in various forms of tension between legal and managerial values, has been primarily shaped by conflict between the executive/administrative agencies and the judiciary/legal community, composed of scholars and practitioners of the law.

The rise of the American 'administrative state,' which began in the late 19th century with the Progressive Reforms and continued to expand during the New Deal of the 1930s, intensified the discussion of legalism-managerialism tension on several grounds. The growing number of administrative agencies sparked questions about the legitimacy of their adjudicative and rulemaking powers within the framework of the American Constitutional system, which is based on the separation of powers among three branches of government. Additionally, the broad discretionary authority exercised by administrators was questioned on the grounds of its compatibility with the rule of law, which obliges certainty and predictability in governmental administration.

Despite receiving support for administrative expansion from the emerging school of legal realists, criticism regarding the legitimacy of administrative agencies persisted, primarily coming from practitioners and scholars of law. The debate surrounding the legitimacy of the adjudicative, rulemaking, and broad discretionary powers exercised by administrative agencies, which involved a combination of legislative, judicial, and administrative powers, culminated in the enactment of the Administrative Procedure Act (APA) of 1946. The APA, regarded as the foundation of American administrative law, set procedural rules for administrative agencies' adjudicative and rulemaking processes and the judicial control of administrative discretion.

This legislative framework increased the interaction between administrative agencies

and the legal system, particularly the courts, emphasizing juridical and legislative aspects of public administrative processes as of the mid-20th century. The relationship between public administration and the judiciary gained significance with the heightened scrutiny of public administrative procedures by the courts in the 1970s and 1980s. This period saw the emergence of the 'hard look' review, which exerted intensive control over public administrative processes. This increasing interplay between courts and public administration, described as a 'partnership[4],' found repercussions in the literature of US public administration due to a growing interest in the connection between public administration and law. However, the enduring conflict between legal and managerial approaches persists in American public administration writings despite efforts to reconcile them.

The tension between prioritizing legal or managerial principles in public administrative processes and the balance of power between administrative agencies and the courts became a significant issue during the Progressive movement of the late 19th century in the United States. This tension, which transformed into a discussion on the constitutional legitimacy of the growing number of administrative agencies within the separation of powers framework, increased during the New Deal policies of the 1930s and 1940s. The conflict intensified with the rise of the public management approach in the late 1970s and early 1980s, as well as the inception of the Reinventing Government movement in the early 1990s. In the context of New Public Management (NPM) Reforms, which aim to reduce the role of the state by implementing private sector techniques in governmental administration, legal values and processes are seen as impediments to managerial reforms. Therefore, the ongoing theoretical debate on whether legal or managerial requirements should take precedence in public administrative processes progressed alongside the changing role of the American State in the economy and society. This connection reveals that the legalism-managerialism debate is not only an abstract theoretical issue but also a political one.

Turkish public administration had a predominantly legalistic approach before the widespread adoption of managerial public administration globally in the 1980s under

[4] Bazelon (1976, p.105) describes the increasing interplay between public administration and the courts as an involuntary partnership.

the influence of NPM Reforms and neoliberal economic policies. Public administration in Turkey has been heavily influenced by the continental European approach to public administration and law, where administrative matters have been primarily viewed through the lens of administrative law until recently. This close connection with the law is evident in the education, research, and practices of public administration in Turkey.

However, there has been historical friction between the Council of State (*Danıştay*) and the executive branch/administrative authorities, exemplifying the conflict between the realms of public administration and law/judiciary. The Council of State was established as part of the late 19th-century Ottoman modernization movement, with influences from the French *Conseil d'état*. Since its establishment, it has been the subject of criticism regarding its functions and status in its relationship with the executive branch and administrative authorities. The establishment of the Council of State, which mainly performed legislative and administrative functions rather than judicial tasks in its Ottoman years, is considered the first attempt to separate administration and judiciary in the Ottoman State. Therefore, since its establishment, the Council of State has played a significant role in Turkish political history by shaping the relations between the executive/public administration and law.

The Council of State was re-established in the Republican era with dual administrative and judicial functions. However, during this period, it has become prominent mainly with its judicial function, which involved the judicial review of executive and administrative acts and actions. In the early years of the Turkish Republic, the Council of State displayed a much more deferential stance towards legislative restraints by restricting itself in reviewing acts of government[5] (*hükümet tasarrufları*). However, over time, the Council of State has broadened the scope of its control on executive/administrative acts and actions through its precedents and developed specific mechanisms to counter legislative restraints imposed by the Turkish Grand National Assembly (TGNA).

[5] The term 'acts of government'(*hükümet tasarrufları*) corresponds to French concept of '*actes du gouvernement.' General Legal Terminology*, prepared by the Turkish Ministry of Foreign Affairs, translates the term '*hükümet tasarrufu'* as 'act of government.' https://www.mfa.gov.tr/data/Terminoloji/hukuk-terminoloji-110615.pdf. (accessed: 13.05.2024).

Due to the very nature of its judicial function, the Council of State has exerted a constraining influence on executive and administrative processes through its annulment and stay of execution decisions. This influence became particularly noticeable during the multi-party period of the 1950s, when the Council of State expanded the scope of judicial review on the executive and administrative acts, in contrast to its early years' hesitance. In response, the ruling party, which wielded legislative and executive power, introduced new legislative restraints on the judicial review of administrative acts and actions. The period following the adoption of the new Constitution of 1961 saw decreased tensions; however, these tensions reemerged after the 1965 elections. The primary issues revolved around the scope of judicial review over administrative discretion and the perceived interference of the Council of State with executive authority. The criticisms against the Council of State primarily came from the party in power and its supporters in academia and the media.

From the 1970s to the 2010s, the role of the Council of State concerning the executive branch and the extent of judicial review of administrative discretion have been one of the major themes of Constitutional amendments. These amendments resulted in constitutional restraints on the judicial competence of the Council of State in reviewing administrative acts and actions. Throughout the 1970s, criticisms concentrated on the extensive judicial review carried out by the Council of State. Critics argued that the Council of State's control over the executive was weakening the executive branch's authority by constraining the fulfillment of executive function.

From the mid-1980s, criticism of the Council of State has centered on the assertion that it exceeds its authority in judicial review of administrative acts and actions. This is seen as an infringement on administrative expediency[6] (*yerindelik*) and a constraint

[6] The English translation of '*yerindelik,'* which corresponds to the French concept of *opportunité*, poses difficulty. The academic writings about Turkish and French administrative law, written in English, propose different wordings: Örücü (2000) adopts the concept of 'merits review,' Mendes (2017) employs the term 'advisability.' As Mendes (2016) noted, in Italian administrative law, the concept is called 'merito.'. Cane (2000) refers to 'merits review' by administrative tribunals by distinguishing it from judicial review conducted by courts. Altıparmak (2003) used the term 'appropriateness' in translating legislation regarding administrative jurisdiction. Since the English translation of the *Turkish Constitution* by TGNA and *General Legal Terminology*, prepared by the Turkish Ministry of Foreign Affairs, used the term 'expediency,' the concept of 'expediency' is adopted throughout this thesis.

on administrative discretion. This assertion underlined that judicial review of administrative acts and actions should be limited to legality review, which examines administrative acts and actions on the grounds of conformity with the law. The concept of expediency, derived from the French *droit administratif*, corresponds to the French concept of *opportunité.* The prohibition of expediency review, which entered Turkish legislation in the early 1980s, became a constitutional rule with the 2010 Constitutional amendments. It is frequently used interchangeably with administrative discretion and is commonly perceived as the purview of administrative authority that operates outside the scope of legal regulation and thus cannot be challenged through judicial review. The expediency review sets the boundaries of judicial review of administrative acts and actions by administrative courts. These courts are only authorized to review the acts and actions of the administration regarding compliance with the law. They are prohibited from intervening in the expediency of administrative decisions.

However, the distinction between the boundaries of legality and expediency in judicial review of executive and administrative actions lacks precise criteria for decisive determination. In Turkish administrative law, this lack of clarity has been an area of contention between the executive/administration and the administrative courts. Furthermore, this has caused unending controversies between the political power, which holds the executive authority and dominates the public administrative processes, and the Council of State, which has functioned as the sole administrative court for many years. This controversy became more apparent in the review of discretionary acts and actions of the administration. Notably, it becomes more pronounced in cases involving economic and environmental implications, such as large-scale government investments and privatizations. In these cases, where the discretionary power of government is more complex and far-reaching, judicial control is perceived as a hindrance to governmental operations, thus being seen as a source of inefficiency. The legality-expediency, which is the contemporary variant of the historical conflict between the executive branch and the Council of State, has been shaped by political turnovers of Turkish history. As political processes in Turkey are usually embodied in constitutional amendments (Sencer, 1984a, p.3; Tunaya,1980, p.6), constitutional processes of Turkey play an essential role in understanding this tension, which stems from the power struggle between the executive branch/administrative authority and the (administrative) judiciary. Within the context

of expediency-legality controversy, this power struggle has come into being as legislative and constitutional restraints imposed on the judicial authority of the Council of State by political power, which wields the executive and majority of legislative power. The Council of State has responded to these limitations by relying on mechanisms developed through its precedents in the judicial review of executive/administrative acts and actions, particularly those with discretionary elements. These precedents have paved the way for the argument that the Council of State and administrative courts exceed their legal review authority and encroach on matters of expediency.

In light of these preliminary discussions, the thesis contends that discussions on the legality-expediency controversy in Turkish administrative law represent one of the epitomes of the law/public administration dichotomy, like the legalism-managerialism debate in American public administration. Despite arising from different disciplines and distinct jurisprudential traditions in different countries, these two discussions are common topics of interest. Both discussions center around prioritizing law-based or managerial-based principles in public administrative processes, the legal boundaries of administrative discretion, the judicial review of public administration, and the broader context of separation of powers. At the core of these debates, which intensified during specific historical and political periods, lies the recurring theme of the balance of power between executive/administrative authority and the judiciary/legal system.
This discussion addresses the intersection of administrative law and public administration, offering an intriguing field of exploration from the perspective of political science and public administration.

The law is one of the founding pillars of public administration. The Weberian conception of rational-legal authority, the notion of the rule of law, and the principle of legality in contemporary constitutional states all indicate the inherent relationship between public administration and law. Moreover, until recently, the topics of governmental administration were long covered within the scope of administrative/public law. However, a limited body of study addresses the connection between the two. Furthermore, the existing literature considers the law and public administration as opposing fields. Given these points, the thesis concentrates its investigation on the historical and intellectual roots of the conflicting relationship

between public administration and law. In doing this, the thesis focuses on the legalism-managerialism tension in American public administration and the legality-expediency controversy in Turkish administration, both of which exemplify the dichotomous relationship between public administration and law.

In the American context, research is focused on analyzing the period from the Progressive movement of the late 19th century, when the American administrative state and autonomous discipline of public administration emerged, to the (new) public management reforms of the 1980s, which further intensified the tension between legalism and managerialism. In the Turkish context, the research is focused on the period from the late 19th century, when the Council of State was established and the first Constitution of the Ottoman State was promulgated, up to 2017, when the last Constitutional amendment introduced a new governmental system in Turkey. The study seeks to unravel the development and evolution of discussions on legalism-managerialism and legality-expediency by examining their historical and intellectual underpinnings, advancements, epochal moments, and the influence of political, economic, and societal factors. Furthermore, with its interdisciplinary approach, the thesis aims to establish connections between discussions from different legal traditions and academic disciplines.

The following research questions will serve as the guiding framework for the thesis:

- What are the theoretical framework and arguments surrounding the relationship between public administration and law?
- What are the historical and intellectual foundations of the legalism-managerialism debate in American public administration and the legality-expediency debate in Turkish administrative law?
- How have these debates evolved over time, and what peculiar political, economic, and historical factors have shaped their changing manifestations?
- In what ways do these two debates, rooted in distinct disciplines and legal traditions, demonstrate similarities and differences?
- What do legalism-managerialism and expediency-legality discussions tell us about the dichotomous relationship between administration and law/judiciary?

The study utilizes descriptive and explanatory research methodologies, employing qualitative analysis of literature, legislation with their reasoning, constitutional amendments, parliamentary minutes, and reports from civil society organizations and political parties as the primary approach for investigation. It also examines prominent decisions of the Turkish Council of State, illustrating the tension between the Council of State and the executive/administration. In both American and Turkish contexts, the thesis employs a descriptive method to examine the public administration/law dichotomy phenomenon, delineating its two distinct manifestations as legalism-managerialism tension in American public administration and legality-expediency controversy in Turkish administrative law. This examination encompasses the historical, political, economic, and social aspects of both discussions. This involves analysis of primary and secondary sources such as literature, official documents, legislation, political parties' arguments, constitutional amendments, and court cases. This analysis aims to uncover the historical and intellectual origins, epochal moments, and characteristics of the dichotomous relation between law and public administration, expressed in various forms. Furthermore, an explanatory analysis of data gathered from these resources is made to elucidate the causes and consequences of this dichotomous relationship evident in both Turkish and American contexts.

1.1. Outline of Study

The thesis comprises seven chapters, with Chapter 1 being the introduction. This introductory chapter identifies and delimits the research area, defines the problem to be examined, clarifies the research questions, outlines the methodology and objectives, and provides a general overview of the thesis. In this chapter, the legalism-managerialism tension within American public administration and the legality-expediency controversy in Turkish public administration were presented in relation to the public administration/law dichotomy. These discussions form the basis of the research topic addressed in this thesis.

Chapter 2 aims to provide a theoretical and conceptual framework for the subsequent chapters. To this end, it briefly portrays the connection between public administration and law, discussing the interaction between public administration and (administrative) law in contemporary states based on Weberian rational-legal authority schema and

constitutionalism. The chapter also focuses on the role of law within the theory and practice of public administration. Lastly, it examines the judicial review of public administration, which illustrates the conflicting relationship between public administration and administrative law/judiciary by referring to the difference between the French and Anglo-American approaches to administrative law in this context.

Chapter 3 discusses the historical evolution and diverse manifestations of the conception of legalism-managerialism tension in American public administration scholarship, exemplifying the tension between public administration and the judiciary. In this exploration, the study draws insights from American public administration literature and the court cases that reflect the tension between public administration and law. The chapter begins by tracing the emergence of public administration as an autonomous discipline separate from the neighboring fields of political science and public law in the United States. It also investigates the establishment of the American administrative state during the Progressive Era. The chapter then examines the perspectives of early public administration scholars on the role of law within public administration. Subsequently, it addresses the expansion of administrative agencies during the New Deal Era, investigating the issue of the legitimacy of these agencies within the framework of the rule of law and the constitutional separation of powers. The analysis highlights the enduring conflict between administrative agencies and constitutional law within American public administration. This has led to the development of American administrative law, as evidenced by significant documents and court cases that illustrate the tensions between executive/administrative agencies and the 'legal community.' Additionally, it examines the development of American administrative law, which provided constitutional legitimacy for the rulemaking and adjudicatory powers of administrative agencies and set rules and procedures for judicial review of administrative discretion. Finally, the chapter analyzes the increased interaction among Congress, the judiciary, and administrative agencies and the accompanying academic interest in legal issues within American public administration.

Chapter 4 explores the historical development of the Turkish administrative jurisdiction and its interplay with the legal and administrative framework. The chapter traces the origins of Turkey's contemporary administrative court system, focusing on

establishing the Turkish Council of State, which pioneered the Turkish administrative jurisdiction system and functioned as the sole administrative court for many years. The chapter also addresses the development of scholarly work on law and public administration and the training of public administrators and lawyers in the late Ottoman Period. The chapter encompasses the period between the Ottoman Reforms of the 19th century, during which the Council of State (*Şurayı Devlet*) was established, up to the 1971 Constitutional Amendments, which reinforced legislative restraints with constitutional restraints on the judicial authority of the Council of State. Additionally, it examines the judicial self-restraint of the Council of State, legislative restraints imposed by the TGNA, and the criticisms directed towards the Council of State in the pre-1971 period.

Chapter 5 concentrates on the constitutional and accompanying legislative restraints on the jurisdiction of the Council of State in the period between 1971 and 2017. It examines the constitutional constraints imposed on the jurisdiction of the Council of State, which were introduced by the 1971 Amendments to the 1961 Constitution. Constitutional restraints on the judicial review of executive/administrative acts and actions were intensified by the 1982 Constitution. Various amendments to the 1982 Constitution -the most recent in 2017, which brought a new governmental system for Turkey- reinforced these restrictions. Additionally, it analyzes the impact of neo-liberal economic policies on the role of the state, which had a significant influence on the relationship between the Council of State and the executive/public administration, as well as political, economic, and social processes in Turkey. The chapter also discusses the responses of the Council of State to constitutional restraints and the political, economic, and social developments during that period.

Chapter 6 deals with expediency review, introduced into Turkish legislation in the early 1980s and became a constitutional provision with the 2010 Constitutional Amendments. The expediency-legality controversy is examined in the context of Turkish administrative law literature, Turkish legislation, and the Turkish Council of State rulings, which play a prominent role in shaping the expediency discussions. After exploring the conceptual aspect of expediency review, the chapter focuses on its connection to the judicial review of administrative discretion. The chapter concludes by analyzing two well-known precedents of the Council of State: the '*Gökova*' and

'*PETKİM*' cases. These cases provide the research with extreme instances of narrow[7] and extensive[8] review by the Council of State in judicial review of executive/administrative acts and actions involving broad discretion and technical expertise. These cases also illustrate the clash between expediency and legality, underlining the ambiguity in determining the boundary between legality and expediency and the absence of exact criteria to ascertain their limits. Moreover, they indicate the challenges posed by issues of administrative discretion and the expediency review in Turkish politics. The chapter aims to demonstrate that the technical legal/jurisdictional discussions on the expediency debate have a political dimension intricately connected to Turkey's political processes.

The concluding Chapter 7 assesses the research findings related to the research questions in light of the preceding chapters. Furthermore, it clarifies how the thesis contributes to the existing literature, delineates its limitations, and identifies the areas that need further exploration.

[7] See Kaboğlu, 1989.

[8] See Hakyemez, 2012.

CHAPTER 2

LAW AND ADMINISTRATION IN CONTEMPORARY STATES

2.1. Introduction

The discipline of public administration, which has its roots in the United States as a distinguished branch of study, is not directly associated with the field of law in the American setting. However, as Frazmand (2018, p.3189) points out, contemporary democratic societies are governed by legal rules, which provide the framework for all institutions, including public administration. These societies are often referred to as 'administered society(ies)' and 'society(ies) of organizations' (Polatoğlu, 2000, p. 40). As Drewry (2012, p.319) emphasizes, the centrality of law in both the theory and practice of public administration is evident due to the extensive application of the Weberian bureaucratic modes of organization in advanced societies. This model relies on rational-legal authority, highlighting the importance of law in public administration. In such a framework, legal rules profoundly impact public administrative structures and functions, shaping the nature of the tasks and the manner in which they are executed (Feldman, 2012, p.346). This interplay between public administration and the law, the focus of this chapter of the thesis, is a crucial aspect of the functioning of modern states.

In contemporary democratic states, public administration serves as an instrument of the state in governing and implementing public policies. It derives its existence and legitimacy from the legal framework that underpins its functions and responsibilities. According to Kettl (2015, cited in O'Leary et al.,2019, p.1), "Public organizations exist to administer the law, and every element of their being—structure, staffing, budgeting, purpose—is the product of legal authority." This intertwinement between law and public administration has practical implications for the legal framework in which the day-to-day operations of public administration take place. Therefore, the study of this relationship is crucial for the conceptualization of the functioning of

modern states.

In the Continental European context, the study and teaching of public administration have long been associated with the realm of the law. This is mainly because the academic study of public administration was considered a topic of administrative law, underlining the deep-seated intellectual connection between the two fields. Countries such as Turkey, which have a French tradition of administrative law (*droit administratif*), have strongly emphasized legal issues in the training and education of public administrators (Onaran, 1967, pp.22-24). Although American public administration, which dominates the mainstream study and teaching of public administration worldwide, is not typically regarded as law-based expertise, it is nonetheless subject to the impact of legal frameworks as an integral part of governmental processes (Schafritz et al., 2017, p.11).

However, the issue of law and administration is intricate, multifaceted, and too extensive to be covered entirely within the scope of one chapter. This chapter, therefore, concentrates mainly on the central issues of the connection between public administration and (administrative) law, specifically focusing on the judicial review of public administration. The concept of judicial review of public administration, involving external control of the acts and actions of public administration to ensure their compatibility with the law, represents the most authentic manifestation of the antagonistic relationship between public administration and the law/judiciary.

The primary objective of this chapter, which concentrates on the general overview of conflicting relationships between public administration and law, is to establish a theoretical and conceptual framework for subsequent chapters of the thesis. The chapter starts with a brief portrayal of the interaction between public administration and (administrative) law in modern states. Subsequently, it concentrates on the role of law in public administrative processes, exploring the practical and intellectual connections between law and public administration. The chapter also analyzes the judicial review of public administration, a quintessential example of the tension between public administration and administrative law/judiciary, by referring to the distinction between the French and Anglo-American conceptions of administrative law.

2.2. Law and Public Administration within Modern State

Ziller (2012, p.325) asserts that the boundary between judicial and administrative functions is crucial in evaluating modern administration. As Ziller (2012, p.325) writes, prior to the 17th and 18th centuries, administrative and judicial functions and their staffing in Europe, including England, were not distinctly separated. Mannori and Sordi (2009, p.225), writing in the European context, argue that many activities, such as tax collection, which are now considered 'administrative functions,' were carried out by states much earlier. In a similar context, Rutgers (2003, p.4) states that before the mid-17th century, administrative activities encompassing the organization and interaction of institutions were commonly known as the *police* (*policey*). This was during the formation of modern states when sovereigns were asserting their authority over their subjects (Sampford, 2004, p.11). As Mannori and Sordi (2009, p.225) wrote, jurists used the terms 'administration' and 'to administer' without specific technical references since ancient times. The earlier use of the term 'administration' did not specifically refer to "public function with its distinct characteristics" until the late 18th century, when the theory of separation of powers emerged. In the context of separation of powers, where public authority embodies three forms of legislation, jurisdiction, and execution/administration, the administration is defined as a state function carried out to meet the needs of citizens, separate from legislation and jurisdiction. From the 19th century onwards, these activities have been recognized as public administration, as Rutgers (2003, p.4) writes.

During this era, the primary duties of European states and administrative bodies were confined to enacting and enforcing laws and regulations. After the French Revolution of 1789 and the Parisian Revolution of 1848, the political ideology of liberalism and the rise of parliamentary democracy gained widespread support. This resulted in the formation of democratic constitutional states, dismantling the monarch's absolute power and emphasizing individual rights and liberties. Consequently, there arose a surge in the prevalence of the concept of *Rechtsstaat*, meaning the 'rule of law,' across continental Europe in the 19th century. The *Rechtsstaat*, a German concept purporting a state in which the exercise of governmental power is constrained by law, replaced the former *Polizeistaat*, corresponding to the autocratic monarchy of the time (Kickert & Stillmann, 1999, pp.8-9; Ziller, 2012, pp.323-324).

As Rutgers (2003, p.5) notes, ‘administration,’ ‘management,’ and ‘government’ are often used interchangeably, but they can also have different meanings. Rutgers (2003, p.9) also emphasizes that the conception of public administration is contingent upon a range of interconnected concepts, such as “constitution, state and the like,” linking public administration with the concepts of state and the law.

On the other hand, the law and the state in capitalist societies are theoretically and politically separated. Their relationship is intricate and multifaceted (Sugarman, 1983, p.2). However, there is an agreement across diverse perspectives regarding the growing importance of law in contemporary societies despite varying opinions on the connection between law and the state, as Hunt (1993, p.12) points out. Hunt (1992, p.13) outlines various embodiments of the significance of law in modernity and political science, which he calls the ‘centrality of law thesis.’ This includes Weber’s concept of the ‘rise of legal rationality,’ Poulantzas’ ‘juridical-political instance,’ Habermas’ ‘juridification,’ Luhman’s ‘positivization of a self-referential legal system’ and ‘legalization,’ which means that legal rules to exert more influence on the social relations. The shared characteristic among these diverse conceptualizations of the relationship between state and law is the prominent role that law plays in the historical advancement of modernity. This historical weight of the role of law in modernity is not just an essential aspect of the topic of public administration and law but a critical aspect that is crucial for understanding the present situation of the relationship of public administration to the law and the state.

Writing on “the European concept of administration,” Schwarze (2006, pp.11-12) asserts that the concept of public administration is rooted in the domain of the state. Accordingly, the modern states, which operate in a “normative and institutional structure” of the rule of law (Zolo,2007, p.7), inherently integrate law and state and its administrative apparatus in many ways.

In a broader context, Waldo (1999, pp. ix-x) encapsulates that the concept of modern states as political and administrative entities asserting superior sovereign power is closely associated with the presence of a bureaucratic structure. This bureaucratic framework is an administrative apparatus comprising various organizations tailored to fulfill specific functions. It is characterized by a hierarchical arrangement and is

entrusted with the authority to exercise sovereign power.

In analyzing the connection between law, state, and bureaucratic administration, Weber presents a conceptual framework that highlights the role of law in providing political legitimacy. According to Weber, the legitimacy of authority in the modern state is based on its legality. Formal legal rationality, the fundamental characteristic of modernity, forms the basis of legitimacy. Therefore, the legitimacy of the modern state is rooted in law, which is rational and objective and excludes the arbitrariness in the governmental administration. The contemporary state requires the most advanced administrative structure as governmental administration becomes increasingly complex. Weber asserts that bureaucracy is the most effective form of administration in contemporary society. According to the Weberian conception, the modern state and capitalism are built upon bureaucratic administration. The essence of the legitimacy of rational authority is most clearly demonstrated in bureaucracy, which functions through formal procedures and a legal framework. Rationality is established through generalization, certainty, predictability, and the systematization of law, all manifested in formal procedures and legal principles and acknowledged as binding. The contemporary state is characterized by a bureaucratic administration managed by a hierarchy of trained officials. This administration operates on rational principles and demonstrates the interconnectedness of law and bureaucratic administration. The contemporary states are also supported by a written constitution, rationally enacted legislation, and the administrative body bound by legal rules (Cotterrell, 1983, pp.75-77; Deflem,2008, p.43).

According to Peters (2008, p.118), public administration in varying political systems is consistently organized as bureaucratic organizations, emphasizing the inherent nature of bureaucratic structures in public administration across different political contexts. Furthermore, as Fox (1993, p.52) stated, the Weberian concept of bureaucracy, together with Wilsonian politics/administration dichotomy and Taylor's scientific management, constitute one of the foundational pillars of classical public administration conception. On the other hand, Drewry (1995, p.42) contends that (public) law is an integral component of public administration, irrespective of whether it is compatible with the Weberian rational-legal bureaucratic model, which gives a rule-bound character to public administration. In any circumstances, legal constraints

and entitlements, administrative processes, and the principle of legality are all crucial elements within a well-established public administration system in contemporary democratic states that operate compatible with the rule of law.

Schwartz (2006, p.320) contends that within the framework of common-law jurisprudence, there has been a historical perception of law and administration as conflicting instruments of 'social control.' This viewpoint, ingrained in the Anglo-American concept of the rule of law, implies that the very existence of administration, which ideally should be entirely bound by the law, runs counter to the principles of the rule of law. Robson (1932, p. 347) argued that the rule of law and liberty prevailed in England while the inhabitants of the Continent were subjected to "the misery and oppression of a lawless tyranny imposed by a privileged state." This perception is primarily rooted in a "deep-seated unease" regarding the expanding authority of the government (Harlow, 1997, pp.257-249) and the English constitutional lawyer Albert Venn Dicey's assertion that "administrative discretion was inherently repugnant and generally illegitimate" (Allan, 2003, p.433). According to the conventional interpretation of the separation of powers, administrative discretion conflicts with the notion of government under the rule of law (Allan, 2003, p.435). According to Picciotto (1979, p176), there exists a "conflict between legal certainty and administrative discretion," which he views as a new manifestation of the inherent tension within the liberal rule of law. This tension is characterized by the "tension between the need for the generality of application and the need for precision" in formulating legal rules (Picciotto, 1979, p.174).

In the American context, the rise of administrative power is regarded as contradictory to the constitutional doctrine of separation of powers, which is the founding philosophy of the American State. The objective of the separation of powers, developed by Locke's *Second Treatise* and Montesquieu's *Spirit of the Laws*, is to protect individual rights against a potential arbitrary exercise of governmental power (Pestritto, 2007, p.19). According to Pestritto (2007, pp.21-23), three principles of separation of powers posed problems for the 19th-century rise of administrative power in the US. First, according to the original vision of separation of powers, powers cannot be delegated. Progressive liberalism's emphasis on vast administrative power paved the way for retracting this 'non-delegation doctrine.' Second, the rule prohibiting

combining legislative, executive, and judiciary functions was broken by administrative agencies, which exercise blended powers of rulemaking, adjudication, and administration. Third, administrative agencies infringed on the principle of political accountability by lessening the accountability of administrators. This deep-rooted contradiction between the ethos of the constitutional separation of powers and the administrative agency practice of the US governance is described as a "bad adjustment between law and administration" by Pound (1942, cited in Schwartz, 2006, p.320). This 'bad adjustment' has echoed in the scholarship of public administration, which has a distant stance on law-related subjects.

On the other hand, in contrast to disciplinary distance, Feldman (2012, p.346) argues that there is a substantial body of empirical evidence regarding the interplay between law and public administration. Similarly, Zouridis (2011, p.23) suggests that there is a contradiction between the study and practice of public administration. Although public administration studies often prioritize managerial approaches over legal approaches, the practice of public administration has increasingly become characterized by "continuous legalization and juridification," which "means governance by rules" (Harlow & Rawlings, 2009, p. xvi).

2.2.1. Law in Public Administration Context

In 1936, Eaglesham (1936, pp.157-158) discussed the ongoing conflict between administrators and lawyers in England. He argued that the legal perspective, which revolves around individual rights, is commonly perceived as conservative. Conversely, administrators often adopt a more radical stance, advocating for change and regarding legal regulations as barriers to progress and reform. Eaglesham also asserted that lawyers disapprove of the administration's prioritization of 'public needs' over 'private rights.' Similarly, administrators, prioritizing "progress at all costs," criticize the courts' narrow legalistic viewpoint, which grants limited power to administrators, preserves the status quo, and rigidly enforces individuals' legal rights. From the administrator's perspective, the court's rigidity and inflexibility impede administrative decision-making. Conversely, lawyers believe that administrators undermine the fundamental principle of the rule of law. Eaglesham (1936, p.158) calls these differences in approaches of lawyers and administrators "conflict between progressive

and conservative" tendencies.

Eaglesham (1936, pp.159-160) advocated establishing administrative law in England. He noted that there was an inherent conflict between the attitudes of administrators and lawyers regarding the problems of the time. This conflict was exemplified by the clash between the *New Despotism* of Lord Hewart (1929) and the *Justice and Administrative Law* of W.A. Robson (1928). Eaglesham believed this perspective led to a 'dichotomy' between government/administration and law/courts. He argued that adopting the continent's separate administrative court model could help "co-ordinate law and administration."

Eaglesham's contention regarding the conflict between lawyers and administrators, which he asserts was prevalent in England in the 1930s, also reflected the conventional public administration perspective on law. In traditional public administration, the law is often depicted as static (Dimock, 1980, cited in Harlow, 2005, p. 280). Harlow contends that this "outdated and one-dimensional" perception of the law stems from a positivist understanding of the law that portrays it as independent and objective. According to legal positivism, as Montesquieu theorized, law and judges are neutral. Consequently, the law is perceived as imposing limitations and exercising control over the actions of public administrators as a mechanism for control and accountability that ensures the legality of administrative action and deters misuse of public power (Harlow, 2005, pp.279-280).

Similarly, the NPM reforms reinforced this conflict under the title of law vs. management. According to the law vs. management postulate of NPM reforms, which favored efficiency and performance, legal values are considered obstacles to market-oriented reforms. In other words, managers' growing exercise of discretionary power contradicts the public law perspective, which considers legal rules and court decisions as legitimate guiding forces for public administrators, who would act 'arbitrarily or capriciously.' The law against management notion also prevailed in the *Minnowbrook III Conference of 2008*, which reflected that law and management working at cross proposes in the administrative process (Christensen et al., 2011, pp.i125-i128). The tconventional idea of conflict between law and management in Anglo-American public administration has been replaced by a new relationship that reflects the evolving

role of the state, as proposed by Harlow (2005, p.291).

Fişek (1974, p.140) suggests an alternative account of the interplay between law and public administration, outlining the 'organic relationship' between the two. According to Fişek (1974, pp.138-140), the "rule over people" and the "submission of people" are the '*raison d'étre'* of administration, which is rooted in the economic foundation of the "division of labor." This is justified by the concept of authority and is manifested through the hierarchical structure. The interconnected concepts of division of labor, authority, and hierarchy constitute the 'essence of administration.' Fişek argues that these concepts materialized in legal structures and are expressed in legal terms. This outward legal form serves as a framework that outlines and regulates organizational activity. Issues about the external structure of 'administrative content,' including organizational principles, intra-organizational duties, and specific regulations for selecting and appointing personnel, fall within the scope of legal science. While administrative science aims to develop effective methods for planning, guiding, and controlling organizational activities, formalize them as law through legal science to ensure a scientific approach. The legal form serves as a tool through which essential aspects of administration are manifested, ensuring both legitimacy and the smooth functioning of administrative processes. Therefore, for Fişek, law and administrative science are intricately interconnected at the superstructural level, forming an organic relationship.

The treatment of the relationship between administration and law in mainstream public administration can be categorized into three main themes: law as the framework, the instrumental conception of law, and law as an accountability mechanism.

As almost all studies emphasizing the integrity of law and public administration suggest, the foundation of public administrative processes lies within the framework of law (see United Nations, 1995, p.4; Gözübüyük, 1975, p.9). Thus, the primary role of law in the context of public administration is to provide a legal framework within which public administrative processes take place. This framework, consisting of several legal rules and regulations and judicial precedents, obliges compliance with legal rules and regulations for all public and private organizations. These rules and regulations are essential for establishing, empowering, controlling, and restricting administrative activities. They govern public administrative functions such as

budgeting, staffing, planning, and organization in line with legal requirements. In these studies, the law is considered one of the environmental factors that influence administrative processes (see Hatch and Cunliffe, 2006, pp. 68-69; Gözübüyük 1975, p. 9).

The concept of law as a framework for public administrative action is closely associated with historical concepts of the Prussian *Rechtsstaat* and the French *principe de legalité*. These ideas are foundational aspects of the Continental administrative system, imposing the obligation on public administration to derive its authority from the law and adhere to legal rules (Ziller, 2012, p.223). The principle of legality, which is constitutionally regulated in Turkish law, necessitates that public administration functions within the framework of legal rules. In addition to this broader interpretation of the principle of legality, the narrower concept of legality prescribes that public administrative bodies are obliged to comply with and act in accordance with laws passed by the legislative branch. Legality, which underlines the connection between public administration and law, is widely considered the foundation for judicial control over governmental administration and ensuring the rights and freedoms of individual citizens (Balta, 1966, p.52).

Ziller (2012, pp.324-325) contends that the principle of legality (French *principe de légalité*) originates from the Enlightenment, particularly from Rousseau's theory of democracy, which profoundly influenced the French Revolution. The principle of legality is primarily based on statute law, reflecting the general will and historically tied to the concept of the social contract. According to this principle, citizens are obligated to obey rules that they have accepted through decisions made by their representatives. It has long been associated with the notion of representative democracy, albeit often reduced to a mere formality. The principle of legality became intrinsically intertwined with the Declaration of Human Rights of 1789. In France, the principle of legality has evolved through precedents of the *Conseil d'état*, which led to the development of a distinct branch of administrative law. According to Ziller (2012, p.325), the Napoleonic system of administration, alongside the separate administrative courts and the branch of administrative law, significantly influenced numerous European countries due to its close association with the French Revolution. The principle of the legality of administration, which forms the foundation of French

administrative law, has evolved into one of the universal principles of law.

In a broader context, the concept of the rule of law necessitates that the states operate according to legal rules and that it is obligated to abide by externally imposed laws. However, the legal rules the public administration must comply with are not solely those made by the legislative. Administrative bodies themselves enact legal rules and regulations. Gözübüyük (1975, pp.16-18) argues that the executive and administrative bodies contribute to the creation of laws in two ways. First, the executive can enact secondary norms and regulations through decrees, circulars, and ordinances. Second, executive and administrative bodies play a role in shaping laws. Ministries and administrative institutions often lead the proposal of laws and policies within their areas of expertise. Throughout enacting laws, expert public administrators and executive members are consulted for their opinions during discussions on draft laws in legislative commissions. Consequently, they significantly influence the formulation of laws, extending beyond the neutral implementation envisaged by the separation of powers, which conceptualizes administration as a tool of the executive responsible for implementing abstract laws to concrete cases.

In his discussion on the role of law in UK public administration, Feldman (2012, pp. 350-351) argues that the law assigns functions to public authorities, grants powers for these functions, sets limits on the actions of administrative authority, allows for lawful expenditure, and establishes procedural standards. However, Feldman asserts that the law cannot provide adequate standards to direct public administration. He suggests that there may be tensions between the objectives of the administration and the practice of legal standards. The legal rules may unduly restrict administrators from pursuing their programs, and procedural requirements may be time-consuming and inflexible, hindering an administrative authority from effectively exercising its powers.

The instrumentalist perspective of law suggests that law functions as a 'tool' to achieve political and administrative objectives (United Nations,1995, pp.4-5). Many changes and regulations regarding administrative processes are brought about through adjustments to pertinent legal rules. From this standpoint, the law is viewed primarily as an instrument to fulfill administrative purposes and policy goals (Harlow, 2005, p.280). Conversely, formulating existing laws and drafting future legislation represent

essential components of the policy guidance offered by civil servants. In this sense, political and administrative institutions may view drafting and implementing the law as the 'object' of public policy programs, as one of the primary functions of public administration is to enforce the law (United Nations, 1995, p.5). According to Peters (2008, p. 122), the legalistic view of public administration implies that public administrators are responsible for applying the law to specific cases. In the Weberian conception of administration, effective administration is based on using the law to achieve public objectives. In conclusion, as Rutgers (2003, p.23) contends, the concept of public administration may be depicted as "the mere execution of laws," while an alternative perspective views "laws as just policy instruments" in the process of governmental administration.

Law as a control and accountability mechanism for the public administrative process is mainly embodied in the judicial review of public administration, which will be examined later in this chapter under the title of judicial review of public administration.

As Zouridis (2011, p.23) contends, public administration practice has gradually aligned with the principles of law through legalization and juridification. In a similar vein, Harlow (2005, p.279) argues that the increasing adoption of soft law methods, which are relatively vague and imprecise as compared to standard legal rules, by the administration, mainly under the influence of global governance, has led to a "convergence of legal and administrative values" through 'good governance' and 'good administration.' Scholars have recently encouraged collaboration between public administration and (administrative) law.

Notable initiatives in the United States, such as the *Minnowbrook III Conference in 2008* (Christensen et al., 2011) and the *Administrative Conference of the United States (ACUS)* in *2010*, have been focused on "bridging the gap between administrative law and public administration" (Olorunippa, 2015). Additionally, *the Permanent Study Group 10 of the European Group of Public Administration (EGPA) of 2005* has aimed to promote interdisciplinary research on law in public administration, administrative science, and policy from a European perspective (Dragos et al.,2018, p. 213).

2.2.2. The Role of Law in Teaching and Scholarship of Public Administration

The historical dominance of law in public administration studies is a significant aspect that has shaped the field. According to Rutgers (1997, p.280), royal servants who performed administrative tasks were typically expected to have a university education in law since the Middle Ages. As the governmental responsibilities expanded and the civil service and the governmental intervention in the economy grew, new skills were demanded from those in office (Raadschelders & Rutgers, 1996, as cited in Rutgers, 1997, p.280). The demand for non-legally trained officials resulted in the emergence of 'cameralism' in Germany and Austria-Hungary. Cameralism involved the study of royal administration and encompassed economics, politics, and social studies related to state administration. It primarily focused on the "internal organization of the state." A similar field of study, called 'polity science,' also appeared in France but did not become a part of university-level teaching until World War II (Rutgers, 1997, p.280-281). In the first half of the 19th century, the transition from absolutist states to liberal states led to a shift in focus from administration, as seen in the studies of Bonnin and Vivien in France, to administrative law. This shift overshadowed the attempts to establish a science of administration as administrative law took center stage in Europe. Accordingly, public administration had evolved into a juridical study by the second half of the 19th century. Von Stein's efforts to innovate administrative science were unsuccessful. Consequently, mainstream thought conventionally perceived public administration as the 'execution of law' and viewed it as a domain primarily associated with legal professionals (Rutgers,1997, pp.286-291).

The conventional method of instructing and researching governmental administration centered on structural and legal aspects of the state. This is because the study of law has always been integral to understanding political matters (Martin & Hazelton, 2011, p. 512). Subjects related to administrative issues have traditionally been viewed within the legal domain. Furthermore, prior to the late 19th century, public administration studies in Continental Europe, which also influenced Turkish public administration scholarship, were primarily influenced by scholars and practitioners with a law background, as Ziller (2012, p.323) notes. During this time, studies on administrative matters were covered within the scope of administrative law. Kickert and Stillmann (1999, pp.8-9) coined the term '*juristenmonopol*' to describe this phenomenon of the dominance of law in the research and teaching of state administration in Continental

Europe. This term encapsulates how the study of law gained a 'monopoly' as the sole relevant field of study in public administration during the 19th century, coinciding with the rise of capitalism, liberalism, and democracy in Europe.

Public administration as a field of study is not confined to a single discipline but is situated at the intersection of various disciplines (Fişek, 2005, pp.36-37), including law, political science, and management (Wright, 2011, p.96). This diverse blend often gives way to what has been termed the "identity crisis of public administration" (Üstüner,1995). According to Fişek (1974, pp.137-138), 'administrative science' is characterized by a controversial state stemming from the dilemma between the "necessity of interdisciplinary integration" and the "requirements of disciplinary independence." Hence, despite the general acknowledgment that the practice of public administration is intertwined with law, academic research and teaching in public administration have been ambivalent in their relationship with neighboring disciplines, including law.

Additionally, the disciplines of public administration and law have a fundamental epistemological difference. As articulated in the *Report of the Twelfth Meeting of Experts on the United Nations Programme in Public Administration and Finance* (1995, p.3), the primary function of the law is not to generate knowledge or comprehension of social reality but to shape reality through regulation of relations. With a normative orientation, the law seeks to establish specific conditions or constraints that must be followed to pursue goals or access the rights set by the law rather than to achieve the goals directly. The legal rules delineate what should be done, not what is currently in effect, and prescribe the behavior of the individuals to whom the law applies. In contrast to the law, the academic study of public administration, referred to as administrative science in the European context, historically endeavors to empirically investigate administrative phenomena through observation and analysis of administrative processes (United Nations, 1995, p. 3; Feldman, 2012, p.348).

Rutgers (2003, p.23) argues that in the conceptualization of public administration, legal and social science approaches are *'incomtapabilité d'humeur.'* The social science perspective of public administration aims to acquire precise knowledge about social phenomena. In contrast, the legal approach to public administration is concerned with

regulating social conduct and is normative rather than empirical in nature. According to Rutgers (2003, p. 24), Von Stein's late 19th-century endeavor to establish a modern study of public administration emphasized that public administration is beyond a mere legal normative study. As interpreted by Rutgers, Von Stein regarded law as subordinate to the social science perspective in the study of public administration.

Rutgers (2003, p.24) points out that the division between sociologists and lawyers emerged from the late 19th and early 20th-century distinction between state and society. While sociology considers society an empirical phenomenon, the academic study of law sees the state as a normative construction. According to Rutgers, a conflict arose between a normative/conceptual approach and an empirical interpretation of the state around the 1960s, when the legal approach that dominated the European discussions on public administration began to decline. Rutgers (2003, p.3) further argues that the traditional 'founding dichotomies' -public/private, politics/administration, and state/society- should also include normativity vs. empiricism as additional divergent approaches to the analysis of public administration.

The role of law in public administration literature has been a topic of debate. Traditional public administration theory and education in the United States have historically overlooked the importance of law and have given minimal consideration to constitutional and administrative law. In contrast to European public administration, early writings of American public administration excluded the study of legal aspects. Although the legal approach is one of the methods in the conception of public administration (Rosenbloom, 1983, p.219), the significance of law in public administrative practice was minimal until the mid-1940s in the US public administration. As a result, neither theory nor education prioritized the study of law-related issues. However, around the 1950s, there occurred a shift in American public administration studies as the legal aspect began to receive more attention (Rosenbloom & Naff, 2008, pp. 1-3).

Rutgers (2003, p.24) argues that the rise in interest in the legal aspect of American public administration coincided with the decline of the legal paradigm in European public administration. This shift occurred as sociology and organization theory began to take precedence in the field of public administration in Europe (Dragos &

Langbroek, 2018, p.1068).

In the mid-1970s, a shift took place from extensive state involvement to minimal state, epitomized in the NPM reforms of the 1980s and 1990s. These reforms prioritized the managerial aspects of public administration over the legal aspects. This shift was also reflected in public administration education and research.

2.3. Judicial Review of Public Administration and Administrative Law

Judicial review, a prominent factor in shaping administrative activity, holds public administrative bodies accountable and resolves conflicts by allowing external control over their acts and actions. It is a significant aspect of the interplay between law and administration, as it can invalidate administrative decisions. According to Drewry (1986, pp-178-180), judicial review is the point of contact between law professionals and public administrators. The primary function of judicial review in public administration is to ensure administrative bodies' compatibility with legal rules. However, as Allan (2003, pp. 433, 436) put it, the role of courts is confined to controlling the legality of administrative action rather than an assessment of 'administrative expediency.'

Additionally, Feldman (2012, pp.347-356) emphasizes that applying for judicial review of administrative acts and actions involves challenging decisions and actions that have already been taken to rectify any improper actions retroactively. In this regard, judicial review ensures adherence to legal regulations and shapes administrative activity by guiding, restricting, and structuring decision-making. On the other hand, judicial review of administrative action, particularly those based on administrative discretion, illustrates the tension between administrative exigencies and legal obligations. As a result, judicial review of administrative action and branch of administrative law stands at the core of the conflicting relationship between public administration and law.

As expressed by Harlow and Rawlings (2009, p. xi), "Judicial review is inherently contentious." In the European context, Rutgers (2003, pp.15-16) asserts that there is often a controversial relationship between the administration and the judiciary, characterized as 'administration vs. judiciary.' Similarly, according to Pound (1942,

cited in Schwartz, 2006, p.3120), a "mutual distrust on the parts of courts and administrative agencies" prevails in common law jurisdiction. The fundamental contentious nature of judicial review challenges public administration, regardless of jurisprudential tradition.

The English common law system developed pragmatically through judicial decisions made case-by-case basis. This method differs from civil law, where the legal system's development is grounded in predetermined general concepts or legislated in the form of written codes (Cotterell, 1992, p.17). Moreover, Fleiner (2005, p. 4) emphasizes that although common law has unique characteristics different from those of civil law jurisdictions, the development of common law in England and the US with the practice of the US Supreme Court in evaluating the constitutionality of laws based on a written constitution are distinct. According to Flenier (2005, p.5), the differences in administrative law between common law and continental legal systems are rooted in their differing perspectives on the role of the state. Candeub (2018, p. 27) further elucidates this by stating that civil law countries perceive the legal framework as a tool for governance. In contrast, in common law jurisdictions, the administration is seen as serving the law. In other words, the fundamental contrast lies in the role of administrative power, with civil law countries prioritizing administrative power and common law systems focusing on the executive's role in implementing laws enacted by the legislative branch. According to Schwartz (2006, pp.76-77), the continental European administration exercises broader powers and more extensive discretionary authority than the Anglo-American administration. The divergence in administrative authority between civil and common law can be traced back to their distinct historical backgrounds.

Various historical contexts have shaped different interpretations of administrative authority, resulting in diverse approaches to judicial review of administrative acts and varying perspectives on administrative law. These differences are exemplified in the French and Anglo-American models. However, the traditional boundaries between Anglo-American and Continental European jurisdictions have become less distinct in the era of contemporary global governance. This has given rise to concepts such as the global administrative sphere and global administrative law, as Harlow (2006) discussed. According to Minattur (1974, p.364), the concept of administrative law in

France varies from that in common law countries. In common law jurisdictions, administrative law primarily deals with delegating legislative and judicial powers to administrative agencies, the procedural aspects of rulemaking and adjudication powers, and the judicial oversight of administrative powers. On the other hand, administrative law in civil law countries encompasses these aspects as well as various forms of administrative agencies, civil service law, administrative procurement, management of public property, public services, administrative contracts, and tort liability.

Originating in France, administrative law is a relatively young legal discipline compared to the longstanding traditions of private and criminal law. D'Alberti (2017, p.102) explains that various regulations enacted during the late 18th century and early 19th century in France established the supremacy of public officials over citizens. These regulations (*reglés exhorbitantes*) differed from the principles of private law, where the parties were considered equal, at least in theory. This development led to the establishing of a separate branch of administrative law with its own set of regulations and principles, shaped by the precedents set by the *Conseil d'état.* The evolution of administrative law within common law jurisdiction, where administrative law is not differentiated from ordinary law, in contrast to the system in France, has undergone a different path (D'Alberti, 2017, p.103).

In his comparative study of *French Administrative Law and the Common Law World*, Schwartz (2006, pp.2-3) highlights the similarities between the French *droit administratif,* a form of judge-made law unlike other branches of French law and the Anglo-American jurisdictions. *Droit administratif* is derived inductively from decided cases, similar to how fundamental principles are established in the Anglo-American system. Instead of being clearly defined by legislation, these principles have been developed gradually through the judicial process of inclusion and exclusion, much like in Anglo-American law. However, there is a fundamental distinction between them. In the common law tradition, the foundational principle of administrative law has been developed by ordinary courts through principles of private law. On the other hand, French administrative law has been developed through administrative courts operating outside the ordinary courts.

2.3.1. French *Droit Administratif*

The French administrative justice system is distinguished by separate courts dedicated to administrative matters, distinct from the general courts that handle civil and criminal cases. According to Harlow and Rawlings (2014, p.28), the term 'administrative law' originated in France during the Revolutionary era with the Law of August 16-24, 1790, which prohibited ordinary courts from intervening in administration (Minattur, 1974, pp.365-366). This legislation signaled the emergence of a specialized administrative court. Hence, as Sordi (2017, p. 25) argued, the judiciary and administration were separated by assigning control of administration to a specialized tribunal formed within the sphere of administration. This internal administrative tribunal, originally established to serve a dual function as an advisory and administrative institution, performed internal administrative supervision, gradually evolving into a form of judicial control. The French *regime administratif* is characterized by a distinct juridical system that exerts control over the administration. One of its notable features is its centralized administration, which is equipped with its own control mechanism. This is the rationale behind the French phrase "to judge administration is to administer." According to D'Alberti (2017, p. 103), this notion originated in a particular interpretation of the separation of powers, where it was believed that the judiciary does not have the authority to adjudicate matters relating to administrative action. According to Minattur (1974, p.366), the reason behind this regulation stems from a deep-seated distrust of the courts, which was a consequence of the abuse of their authority by *parlements* prior to the French Revolution.

Fleiner (2005, pp. 6-7) explains the supremacy of administration in France with the instrumentalization of the state in the societal reforms. In the aftermath of the French Revolution, the Parliament was regarded as the ultimate authority in the legislation. In the French system, laws derived their authority from the parliament, which embodied the general will as suggested by Rousseau. This principle formed the basis of Napoleon's vision of the state as an agent for transitioning society from feudalism to liberalism, founded on the equal rights of citizens. This profoundly impacted European legal thought, contributing to the development of constitutionalism on the continent. In this framework, constitutions were not only tools for limiting the power of the government but also mechanisms for empowering governmental branches to establish

liberal states in the 19th century and, subsequently, welfare states in the 20th century.

On the other hand, Ziller (2012, p.325) relates the empowerment of administration in European states with the tradition of civil law. The legal tradition in continental Europe originates in the 13th century codification movement, which took place under the influence of Roman Law. Candeub (2018, p.26) highlights the Code of Justinian (Corpus Iuris Civilis), developed in the 6th century by the Byzantine Emperor Justinian, emphasizing its substantial influence on European Law. Ziller (2012, p.325) argues that during this period, the codification of customary law and case law aimed to unify the country's legal system and facilitate modernization, as seen in the Napoleonic Civil Code of 1804. This gave rise to a proliferation of written statute law, setting it apart from common law. This system established a hierarchy of written law, with the Constitution at the apex. Statute law, which is not detailed, seeks to develop general principles and rules within pre-defined legal categories, requiring supplementation by more detailed secondary regulations from the executive branch and administrative bodies. These secondary regulations also offer specific solutions for particular circumstances when implementing parliamentary law in specific cases. Therefore, the authority to make legally binding administrative decisions was delegated to administrators and the executive. Candeub (2018, p.27) notes that the executive administration retained the authority to enact laws in civil law jurisdictions, as the law did not bind them before the *Rechtsstaat*. Consequently, countries with civil law systems are more inclined to delegate rulemaking power to the executive administration. According to Fleiner (2005, p.14), this authority was granted through newly developed public law, enabling administrators to promulgate binding "unilateral decisions or administrative acts." The administration is perceived as the guardian of public interest and is given certain privileges under public law. These privileges include the presumption of lawfulness and the enforcement authority (Fleiner, 2005, p.22).

Fleiner (2005, p.7) noted that Napoleon, with an instrumentalist view of the state, sought to drive societal change through state institutions. His vision included freeing the administration from the influence of conservative judges of the *Ancien Régime*. To this end, he expanded the Roman conception of public law to establish a new independent branch of administrative law, encompassing areas such as constitutional

and fiscal law (Langrod, 1961, p. 8). This new branch, separated from traditional private law, empowered administrators to implement statutes without being subject to the jurisdiction of the ancient regime courts. The *Conseil d'état*, as the court of appeal and court of cassation, introduced safeguards against the misuse of administrative power by developing principles of administrative law through its precedents (Fleiner, 2005, p. 7).

The *Conseil d'état,* dating back to the 13th century King's Council, was officially established in 1799. Initially, its authority was confined to advising the government, while its judicial powers were restricted (*justice retenué).* It was later granted the authority to settle disputes independently (*justice déléguee*) in 1872. The *Conseil d'état* has played a pivotal role in shaping administrative law through its precedents tailored to immediate needs. Concurrently with the formation of the *Conseil d'état*, the early 19th century saw the introduction of university chairs, academic courses, and the publication of numerous treatises on the subject (D'Alberti, 2017, p.103). In 1873, the Blanco decision of the French Court of Conflicts introduced the concept of administrative liability (Massot, 2017, p.440). The principles of administrative legality, which compels the administration to act in accordance with the law, and administrative liability, which holds the administration liable to citizens whose rights are violated due to its unlawful actions, are essential foundations of French administrative jurisdiction (Minattur, 1974, p.370). As noted by Minnatur (1974, p.373), the grounds for review of administrative action in France encompass incompetence, procedure, violation of the law, and misuse of the law.

The primary role of administrative courts is to oversee administrative discretion through legality review (*contrôle de légalité*) to ensure adherence to statutory laws and general principles of law, such as equality before the law, and administrative principles, such as administrative orderliness. These courts can invalidate administrative acts and rule compensation for damages. In France, judicial control of administration is anchored in the concept of challenging administrative abuse of power (*recours pour excès de pouvoir),* which is analogous to the idea of ultra vires in the common law system (Ziller, 2012, pp. 328-329). In his work, Mendes (2017, pp.637-638) discusses how the realm of legality establishes the boundaries of judicial control. Courts, as 'arbiters of legality,' define the extent of administrative discretion. This is

particularly evident in French courts through the concept of abuse of power (*excés de pouvoir*). This judicial approach reveals the challenge of differentiating between legality and discretion. Consequently, the extent to which administrative discretion is subject to judicial review poses one of the most challenging questions in French administrative jurisdiction, exhibiting the limitations of the court-centered approach to administrative discretion. The dilemma of delineating the limits of legality is evident in the discussions about legality and expediency (*opportunité*), which refers to non-legal aspects of administration. This principle suggests that judges should refrain from interfering in matters of expediency (Mendes, 2017, p.642).

French administrative law, which lacks statutes and is not codified, is formed through precedents. The legal rules used by administrative courts are mainly judge-made laws derived inductively from established cases. This characteristic aligns French administrative law with common law principles, as Minattur (1974, p. 369) argued. Metzger (2012, p. 1293) refers to this judicially created character of administrative law as "administrative common law" when describing the development of US administrative law through judicial precedents.

2.3.2. Anglo-American Administrative Law

Shapiro (1982, p.18) contends that the traditional liberal theory in the US during the 19th century was at odds with administrative law. According to Langrod (1961, p.43), Anglo-Saxon nations viewed the French *Conseil d'état* with suspicion in the 19th century. Rohr (2002, p.8) describes this skepticism as 'Dicey's Ghost,' referring to British Constitutional Law scholar Albert V. Dicey's 1885 work *Introduction to the Study of the Law of the Constitution,* which argued that French *droit administratif* is inconsistent with the British understanding of the rule of law (Bell & Lichére, 2022, p.1). Furthermore, Rohr (2002, p.8) asserts that Dicey rejected the presence of administrative law and the prospect of administrative law in common-law countries.

In the early 20th century, M. Barthélemy, the Dean of the Faculty of Law at the University of Paris, recounted a conversation with Dicey regarding administrative law in England. Dicey's response, "In England, we know nothing of administrative law, and we wish to know nothing" (Robson, 1932, p.346), revealed his firm belief in the supremacy of the rule of law in England, asserting that every official, regardless of

rank, was held to the same legal responsibility for their actions. However, as Robson (1932, p.347) pointed out, Dicey misunderstood the French *droit administratif* just as Montesquieu interpreted the English Constitution in his *Spirit of Laws*. Dicey viewed the French system, where acts of public officials were judged by special administrative courts, as a privilege granted to public officials rather than a form of accountability. According to Robson (1932, p.346), this viewpoint was prevalent among the 'political intelligentsia' of Great Britain at that time.

This well-known statement by Dicey (1885), as cited by Sugarman (1983, p. 243), "There exists in England no true *droit administratif*," is widely acknowledged as the foundation of "Dicey's powerful tradition of hostility ... to administrative law" (Wade, 1971, cited in Harlow & Rawlings, 2014, p.30). According to Drewry (2009, p.46), "Lord Hewart, the Chief Justice of England and Wales," was the most prominent advocate of Dicey's viewpoint. In his book *New Despotism*, Hewart (1929, pp36-37) criticized the Civil Service (Robson, 1932, p.348) and also asserted that there is a stark contrast between the 'Rule of Law' and what is referred to as 'administrative law' "(happily, there is no English term for it)." One is essentially the antithesis of the other. Citing Allison (1996), Bell and Lechére (2022, p.1) contend that Dicey's later works recognized the merits of *droit administratif.*

Sugarman (1983, p. 243) asserted that administrative law in England experienced substantial development during the 19th century, although judicial review did not see the same level of growth. Additionally, Harlow and Rawlings (2014, p.28) cite Maitland (1908), who suggests that administrative law has been a part of the English legal system since the 19th century, coinciding with the increased state intervention in society. According to Harlow and Rawlings, Sir Thomas Holland classified administrative law as a branch of law dealing with sovereign power in his *Jurisprudence* of 1880. The initial English publication on administrative law was authored by F.J. Fort in 1929, as mentioned by Harlow and Rawlings (2014, pp.29-30). However, Harlow and Rawlings (2014, p.30) also note that academic recognition and the establishment of administrative law as a discipline took longer in England than in the United States.

Drewry (2009, p.50) states that *the Donoughmore Committee on Ministers' Powers* of

1932, following a Diceyan approach, rejected Robson's proposal for the system of administrative law and administrative courts in Britain. The scholarly examination of administrative law in Britain received substantial interest in the post-World War II era. The establishment of the *Journal of Public Law* in 1956 revealed this growing interest in the subject.

According to Harlow and Rawlings (2009, p. xvi), *the Human Rights Act* of 1998, the European Court of Human Rights in Strasbourg, and the case law of the Court of Justice of the European Communities have played a significant role in the traditional judicial review of English law. They have extended the boundaries of common law, driving the conventional approach of English law to judicial review beyond its previous confines.

The foundation of English administrative law is based on the principle of natural justice, "the right to access the court for an independent judge to have access to all evidence" (Fleiner, 2005, p.19), and ultra vires jurisdiction, which compels that the "administration should not act beyond the law" (Fleiner, 2005, p.26). As Fleiner (2005, p.16) postulates, individuals seeking recourse against the government's actions are guided by specific writs to resolve particular issues in common law jurisdictions. Initially, these writs did not apply to Crown servants, as the Crown's authority exempted them. Known as prerogative writs, they are special mandates issued to courts on behalf of the Crown. The first of these writs was *habeas corpus*, followed by *mandamus and certiorari*.

According to Metzger (2012, pp.1517-1518), American administrative law emerged as a separate field in the early 19th century to address the growing number of administrative agencies. Frank J. Goodnow was one of the first to recognize the importance of a distinct body of administrative law in the US. Goodnow examined various European countries in his two-volume work *Comparative Administrative Law*, published in 1893. The APA of 1946 introduced procedural requirements for administrative agencies, increasing the academic interest in the legal aspect of public administration. According to Metzger (2012, p.1293), in the American context, administrative law serves as a legitimating means for judicial lawmaking, addressing constitutional tensions arising from the administrative state. This will be the focal point of the upcoming chapter of the thesis.

2.4. Assessment

The discipline of public administration, widely regarded as having originated as a distinct field in the United States, has not traditionally been linked with the field of law in the predominant Anglo-American managerial literature at the academic level. However, public administration and law are intensely interrelated in many areas, both academically, as in continental European scholarship, and empirically in various ways. The locus, where the intersection of public administration and law is most pronounced, can be found in the judicial review of administration and the branch of administrative law. The Anglo-American and French models exhibit distinct methods of judicial review of the administration and conception of administrative law due to historical peculiarities in the conception of administrative power. However, both approaches are similar because they are based on judge-made law. The process of judicial review of administrative action is the realm where the relationship between administration and law is the most intense and often strained. It presents a profound challenge in controlling the discretionary actions of the administration and delineating the boundaries of its discretionary powers.

CHAPTER 3

AMERICAN PUBLIC ADMINISTRATION: 'ANTI-LEGAL TEMPER'

3.1. Introduction

In his work, *The Administrative State: The Political Theory of Public Administration,* published in 1984, Dwight Waldo identified the prevailing 'anti-legal temper' in American public administration (O'Leary et al., 2019, p. 1). The term 'anti-legal temper' describes the attitude of American public administration that views the law as a restraint on administrative discretion. This bias, which has persisted since the early years of American public administration, paved the way for overlooking law-related issues in the public administration literature despite growing interest in legal matters in later years. Warren (2011, p.2) characterizes the treatment of law in traditional American public administration literature, which lacks attention to legal aspects, as a "flirtatious glance at the technical legal aspects associated with public administration."

This chapter explores the historical development of this 'anti-law bias' (Waldo, 1968, cited in Cooper, 1988). It is often characterized as the 'legalism-managerialism tension' (Rosenbloom, 1983) within American public administration scholarship, significantly influencing mainstream literature on public administration. The chapter primarily focuses on the evolving status of law in American public administration scholarship throughout various periods of US political and administrative history. These periods reflect changes in the role of the state and the interaction between the legal/judicial domain and administrative agencies.

Since Wilson's 1887 article, there has been a persistent concern, rooted in the legitimacy of administrative agencies, about reconciling the extensive rulemaking and adjudication powers of public administration with the constitutional separation of powers and the principle of the rule of law. This constitutional concern and the endeavor to find the right balance between managerial and legal aspects of the

administrative process have been central to the intricate and often tense relationship between public administration and law in American public administration.

The chapter explores the interaction between public administration and law in the American context in five sections. It begins with a discussion of the evolution of public administration as a distinct discipline, separate from political science and public law in the US. It also examines the rise of the American administrative state, a term that describes the expansion of governmental functions and the emergence of administrative agencies during American progressivism. The chapter then scrutinizes the early perspective of public administration scholars on the role of law within public administration. Subsequently, it explores the proliferation of administrative agencies, particularly during the New Deal Era, and investigates the issue of legitimacy of these agencies within the constitutional principles of separation of powers and the rule of law. This analysis underlines the historical conflict between the administrative agencies and constitutional law in American public administration, culminating in the development of American administrative law. After analyzing the development of American administrative law as a means of providing constitutional legitimacy for administrative agencies, the chapter explores the increased interaction between Congress/Judiciary and administrative agencies, resulting in heightened academic interest in legal issues within American public administration.

3.2. Development of American 'Administrative State' and Independent Discipline of Public Administration

Woodrow Wilson's article *The Study of Administration*, written in 1887 - 100 years after the US Constitution - is widely acknowledged as the foundation of the 'self-conscious study' of public administration in the US (Van Riper, 1987, p.4). According to Rabin and Bowman (1984, p.2), this means that public administration became "a subject of (formal) inquiry." In the US, the establishment of public administration as a structure and function of governmental administration and as a distinct study coincides with the period of American Progressivism (1890-1920), which endeavored to overcome pressing societal problems in the post-Civil War American State.

In 1835, Alexis de Tocqueville, in his book *Democracy in America*, observed that the most remarkable aspect of the United States is the lack of specific terms for government or administration (cited in Stillmann, 1991, p.19). Stillmann (1991, p.19),

describing this as "the peculiar 'Stateless' Origins of American Public Administration Theory," argues that it was not until a century after the drafting of the Constitution (1787) that the theory and structure of public administration in the US began to develop.

Farlie (1968 [1935], p.3) argues that the concepts of 'public administration' and 'administrative law' gained widespread recognition in English-speaking countries in the late 19th century. The term 'administration,' defined as the "management of public affairs" and "the work of the executive (or non-legislative part of government)," which was acknowledged in Europe around the 17th century, was mentioned in America by Alexander Hamilton at the end of the 18th century in the Federalist Papers No. 72. The concept of administrative law was first brought into American law by Frank J. Goodnow in his *Comparative Administrative Law* (1893). However, Goodnow wrote that several branches of administrative law had already been recognized in the US when he wrote this book, as Farlie (1968 [1935], pp.25-26) noted.

While Wilson's article was regarded as the establishment of the study of administration in the United States, the 1883 Pendleton Act on US Civil Service and the 1887 Interstate Commerce Commission (ICC), regulating private enterprise at the federal level, were considered the foundation of American public administration system (Stillmann, 1991, p.15).

Classical public administration, which persisted until the post-World War II criticism, aimed to establish a politically neutral civil service based on technical expertise and the ideal of efficient fulfillment of the political will of 20th-century industrialized democracies (Kirwan, 1977, pp.322-323). According to Rabin and Bowman (1984, pp. 3-4), the objective was to transform the existing civil service 'spoils system,' 'partisan administrators,' and ad hoc administration into a professional bureaucracy based on the merit system. The way to achieve "administratively efficient and politically neutral public service" was to separate administration from politics and to provide performance on the basis of scientific principles. This idea was put into practice through the 1883 Civil Service Reform Act (CSRA), known as the Pendleton Act. Like Wilson, Goodnow claimed that "the execution of the will of the state" should be divorced from "political expediency and partisan concern." Furthermore, Goodnow argued for "looking beyond the formal constitution" to comprehend governmental

administration (Goodnow, 1900, cited in Rabin & Bowman, 1984, pp.4). Consequently, the politics/administration distinction, as postulated by Wilson and Goodnow, along with scientific management principles of the time and the adoption of POSDCORB (Planning, Organizing, Staffing, Directing, Coordination, Reporting, Budgeting), emerged as the dominant paradigm of the time, questing for 'businesslike,' 'nonpartisan' and 'scientific analysis' of public administration (Rabin & Bowman, 1984, p.4; Rosenbloom, 2007, p.655).

In Kirwan's (1977, p.322) words, the classical public administration was founded with Wilson's 1887 article, described comprehensively by Goodnow's study *The Politics and Administration: A Study in Government* of 1900, and further advanced through Taylor's *The Principles of Scientific Management* of 1911. White's *The Study of Public Administration* of 1926 and Willoughby's *Principles of Public Administration* of 1927, the first textbooks, took the field to the 'high point' (Kirwan, 1977, p.322). The commitment to a 'scientific' approach to studying administration, the faith in the 'principles' of administration, which was later encapsulated in the POSDCORB acronym, as well as the publication of *The Papers on Science of Administration* of 1937, edited by Gulick and Urwick, and *The President's Committee Report on Administrative Management,* known as the Brownlow Report, are considered the 'high noon orthodoxy' in the field of US public administration (Overeem, 2012, p.82; Kirwan, 1977, p.322). Fox (1993, p.52) argues that orthodoxy in US public administration signifies the period of the hegemonic American quarter-century characterized by high modernism, industrialism, pluralism, and procedural democracy.

Established in the same period, the 1883 CSRA and the 1887 Interstate Commerce Act (ICA) marked the inception of the US administrative system (Stillmann, 1991, p.15). Skowronek (1982, cited in Rosenbloom, 1987, p.654) also characterizes them as crucial for the federal-level expansion of the US' administrative capacity.' These Acts, integral to the political and administrative reform movement of the time, sought to introduce 'morality and efficiency' in the civil service. They were based on the idea that "the business part of the government shall be carried out in a sound businesslike manner" (Schurz, 1894, cited in Rosenbloom, 2005, p.8). The necessity of "businesslike-like public administration" was examined in Wilson's article, which describes public administration as a 'field of business' based on managerial principles

(Rosenbloom, 2005, p.8). The CSRA, which established the Civil Service Commission (CSC), played a significant role in ceasing patronage hiring (known as the spoils system), establishing a merit-based system, and eliminating partisanship in the public personnel system (Rosenbloom, 2007, p.654). Similarly, the ICA created the ICC, regarded as "the archetype of modern administrative agency" (Schwartz, 1977 cited in Rosenbloom, 2007, p. 23).

Until the New Deal era (1932-1952), when "the full-fledged American administrative state" was established, the administrative agencies, created during the reform movement of the Progressive era, marked the beginning of the American administrative state (Rosenbloom, 2007, p.653). As Postell (2012, p.53) asserts, the literature on American politics links American progressivism with the establishment of an 'administrative state.' According to this account, the administrative state arose from progressive reforms, consolidating political authority and delegating it to a "headless fourth branch of government," granting administrative agencies with rulemaking, adjudicatory, and enforcement powers. According to Shapiro (1982, p.21), in its effort to replace corruption and inefficiency of the spoils system with a professional civil service, progressivism brought about the introduction of independent regulatory commissions, the city manager, and a stronger presidency in the US, ultimately giving rise to American administrative law (Shapiro, 1982, p.19).

In his study, Green (1992, pp. 5-6) contends that "law and administration should no longer be thought as separate endeavors." He discusses how the rise of positivist science and philosophic pragmatism influenced law and public administration during the Progressive era, which was also the formative period for public administration. Green argues that positivism provided a new basis for knowledge and reasoning in various professional fields, including law and public administration. In this process, empirical analysis of law to detach it from previous traditional, customary, religious, and political influences resulted in legal positivism. Similarly, the legal community, like public administration scholars, sought to establish a distinct area of study and practice. As a result, law and public administration became separate disciplines, reflecting the influence of positivism, which arose within the context of political, philosophical, social, economic, and educational reforms of the progressive era.

Green (1992) also emphasizes the significant role philosophic pragmatism plays in

supporting positivism and subsequent refinements, such as logical positivism and interpretivism, as they are applied to these fields. Referring to Jacopsohn (1977), Green (1992, p. 6) explains that the emergence of philosophic pragmatism was part of a political endeavor to address the growing "'inequality of conditions' in American society." Jacopsohn (1977), as cited in Green (1992, pp. 6-7), influenced by Tocqueville, outlines four fundamental components of pragmatic doctrine as "reconstruction (rejection of tradition), change, experience, and anti-formalism." According to Green (1992, p. 9), these fundamental aspects of the philosophy of pragmatism influenced American legal, political, and administrative ideologies in many ways.

During the progressive era, which sought to overcome prevalent societal problems, reconstruction was viewed as an element of pragmatism that reflected a skepticism against authority derived from "habit, tradition, precedent, religion, and social class." This resulted in an evaluation of existing conditions in an empirical way (Jacobsohn, 1977, cited in Green, 1992, p.7). The concept of change, rooted in reconstruction, as a component of pragmatism, involves the denial of tradition and fixed standards. Social Darwinism supports the idea that progress occurs through adaptation and emphasizes the crucial role of human effort in shaping the social environment, similar to how engineers manipulate the physical environment. As a result, judges and public administrators have been regarded as 'social engineers,' and 'engineering metaphors' have been widely used in fields such as management science, organizational theory, and modern jurisprudence for analytical purposes. The focus on change to achieve specific goals has shifted the emphasis from process to means-ends rationality (Jacopsohn, 1977, cited in Green 1992, p.7).

Learning by experience is a crucial aspect of pragmatism (Jacopsohn, 1977, cited in Green, 1992, p. 8). Praxis entails using theories to solve real-life problems. Consequently, management and policy sciences are characterized by a problem-solving approach and emphasizing market-style efficiency within governmental processes (Green, 1992, p.8). Anti-formalism, a component of pragmatism, suggests that traditional forms hinder progress, slow down change, and restrict experimentation (Jacopsohn, 1977, cited in Green, 1992, p. 9). Consequently, it rejected old political, legal, and administrative doctrines unless verified empirically. It also degrades

constitutional and structural forms, such as the separation of powers (Green, 1992, p. 9).

According to Freedman (1975, p. 1046), Americans have historically revered the principle of separation of powers. Mainly, Montesquieu's assertion in *The Spirit of the Laws* that "if the total power of government is divided among autonomous organs, one will act as a check upon the other and in the check liberty can survive" is considered to have had a significant influence on the Framers of the US Constitution (The Federalist No. 41, cited in Freedman, 1975, p.1046). The framers of the American State greatly emphasized constitutional values in governmental administration, as Jacopsohn (1986, cited in Green 1992, p. 12) expressed. Conversely, the early scholars of public administration who focused more on practical administrative matters were influenced by the positivism and pragmatism of progressivism of their era.

3.3. 'Framing Constitution' vs. 'Running of Constitution': Beginning of 'Legalism-Managerialism' Controversy

According to common understanding, the roots of the anti-legal temper, as attributed to American public administration literature, can be traced back to the foundational texts of the field of public administration. The early pioneers of American public administration, Wilson (1887), Goodnow (1900), and White (1926), emphasized the managerial aspect of public administration to maintain a separation between public administrators and partisan politics. Therefore, examining early public administration studies through the lens of legalism-managerialism opposition can shed light on whether American public administration had an inherent 'anti-legal' inclination from its beginning.

In his study *Introduction to the Study of Public Administration*, the first textbook on public administration in the US, Leonard White presented a provocative viewpoint. He proposed that "the study of administration should start from the base of management rather than the foundation of law, and is, therefore, more absorbed in the affairs of the American Management Association than in the decisions of the courts." Roberts (2008, p.51) contends that White's perspective in this book marked a 'turning point' in American public administration. In this book, White (1926, cited in Farlie, 1968 [1935], p.35) defines the subject as "the management of men and materials in the accomplishment of affairs of the state." Farlie (1968 [1935], p.36) explains that White

contrasts administration with administrative law[9], as he considers the primary objective of administrative law to be the protection of private rights, while "the objective of public administration is the efficient conduct of public business."

Green (1992, pp.3-4) interprets White's statement as emphasizing the growing influence of scientific principles and specialized expertise in management, delineating a clear demarcation between the practices of the courts in particular - and law in general - and administrative affairs. This "law/administration dichotomy," as Green (1992, p.4) postulates, is an intersection between law and administration, which has been neglected compared to the well-known politics/administration dichotomy despite far-reaching consequences on the theory and practice of public administration.

Roberts (2008, p.51) contends that Wilson expressed a sentiment similar to White's assertion when he stated, "The field of administration is a field of business. It is removed from the hurry and strife of politics; it at most points stands apart even from the debatable ground of constitutional study." According to Roberts (2008, pp.51-52), Wilson and White emphasized that public agencies should eliminate constitutional, statutory, or common-law constraints and judicial review to exercise administrative discretion. Wilson and White, as interpreted by Roberts, advocated for administrative agencies to adopt modern management principles to enhance performance and efficiency. As Roberts (2008, p.52) cites, White (1939) raised concern about the inhibiting impact of an excessive focus on the law on managerial innovations, stating,"...an exaggeration of legal correctness, and in consequence and accentuation of the lawyer in administration..."

Similarly, Beckett and Koenig (2005, pp. ix-x) contend that American public administration has historically emphasized administration as management at the expense of the legal basis for administrative actions. They stressed that public administration is not solely about "carrying out the business of government" but also about "the execution of law." Beckett and Koenig attributed this separation between law and administration to Wilson's (1887, p. 200) statement: "It is getting to be harder to run a constitution to frame one." As Miewald (1984, p.21) interprets, this was an attempt to draw attention to the shift from a period of constitutional issues to an era

[9] Farlie (1968[1935], pp. 29, 36) refers to Ernst Freund's 1911 study "Cases on Administrative Law."

focused on administration.

According to McCandless and Guy (2013, p.356), Wilson aimed to delineate the subject of administration to distinguish it from "the province and process of the legislative function." Drawing upon McCandless and Guy's (2013, pp.356-357) analysis of the politics/administration dichotomy, it can be argued that Wilson's main goal was not setting law and administration in opposition in the study of public administration. Instead, Wilson argued for the autonomy of public administration as a distinct field, separate from interrelated disciplines and actions such as constitutional and public law within the governmental process. This is evident in Wilson's following assertion:

> A clear view of the difference between constitutional law and the province of administrative function ought to leave no room for misconception;...Public administration is detailed and systematic execution of public law. Every particular application of general law is an act of administration. ... The broad plans of governmental action is not administrative; the detailed execution of such plans is administrative (Wilson, 1887, p.212).

Furthermore, Wilson (1887, pp.198-199) underlined the distinction between "the *constitution* of government" and administration, stating,

> The question was always: Who shall make law, and what shall that law be? The other question, how law should be administered...was put aside as practical detail...The weightier debates of constitutional principle are even yet by no means concluded: but they are no longer of more immediate practical moment than questions of administration.

In the article, Wilson primarily focuses on the normative assertion that the era for dealing with constitutional issues, which was the primary concern in the past when the functions of the state were less complex, ended. Instead, he draws attention to new administrative challenges rather than opposing the Constitution(al) law and the administration. Cooper (1983, pp.82-83) contends that emphasis on a 'pro-process and pro-administration' approach could be perceived as 'anti-structure' and 'anti-constitution.' However, as Cooper explains, Wilson focused on examining governmental processes and operations rather than the constitutional and structural aspects, given the prevailing weight of public law, with its rigidity and in the political science at that time. According to Cooper (1984, p.85), Wilson's emphasis on 'businesslike' public administration represents a move from a 'law-based' approach

to public administration to a more 'managerial-based' perspective.

Goodnow, the first president of the American Political Science Association, was referred to as the 'father of American Administration.' Having studied at American and European Universities, he specialized in public administration and administrative law (Haines and Dimock,1968 [1935], pp. v-vii). As Haines and Dimock (1968 [1935], p. xii) cite, Goodnow (1900), who, in his prominent work *Politics and Administration*, outlined a 'dual division' between the creation of law and policy (pertaining to politics) and the implementation of the will of the state (forming the basis of administration). For Haines and Dimock, this dual division underlines the inherent connection between "the formulation and execution of the law" by highlighting the role of public administration in the governmental process.

In the foreword of *Comparative Administrative Law*, Goodnow (1893 cited in Pestritto,2007, 45) wrote that: "The great problems of modern public law are almost exclusively administrative in character. While the age that has passed was one of constitutional, the present age is one of administrative reform."

In the same book, Goodnow defined administrative law as "that part of the public law which fixes the organization and determines the competence of the administrative authorities and indicates to individual remedies for the violation of rights" (Goodnow, 1905, cited in Farlie 1968 [1935], p.25). For Haines and Dimock (1968 [1935], pp. xi-xii),

> ...the general content of Goodnow's course on administrative law did not differ substantially from the usual substance of a course on public administration today. The principles differences in scope and emphasis today are that legal materials are not utilized to any great extent and that modern public administration emphasizes much more finance and non-legal techniques.

Goodnow emphasizes the close relationship between law and public administration, in contrast to White's managerial emphasis, which reflects the early 'anti-legal temper' in American public administration literature, as argued by Lynn (2009, p.803). As with Wilson's, Goodnow's assertions, which perceive public administration and public law as related, can be interpreted as an attempt to prioritize administrative matters over constitutional issues.

Similarly, citing Link (1968), Cooper (1988, p.256) points out that Wilson considers

"public administration as a subfield of public law." According to Cooper (1988, p.257), 'early scholars' in the emerging field of public administration treated law inherent to public administration. Additionally, as Cooper notes, influential early public administration scholars such as Goodnow, Wilson, Mawr, and Freund, who had legal backgrounds, "taught public administration as public law."

Wilson, White, and Goodnow, the founding pillars of US public administration orthodoxy, emphasized the necessity of dealing with administrative matters with a 'businesslike' managerial focus rather than relying primarily on constitutional and public law or court-centered approaches. This approach aimed to keep the realm of administration away from the influence of partisan politics through technical, managerial principles.

The essence of the 'legalism-managerialism' (or law-management) tension prevailing in the American public administration literature (Christensen et al., 2011, p. i125) is to underline the differences in values of managerialism and legalism, which was postulated by early writers' efforts to establish an autonomous field of administrative study based on managerial values rather than constitutional/legal values.

This tension between public administration and constitutional law became particularly evident with the prevalence of administrative agencies in the 1930s. During this time, questions were raised about the constitutional basis and legitimacy of administrative agencies' quasi-judicial and quasi-legislative powers, as the Constitution does not explicitly mention the 'administration' (Rohr, 1986, cited in Fox, 1993, p.54).

3.3.1. The 'Uneasy' Status of Administrative Agencies within the Doctrine of Separation of Powers

The history of administrative agencies in the US administration dates back to the early years[10] of the American State. However, the establishment of the ICC in 1887 is widely recognized as the beginning of administrative agencies in the United States. Subsequently, many similar agencies were established during the Progressive Era and

[10] The first two laws establishing administrative agencies were enacted in 1789. One agency dealt with "estimating the duties payable" and the other "to adjudicate claims to military pensions for 'invalids' who were wounded and disabled during the late war" (Freedman, 1975, p.1045).

the New Deal Period. As Staszas (2015, p. 127) asserts, administrative agencies and regulatory legislation paved the way for governmental intervention in the economy and society during the Progressive era. However, Franklin D. Roosevelt's election in 1932 marked a significant turning point in the establishment of the American regulatory state. This era, known as the New Deal, witnessed the implementation of policies that enhanced the prominence and role of administrative agencies as crucial instruments for governmental policy and reshaped the course of American governance (Freedman, 1975, p. 1045). In 1936, President Roosevelt established the Brownlow Committee, also known as the *President's Committee on Administrative Management*, which advocated for enhancing the presidential power to reorganize the executive branch[11] (Arnold, 1976, p.47). As Van Riper (1987, p.4) noted, the American government continuously refined its administrative structure, ultimately establishing *the Executive Office of the President* in 1939.

The actual development of the "full-fledged administrative state" (Rosenbloom, 2007, p.663), the US version of the regulatory welfare state, occurred in the 1930s in response to the Great Depression of 1929. Despite inconsistencies in its policies and programs, the New Deal was considered an instrument for economic recovery and reform. This policy persisted throughout World War II and its aftermath (Krane & Leach, 2007, p.490). In economic and social turmoil, administrative agencies were utilized as tools by the *National Recovery Administration* of President Roosevelt due to their expertise and flexibility in adapting to changing societal circumstances (Freedman, 1975, p.1053). The New Deal measures implemented by President Roosevelt upon assuming office in 1933 encompassed far-reaching reforms and relief programs in banking, finance, labor, agriculture, and manufacturing (Gely & Spiller, 1992, p. 53).

According to Pestritto (2007, p.27), Roosevelt sought to significantly expand the federal government's authority on a national scale. Pestritto argues that this endeavor was not merely a reaction to the economic conditions of the time but a deliberate undertaking to implement the centralized, regulatory government envisioned by the

[11] Committee consisted of Louis Brownlow (Chairman), Charles Merriam, and Luther Gulick (Arnold, 1976, p.47).

Progressives of the preceding generation.

Rosenbloom (2007, pp.663-664) asserted that the most striking feature of this era was the proliferation of administrative agencies dealing with policymaking and implementation. By the late 1930s, Congress began to delegate broad legislative power to these agencies. Through this delegated authority, public administrators were empowered to enact rules, issue adjudicatory orders, and formulate policies that quickly get the force of law. These delegations represented the novelty brought about by the New Neal. They were justified on several grounds: First, they disburden the Congress. Second, they leveraged the expertise and technical specialization of public administrators. Third, they provided greater flexibility in rulemaking compared to the legislative procedures of Congress. However, these justifications came with limits vis-à-vis the constitutional principle of separation of powers.

The Congressional delegation of legislative power to administrative agencies echoed in the judicial branch. In the period from 1937 to the early 1980s, the courts, which had previously been more restrictive from the 1890s to the mid-1930s, displayed a high level of deference to administrative expertise. They largely accepted and supported the exercise of administrative authority (Pritchett, 1948; Shapiro, 1968, cited in Rosenbloom and Naff, 2008, p.1).

However, the expansion of administrative agencies raised significant constitutional concerns, as delegations could potentially infringe upon the constitutional separation of powers by transferring legislative power to the executive branch (Rosenbloom, 2007, p.664). As outlined in Gely and Spiller's work (1992, pp. 52-56), before 1937, the constitutionality of New Deal legislation was not clear due to conflicting precedents. In the early years of the New Deal, by approving laws regulating economic activities, the Supreme Court supported the notion that the Constitution should not be interpreted with literal exactness. However, beginning in January 1935, the Court began to overturn significant legislation of the New Deal. This shift raised concerns for Congress and the President, as the Court deemed a statute delegating quasi-legislative authority to the executive unconstitutional. In another case, the Court interpreted the unilateral delegation of legislative power to the president as an "abuse of congressional power." As of 1936, the Court's position was clear -it was "against the enhancement of presidential power."

As Gely and Spiller (1992, pp.56-57) articulated, in November 1936, Roosevelt secured a clear victory in his reelection, leading to further New Deal programs, including a potential court reform. In this process, Constitutional controversies triggered proposals to limit the power of the Court. President Roosevelt's 'court-packing plan' was the most notable among these. The plan stated that if any federal judge "served for ten or more years" and did not "retire within six months" of turning seventy, "the president could appoint an additional judge to the same court." The plan envisaged limiting the number of additional judges to fifty and setting the maximum size of the Supreme Court at fifteen. Roosevelt announced this plan on February 5, 1937. Alongside Roosevelt's plan, other suggestions were made to influence the Court, ranging from extreme measures like a constitutional amendment to abolish the Court's power to deem "acts of Congress unconstitutional" to more moderate ideas such as limiting the Court's appellate power in certain administrative matters. Although none of these proposals became law, it was evident to the Court that Congress was deeply concerned about its decisions.

In the 1937 report to the President, the Brownlow Commission submitted the following statement:

> The Executive Branch of Government in the United States has... grown up...Commissions...are in reality miniature independent governments set up to deal with railroad problems, the banking problem or the radio problem. They constitute a headless 'fourth branch' of the government, a haphazard deposit of irresponsible agencies and uncoordinated powers...They are vested with duties of administration...and at the same time, they are given important judicial work...officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights..." (cited in Schwartz, 2006, p.xiv).

The committee proposed to the President that the administrative agencies ought to...

> ...be divided into an administrative section and a judicial section...The judicial section...would be wholly independent...The administrative section... would formulate rules, initiate action, investigate complaints...It would...do all the purely administrative or sub-legislative work...The judicial section would sit as an impartial, independent body to make decisions affecting the public interest and private rights... (cited in Schwartz, 2006, pp. xiv-xv).

President Roosevelt sent the report to Congress, in which he stated that:

> I have examined this report carefully and thoughtfully, and I am convinced that

> it is a great document of permanent importance...The practice of creating independent regulatory commissions, who perform administrative work in addition to judicial work, threatens to develop a 'fourth branch' of the Government for which there is no sanction in the Constitution (cited in Schwartz, 2006, p.xv).

Roosevelt was a pragmatic leader committed to surpassing the economic decline using any means necessary. The New Deal's pragmatic approach established a consensus on increased governmental intervention in the economy through administrative agencies, although it did not eliminate questions about its legitimacy (Freedman, 1975, pp.1052-1054). In Rosenbloom's words (1991, p. 253), the New Deal version of the president as 'administrative chief' was considered inconsistent with the constitutionally limited authority of the president over administration.

Despite the consistent expansion of administrative and executive power throughout the New Deal, concerns over the constitutional status of administrative agencies did not end. According to Freedman (1975, pp.1043-1045), the history of the modern administrative process has been characterized by an "enduring sense of crisis," which has been traditionally linked to administrative agencies and a reflection of "deeper uneasiness" regarding the place and function of the administrative process within American politics. That is the challenge to "the very basis of their existence" and "the legitimacy of the administrative process itself." Freedman (1975, p.1043) articulates these questions: What legitimizes the extensive lawmaking authority of groups that are not directly accountable to the public, like the legislature? What justifies the significant adjudicatory powers of groups whose members do not have the same level of tenure and independence as the judiciary? Moreover, to what extent can we account for administrative agencies' recurrent inability to carry out their regulatory duties effectively? (Freedman, 1975, p.1041).

As (Postell, 2012, pp.53-54) argued, the legitimacy of American administrative agencies has been a concern since their inception. Pestritto (2007, p. 16) contends that the administrative state, its legal structure, and the policy process carried out by administrative agencies contradict the constitutional principles of the American State. According to Rohr (1987, p.116), "this lack of legitimacy" can be attributed to "the questionable constitutional status of administrative institutions" within a system based on the separation of powers and designed to safeguard individual rights. Freedman

(1975, p.1041) summarizes the recurring concern as the perception of "the anomaly of the existence of administrative agencies in a government founded upon a commitment to the separation of powers." This matter eventually became a new concern about the constitutionality of delegating authority to administrative agencies. For him, historically, each generation has tended to define this situation based on their own experiences and contexts without abandoning the term crisis.

Freedman (1975, p. 1042) identifies two distinct periods in the focus of discussions on the legitimacy crisis. In the early 20th century, the emphasis was on the role of courts in reviewing administrative action. From the 1920s to 1945, the focus shifted to the procedures by which administrative agencies reached their decisions, closely related to judicial review. The procedural concern eventually led to the APA of 1946, which the Supreme Court enforced to ensure procedural due process. Freedman (1975, pp.1042-1043) mentions additional critiques that were not specific to a particular historical epoch, such as the "failure of agencies to develop standards" and "lack of relevant expertise," all of which were summarized in Judge Jackson's statement of "malaise in the administrative scheme." Freedman (1975, pp.1051) argues that the "deeper uneasiness" experienced by administrative agencies goes beyond the theory of separation of powers, reflecting American society's ambivalence toward regulation. Public concern with bureaucratic processes associated with administration also contributes to this sense of uneasiness (Freedman, 1975, p.1064).

On the other hand, the legitimacy questions led to the theoretical justification of administrative agencies, aligning their existence with the constitutional structure and establishing limits on delegated powers to these agencies (Freedman, 1975, p.1042). Pestritto (2007, p. 26) notes that Roosevelt's adviser, Felix Frankfurter, aimed to build a team to support the new administration in devising a plan to implement Roosevelt's objectives. Among others, Frankfurter enlisted James Landis, his junior colleague at Harvard Law School. Landis advocated empowering regulatory agencies and granting their experts and administrators broad discretion to carry out Roosevelt's goals through the New Deal Program. In his 1938 work titled *The Administrative State*, Landis offers the rationalization of the New Deal administrative state and critiques constitutional formalism. He argues that the government structure should be adjusted to meet the demands of contemporary society, and the discretionary authority should not be

limited (Pestritto, 2007, pp.26-29).

3.3.2. Criticism from the American Bar Association

As Roberts (2008, p. 52) notes, early writers' managerial emphasis on public administration vis-à-vis legal aspects and judicial control drew criticism from scholars and practitioners of law. Legal experts emphasize the importance of developing legal and judicial mechanisms to protect the rights of citizens and private property from potential abuse of power by regulatory agencies. As Breger (2007, p.106) stated, in the administrative state's early years, critics sought ways for an independent review of agency action as they perceived the agency adjudication process as insufficient in adhering to the principles of the rule of law. In 1916, Elihu Root, who was President of the American Bar Association (ABA), put forward a proposal for the establishment of administrative law, stating:

> If we are continue to government of limited powers, these agencies of regulation must themselves be regulated. The rights of the citizens against them must be made plain. A system of administrative law must be developed, and that with us is still in its infancy, crude and imperfect (Davis, 1975, cited in Roberts, 2008, p.51).

The aim was to govern administrative agencies in line with the principle of limited government, which was rooted in the classical liberalism of the time. According to Cooper (1988, p. 258), in this speech, Elihu Root foresaw early works on US administrative law, such as Dickinson's *Administrative Justice and Supremacy of Law in the United States* (1927) and Freund's *Administrative Powers Over Persons and Property* (1928). As noted by Cooper, these works provided an external view of public administration from the lawyers' perspective, in contrast to Goodnow and Wilson's intra-administrative analysis.

Dickinson (1927, cited in Cooper, 1988, p.258) underlined the tension between law and government(al) administration, arguing that:

> In Anglo-American Jurisprudence, government and law have always in a sense stood opposed to one another; the law has been rather something to give the citizen a check on government than an instrument to give the government control over the citizen.

As Cooper (1988, p.259) interprets, Dickinson also questioned the legitimacy of the administration in his work. In contrast to subsequent New Deal critics, who focused

on the constitutional separation of powers based on Congress' delegation of rulemaking power, his critique was rooted in the rule of law. Dickinson argued that administrative agencies' adjudicative power exercise, which combines administrative decisions with the law, should be guided by legal regulations and provide sufficient due process protection for citizens.

The early writer's managerial emphasis and an early form of "administrative state," which originated from the Progressive Reforms, the administrative state of Roosevelt's New Deal, faced increasing criticism from critics of the New Deal and legal scholars and practitioners. They accused it of "totalitarianism and administrative absolutism" (Staszas, 2015, p. 119). The ABA began to criticize the expansion of administrative power during the New Deal (Postell, 2012, p. 55). It formed the *Special Committee on Administrative Law (SCAL)* to propose legal reforms to provide legal accountability to administrative agencies to protect against potential abuse of administrative power (Cooper, 1988, p.259). The committee released annual reports expressing concerns about the growing influence of the executive branch. These reports played a significant role in shaping the development of US administrative law. The yearly report of 1938, proposed by the SCAL at the annual meeting of the ABA, was regarded as the most important one in the administrative law literature (O'Reilly, 1938, p.310). In this 1938 report, the ABA advocated for an in-depth examination of the New Deal, emphasizing the potential dangers of "administrative absolutism" on the rule of law (Postell, 2012, pp. 55-56).

The SCAL declared its criticism beginning in 1933, mainly focusing on adjudicative power exercised by administrative agencies. It endeavored consistently to transfer judicial power exercised by administrative agencies to independent courts. The ABA continued to oppose the administrative state throughout the 1930s. The controversy reached a critical point with the introduction of the *Walter-Logan Act* (WLA) of 1940, which envisaged the establishment of boards within agencies and departments to control administrative action and the empowerment of the courts to hear and nullify rules and regulations enacted by agencies. However, Roosevelt vetoed the bill (Postell, 2012, p.55).

According to Staszas's (2015, p.119) analysis, the ABA was influential in enacting the WLA, which aimed to establish a maximum judicial review of administrative acts

previously immune to the review of the courts. Roosevelt's reasoning for the veto was that his committee did not issue recommendations on administrative reform. On the other hand, his veto signified a strong endorsement for the regulatory state, claiming that the regulatory state was one "of the most significant and useful trends of the 20th century in legal administration." Furthermore, he criticized the 'legal establishment' because they "desire to have all processes of government conducted through lawsuits." Roosevelt contended that the WLA enforced limitations on the agency adjudication process carried out by administrative tribunals, which he perceived as more adept at reviewing administrative action than courts. This was because courts were not considered well-equipped to review the day-to-day operations of administrative agencies. In the following words, Roosevelt asserted that:

> While 'the more progressive bar associations' accepted the need to 'supplement' the judicial branch with 'the administrative tribunal...a large part of the legal profession has never reconciled itself to the existence of administrative tribunal. Many of them prefer to stately ritual of the courts, in which lawyers play all the speaking parts, to the simple procedure of administrative hearings, which a client can understand and even participate in' (Roosevelt, 140, cited in Postell, 2012, p.55).

According to Postell (2012, p. 56), President Roosevelt's veto of the WLA in 1940 was a reaction to the 1938 ABA Report, primarily written by Roscoe Pound, Chairman of the ABA at the time and previous Dean of Harvard Law School. As interpreted by O'Reilly (1938, pp.310-312), the report offers the most detailed and comprehensive analysis and critique of administrative adjudication performed by administrative tribunals, as opposed to traditional courts, and their related processes. Quoting from O'Reilly's (1938, pp.310-312) interpretation, the term "administrative absolutism" is repeatedly emphasized throughout the report. In defining law, the report referred to "administration without law" or "contrary to law," as described by Chairman Pound in his 1933 study about "Oriental justice" or "subjective justice," a process of adjudication based on 'whim and caprice.' The overall focus of the report was safeguarding individual rights and maintaining the checks and balances established in the common law doctrine of the supremacy of law and the constitutional separation of powers, which are fundamental principles in American governance.

The criticism raised by the ABA throughout the 1930s focused mainly on the administrative adjudication process carried out by administrative agencies,

emphasizing the importance of adhering to the rule of law. In the 1940s, this criticism began to be expressed by the judiciary. Judiciary's attack on administrative agencies mainly targeted the congressional delegation of rulemaking power to administrative agencies, which was argued to be inconsistent with the constitutional separation of powers. In a judicial decision rendered in 1952, American Supreme Court Judge Robert Jackson expressed concern over this matter, stating that:

> The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart...They have become veritable fourth branch of government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking (cited in Rosenbloom, 2007, p.637).

Rosenbloom (2007, p.637) cites the Supreme Court's 1976 decision, affirming that the evolution of administrative agencies "has placed severe strain on the separation-of-powers principle in its pristine formulation."

The controversy stemming from the ABA report, the presidential veto of the WLA, and Supreme Court decisions underlining the judiciary's concern over the legitimacy of administrative agencies in terms of the constitutional separation of powers and the principle of rule of law are all significant examples of the conflict between legal values and administrative exigencies. Notable criticism raised by the ABA against the legitimacy of administrative adjudication, conducted by administrative agencies rather than judicial review by independent courts with tenure judges, was, in essence, an epitome of the controversy between administrative agencies and courts.

However, a group of lawyers advocated for the necessity of administrative agencies. As Cooper (1988, p.259) cites, the prominent advocates of the New Deal administrative State in administrative law literature were James Landis (1938), Walter Gelhorn (1941), and Jerome Frank (1942). These studies argued that the growth of administrative agencies granted with broad rulemaking and adjudicative power was a 'practical necessity' rather than an ideological attempt to remove the governmental power from citizens and their elected representatives. According to them, these agencies aimed to address challenges in governmental administration that Congress and the President had not addressed. They acknowledged the need for a well-

developed administrative law. However, they cautioned against "overly rigid rules" that could impede administrators from exercising necessary discretion to solve societal problems through their 'expertise and experience.' Jerome Frank, who worked as both the administrator and the judge, disagreed with the assertion that administrators were less competent than judges in making fair and just decisions, as cited by Cooper (1988, p.259).

The work of the Attorney General's Committee on Administrative Procedure greatly influenced the development of legal standards for the administrative process, particularly in reforming the legal system. The final Report of the Committee, dated 1941, emphasized the pressing need for "legislative standards of fair procedure" (Schwartz, 2006, p.xiv). This endeavor ultimately resulted in the enactment of the APA, which consisted of a set of procedural rules intended to address existing administrative issues and establish standards to improve the legitimacy of administrative agencies (Cooper, 1988, p.260).) Thus, the growth of the administrative state during the New Deal period in the United States paved the way for the emergence of administrative law. This development was driven by concerns about administrative agencies' quasi-legislative and quasi-judicial powers.

3.4. Administrative Procedure Act and American Administrative Law

As Rosenbloom (2000, p.101) put it, Congress enacted the APA in 1946 in response to the 'legitimacy crisis' faced by administrative agencies. As Freedman (1975, p. 1049) argued, the APA alleviated the legitimacy issue stemming from the constitutional status of administrative agencies and set the stage for a new era in administrative law. The APA's primary objective, as outlined by Staszas (2015, p.123), was to regulate how administrative agencies could propose and implement regulations, thereby reconciling the Constitution and the administration.

According to Rosenbloom (2000, pp.101-102), Congress's passage of the APA redefined administrative agencies, transforming them into 'legislative extensions' with delegated legislative authority. Integrating constitutional values and public administration gave rise to a "legislative-centered public administration." In this new framework, public administrators are seen as "supplementary lawmakers and policymakers," emphasizing "representativeness, responsiveness, and accountability," thus replacing the previous executive-centered approach based on universalistic principles (Rosenbloom, 1983, p.224). According to Rosenbloom (1983, pp. 222-223), the APA also facilitated a 'judicialization' process within public administration,

incorporating legal and judicial procedures, judges, and courts into the administrative process. This process, recognized as one of the pillars of the legal approach to public administration in the US, was accelerated by the APA (Dimock, 1980, cited in Rosenbloom, 1983, p. 222), introducing legal procedures to protect individual rights.

The APA is widely regarded as the foundation of administrative law in the US (see Shapiro, 1982, p.21) and the "bill of rights for the new regulatory state" (Shepherd, 1996, cited in Staszas, 2015, p.123). However, it was Elihu Root, in his 1916 speech, drew attention to the establishment of US administrative law in the pre-APA process. His words, "We are entering upon the creation of a body of administrative law, quite different in its machinery, its remedies, and its necessary safeguards from the old methods of specific statutes enforced by the courts" (Document No.48, 79th Congress 2nd Section,1946, cited in Staszas, 2015, p. 127), was announcing the development of US administrative law. As noted by O'Reilly (1938, p.312), the 1938 SCAL Report submitted to the ABA advocated including administrative law in legal education in law schools and other relevant academic institutions.

According to Shapiro (1982, pp. 18-19), the conventional liberal theory of the 19th century opposed administrative law in England and the United States, where the trial of all cases was conducted in regular courts. US Administrative law emerged from controversies over constitutional non-delegation doctrine despite earlier progressive era indicators. The non-delegation doctrine, which asserts that the legislative branch of government cannot delegate its powers to the executive branch without specific guidelines, became an issue within one of the Supreme Court's anti-New Deal rulings. However, throughout the 1940s and 1950s, judicial deference to the technical expertise of administrative agencies dominated US administrative law practice (Shapiro, 1982, p.21).

In his study, Rosenbloom (2007, p.638) discusses the evolution of administrative law in the US through different phases, focusing on the conflict between administrative agencies and the constitutional state. According to Rosenbloom, the earliest phase of administrative law emphasized the rights and obligations of public officers. Rosenbloom cites Wyman's 1903 work, which defined the subject as the law "governing the relations of public officers." As Rosenbloom argues, during the 1910s through the 1930s, administrative law focused on determining the appropriate scope

of judicial review of agency actions. Citing Roscoe Pound's 1914 speech, Rosenbloom explains that Pound criticized administrative adjudication as improper, labeling it as "executive justice" and a regression to "justice without law." As interpreted by Rosenbloom, Pound proposed that courts should substitute their judgment for that of administrators.

According to Rosenbloom (2007, p. 640), Wyman and Goodnow tried to delineate a field, establish its parameters, and explain why it should be acknowledged as a distinct branch of law and academic inquiry. Although their works laid the foundation for administrative law in the US, the term 'administrative law' started to appear in legal writings in the 1930s and 1940s (Tresolini, 1951, cited in Rosenbloom, 2007, p. 460). Rosenbloom reports that after Goodnow's works, the first comprehensive study of an introductory administrative law was James Hart's 1940 book, *An Introduction to Administrative Law with Selected Cases*. This book is aimed at public administration students rather than law school students, as Hart wrote in his book:

> Despite an ever-increasing number of courses on public administration and even of whole curricula for training for the public service, students of public administration have all too often received no sufficient training in the legal matrix of their subjects. Administrative law, moreover, is coming to loom so large in the fields of modern government and public law that its implications reach far beyond public administration as a technical subject. The time is at hand when these implications must be brought to the attention of every student of political science and every undergraduate who is preparing for the law (Hart, 1940, cited in Rosenbloom, 2007, p.640).

After the enactment of the APA, the judiciary's influence on public administration expanded significantly beyond what was outlined in the statute. This has impacted dramatically the US literature on public administration, making administrative law a relevant topic for the discipline, as noted by Rosenbloom (2007, p. 637-638). Cooper (1988, p.265) explains the renewed interest in administrative law on the grounds of administrative developments of the 1950s and 1960s, mainly regarding increased demand for more complex and expansive service delivery in the post-war era. However, as Cooper (1988, pp.264-265) argues, the late 1960s saw the reincarnation of the founding years' law-management controversy, according to which managerial values of efficiency, expertise, and flexibility contradict procedural and narrow principles of legalism, under the disguise of differences in the approaches of public administrators and lawyers. In this process, public administrators tended to view the

law as a restrictive force that hindered their managerial flexibility and expertise in achieving agency goals efficiently. Instead of providing a legitimizing ground for public administration, the law is often regarded as an obstacle to change. This antagonistic portrayal of public administration and law, rooted in the rule/discretion dilemma, resulted in 'disunion' between the fields of public administration and law (Cooper, 1988, p.265).

The post-1980 changes in the role of the state and the structuring of public administration have been influential on the role of law in public administration. The NPM movement of the 1980s emphasized output-oriented values and the application of private sector techniques as a response to the perceived shortcomings of the expansive state in the face of the mid-1970s crisis. This approach, which emerged during the deregulation of the 1980s and the implementation of neo-liberal policies, encompassed privatization and the outsourcing of public services (Harlow, 2005, p. 285). Christensen et al. (2011, pp. i125–i126) assert that the introduction of market-based reforms under the umbrella of NPM, emphasizing managerial values of the '3Es' of efficiency, economy, and effectiveness, rather than traditional legal values such as accountability and due process, heighten the historical tension of legalism-managerialism embedded in US public administration. Harlow (2005, pp. 279-280) argues that the current process of global governance has also changed the interplay between public administration and law. According to Harlow, this is a process of 'juridification,' which reduces social relations into rules. The process of juridification necessitates courts or alternative dispute resolution methods to interpret vague regulations within specific cases (Twinning, 1999, as cited in Harlow, 2005, p. 281). Teubner (1998, cited in Harlow, 2005, p. 281) suggests that this process creates a 'cycle of juridification' as regulation leads to adjudication, which in turn necessitates the development of new rules. Thus, public administration and law remain in an endless cycle of interaction.

In examining the changing relationship between public administration and administrative law, it becomes evident that administrative law in the American context developed in response to the challenge of integrating the administrative state into the constitutional framework (Rosenbloom, 2005, p.48). It has gone through different stages regarding its connection with public administration, reflecting the evolving role

of the state and the changing ethos of public administration.

In the process that led to the creation of the APA, various solutions were developed to address the issue of integrating administrative agencies into the constitutional system. This ultimately resulted in the development of American administrative law. According to Rosenbloom (2005, p.48), since the framers of the Constitution could not have foreseen the expansion of the administrative state, the concept of separation of powers has been blurred vis-à-vis blended powers of agencies. While the complete integration of the administrative agencies remains a challenge (Waldo, 1984, cited in Rosenbloom, 2005, p.48), Congress and the judiciary sought solutions to the challenge of the administrative state by integrating it into the separation of powers.

According to Rosenbloom's (2005, pp.49-58) periodization, in the mid-1930s, there was an 'orthodox response' to the emergence of the administrative state. This response entailed a suggestion for enhancing the president's power, as put forth by the 1937 Brownlow Committee. The committee proposed that the President, "the one and only national officer representative of the entire nation," should dominate the administration (Rosenbloom, 2005, p.49). On the other hand, the Congress's initial response was power delegation to administrative agencies despite hesitations on the constitutionality of the delegation. The second lasting strategy of Congress was passing the APA in 1946, which 'retrofit' administrative agencies to the Constitution by mandating administrative procedures that incorporate constitutional values (Rosenbloom, 2005, p. 50). The judicial response was the increasing significance of administrative law as a tool for controlling administrative power, paving the way for the judicialization of administrative action (Rosenbloom, 2005, p.56).

The APA included rules outlining the adjudication and rulemaking powers of administrative agencies and endeavored to set standards for reviewing administrative discretion. Thus, the courts, rather than administrative agencies, obtained the authority to conduct judicial review of administrative actions under the APA's statutory framework. This intensified the interaction between public administration and the courts (Rosenbloom, 1991, p.257; Rosenbloom, 2007, p. 638).

According to Rosenbloom (1991, pp.251-252), the federal judiciary's approach to public administrative issues in the US shifted from the 1950s to the 1980s. Instead of

passively approving the independence of administrative agencies, the judiciary became more actively involved in administrative decision-making and policy implementation by increasing the intensity of judicial review, forming a new 'partnership.' This shift also sparked a renewed academic interest in the intersection of public administration and law (Cooper, 1988, p.269).

3.5. 'Involuntary Partnership' between Judiciary and Public Administration

Breger (2007, p.84), citing Lee (1948), reports that in the United States during the 19th century, the courts had a restrictive approach to the reviewability of administrative transactions. Breger (2007, p.84), referencing Woodhandler (1991), also argued that before the Civil War, the Supreme Court adhered to the principle of *res judicata*, granting "final decisional authority to the executive branch" and focusing primarily on the executive's jurisdictional authority to act. Except for discretionary transactions, which were determined broadly, reviewable executive actions were limited to ministerial acts. Furthermore, until the 1900s, the Court tended to hold that "courts have no general supervisory power over the proceedings and actions of various administrative departments of the government." However, the Supreme Court had not yet reversed the "presumption of unreviewability" until 1902 (Breger, 2007, p.86).

As Breger (2007, p. 86) noted, the emergence of federal-level governmental regulation in the second half of the 19th century in the United States significantly altered the relationship between governmental administration and law. With the rise of the regulatory role of the state, courts began to scrutinize the authority of newly established administrative agencies, particularly in cases of legal error and unauthorized actions. This shift, which occurred before the 1902 ruling of the Supreme Court[12], was a response to the need to prevent unchecked actions by administrators even when Congress did not explicitly regulate the matter of judicial review. In its 1902 decision, the Supreme Court ruled that when an official makes an error or acts outside the limits of authority granted to him, the court must have the power to check to prevent the arbitrariness of public officials that may violate individual rights and liberties.

[12] American School of Magnetic Healing v.McAnnalty,187, U.S. 94 (1902) (cited in Breger, 2007, p. 86): https://supreme.justia.com/cases/federal/us/187/94/. (accessed: 12.08.2024).

According to Breger (2007, p.87), 20th-century American administrative law focuses on restricting administrative discretion through adjudication and judicial review. Breger further contends that this approach stems from concerns about the potential 'arbitrary and capricious' use of administrative power within the expanding administrative state. Referring to APA's rule, courts should not evade judicial review unless a statute explicitly states or unless the legislation specifies a transaction as discretionary; Breger (2007, p.87) contends that courts tend to interpret the scope of judicial review broadly. Rosenbloom et al. (2010, p.31) contend that discretion is deemed undesirable within the Anglo-American legal tradition as it is viewed as contrary to the rule of law. This viewpoint is explicitly depicted on the façade of the US Department of Justice building, where an epigraph reads, "Where Law Ends Tyranny Begins."

Similarly to Breger's periodization, Rosenbloom (2008, p.1) argues that from the 1890s to the mid-1930s, court decisions tended to prohibit administrative action. However, from 1937 to the early 1950s, courts mainly accorded administrative authority stemming from their expertise; therefore, the impact of courts on administrative action was quite limited (Shapiro, 1968, cited in Rosenbloom, 2008, p.1). Starting from the 1950s, under the impact of APA and subsequent legislation concerning administrative activity, the law and judiciary became more involved in public administrative processes. This frequent contact, which took place in administrative practice, was accompanied by increased attention to law-related topics in teaching and scholarship of public administration (Rosenbloom et al., 2010, p.3).

Shapiro (1982, p.23) observed that by 1960, courts had started to adopt substantive rather than procedural review. Shapiro (1982, p. 22) attributed the shift towards expansive judicial control on public administrative matters to Americans' reaction against the technocratic government and strong executive authority that originated in the Progressive era and was reinforced during the New Deal.

In the 1950s, judges from the Supreme Court and other federal-level courts voiced concerns about the expanding administrative state and its potential impact on "individual liberty, popular sovereignty, and the separation of powers" (Rosenbloom, 1987, p.76). In response, the courts developed a legal framework, leading to a

"redefinition of procedural due process, equal protection, and substantive rights and liberties of individuals" concerning public administrators (Rosenbloom, 1983, p.223). This empowered judges to ensure that public administrators respected the constitutional rights and liberties of individuals, leading to the establishment of new rights, such as the right to treatment and habilitation by the Supreme Court. Furthermore, the right to equal protection was strengthened and implemented in various administrative contexts, expanding constitutional due process protections for individuals in their interactions with public administrators (Rosenbloom, 1983, p.223).

In this relationship that intensified the involvement of courts and judges in the administrative process, Rosenbloom (1987, p.76) characterizes the courts' role as 'senior partners,' highlighting their authority to determine and control the requirements of the context. Rosenbloom argues that judicial intervention in public administration is based on three legal changes, which courts developed over time through their precedents. These changes moved the focus of administrative law from traditional considerations of administrative discretion and the extent of judicial oversight to the constitutional rights of individuals in their relation to public administration, as Rosenbloom contends (1987, p.76).

According to Rosenbloom (1987, pp. 76-77), the periodization of these judicial innovations, the first implementation, dating back to the 1960s, is the declaration of new constitutional rights for individuals in their interactions with administrative institutions. These rights encompassed concepts such as substantial equality protection and procedural due process. The second significant development was the emergence of 'public law litigation' in the 1970s. Public law litigation facilitated a more participatory process in the judicial proceedings, allowing for increased involvement of both the parties and judges. The third change involved the transition from an assumption of absolute immunity for public administrators to a presumption of qualified immunity in cases involving tortious conduct and damages. This shift originated in the 1970s and made public administrators more accountable for violating individuals' constitutional rights.

The legal framework was adopted mainly by the Warren and Burger Courts of the DC Circuit throughout the 1960s and 1970s (Roberts, 2008, p.54). These courts instrumentalized judicial review to subject administrative agencies to "a huge new

body of administrative law," enabling judges to implement a 'hard look' over administrative agencies (Rosenbloom, 1991, pp.257-258). Thus, these courts decreased the obstacles against judicial review of agency action (Roberts, 2008, p.59)

Procedural requirements enforced by the judiciary intensified the interaction between courts and public administrative bodies. In his 1976 article, *The Impact of Courts in Public Administration*, Judge Bazelon (1976, p.105) drew attention to the growing interaction between the judiciary and public administration, stating, "... administrators will find themselves locked into involuntary partnerships with the court." Judges in this partnership supervise the administrative actions (Chayes, 1976, cited in Rosenbloom, 1983, pp.223).

On the other hand, as Rosenbloom (1991, pp.258-259) noted, the increased engagement of judges in public administrative processes was criticized on three grounds. While the first criticism questions the skills of judges in administrative matters, the second one questions the democratic accountability of judges as they were not elected. The most striking of these criticisms came into being as the question, "Are judges becoming bureaucrats in black robes?" underlining the potential decline of the courts. Horowitz (1977, cited in Rosenbloom, 1991, p.259) asserted that "the danger is that courts, in developing a capacity to improve on the work of other institutions, may become altogether too much like them."

Rosenbloom et al. (2010, p.134) defined 'partnership' as a process that involves incorporating constitutional values and rights into the public administration, constituting what they called "constitutionalization of public administration." Constitutionalization is one of the pillars of the legal approach to public administration in the US, as Rosenbloom (1983, p.223) argues. Theorized in John Rohr's 1986 book *To Run a Constitution,* constitutionalism in public administration presents an alternative to the traditional orthodoxy of US public administration. Its primary aim is to provide the legitimacy of the US administrative state based on constitutional principles (Rohr, 1986, cited in Fox, 1993, p.54). Furthermore, Newbold (2010, p. 538) advocated for "moving toward a Constitutional School," which links constitutional values with public administrative theory and practice.

The intensified interaction between legal/judicial and public administrative practices

contributed to building literature on the relationship between public administration and law in the US and the rest of the world. In this respect, various writings dealing with constitutional legitimacy, interdisciplinary collaboration with law, and administrative law have appeared in American literature on public administration.

On the other hand, the courts' intense review of administrative agencies changed with the 1984 Chevron Doctrine, established by the Supreme Court in the case of Chevron USA v. National Resources Defense Council[13]. According to Chevron's deference, administrative agencies interpret ambiguous laws. The judiciary can intervene when the interpretation of the agency is unreasonable or impermissible. The Chevron doctrine, which is justified on the grounds of technical expertise and legitimacy of administrative discretion, has become a standard principle in US administrative law, resulting in a more deferential stance by the courts toward reviewing administrative agencies' actions (Breger, 2007, p.108).

3.6. Assessment

There is a historically unsettled relationship between law and public administration in the US, where public administration emerged as a separate discipline. Early writings described public administration as the field of management guided by scientific principles rather than principles of (constitutional) law and political approaches. This early characterization resulted in a conflicting and dichotomous relationship between public administration law and politics. The status of law in American public administration has undergone various phases in line with political and administrative developments. During the early years, the managerial aspects of public administration were underlined vis-à-vis formal constitutional and legal aspects to establish an autonomous discipline of public administration that deals with pressing administrative issues of the developing federal-level administrative structure. However, with the establishment of administrative agencies in the second half of the 19th century, the constitutional legitimacy of these agencies started to trigger concerns on the basis of the constitutional principle of separation of powers and the principle of rule of law. These initial concerns raised by lawyers, notably the ABA, concentrated mainly on the

[13] Chevron USA v. National Resources Defense Council 467 U.S.837 (1984) (cited in Breger, 2007, p.108): https://supreme.justia.com/cases/federal/us/467/837/. (accessed: 12.08.2024).

adjudicatory power exercised by the administrative agencies on the grounds of the rule of law. In the late 1930s, there was an increased focus on the constitutional legitimacy of the rulemaking power delegated to administrative agencies by Congress.

These concerns about the legitimacy of adjudicatory and rulemaking power exercised by administrative agencies resulted in the APA in 1946, which set legal standards for these powers and established a framework for judicial review of administrative discretion by the courts. The APA, often considered the birth of US administrative law, played a crucial role in addressing the constitutional legitimacy of administrative agencies, thereby serving as a legitimizing instrument for their role within the US legal system.

Following the enactment of the APA, the Courts, which had a deferential attitude towards the actions of administrative agencies, adopted a more critical stance. They began to review administrative actions more intensely, applying the legal criteria developed through precedents. This increased scrutiny of administrative actions by the courts, in line with the standards set by the APA and the Constitutional due process, has been a significant development in the relationship between law and public administration in the US. The public administration literature has reflected this intensified interaction between the judiciary and administrative practice, mainly through comprehensive judicial review. This has led to the development of a body of literature focusing on law-related topics within US public administration.

CHAPTER 4

ESTABLISHMENT OF TURKISH ADMINISTRATIVE JURISDICTION: RETAINED JUSTICE, JUDICIAL SELF-RESTRAINT, AND LEGISLATIVE RESTRAINTS

4.1. Introduction

This chapter explores the historical development of the Turkish administrative jurisdiction and its relationship with the legal and administrative framework within which it operates. Since the present-day administrative court system has its roots in the Council of State, the founder of the Turkish administrative jurisdiction system and the sole administrative court for many years, the chapter focuses on its establishment and development. This period also witnessed advancements in the scholarship and practices of public administration, administrative law, and administrative judiciary. In doing this, the chapter deals with the period between the late Ottoman Reforms of the 19th century, when the Council of State (*Danıştay*) was established, and the 1971 Constitutional Amendment, when constitutional restraints were imposed on the judicial review of administration. Until the 1971 Constitutional restrictions, the judicial review of the administration carried out by the Council of State, despite interruptions by judicial self-restraint and legislative restraints and intense criticism of various circles, has made progress, whereas, from 1971 onwards, it confronted Constitutional restraints and accompanying legislative restraints.

Since its establishment in 1868, the Council of State has carried out various combinations of administrative, legislative, jurisdictional, and consultative tasks, significantly shaping the course of Turkish public administration, administrative jurisdiction, and administrative law. However, its relationship with the executive branch and administrative authorities has been controversial, particularly regarding judicial review of executive and administrative acts and actions. This resulted in t

ension between the executive and the Council of State, accompanied by criticism of its existence and restraints on the judicial review it performed. The reaction of the Council of State to these criticisms and restraints manifested itself in various forms according to the historical peculiarities of the period in which it took place. In the first years of its establishment, the Council of State was relatively hesitant and self-restrictive. However, over time, it started to develop various mechanisms through its precedents to eliminate the restrictions imposed through laws and interpretation decisions of the legislative branch.

This conflict, as described by Azrak (2011, p.17), is a reflection of "antagonism between active administration and the judiciary," which stems from the inherent "dialectic relationship between politics and judicial control" (2004, p.121). The criticisms of the status of the Council of State vis-à-vis the executive have increased from the mid-1960s onwards. Furthermore, the role of the Council of State has been one of the central themes of the constitutional movements experienced in Turkey from 19th-century reforms up until the 2010s.

This chapter traces the evolution of the conflict mentioned above between the Council of State and the executive branch and administrative authorities in Turkey from its inception in the mid-19th century to the 1971 Amendments to the 1961 Constitution, which has undergone several transformations and was heavily influenced by the political turnovers of the country. Intricately woven with the political developments of the period it took place, the tension between the executive and the (administrative) judiciary has catalyzed significant constitutional amendments.

As the constitutional processes in Turkey are deeply intertwined with political developments (Sencer,1984a, p.3; Tunaya, 1980, p.6), the changing status of the Council of State and its relationship with the executive and administrative institutions are examined through the lens of constitutional movements and associated laws that were accompanied by significant political milestones in Turkish history.

The analysis of the changing status of the Council of State in this evolving constitutional schema provides a fertile ground to understand its influence and relevance in Turkish legal and administrative history.

4.2. Ottoman Legal and Administrative Reforms: Roots of Turkish Legal and Administrative System

The foundation of the contemporary administrative mechanism and administrative court system can be traced back to the reform and modernization movement of the late Ottoman State. This transformative period, when receptions from Western law accompanied the adoption of Western administrative and judicial institutions, marked a significant shift in the role and structure of the Ottoman State. Prior to this reform period, the role of the Ottoman state was confined to classical state functions of military, justice, and the maintenance of order. The state, based on patrimonialism and theocratic monarchy, was governed mainly by a religious law called Sharia and orders and proclamations based on the absolute will of the Sultan. As Örücü (1999, p.30) wrote, private law matters such as marriage, commerce, and inheritance were regulated under Sharia law, while public law matters were not addressed in this law. The Sultan held complete authority and discretion over governmental administration without recognizing any legal control over his power. The legislation of the Sultan concerning governmental administration was embodied in decrees and ordinances. Administrative and public law concepts did not exist during this time, resulting in no differentiation between private and public law.

As Akıllıoğlu (1995, p.147-148) and Balta (1972, p.33-46) noted, administrative and judicial tasks were not carried out separately. The officials known as Qadhi performed both administrative and judicial tasks. Likewise, the Imperial Council (*Divan-ı Hümayun)*, which acted as a consultative body on executive and judicial matters, carried out both administrative and judicial duties. The unity of powers was concentrated in the hands of the Sultan, which meant that all governmental decisions were made by him rather than by committees and assemblies. The state administration, organized according to military priorities, was structured according to the Turkish-Islamic tradition.

During this time, as Akıllıoğlu (1995, p.147-148) wrote, the concept of public service had not developed, and officials and local foundations carried out common services such as education and health. Public services did not depend on the abstract legal personality of the state but on the personality of the individuals providing them. The legal system was largely unwritten, with governmental affairs and land law governed

through a distinct law derived from customs and traditions (Örücü, 1999, p.31) This led to a diverse set of laws that lacked unity, with varying combinations of Sharia law,

According to Sencer (1984) and Balta (1966), starting from the end of the 18th century[14], certain re-organization efforts were initiated to overcome the problem of the Ottoman Empire's loss of power against the European states and accompanying deterioration in state administration, which had begun in the 16th century. The reforms became more comprehensive during the first half of the 19th century with the proclamation of the *Tanzimat* (Re-organization) Edict of 1839, which initiated the implementation of new principles in legal order and state administration with an attempt to limit the absolute authority of the Sultan. Although the Edict, which was issued by the unilateral will of the Sultan, did not contain any supervisory mechanisms to ensure the Sultan's compliance with the rules, it was a crucial step towards a modern state and rule of law in Ottoman-Turkish polity. These principles were reinforced with the 1856 Reform Edict *(Islahat Fermanı),* aimed at securing the rights of non-Muslim citizens, further solidifying the reform process.

These reform edicts started a process of westernization, rationalization, and legality by initiating legal receptions and establishing new governmental institutions, particularly in military service, education, taxation, public administration, and the court system. For Akıllıoğlu (1995, p.149), the intended governmental approach can be summarized as "the unitary state, centralized administration, and restricted decentralization." One of the most significant innovations of the reform period was the shift from the fragmented and unwritten laws of the classical Ottoman State to a written legal system. This crucial change was achieved through the codification movement, which involved the transplantation and reception of codes and institutions from the European States[15], particularly France. Ottoman intellectuals drew inspiration from French Revolutionary ideas (Toprak, 2003, p.3), which significantly influenced

[14] This began with Selim III's New Order (*Nizam-ı Cedid*) from 1761 to 1808. Later on, Mahmud II (1808-1839) continued these reforms by implementing a comprehensive reorganization of the governmental administration in line with centralization and modernization. This included the establishment of ministries to carry out public services and councils to manage administrative and judicial matters.

[15] 1850 Commercial Code was a translation of the French Commercial Code, and the 1858 Imperial Penal Code was adapted from the French Penal Code.

the adoption of Continental European jurisprudence, where the source of law was codified legislation (Toprak, 2003, pp.16-17).

Another crucial development was the foundation of separate Councils to deal with legislative, judicial, and executive affairs. These Councils prepared draft laws, prosecuted high-ranking officials, and served as the legislative body that carried out the reforms (Sencer, 1984, pp. 46-51). The most significant of these assemblies was the Supreme Council of Judicial Ordinances of 1838 (*Meclis-i Valay-ı Ahkamı Adliye*), functioning as a supreme judicial and legislative body, which mainly acted as "the kitchen of the Tanzimat reforms" (Konan, 2018, p.26). *Nizamiy*e Courts, regarded as the origin of modern civil law courts, were built in 1868 to implement newly adopted secular law. The Imperial Edict of Justice (*Ferman-ı Adalet*) of 1875 restructured the judicial system, introducing earlier forms of principles such as independence of courts and security for judges into Ottoman jurisprudence (Balta, 1972, p.53; Toprak, 2007, p.7).

According to Sencer (1984, p.51-56), the reforms implemented in the administrative sphere came into being as changes in the civil servant regime of training, job security, and salary of civil servants to improve efficiency and prevent corruption. Additionally, to ensure an effective centralized administration, a modernized bureaucracy, which played a significant role in Ottoman political history until the Republican period, was established (Balta, 1972, pp.57-58). In 1867, the fiscal administration was restructured, and the Court of Accounts (*Divanı-ı Muhasebat-ı Ali/Sayıştay*) was established to audit public expenditures, inspired by its French counterpart. Other administrative institutions modeled on the French system were the Council of State, the cabinet and ministerial system, special provincial administrations, and municipalities (Örücü, 2000, p.679).

In 1871, The General Order of Provincial Administration (*İdare-i Umumiyye-i Vilayet Nizamnamesi*) was introduced, amending the previous 1864 Provincial Ordinance (*Vilayet Nizamnamesi*). This brought about a comprehensive re-organization of provincial administration and bureaucratic organization in line with the French Napoleonic administrative system (Fişek, 1977, p.1). As a part of this reorganization, the provincial assemblies (*Meclis-i İdare-i Vilayet*) were given judicial power in addition to their administrative duties, similar to their French counterparts. Throughout

the Ottoman Period, in contrast to the decisions of the Council of State, their decisions on judicial matters were executed without any approval (Gözübüyük, 1961, p.22). These councils, which continued to exist in the Republican Period, functioned as administrative courts of first instance until the 1982 administrative judiciary reform.

These earlier modernization endeavors in administrative and legal spheres, representing a rupture from the theocratic monarchy structure, paved the way for the 1876 Constitution (*Kanun-i Esasi*), the first written Constitution of the Ottoman State. The Constitution of 1876, an adaptation of liberal Western law to the monarchy, was far from an actual constitution regarding its form and content. It did not restrict the absolute power of the Sultan, lacked safeguards and mechanisms for protecting fundamental rights, and did not balance the powers of the legislative and executive branches. The establishment of a legislative assembly with two chambers[16]- one elected and the other appointed, as outlined in the constitution, was a notable step towards placing state administration under popular control. However, according to Balta (1972, p.59) and Özbudun (1987, p.24), it did not fully embody the characteristics of a Western-style parliamentary monarchy. After two years, the Sultan suspended the constitution, resulting in the dissolution of the constitutional government and the reinstatement of the absolute monarchy. In 1908, the opposition of the military and civilian bureaucracy led to the proclamation of the Second Constitutional period, followed by considerable constitutional amendments in 1909. These amendments intended to establish a parliamentary monarchy by limiting the powers and privileges of the Sultan through an effective assembly. However, it did not last long and was terminated in the aftermath of World War I, which concluded with the defeat of the Ottoman State (Özbudun, 1987, p.25).

In the field of jurisprudence, the rules and institutions specific to Sharia law and customary law prevailed in the Ottoman classical period coexisted with Western laws, giving way to a dualist practice of law (Balta, 1972, pp.56-57). This coexistence of Western and traditional institutions and rules has been called the 'dualist period' by Onar (1966, p.716) and the 'mixed legal system' by Örücü (2000, p.480). As Mumcu (1995, p.545) argued, Sharia Courts, Commercial Courts, Consular Courts, and

[16] The Senate (*Heyet-i Ayan*) was composed of appointed members, and the Chamber of Deputies *(Heyet-i Mebusan*) consisted of elected members.

Nizamiye Courts all implemented different legal rules, Sharia law and customary law on the one hand and Western law on the other. Consequently, the legal system, which lacked unity, became even more fragmented and caused 'chaos' in the jurisdiction, disrupting the effectiveness of judicial services.

The reforms, supported by a few intellectuals influenced by French revolutionary ideas, significantly impacted the public sector but failed to gain acceptance in civil society. Additionally, the Muslim population did not embrace modernization and the Westernization movement. As Akıllıoğlu (1995, p.149) argues, reforms were executed pragmatically. Taking the discussion to a further level, Akıllıoğlu (2012, p.192-193) asserts that this lack of harmony between public institutions, which were exposed to the French influence, and civil society, which remained distant from Western impact, resulted in a disconnection between bureaucracy and civil society. According to Akıllıoğlu (2012, p.185-186), one of the most significant differences between the Ottoman Reforms and Revolutionary France was the approach to introducing the civil code. In France, the newly created civil servant class introduced the *Code Civil* to the entire society, and the modernization of civil society went hand in hand with the modernization of the bureaucracy. However, the Ottoman State's efforts to develop a secular civil code applicable to social relations resulted in the *Mecelle* of 1869, dominated by Islamic Law. On the other hand, the bureaucracy was regulated following secular rules and principles, in stark contrast to civil society (Akıllıoğlu, 2012, p.192).

4.2.1. Ottoman Council of State: Separation of Administrative and Legal Functions

The most significant development regarding the relationship between public administration and (administrative) law of late Ottoman Reforms was the establishment of the Council of State, which acted as an advisory-administrative body having both legislative and jurisdictional functions. The Council of State emerged from dividing the Supreme Council of Judicial Ordinances into two autonomous bodies responsible for distinct functions. These two new bodies were the Council of State (*Şurayı Devlet*)[17], headed by modernist *Mithat Paşa*, and the Board of Judicial

[17] The Council of State was divided into five Chambers: Interior, Finance, Public Works, Education, and Justice. Later, the number of Chambers was reduced to three: one dealt with administrative affairs,

Ordinances (*Divan-ı Ahkamı Adliye*), governed by conservative *Cevdet Paşa* (Toprak 2003: p. 10). The Board of Judicial Ordinances, regarded as today's Court of Cassation (*Yargıtay*) and functioned in civil jurisdiction, served as the superior court overseeing the *Nizamiye* Courts. The date of the separation of these two organizations, May 10[18], 1868, is widely accepted as the date of the establishment of the Council of State in Turkish administrative-legal scholarship and practice.

In the establishment of the Council of State, the structure and functioning of the French *Conseil d'état* were taken as a model. Its establishment arose from the 'imposed receptions' of Western states, particularly France, supported by England and Austria, as part of the reform movement (Levis,1968, cited in Örücü, 2000, p. 680). The Council of State, as Örücü (2000, p.679) notes, is a prime example of the 'French layer of Turkish Administrative law,' which is also evident in other administrative and legal institutions such as the Court of Accounts, provincial administration, and municipalities. Additionally, this influence is reflected in administrative law concepts referred to in precedents of administrative courts and administrative law textbooks, such as public service, administrative acts, and administrative tutelage.

The division of the Supreme Council of Judicial Ordinances into two separate bodies is accepted not only as the establishment of the Council of State but also as the beginning of the separation of justice and administration, which was carried out together throughout the classical era of the Ottoman State. As in Revolutionary France, the judicial review of the administration was assigned to a specialized tribunal established within the administration, namely the Council of State, rather than ordinary courts. In the Turkish administrative law scholarship, this is widely regarded as the starting point of administrative jurisdiction and administrative law and transition to the administrative regime of French jurisprudence (i.e., Onar, 1966, p.76). The administrative regime is a judicial system that conducts judicial review of the acts and actions of the executive and the administration by specialized courts peculiar to the administration following their own procedures. However, it is essential to note that the

the other concerned with preparing the laws, and the third one was responsible for administrative law (Örücü, 1999, p.32).

[18] The Council of State celebrates May 10th as "Council of State Day."

Council of State in the Ottoman State, also known as *İstanbul Şurayı Devlet*, did not fully perform an administrative court function in the modern sense. The actual development of administrative jurisdiction and administrative law, along with other branches of public law, took place during the Republican era, as argued by Örücü (2000, p.680) and Özyörük (1973, p.154).

As Özdeş (1968, p.41) wrote, the founding legislation of the Council of State (*Şurayı Devlet Nizamnamesi*) assigned the Council of State with other tasks of legislative duties, such as preparing and examining draft laws to be implemented in the reform process and advisory task for the problems faced by the administration in addition to its duty to hear disputes between the state and the individuals. Despite the explicit provision of its legislation, the Council of State's jurisdictional function of hearing administrative cases between the state and individuals had remained restricted in practice. Additionally, the Council of State did not have an independent chamber or a specific procedure peculiar to administrative cases. Each chamber had a distinct responsibility for tax collection, civil administration, or public works. Furthermore, the chambers jointly managed administrative and judicial affairs according to their expertise.

Aral (1973, p.54-55) reports that as the Council of State was established to separate justice and administration, administrative procedures were removed from the jurisdiction of ordinary courts. And so on, matters regarding administrative issues were brought before the Council of State, where they were reviewed by using administrative procedures rather than judicial procedures, which should ensure the right to defense and publicity of trials. Upon referral of the Grand Vizier (*Sadrazam*), the administrative chambers reviewed cases within their area of expertise within the framework of administrative procedures. Hence, decisions made by the Council of State were administrative rather than judicial and did not achieve a distinction between judiciary and administration.

Moreover, as highlighted by Özyörük (1973, p.152-153), the law implemented by the Council of State was not administrative law during that era. Rules and principles of administrative law, an unwritten and uncodified law, are based on the accumulation of judgments made by the administrative judiciary. When the Ottoman Council of State

was established, rules and principles peculiar to administrative law had not yet been developed. The concept of a public service undertaken by the state, which forms the foundation of administrative law, did not exist during the time of the Ottoman Council of State. Additionally, the absence of a constitution and the notion of separation of powers made implementing judicial review of administrative action impractical. The administration was still closely connected to the state, following the principle of unity of powers. The Council of State could not detach itself from the executive even though its establishment symbolized the historical separation of administration and the judiciary. Consequently, a peculiar set of relationships between individuals and the governmental administration holding the administration accountable to individuals before the courts was not developed throughout the Ottoman Council of State.

As in the first years of the French *Conseil d'état*, the decisions of the Council of State could become definitive judgments after the approval of the Grand Vizier, who held the highest position in the executive office (*Sadaret Makamı*). The Grand Vizier could nullify, modify, or delay approved decisions he did not wish to implement. This practice, known as 'retained justice' or *justice reténue (tutuk adalet)* (Örücü, 2000, p.680), suggests that the judiciary was not as independent from administrative influence as intended. Like the French system, the president of the Council of State, who was part of the executive branch, was appointed by the Sultan. The head of the Council of State, who attended government meetings as a vizier, was highly involved in political matters. The council members were comprised of foreign experts and Muslim and non-Muslim citizens who represented provinces across the country. However, the Sultan made their appointments, which often led to an unfair distribution of memberships to the relatives of state elders. Over time, as Özdeş (1982, p.116) mentioned, Grand Vizier Ali Pasha, who was active in establishing the Council of State, dismissed President Mithat Pasha due to the Council of State's rejection of some concessions and contracts and appointed people who would not contradict him. The dissidents called the Council of State 'Shura Yes' (*Şurayı Evvet*), implying it performed merely a confirmation function of the executive office rather than controlling it (Seyitdanlıoğlu, 1994, cited in Canatar, 1998, p. 116).

The first Constitution of 1876 transferred the authority to hear cases between individuals and the state to the civil courts. This meant putting an end to establishing

separate administrative jurisdiction (Gözübüyük, 1995, p.303). In Onar's (1966, p.87) view, this represented a regression in the conception of the judicial control of the administration, which is the core of the principle of the rule of law. As Örücü (2000, p.681) states, the Constitution assigned the legislative functions previously performed by the Council of State to the newly created Council of Ministers and Parliament. On the other hand, the Council of State, which occupied an essential place in the administrative organization of the state, was connected to the newly formed Council of Ministers. The president of the Council of State was recognized as equal to the minister and attended meetings of the Council of Ministers (Tan, 2020, p.678). Two years later, during the absolutist period that began with the suspension of the Constitution, the Council of State lost its former importance.

The Second Constitutional Monarchy proclaimed in 1908, tried to revive the judicial function of the Council of State. The Council of State, which was first transformed into an independent body under the Council of Ministers, was then attached to the Ministry of Justice and then again to the Council of Ministers. The President of the Council of State was made a member of the Council of Ministers as in the past (Tan, 2020, p.678). However, in practice, the work of the Ottoman Council of State consisted of the decisions of the Court of Accounts regarding the accounts of finance officials, the matters related to the Provincial General Administration Law and the Mining and Quarrying Law, and disputes arising from concession contracts and issues concerning allowances and taxes (Aral, 1973, p.55). In 1922, along with other imperial institutions, the Council of State, which lost its dignity, was abolished.

As Özyörük (1973, p.155) argued, the Council of State could not operate as an independent administrative court given the Sultan's absolute authority. During the Ottoman era, the primary role of the Council of State was to facilitate the transition towards a Western-style administrative system by offering guidance and recommendations on administrative matters and newly introduced reforms. As Konan (2018, p.26) asserted, its legislative activities accelerated the transition to a constitutional monarchy at a time when the legislative assembly had not yet been formed.

Thus, the Ottoman Council of State's advisory-administrative and legislative functions were more prominent than its judicial functions. On the other hand, during the

Republican era, the Council of State's judicial aspect became more prominent, overshadowing its administrative and advisory functions (Oytan, 1985a, p.76).

4.2.2. Teaching in (Administrative) Law and Public Administration: School of Civil Service and School of Law

Although the Ottoman Council of State could not function as a complete administrative court in the modern sense, teaching administrative law courses had begun in this period (Akıllıoğlu, 1995, p.150). As a part of the reform movement, Western-style educational institutions were established to provide specialized civil servants and lawyers for the newly formed judicial and administrative institutions. The School of Civil Service (*Mekteb-i Mülkiyye-1859*), which mainly relied on French textbooks, was established to train civil servants (Keskin, 2006, p.3).

The School of Law (*Mekteb-i Hukuk,1880*)[19], modeled on the education programs of French law faculties, aimed to train professional lawyers (Akkaya-Kia, 2012, pp.79-85). These schools included administrative law courses, alongside other law courses, in their curricula (Cihan, 1991, pp. 107-109).

As noted by Akıllıoğlu (1983, p. 56-58), '*Hukuku İdare*' (Administrative Law), written by *İbrahim Hakkı* in 1890, is recognized as the first textbook on Turkish administrative law. This two-volume book was compiled from lecture notes on administrative law taught at the School of Civil Service (*Mekteb-i Fünun-u Mülkiye*) and the School of Law (*Mekteb-i Hukuk*). Akıllıoğlu (1983, p.69) writes that the book, based on the textbooks of the French scholars of the time, was mainly written with a descriptive approach to introduce administrative legislation of the 19th reform movement to the students.

According to Heper and Berkman (1979, p.311), administrative law courses were at the forefront and covered all issues concerning administration, as modernization reforms were carried out via legal instruments. This also resembled the model state of

[19] The school, which is the origin of Istanbul Law Faculty, was initially affiliated with the Ministry of Justice after the 2nd Constitutional Monarchy; the school was included in Darülfünun, today's Istanbul University, the University of the period (Akkaya-Kia, 2012).

France, where administrative matters were included within the scope of administrative law courses. It is, therefore, difficult to talk about the existence of an autonomous study and teaching of administrative science in the Ottoman period.

On the other hand, Keskin (2006, p.3) asserts that contrary to widespread assumption, which dates the beginning of the public administration discipline in Turkey to the 1950s (Keskin, 2006, p.2), studies and teaching on the administrative phenomenon started much earlier in Turkey. Analyzing the syllabus of the Ottoman period School of Civil Service, Keskin wrote that the courses titled "Administration of Civilized Countries," "Administrative Affairs," "General Administrative Procedure," and "Things Related to Administration" confirm that administrative science was taught during the Ottoman reforms. In another study, Keskin (2010, p.182) mentions an article titled *Social Sciences and Administrative Science*[20], published in the Journal of *Mülkiye* dated December 1909, and argues that this article proves pre-1950 studies of administrative science.

As argued by Balta (1966, p.51), public law in general and administrative law in particular did not see notable progress until the Republican period. Since administrative jurisdiction and administrative law developed simultaneously, the actual development of administrative law took place after 1927, when the Council of State became a full-fledged administrative court and began to rule precedents that formed the corpus of Turkish administrative law. The newly developed public law and administrative law also encompassed the topics concerning public administration.

Throughout the Ottoman State, attempts to limit and control the sultan's power were unsuccessful. However, the era did witness the introduction of new principles of Westernization and modernization, particularly in the realms of law and governmental administration. The establishment of the Council of State was a significant manifestation of these principles, as it played a crucial role in shaping the legal and administrative framework of the Ottoman State and the Turkish Republic. The study and teaching of the legal and administrative structure of Turkey were primarily

[20] The original title of the article, written by Bedii Nuri, an administrator in the Ottoman provincial administration: *Ulum-ı İçtimaiyye ve Fenn-i İdare* (Keskin, 2010, p.182).

dominated by administrative law rather than separate studies of administrative science.

4.3. Republican Period: Secularization of Law and Administration

During the War of Independence in Turkey, the political power of the Ottoman administration was dissolved, and the Grand National Assembly (GNA) was established in 1920. In 1921, the Assembly Government, which held both legislative and executive powers, enacted a brief legislation called the Basic Law of Organization (*Teşkilat-ı Esasiye*)[21]. This law, a cornerstone in the foundation of the Turkish State, not only marked the first written constitution but also became the legal framework of the new Assembly. However, as argued by Oder (2018, p.63), this constitution, peculiar to the transitional period, was not designed to restrict political power but rather to construct the GNA as the new political authority that arose during the War of Independence. This law, based on the principle of national sovereignty, granted the Assembly 'extraordinary powers' (Özbudun, 1987, p.25), consolidating the legislative and executive powers in the Assembly and later extending to include judicial power with the establishment of the Courts of Independence (*İstiklal Mahkemeleri*). However, as Ünsal (1980, p.54) points out, the decision-making process in practice was led by the president of the executive deputies (*İcra Vekilleri Heyeti*), who was also the president of the Assembly. This was done with the assistance of the bureaucrats of that time and under the influence of the strong executive tradition inherited from the Ottoman State.

According to Aral (1973, p.43), the principle of separation of justice and administration, introduced during the Ottoman reforms, remained unchanged under the Assembly Government of 1920. Until it was abolished in 1922, the İstanbul Council of State, a crucial institution in the Ottoman administrative system, maintained its operation, except for administrative affairs and litigation in the regions under the jurisdiction of the Assembly Government. To carry out the duties of the Council of State and implement laws in these regions, the Assembly created the Civil Servant Investigation Committee (*Memurin Muhakematı Encümeni*) and the Civil Servant Investigation Board (*Memurin Muhakematı Heyeti*), comprised of members elected from among the members of parliament through Law on Civil Servant Investigations

[21] Law No. 85 on the Principles of Organization (Teşkilat-ı Esasiye) dated 20.01.1921.

(*Memurun Muhahematı Kanunu*). These commissions operated within the Assembly, but their decisions on administrative disputes did not require the Assembly's approval. However, these councils, which assumed the functions of the Council of State, dealt mainly with administrative and criminal matters during this transitional period.

Law on Provincial General Administration (*İdareyi Umumiyei Vilayat*) also granted specific responsibilities to the Civil Servant Investigation Board. Subsequently, the parliament passed a resolution empowering the Board of Deputies to cancel mining licenses and concessions due to non-payment or agreement termination until the new Council of State was formed. Another parliamentary decision tasked the Civil Servant Investigation Board with resolving unresolved disputes in the absence of the Council of State. Although some disputes within the Assembly Government were settled by the commissions and the Board of Deputies, many disputes remained unresolved until the Republican Council of State was established (Aral, 1973, p.55). Aral (1973, p.75) also noted that an effort was made during the War of Independence to establish a Council of State to judge civil servants. However, the war made it difficult to establish new institutions. Similarly, in a parliamentary speech at the GNA, Ataturk expressed the need for the Council of State to handle administrative and economic affairs.

According to Sencer (1992, p.101-102), the Assembly Government system, founded on the principle of national sovereignty, took a conciliatory approach towards the Caliphate and Sultanate despite their incompatibility with this principle. As a result, the Assembly officially declared the Republic as the appropriate form of state for the new society in October 1923. However, the Caliphate was not abolished until March 1924, and the Constitution was amended to specify that the form of government was a republic, with the President being elected from among the Assembly's members.

Following the establishment of the Republic, a comprehensive set of reforms was implemented in both law and administration. These reforms were regarded as a tool for modernizing, westernizing, and secularizing society. As with late Ottoman reforms, these reforms incorporated legal practices from various European states[22] to secularize governmental and societal systems. However, distinct from preceding

[22] The Civil Code from Switzerland, The Penal Code from Italy, the Commercial Code from Germany, the Civil Procedure Code from Switzerland, the Criminal Procedure from Germany, and the Maritime Code from Germany" (Örücü, 1999, p.32).

Ottoman reforms, the Republican period's reforms marked a significant shift by entirely replacing Islamic law and its institutions with a secular state system based on Western laws. This shift from the 'dualist system' of the 19th-century reforms, where Islamic law and its institutions coexisted, to the 'monist period' of the Republican era, as described by Onar (1966, p.716). Monist system relies on the complete replacement of the rules and institutions of law of a religious character with laic westernized laws and institutions.

In 1924, the Turkish Grand National Assembly (TGNA) introduced a new Constitution to meet the needs of the Republic. The 1924 Constitution maintained the essential principles of the 1921 Constitution, including the idea of national sovereignty and the dominance of the legislative. The Assembly had legislative and executive authority, but this time, while the parliament undertook the legislative power itself, the executive power was exercised through the president and the executive deputies to be elected from among its members. In this system, the legislative branch had significant control over the executive, while the executive was less capable. The Assembly had the power to dismiss the Council of Ministers; however, the Council of Ministers could not dissolve the Assembly for new elections. According to Özbudun (1987, p. 26), the Assembly under the 1924 Constitution demonstrated the traits of the 'government by assembly' rather than the parliamentary regime regarding the centrality of the legislative vis-à-vis the executive and the judiciary. Owing to the absence of a strict separation of powers, the Constitution referred to as a 'soft separation of powers' (Balta, 1972, p.67). As Oder (2018, p.63) points out, the 1924 Constitution represented a significant milestone in the "convergence towards liberal democratic constitutionalism." However, its scope was limited to being merely a "legal framework for implementing the Republican reforms." Notably, the Constitution neglected to establish a Constitutional Court, a gap in the legal system that would later have significant implications.

The Constitution stipulated the establishment of the Council of State to conduct judicial review of administrative actions. As Gözübüyük (1961, p.23) stated, Turkey's administrative judicial system is unique in that it is based on the Constitution, unlike in France and the United States. According to Akıllıoğlu (1995, p.154), this has also resulted in a less flexible administrative jurisdiction in Turkey compared to France.

Furthermore, constitutional regulation is a consequence of expanding scope of governmental administration in the 1961 and 1982 constitutions compared to the 1924 Constitution. According to Azrak (1992, p.323), there is a strong connection between administrative law and constitutional law. It has been embodied in an 'aphorism' in the German administrative law scholarship that "administrative law is concretized constitutional law." Azrak (1992, p.323) further emphasizes that "the legislative branch and administrative bodies continuously concretize the Constitution(al) (law)." Thus, it is crucial to examine the administrative judiciary in Turkey through the lens of constitutional processes to comprehend its function and historical development.

4.3.1. The 1924 Constitution: Re-establishment of the Council of State

In Turkey, the emergence of administrative law as a distinct legal field can be traced back to the establishment of the Council of State and the introduction of administrative law courses during the Ottoman Reforms of the 19th century. However, it was not until 1927, during the Republican period, that the Council of State began functioning as a judicial body, and the executive and administrative bodies were subject to judicial review. Mimaroğlu (1945, p.7) asserted that the İstanbul Council of State, which originated in the Sultanate era, was initially hesitant to embrace the concept of administrative judiciary in the modern sense. Nevertheless, it was still a positive step towards Westernization despite the practice of 'retained justice.' Similarly, Özyörük (1973, p.155) argued that there is no correlation between the Ottoman Council of State and the Republican period Council of State. This is because the Ottoman period lacked the necessary conditions required for the development of judicial review of administration by administrative courts and the field of administrative law, such as the constitutional principle of separation of powers and the expanding role of the state in social and economic spheres that constitute public services.

Tan (2020, p.678) states that in 1923, the government submitted a bill to the TGNA to establish a Council of State with competence of administrative jurisdiction. However, the 1924 Constitution was adopted before the bill was enacted. Olcay (2013, p.17) reported that some members of the Assembly were initially against its establishment during the Republican period as they viewed it as a symbol of the previous imperial era. As Duran (1981, p.22-23) cited in parliamentary discussions on Article 51 of the 1924 Constitution, which proposed the formation of the Council of State, a deputy

asked, “The Council of State is being formed here. Is this the Council of State with scandals we used to know or another Council of State?” In response to the question, the commission’s rapporteur clarified:

> ...as you know, there is a Council of State Law in the Internal Affairs Committee. This law has been analyzed for a long time to arrive at outstanding principles. The Council of State, as we understand it, is not the Council of State one where seats are allocated to one or the other as a sinecure. This is our intention (Gözübüyük and Sezgin, 1957, cited in Duran, 1981, p.22-23).

Consequently, the Assembly decided to create the Council of State, including Article 51 in the 1924 Constitution and passing Law No. 669[23] in 1925, which reestablished the Council of State.

Article 51 of Chapter 3 of the 1924 Constitution[24], the first law regulating the Council of State in the Republican period, stipulated the creation of the Council of State, which was tasked with dealing with administrative cases and disputes. The Constitutional Committee’s report on Article 51 was brief, noting that it “….pertained to the executive branch of the government and no more than an outline of standard procedures that apply in any constitutional and republican state” (Gözübüyük and Sezgin, 1957, cited in Duran, 1981, p.22).

The Constitution designed the Council of State to be a multi-faceted hybrid institution that served administrative, advisory, and judicial purposes. Its members and president were appointed by the Assembly, and it was regulated in the executive section of the Constitution, not the judicial section. The Council of State was attached to the Council of Ministers. According to Ünsal (1980, p.76-77), the framers of the Constitution intended the Council of State to be an auxiliary organization and an advisory body to the administration. They considered its judicial function secondary, which is why it was regulated in the executive section of the Constitution. He also underlined the ‘contradiction’ in the election of the president and members of the Council of State by the TGNA, which was interwoven with political power in many respects. This situation threatened the requirement to keep the judiciary away from the influence of politics. According to Ünsal, in this way, parliamentary supremacy had a paralyzing

[23] Law No.669 Law on the Council of State (*Devlet Şürası Kanunu*), dated 23.11.1925, published in Official Gazette on 07.12.1925-No.238.

[24] Law No. 491 on the Principles of Organization (*Teşkilat-ı Esasiye Kanunu*) dated 20.04.1924.

effect on the principles of judicial independence and judicial review of the administration by an independent court, raising questions on the position of the Council of State vis-à-vis the legislative and executive branches, which are identified with political power.

In 1925, Law No. 669[25] was passed to regulate the organization and functioning of the Council of State. However, the Republican Council of State[26] started to operate in 1927[27]. According to Law No. 669, the Council of State had three administrative chambers: the Reorganization, the Civil Service, the Finance and Zoning, and one case chamber (Alan, 1998, p. 519). This law brought about some significant changes, including the establishment of an independent chamber to hear administrative cases - something that had been missing in the İstanbul Council of State. In addition, the law made it clear that the decisions of the Council of State in these administrative cases were binding without requiring approval from any other authority. As Şenlen (1994, p. 407) explained, this marked a shift from the retained justice system of the Ottoman era to the delegated justice system (*justice délégue*). This was a system where the Council of State was granted the authority to decide on administrative cases without requiring approval from other authorities, similar to the French *Conseil d'état*. Over time, the number of court chambers increased due to the growing judicial responsibilities. This transformed the traditional role of the Council of State from one of consultation and legislation to one that addresses judicial issues. This shift represents a change in the status and functions of the Council of State. The Constitution's words of 'administrative cases and disputes' indicated the existence of an administrative judiciary separate from the civil judiciary. Consequently, the Council of State during the Republican era was known more for its judicial aspect than its administrative and advisory functions (Oytan, 1985a, p.76). During the discussions

[25] This law was amended by Law No. 1859, dated 1931, increasing the number of case departments to two. This Law was also amended by Law No. 3546, dated 1938, increasing the number of case departments to four. Law No. 3546 was amended by Law No. 4904 of 1939, and Law No. 4904 was amended by Law No. 7354 of 1959. With these amendments, the number of staff and departments was increased, and the backlog of cases was tried to be solved (Şenlen, 1994, p.407-408).

[26] It is Situated in Ankara, the capital city of the Republic, not in Istanbul, which is associated with the Ottoman Sultanate.

[27] On 23 June 1927, its members were elected by the TGNA, and it started work on 6 July 1927 (Alan, 1998, pp.518-519).

of Law No.3546 of 1938, as (Başpınar, 1967,p.8) quotes, the Council of Justice highlighted that "governments were not held accountable before the courts for their administrative actions in the pre-Republican era. They were seen as metaphysical entities, not responsible to individuals for their unlawful decisions." The administrative jurisdiction system was established to ensure the principle of legality outlined in the Constitution, creating a rule of law that obliges political, economic, and social life to operate within the framework of legal rules.

In 1929, the Law on Provincial Administration reintroduced the provincial administrative boards of the Ottoman era. These boards primarily functioned as administrative organizations dealing with administrative cases, serving as first-instance administrative courts until the administrative judiciary reform of 1982. This reform established first-instance administrative and tax courts. Prior to the reform, the provincial and district administrative boards operated as the first-instance administrative courts (Yıldız, 2018, p.211).

In 1938, a new Law on the Council of State numbered 3546[28] entered into force. According to its reasoning, the primary objective of this law was to improve the efficiency and functionality of the Council of State. According to this law, the Council of State was affiliated with the Prime Ministry. Its members are elected by the TGNA. However, in terms of its administrative tasks, it is an independent organization organized outside the central administration; its members are not subject to the administrative hierarchy. Chambers of the Council of State, which was regulated under the section of the executive in the Constitution, have the qualifications and powers of independent courts. Concerning its judicial duties, it has its own jurisdiction procedure but may employ judicial procedures of private law when necessary (Alan, 1998, p.519). Thus, the TGNA decision of 1934, which settled the debate on whether the rulings of the Council of State were final court judgments, became a provision of law by being included in the Law on the Council of State.

As the first president of the Council of State, Mimaroğlu (1945, p.7) wrote that the Council of State's legislation was adapted from the French *Conseil d'état*. Like its

[28] Law No.3546 Law on Council of State (*Devlet Şurası Kanunu*) dated 21.07.1938, published in Official Gazette on 21.07.1938. This law underwent several amendments through Law No. 4944 of 146, Law No. 7354 of 1959, and Law No. 20 of 1960 (Alan, 1998, p.519).

French counterpart, the Republican Council of State was an administrative court associated with the executive branch. The Council of State also heavily relied on principles of French administrative law, including public service, administrative action, administrative contract, and excess of authority, as highlighted by Örücü (2000, p.683). However, Balta (1966, p.51) emphasizes that the Turkish Council of State functioned differently from its French roots in certain respects, primarily due to the unique circumstances of Turkish jurisprudence and political environment.

The inclusion of the Council of State's judicial review in the Constitution was an attempt to concretize the principle of the rule of law. Nevertheless, the Constitution neglected to establish a Constitutional Court to safeguard essential rights and scrutinize the constitutionality of laws, which is a necessary element of the principle of the rule of law. Özbudun (2011, p.22-23) explains the lack of the Constitutional Court by associating it with the concept of parliamentary supremacy. The idea of supremacy of parliament is rooted in the majoritarian democracy espoused by Rousseau, which played a fundamental role in the French and Turkish Revolutions. Under this view, the Constitution regarded the general will as the ultimate source of sovereignty, with the legislative body serving as its manifestation. Laws were deemed self-explanatory and required no interpretation beyond the parliamentary context, with the practice of legislative interpretation serving as the mechanism for giving them meaning. This belief also gave way to the view that any limitations on the legislative process would hinder the national will. Consequently, no checks and balances mechanism existed for the legislative branch.

Additionally, as highlighted by Sencer (1992, p.109), although the Constitution envisaged the judiciary as a power, in practice, the independence of the judiciary from the legislative and executive branches was not always provided, leading to conflicts when their powers overlapped. Laws granting powers to the executive branch caused significant friction between the (administrative) judiciary and the executive throughout the period of the 1924 Constitution. According to Özbudun (1987, p.26-27), the tension between the executive and administrative judiciary arose due to the constitutional superiority of the Assembly, resulting in an uneven distribution of power in the political practice. Notably, the ruling party, which holds the majority in parliament, utilized the current electoral system of the period and legislative measures

to establish dominance in the executive branch of government. As a result, the executive branch exercised extensive power, supported by an authoritarian leadership style and manipulation of party discipline.

In summary, the Council of State was established under the 1924 Constitution to conduct judicial control of the executive and administration. However, the distribution of powers designed by the Constitution resulted in the weakness of the (administrative) judiciary, impeding its ability to achieve this objective. More specifically, first, the legislative, fused with the executive, imposed legislative restraints (*yasama kısıntısı*) (Gözübüyük, 1995, pp.304-305), preventing certain administrative acts from being reviewed by the Council of State. Second, the Council of State, which remained hesitant vis-à-vis executive/legislative, exercised judicial self-restraint (*yargı kısıntısı*) (2020, p.686) through the category of acts of government (*hükümet tasarrufları*). Balta (Balta, 1968-1970, cited in Gözübüyük,1995, pp.305-306) names the former 'principle restraint' and the latter 'legal restraint.' Third, restrictions on the Council of State through constitutional provisions (Günday, 2022, p.50) have been ever-increasingly the case since the 1971 constitutional amendments.

4.3.1.1. The Ankara Law School

During the Tanzimat period, the reception of Western laws evolved into a legal revolution aimed at ensuring political, economic, and legal independence with the establishment of the TGNA. After the proclamation of the Republic and the adoption of secularism, the continental European legal framework was firmly established in Turkish jurisdiction, along with its concepts and institutions (Örsten-Esirgen, 2019, p.433). The opening of the Ankara Faculty of Law, alongside the widespread codification and reception movements, was a significant development in the history of Republican law. The Ankara Law School is considered "the most tangible symbol of the legal revolution," completely replacing Ottoman legal tradition (Mumcu, 1995, p.541).

As Mumcu (1995, p.548) writes, Atatürk expressed his commitment to a legal revolution and emphasized the necessity of establishing a law faculty to train lawyers to implement the new secular laws. The School of Law in İstanbul, established during the Tanzimat period and later affiliated with the *Darulfünun*, Ottoman University,

trained many lawyers. However, most of its graduates and teachers were critical of the newly established legal system. In response, Ankara Law School[29] was founded in 1925 under the Ministry of Justice and carried out its educational activities in the TGNA building. It was located in Ankara, the capital of the newly established republic (Mumcu, 1995, pp.549-550). As the first institution of higher education in the Republic, it was considered an instrument for educating lawyers who embraced the philosophy of Republican law based on secularism. In the opening speech of the school, Atatürk stated that:

> We are attempting to uproot the old principles of law by formulating completely new laws. We are establishing these institutions to educate a new generation of jurists with new principles from the beginning (Bozkurt, 1991, cited in Erözden, 2010, p.10).

These 'new principles' of law, as envisioned by Atatürk, were based on the principles of secularism, equality before the law, and justice and were a fundamental part of the legal revolution in Turkey.

Due to the University Reform in 1933, the Ottoman University *Darülfünun* underwent a transformation and was replaced by İstanbul University. As part of this restructuring, the İstanbul School of Law became affiliated with İstanbul University. Additionally, the School of Civil Service, previously affiliated with *Darülfünun*, was relocated to Ankara in 1936 and renamed the School of Political Sciences (Aykaç, 2003, p.51). While Ankara Law School aimed to educate lawyers, the School of Political Sciences in Ankara was dedicated to training bureaucrats for the Republican State.

4.3.1.2. Early Years of the Council of State: 'Identity Crisis'

The Council of State, a pivotal institution in the Turkish administrative and judicial system, was established in 1927. As stipulated by the Constitution, its primary function was to conduct judicial review of the executive and administrative authorities. However, in its early years, the Council of State was hesitant to review administrative acts and actions. Oytan (1985a, p.77) attributes this hesitancy to historical reasons rooted in the philosophy of the 1924 Constitution.

[29] Ankara Law School became a faculty in 1927 and was affiliated with the Ministry of National Education in 1941 and Ankara University in 1946.

According to Oytan (1985a, p.77-78), during the formative years, the Assembly was primarily composed of secular, western-minded, and intellectual civil servants who actively participated in the War of Independence and the foundation of the Republic. This group worked harmoniously across the legislative, executive, and judicial branches to achieve the Republic's development program and reforms. The 1924

Constitution granted the TGNA broad discretion, in line with the principle of national sovereignty and the system of the Assembly government, such as interpreting the meaning of the laws it enacted. This structure minimized conflicts among the organs of the state.

On the contrary, according to Ünsal (1980, p.77), the Council of State's expanding power of judicial review had disturbed political power. The first significant clash between the Council of State and the administration occurred in 1928, just a year after the Council of State became operational. In response to a query from the Council of State regarding the review of applications from individuals who participated in the War of Independence but were not promoted in accordance with relevant law, the TGNA ruled that this would not be within the jurisdiction of the Council of State, through its interpretation decision. This interpretation decision of TGNA created the category of acts of government in Turkey. Similarly, the Council of State sought clarification from the TGNA on the extent of its powers under the founding law, following the Ministry of National Defense's claim that the Council of State was not authorized to review matters on military personnel. The parliamentary interpretation narrowed the scope of the Council of State's jurisdiction, stating that military personnel could not seek a remedy through the Council of State. Subsequently, Law No. 2515 eliminated the possibility of judicial recourse for retired military officers based on their records. In addition to all these, according to Ünsal (1980, p.79), on various occasions, political power tends to hold the Council of State in contempt, accusing it of protecting the unjust by prolonging cases and causing additional burdens due to applications.

Furthermore, in the early years of the Council of State, litigants could appeal against the decisions of the Council of State to the Petition Commission of TGNA. The Commission had the power to overturn the decisions of the Council of State, which significantly impacted its authority and raised questions about its status as an

independent court (Oytan, 1985a, p.77-78). Moreover, considering that the TGNA appoints the President and members of the Council of State, the TGNA's broad leverage over the Council of State had a 'discouraging' effect on the Council of State, as Oytan (1985a, p.77) asserted. The Petition Commission's rulings often resulted in favor of the claimants (Duran, 1981, p. 38). However, an appeal filed to TGNA, which objected to an overturned decision of the Council of State by the TGNA Petition Commission, triggered a debate about whether the Council of State was an independent court or not. The Constitutional Commission of TGNA analyzed this issue as a 'question of unconstitutionality,' which sparked pro and con arguments in the media and public opinion. In April 1934, TGNA released a report confirming the judicial authority of the Council of State's judicial chambers, which were independent courts authorized to rule final judgments. TGNA's interpretative decision (No. 803[30]) stated, "The Case Chambers of the Council of State have judicial functions and are qualified and authorized as an independent court." This decision abolished the option to file a complaint against decisions made by the Council of State (Mimaroğlu, 1945, p.20; Olcay, 2013, p.18).

However, according to Duran (1981, p.38), this debate, which continued until 1934, undermined the reputation and *raison d'être* of the Council of State's function of judicial review of the executive an administrative acts and actions as a separate administrative court. According to Duran (1981, p.37-38), this situation is a matter of debate even within the TGNA since the TGNA, which worked on the basis of unity of powers under the extraordinary conditions of the War of Independence, still considers itself having the power to control the judiciary. Mimaroğlu (1945, p.18,21, on the other hand, interpreted the perception that the decisions of the Council of State need to be approved by the TGNA as a misconception that the Council of State was still ruling in line with the principle of retained justice as it did in the Ottoman period. Regardless, this led to a conception that decisions of the Council of State were reversible administrative decisions rather than final judicial judgments.

As Olcay (2013, p.18) pointed out, between 1927 and 1934, the Council of State endeavored with self-discovery, facing an 'identity crisis,' which refers to its struggle

[30] TGNA's interpretative decision, dated April 12, 1934, No. 803, published in Official Gazette: April 17, 1934, No. 2678.

to define its role and authority, particularly concerning the TGNA and the executive branch. Besides the fact that it was regulated under the executive section of the Constitution instead of the judiciary section, the TGNA had the option to overturn the decisions of the Council of State, causing significant confusion and uncertainty on the status of the Council of State. Duran's analysis (1981) supports this idea, noting that the Journal of Decisions (*Kararlar Mecmuası*)[31], which began publishing in 1937, does not include any pre-1934 decisions of the Council of State. This indicates that the TGNA's interpretive decision No. 803 of 1934 was a critical moment in the history of administrative justice.

In addition to these constitutional and governmental challenges, Mimaroğlu[32] documented internal struggles within the Council of State in a booklet[33] he wrote. In the preface, Mimaroğlu (1945, p.3) stated that his purpose was to provide "a balance sheet of duties and self-accounting," documenting the Council of State's commendable efforts to establish the judicial review of administration in Turkey and defend against the 'criticisms and satires' it faced at the time. These struggles, detailed in the booklet, further highlight the complexity the Council of State confronted in its early years and its efforts to define its role and responsibilities.

According to Mimaroğlu (1945, p.10), the Council of State 'got confused' with administrative lawsuits when they were first introduced in Turkey. Mimaroğlu identifies several reasons for this, including its reluctance to conduct strict legality reviews against state institutions, delays caused by excessive adherence to procedural rules, abuse of discretionary power of judges by dissatisfied litigants, and a lack of experienced staff. Mimaroğlu (1945, p.9-14) notes that complaints from litigants[34],

[31] The journal was later renamed the Journal of Council of State Decisions (*Danıştay Kararlar Dergisi*) (Duran, 1981, p.36).

[32] A graduate of the Civil Service School *(Mülkiye),* Reşat Mimaroğlu worked at the Council of State from 1927 until 1938, when he voluntarily retired (https://www.danistay.gov.tr/icerik/32, October 21, 2023).

[33] The booklet, consisting of 33 pages, titled Cumhuriyet Devrinde Danıştay ve İdari Davalar (Council of State and Administrative Litigation in the Republican Era) was written in 1938 following the retirement of Mimaroğlu and published in 1945.

[34] Mimaroğlu (1945, p.13) wrote that complaints about delays in court cases were reflected in writing on "notepads in the courts' waiting rooms" and "even on the wood of the desks." He stated that these messages later turned into thank-you.

scholars, and the press about delays in the work of the Council of State were overcome in 1934, efforts from the staff and a law amendment enacted through intense debates in the TGNA in 1931[35].

However, as the booklet reveals, the criticisms persisted, particularly in the aftermath of the lawsuits concluded against the government. While resistance on the ministerial level came from only one ministry, lower-level administrators were more likely to resist implementing decisions of the Council of State. Mimaroğlu (1945, p.14) noted that such issues were resolved through the intervention of Prime Minister İsmet İnönü.

Other criticisms mentioned in the booklet (1945, 21-28) were the inconsistency and lack of scientific and just decisions of the Council of State. The judges of the Council of State were labeled as 'accidental judges' (*tesadüfi hakimler*) "who appeared before a court bench for the first time in their lives." According to Mimaroğlu (1945, p.22), these claims were baseless, as the judges were law and political science graduates and academics carefully selected for their expertise in administrative law. For Mimaroğlu (1945, p.24), the incompetency in administrative law/public law mainly stemmed from the lawyers involved in the case.

According to Duran (1981, p.22), administrators and the executive branch were previously exempt from judicial review and, therefore, accustomed to making decisions with broad discretionary power. In this regard, their reaction to judicial review of their acts and actions was understandable. On the other hand, it was also understandable for individuals affected by the acts and actions of the administrators, based on broad discretion, during the Republican Revolution to express their discontent. Duran (1981, p.24-25) noted that when the Council of State was formed, there was a lack of administrative judiciary tradition and trained personnel inherited from the Ottoman Empire, resulting in judges' tendency to apply civil court procedures. Duran (1982, p.435) also observed that the Council of State judges, who had varying backgrounds in judicial and administrative affairs, experienced hesitancy and confusion in the methods and procedures that caused delays. This "contradiction and incompatibility" between the two backgrounds ultimately led to a "convergence

[35] Law No.1859, amending Law on the Council of State, dated 21.07.1931.

of the administrative courts towards the civil courts" regarding working methods and philosophy (Duran, 1981, p.25). As Duran (1981, p.39) emphasized, establishing the concept of judicial review of the administration by the Council of State in Turkey was challenging, requiring significant "acclimatization and adaptation efforts" between 1927 and 1938.

As quoted from Oytan (1985, pp.23-24), a 1955 study (conducted by Vance and Erem) analyzed the decisions of the case chambers of the Council of State between 1947 and 1954, when the 1924 Constitution was in force. Based on the survey results, Oytan (1985, pp.24-25) asserted that over 50% of the cases were associated with tax disputes. Additionally, only 32% of the remaining cases were annulled. As a result, Oytan concluded that the Council of State functioned primarily as a 'tax court' and criticized the administration for complaining about the rulings of the Council of State.

4.3.1.3. Acts of Government: Self-Restraint of the Council of State

During the era of the 1924 Constitution, certain executive acts were deemed acts of government and exempted from judicial review by the Council of State, like the early years of the French *Conseil d'état*. These transactions, categorized as acts of government, were regarded as unsuitable for judicial review due to their nature as they were concerned with 'the high politics of the state' and 'the supreme government of the state.' The category of acts of government is not specific to the Continental European jurisprudence, to which Turkey and France belong. It is practiced in countries of Anglo-American jurisprudence such as the United Kingdom, where it is referred to as 'acts of state' or 'prerogative acts' (Özbudun, 1961, p.337), and in the United States, where it is termed as 'political questions' (Schwartz, 2006, p.162).

As Azrak (2004, p.121) explains, the judiciary considered the category of acts of government unreviewable based on legal criteria due to their "predominantly political character." These acts, commonly referenced in the pre-1961 period rulings of the Turkish Council of State, emerged with the impact of the French doctrine of acts of government (*acte de gouvernement*), which granted immunity to certain executive/administrative acts from judicial review (Günday, 2022, p.60).

According to Giritli's (1958, p.15-16) seminal study on acts of government, the concept was first introduced in France during the early 19th century by the

jurisprudence of the French *Conseil d'état*. During the Restoration period, the *Conseil d'état,* established by Napoleon, encountered severe criticism despite its practice of retained justice. To maintain its existence, the *Conseil d'état* limited its own judicial authority by stating that it did not have jurisdiction in certain transactions. However, efforts to determine unique criteria for acts of government, such as political motive and the distinction between governing and administering, were unsuccessful in French administrative law. Instead, by creating a list, a pragmatic approach based on judgments of the *Conseil d'état* was used to determine which acts would be classified as acts of government. Consequently, the *French Conseil d'état* has classified acts relating to the legislative-executive relationship, foreign relations, and war as acts of government.

Feyzioğlu (1966, p.156) contends that French administrative law scholars have opposed the doctrine of the acts of government. They argued that this doctrine impeded the *Conseil d'état's* ability to review certain administration acts to ensure compliance with the law, which contradicts the principle of the rule of law. These scholars viewed acts of government as a 'blemish' in the rule of law. As Tan (2020, p.683) pointed out, over time, acts of government have become less frequent and seldom practiced in France[36].

The process of creating acts of government in Turkey took a different path from that of France, as Azrak (2004, p.121) noted. The TGNA's interpretative decision no. 457, dated 1928, excluded administrative actions from judicial review if they were based on the Law of 1924 concerning rewarding those who participated in the War of Independence. The TGNA ruled that the Council of State had no authority in disputes arising from this law. Ünsal (1980, p.77) noted that this decision, coupled with the Council of State's 1928 interpretation, which did not authorize the Council of State in the cases involving military personnel, marked one of the earliest instances of conflict between the Council of State and the government, sparking a debate on the scope of judicial review of administration. According to Giritli (1958, p.73), the process that led to the emergence of the category of act of government in Turkey came into being as a result of the fact that the Council of State was the court with broad jurisdiction

[36] In 1995, the President's decision to start nuclear testing was accepted as an act of government (Tan, 2020, p. 683).

over administrative disputes; however, the government and the administrative authorities were unaccustomed to judicial review leading to debates on whether certain acts should be subject to judicial review or not. For Ünsal (1980, p.80), the efforts of the government to limit the Council of State's judicial oversight were reciprocated by the Council of State's self-limitation through its jurisprudence, which made up the majority of acts of government in Turkey and resembled the implementation of the doctrine of acts of government in France.

According to Giritli's (1958, p.77) study, TGNA's Internal Affairs Council, Justice Council, and Government bills attempted to include the category of acts of government in the Law of Council of State numbered 3546 of 1938, despite its authority to create acts of government through its interpretative decisions. Azrak (2004, p.121) reported that during the drafting of this Law on the Council of State, the Council of Ministers included a provision in the draft law to exclude administrative actions left to the government's discretion from judicial review of administrative courts. The TGNA Justice Commission's draft also included a provision stating that "government actions taken for political expediency cannot be subject to administrative litigation." However, both proposals were ultimately removed from the bill during the TGNA General Assembly's deliberations, leaving no legal regulations on the category of acts of government implemented by the Council of State. Consequently, the category of acts of government is left to the case law of the Council of State.

Furthermore, according to Sarıca (1942, p.472), there was no established scientific, legal, or theoretical framework to distinguish acts of government from other executive actions in Turkey. In his study, Sarıca attempted to differentiate acts of government through an "a posteriori empirical basis" similar to France, believing that an "a priori theoretical method" was impossible in distinguishing acts of government. By examining the decisions of the Council of State from 1937 to 1942, he identified five general categories of transactions that qualify as acts of government (1942, p.464-470):

1. When one state takes retaliatory measures against another state.

2. The transfer of people from one region to another by the government due to sanitation, social welfare, politics, or economics, as outlined in Resettlement

Legislations numbered 2510 and 2848.

3. With TGNA's Decision No. 921, dated 1935, the government's decisions concerning foreigners who were not Turkish nationals were considered acts of government.

4. Government decisions regarding individuals who claimed to be foreigners but were determined to be Turkish citizens.

5. Government decisions regarding the deprivation of Turkish citizenship for Ottoman citizens who did not participate in the War of Independence and did not return to Turkey between 1923 and 1927 under the provisions of Law No. 1041.

In addition to these acts, Giritli's (1958, p.114-117) work on acts of government regarded "transactions related to the deportation of foreigners" as acts of government.

According to Gözübüyük (1969 cited in Ünsal, 1980, p.80), precise criteria for the category of the act of government were not fully developed, making it challenging to determine the exact scope of this concept. Gözübüyük contends that the government has sought to avoid judicial review of administrative decisions without a legal basis under the guise of the act of government. Like the French *Conseil d'état,* The Turkish Council of State had significantly narrowed the category of acts of government. In a 1952 unification decision[37], the Council of State ruled that the issue of citizenship was not an act of government. As Sarıca (1943, cited in Giritli, 1958, p.78) points out, the legislator indirectly allowed for the existence of acts of government in administrative law practice by not directly prohibiting them. The Council of State maintained a hesitant stance on the matter prior to the 1961 Constitution, which abolished the practice of the act of government. On the other hand, despite the regulation of the 1961 Constitution, debates on acts of government have resurfaced in Turkish legal and political circles, as will be further explored in subsequent sections of the thesis.

4.3.1.4. Legislative Restraints in Single Party Period

As discussed above, the 1924 Constitution granted the TGNA extensive powers on the basis of the national sovereignty and assembly government system. According to

[37] DDGK E.951/128-K.952/15 Danıştay Kararlar Dergisi, no.54-57 cited in Tan, 2020, p.684).

Özbudun (1987, p.26), this created a constitutional imbalance in favor of the legislative. During both the single-party period (1924-1946) and the multi-party period (1946-1960), this resulted in the concentration of power in the hands of the ruling party with an absolute majority in the assembly. In practice, the executive, carried out by the ruling party, and the administrative bodies were highly intertwined with legislative power. Özbudun (2011, p.22) stated that during the single-party period, the concentration of power was instrumental in carrying out republican reforms without any issues. However, the situation changed after the multi-party era that began in 1946. The unrestricted legislative power and electoral system allowed party leaders, who had a parliamentary majority, to exercise their powers without any restraint, which had suppressing effects on opposing groups. This heightened tension between the opposing RRP and the ruling DP after it came to power in 1950. Furthermore, in combination with the absence of the Constitutional Court, a mechanism to prevent unconstitutional laws, the imbalance among powers had significant implications on the relationship between the executive and the Council of State.

Azrak (2008, p.217) wrote that during the Republican People's Party (RPP) period, which remained in power after the 1946 elections, the conflict between the ruling RPP and the opposition DP grew. This led to a politicization of the governmental administration even before the pre-election period. Under the post-1946 RPP rule, some civil servants were suspended from duty and filed annulment actions before the Council of State. Some of these annulment cases were concluded in favor of the plaintiff civil servant, leading to discomfort for those in political power. In response, the government resorted to legislative restraints through ad hoc laws to bypass judicial review of the administration. The most well-known of these laws are (Akan,1950, p.6):

1. Law No. 3710 of 1939 on municipal expropriation and Law No. 3887 of 1940 had closed the way for litigation against certain administrative decisions regarding expropriation acts. The Council of State examined some of the transactions that were closed to litigation in the relevant provisions of these laws and sometimes annulled in terms of the 'purpose element' of the administrative act (Giritli, 1958, p.80).

2. Article 13 of Law No. 4505, dated 1942, known as the Wealth Tax Law, prohibited appeal to administrative or civil courts against administrative

decisions regarding tax collection. The Council of State rejected cases concerning the Wealth Tax at the initial application stage without examining the case through its consistent precedence (Giritli, 1958, p.80-81).

3. With the amendment to Law No. 3312 on the Establishment of Ministry of Foreign Affairs through the provisional Article 2 of Law No. 5250 dated 1948, civil servants dismissed for professional failures were no longer allowed to appeal. As Giritli (1958, p.82) stated, the Council of State tended to examine the administrative procedures based on Law No. 5250 rather than rejecting them at the first examination.

4. Article 39, paragraph (b) of the 5434 Pension Fund Law dated 1949 prevented annulment cases against the government's decisions to ex officio retire civil servants with 30 years of service "upon deemed necessity."

As Balta and Kubalı (1960, p.5-6) noted, during the Single-Party era in Turkey, the legislative branch had considerable power to execute reforms for the modernization and secularization of the newly formed Republic. The absence of constitutional oversight over laws and legislative restraints imposed on the Council of State by TGNA through enacting laws closing judicial remedy or legislative interpretation decisions did not cause significant issues, as the legislative organ consisted of members of a single party. Ünsal (1980, pp. 80-81) added that during this period, the Council of State did not participate in legal discussions about these laws, which closed the judicial remedy by rejecting cases based on the 'clear and absolute' provision of law, leaving no room for judicial remedy. However, in the aftermath of the transition to a multi-party system, "the Council of State became more self-confident" and attempted to narrow legislative restrains using a unique jurisprudential technique called "interpretation in harmony with the constitution[38]" (Azrak, 1992, p.330).

4.3.1.5. The Method of Interpretation in Harmony with the Constitution

Decision No.128 of 1950, issued by the General Assembly of the Council of State Chambers of Appeals[39], was a pivotal example of the method of interpretation in

[38] Anayasaya uygun yorum metodu.

[39] DDGK, E. 40/320, K: 50/128 Danıştay Kararlar Dergisi. sayı:50-53, ss.112-118.

harmony with the Constitution. As stated above, provisional Article 2 of 1948 Law No. 5250, which complements Law on the Establishment of the Ministry of Foreign Affairs, stipulates that when the services of "persons who are found to be unsuitable to remain in their posts in terms of their records" were terminated, no judicial remedy could be applied against these decisions. However, the Council of State eliminated this provision, which blocked the judicial remedy, by utilizing the method of interpretation in harmony with the Constitution that allowed for judicial review of this act (Azrak, 1992, p.329). Based on Kelsen's hierarchy of norms, this method, which means interpreting legal provisions open to multiple interpretations, is based on the principle of interpretation of the norm in accordance with constitutional norms. This method was first used by the American Supreme Court in 1821 and later by the Swiss Federal Court in 1908[40] (Azrak, 1992, pp.332).

The process leading to the utilization of this method began with the provisional Article 2 of 1948 Law No. 5250, which complements the Law on the Establishment of the Ministry of Foreign Affairs. The plaintiff, who was retired ex-officio due to incompetence according to the provisions of this law, applied for annulment, citing that Law No. 5250, which prohibits judicial remedy, is unconstitutional as it violates citizens' access to the judiciary as guaranteed by the Constitution. In the annulment case, the Council of State examined the provision that eliminates judicial review by stating that it only concerns the discretionary element of the administrative act and does not eliminate judicial review in terms of other elements and forms of the act. In this decision[41], Kemal Galip Balkar, the president speaker of the law of the Council of State[42], interpreted Article 103 as follows: "No article of the constitution ..... cannot be ignored....No law can be unconstitutional." Article 51, "…the Council of State is authorized to hear administrative cases", of the 1924 Constitution together, asserted that "…judicial review of administrative acts is the most fundamental characteristic of a law-abiding state…". It is, therefore, "impossible for the court to rule that the case cannot be heard." Balkar concluded that the law applied to the plaintiff was

[40] The Austrian Constitutional Court implemented it in 1951, and the German Federal Court and the Bavarian State Court implemented it in 1952 (Azrak, 1992, p.332).

[41] DDGK, E. 40/320, K: 50/128 Danıştay Kararlar Dergisi sayı:50-53, ss.112-118.

[42] (Baş)kanunun Sözcüsü: French *comissaire de gouvernement*, who give his own opinions about the case to the Council of State (Balta, 1966, p.73).

unconstitutional. For Ünsal (1980, p.88), this view, which states that "no one can be deprived of the right to sue according to the Constitution," was "the precursor of the 1961 Constitution".

According to Azrak (2008, p.218), the method used by the Council of State was a novel approach in the Turkish administrative judiciary to review the constitutionality of the law through administrative litigation and is known as 'interpretation in harmony with the constitution.' At the time of this ruling of the Council of State, the Constitutional Court had not yet been established, and the conception of judicial review of the constitutionality of laws had not yet been developed. Therefore, this ruling of the Council of State marked a significant turning point in the administrative jurisdiction in Turkey. Azrak (1996, p.747) describes this method as a mechanism developed "to eliminate a legislative restraint by the judiciary."

According to Azrak's (1992, p.339) study, the traditional approach to the relationship between administrative law and the Constitution assumes the 'legislative screen hypothesis,' which suggests that "there is a legislative curtain between the administrative court judge and the constitution" (1992, p.339). According to this hypothesis, administrative courts should not directly apply supra-legal norms, going beyond laws, on the grounds that laws to be used in the disputed case contradict constitutional or supra-constitutional norms such as norms of international law (Azrak, 1992, p.328). Additionally, the 'impermeable law' practice, where the legislator regulates the powers given to the administration in detail without leaving any gaps in the relevant law, is used to prevent possible disputes that may arise in the judicial review of administration while making laws regarding the administration. This practice, developed in Germany to eliminate the transition from the state of laws to the state of judges, is often criticized (1992, p.325). As a result, administrative courts are seen as mere implementors of laws rather than interpreters.

According to Azrak (1992, p.323-326), the method of interpretation in harmony with the Constitution superseded the traditional legislative screen hypothesis, which has become increasingly outdated. Rather than relying solely on the law as the 'criterion norm' for the judicial review of administrative actions, which stems from a narrow understanding of the principle of legality of administration, this new approach emphasizes applying constitutional norms, removing the 'legislative screen',

particularly in cases related to administrative acts related to fundamental rights. Considering the broader philosophy and fundamental principles of the Constitution, this method provides a more comprehensive review of administrative acts and actions.

As Azrak (1992, p.339) suggests, this critical decision method implies that in "areas where administrative law and constitutional law intersect, judges of the administrative court assume the role of substitute judge of the constitutional court." This shift in the role of administrative court judges, from mere implementors of laws to interpreters of them, sheds light on the stance of the Council of State on the constitutionality review of laws before the establishment of the Turkish Constitutional Court.

During the DP Government, from 1950 to 1960, the parliamentary majority frequently passed laws restricting judicial oversight and weakening the Council of State, as pointed out by Oytan (1985a, pp. 77-78). The Council of State used this approach to overcome barriers imposed by the legislation in the subsequent years.

4.3.1.6. Transition to Multi-Party Period: Expansion of Legislative Restraints on the Council of State

From 1924 to 1945, the RPP held a significant role as the sole party in Turkey, focusing primarily on state formation. The military and civil bureaucracy, which carried out the Kemalist Reforms, were the driving force behind this. This transitional period witnessed a comprehensive overhaul of the administrative-legal structure, including legal codes, governmental institutions, and the education of judges and civil servants, which changed in harmony with the new regime of the Republic. The post-1930 period saw the emergence of the economic and political identity of Turkey, which was enshrined in the Constitution. Until the end of World War II, the Turkish Republic followed a statist economic program accompanied by a development policy through private enterprise. The economic model, termed state capitalism, was instituted to safeguard and enhance the domestic economy vis-à-vis foreign competition. To this end, the government supported private enterprises and directly intervened in the economy or acted as an entrepreneur in areas where the private sector was unwilling to enter (Sencer, 1992, pp. 111-112).

The end of World War II in 1945 initiated a wave of social and political changes in Turkey, as it did in the rest of the world. The emerging national capital circles became

influential in politics, ultimately reshaping social and political power balance. These circles opposed the political ideology of the ruling RPP, specifically the statist economy and bureaucratic dominance. The opposition, supported by empowered capitalist circles and worldwide democratic movements, ultimately ended the single-party regime in Turkish politics. This led to the introduction of a multi-party system in 1946, leading to a shift in political power with the Democratic Party's (DP) majority victory in the 1950 elections, marking a significant turning point in Turkish political history.

Between 1946 and 1950, when the transition to a multi-party system took place but the RPP rule continued, the most discussed issue was civil servants. Since its inception, the opposition party, DP, had long criticized the bureaucracy that had become intertwined with the ruling party. They criticized the extensive powers of civil servants, their biased attitudes, and laws that favored civil servants (Tutum, 1972, p.80). Under the RPP rule, the Assembly passed the Civil Servants Law of 1926 to provide job security to bureaucrats. From the Republic's early years until the end of World War II, civil servant law generally favored civil servants who implemented the republican revolutions and held a prestigious status (Tutum, 1972, p.79).

As analyzed in Tutum's (1972, p.82-86) study, after the 1950 elections, the DP came to power with broad popular support and began implementing its policies that targeted the bureaucracy and civil servants, as well as its economic and fiscal policies. The DP's economic agenda aimed to reduce state intervention, limit the role of the state in the economy, and encourage private enterprises. The DP rule criticized the state capitalism of the single-party era as 'interventionist,' 'bureaucratic,' and "monopolistic," sparking significant tension and conflict between the DP government and the bureaucracy. The DP viewed public administration as the administrative serving nation, free from political influences. The conception of civil servants was the "civil servants in the service of the nation." The government of DP aimed to establish a civil servant cadre that aligned with its vision for public administration and civil servants by curbing the power of bureaucracy. Consequently, it began to replace civil servants who did not conform to the party's preferences, leading to growing unrest among civil servants and increasing tension between the bureaucracy and the government. The DP government, having complete control over the Assembly, passed

a series of laws affecting the job security of civil servants. Under the guise of the principle of parliamentary supremacy, which DP described as the 'national will' (Tanör, 1991, p.33), the government also prevented any legal remedies that could challenge these laws. The prohibition of purged civil servants from accessing the judiciary has engendered a discussion involving the Council of State, the DP government, and the public administration/civil servants.

4.3.1.7. Ex Officio Retirement and the Placing under the Ministerial Order

The DP government attempted to remove critical provisions of laws, which previously provided security for civil servants. This move was primarily motivated by the perceived notion that the legislation constituted an 'obstacle' in that it imposed restrictions on the government's freedom of action (Tutum, 1972, p.86). For this purpose, the legislative branch began to exclude pension transactions from judicial review. The Council of State established a consistent precedent in favor of civil servants by issuing annulment decisions based on 'the reason and purpose' of the transaction and reviewing the practice of 'placing under ministerial order' as stipulated in the 1926 Law on Civil Servants. The Council of State extended this jurisprudence, which it had developed against the practice of "being placed under the order of the ministry upon necessity" stipulated in the 1926 Civil Servant Law. This jurisprudence was extended to the annulment of the 'ex officio retirement' acts specified in Law No. 5434[43] enacted during the single-party period, triggering a conflict between the DP government and the Council of State. In his capacity as a member of parliament, a minister submitted a resolution to the TGNA arguing that "the jurisprudence of the Council of State infringed on the discretionary right of the government." The minister requested that Article 39 (B) of the Pension Fund Law be interpreted in a way that would allow the government to determine the scope of necessity and retire the civil servant for any reason it wished. In its interpretation, decision no. 1728 of 1951, the TGNA ruled in line with the minister's opinion that the Council of State cannot review 'ex officio retirement' procedures in terms of the element of reason (Giritli, 1958, pp. 82-83).

[43] Law No.5434 of the Turkish Republic Pension Fund, published in the Official Gazette on 17.06.1949-No.7235.

However, the legislative was not satisfied with this interpretation, which excluded acts of ex-officio retirement from the judicial review of the transaction's reason element. In 1953, Law No. 6122[44] was enacted, which prohibited civil servants who had retired ex officio from seeking judicial remedy against the decision. The government's authority to retire civil servants and first-instance court judges ex officio after 30 years in the profession, regardless of age, was broadened to include those who had served for 25 years. Additionally, an amendment was introduced in Article 39, which made it impossible for those who had retired ex officio to appeal to judicial bodies. It is important to note that this change did not affect the presidents, members, and speakers of law of the Council of State and the Court of Cassation. According to Tutum's (1972, p.87-90) study, the government stated in the TGNA debates that certain civil servants who had completed 25 years of service but were yet to complete 30 years had failed to meet expected performance and had caused disruptions in their service. The government suggested that if such individuals were to retire, it would create opportunities to appoint more competent personnel in their cadres. Critics of the proposed legislation contend that it would grant the government the authority to dismiss civil servants, thereby encroaching on the objectivity of the administration. They argue that this move would leave the careers of public officials subject to the whims of the government, ultimately resulting in a decline in the quality of public services.

Additionally, an amendment to Article 39 of Retirement Fund Law No. 5434 was enacted in 1954 through Law No. 6435[45]. This amendment extended the ex-officio retirement provision for university professors and the presidents and members of high courts of the Court of Cassation, Council of State, and Court of Accounts. The government asserted "the difficulty in justifying the exceptional treatment of this group" as the reason behind this amendment. During the debate on this law, many MPs raised the unconstitutionality of this provision, which eliminated judicial review of administrative acts (Tutum, 1972, p.88). However, Turkey did not yet have a

[44] Law No. 6122 on the Amendment of Certain Articles of the Turkish Republic Pension Fund Law, published in the Official Gazette on 11.07.1953-No.8455.

[45] Law No.6453 Regarding Those Who Will Be Removed from Duty by Subjecting Them to the Order of Organization to which They are Subjected, published in Official Gazette on 08.07.1954-No. 8749. Annulled by the Constitutional Court case no: 1962/86.

Constitutional Court to review the constitutionality of laws. Moreover, it rendered the Council of State, responsible for reviewing administrative procedures, insecure in the face of the government's ex officio retirement and recruitment of its presidents and members.

Following these laws, which reduced the period for ex officio retirement from 30 years to 25 years and extended the scope of this regulation, including university professors and high court members, the government attempted to close the judicial remedy against acts of placing ministerial order. To address this, a bill, which sparked intense debates in TGNA, was prepared, with advocates arguing that bureaucratic obstacles in the country were increasing and a shift in civil servant mentality was necessary. They argued that the current system led to complacency and weakened service and that some privileges given to civil servants were hindering productivity. The proposed bill would grant the government the authority to remove unproductive civil servants, and it was argued that placing them under ministerial order would have a positive 'disciplining' effect. The article's reasoning stated that the Council of State had tried to substitute its own discretion for the administration's, leading to the practice of placing under ministerial order becoming unworkable, as noted by Tutum (1972, p.90). Tutum argued that this was the first time the Council of State had expressed the idea of complaining about judicial control.

As Ünsal (1980, p.80) points out, these amendments restricting the authority of the Council of State indicated that the DP government was afraid of judicial review. During the DP period, many civil servants were retired "as deemed necessary." According to the DP, these actions were acts of government and not suitable for judicial review. As asserted by Ünsal (1980, p.94), by limiting the independence of judges, the DP government further exacerbated the existing tension between the judiciary and political power. This was evidenced by the establishment of the Parliamentary Investigation Commission, which indicated the lack of trust in the courts and the takeover of the judicial function through the Assembly. For Ünsal, this was reinforced by the fact that the ruling DP saw the judiciary as an auxiliary power of the opposition party RPP and that there was no constitutional court to prevent the implementation of these unconstitutional laws.

The legislative branch's efforts revealed the negative consequences stemming from

the imbalance of power created between the different organs of the state under the 1924 Constitution. While the Constitution was designed to meet the unique needs of the Republic's founding period, it became clear that granting broad discretion to the legislative branch based on national sovereignty and parliamentary supremacy may have its drawbacks. The constitution, which granted broad powers to the legislative and the executive, which was intertwined with the legislative, paved the way for the arbitrary rule of political power. As Oder (2018, p.63) argued, while the Constitution was initially functional in providing a needed legal framework for Republic reforms, during the multi-party era, it ultimately became a basis for antidemocratic practices of the government. Mainly, the absence of guarantees of judicial independence, coupled with the lack of a mechanism for judicial review of the constitutionality of laws, resulted in the Assembly passing unconstitutional laws. This gave rise to various challenges within the multi-party system.

Up to 1960, the DP government faced growing opposition as it increasingly used oppressive measures such as turning provinces that did not vote for him into districts and districts into sub-districts, with its power derived from its parliamentary majority. This generated political tension that ultimately culminated in the downfall of the DP government through a military takeover on 27 May 1960, which was led by the military bureaucracy supported by dissatisfied social segments. According to Tanör (1991, pp.9-15), the opposition to the DP government came primarily from middle-class, including intellectuals, civil servants, and military members. These groups faced worsening conditions due to increased taxes against economic liberalization, foreign aid, and the accumulation of private capital supported by the state. Bureaucrats and professors, subject to anti-democratic and unlawful treatments through ministerial orders and ex officio retirements, were among those reacting against the domination of the provincial and urban elite represented by the DP government. This contradiction, fueled by economic and social factors, resulted in a crisis of political regime and created the conditions for the military intervention on May 27, 1960. In the aftermath of the military takeover, new legal arrangements and a new Constitution were enacted.

To fully understand the changing relationship between law and administration during the 1961 Constitutional period, it is essential to acknowledge a significant

development of the 1950s. At that time, the traditional approach to studying public administration through law-based public administration courses shifted to include a focus on the "non-legal aspects of administration." This change led to the introduction of independent public administration courses in Turkey.

4.3.1.8. Administrative Reforms and Non-Legal Aspects of Administration

After World War II, Turkey focused on studying governmental administration, which traditionally studied on the basis of law in the scope of administrative law, as a distinct discipline separate from administrative law. In the 1950s, when Turkey "became interested in US administrative technology" (Emre,2003, p.10), it was introduced to the discipline of 'administrative science'/public administration, which deals with the 'non-legal aspects' of administration (Balta,1967, p.65). However, the independent discipline of public administration in Turkey, which was inspired by the American discipline of public administration, did not emerge as a result of autonomy from political science as in the United States but as a result of dissociation from administrative law (Emre, 2003, p.10). Additionally, as Balta (1967a, p.263), a professor of administrative law, points out, the study of administrative science in Turkey and the introduction of administrative science courses into the curricula of universities was a consequence of practical considerations rather than 'scientific curiosity.'

As Emre (2003, pp.10-11) wrote, the report known as the 'Barker Report' was presented to Turkey in 1951 by a World Bank delegation. The Report recommended the establishment of "public administration and business administration chairs" in Turkish universities to "train staff with management skills," which was seen as one of the deficiencies in the field of governmental administration. In 1953, Turkish and Middle East Public Administration Institute (TMEPAI) was established under the technical assistance agreement between Turkey and the United Nations. Public administration courses were introduced at Ankara University Faculty of Political Sciences (AUFPS) and TMEPAI, with 'Administrative Science,' 'Personal Administration,' 'Organization,' and 'Method' being taught by foreign experts through the leadership of New York University. The Middle East Technical University Faculty of Administrative Sciences, founded in 1956, offered public administration courses in English. In 1957, AUFPS established "Turkey's first chair of public

administration."

After the 1961 Constitution was adopted, there was a renewed effort to implement comprehensive administrative reforms[46]. The main goal was to enhance the capacity of the administrative system to achieve the developmental objectives outlined in the development plans of the newly formed State Planning Organization (SPO). This resulted in a renewed focus on effective administration based on the fundamental principles of classical US public administration, such as control and efficiency (Heper & Berkman, 1979, p.3109).

In the same period, the necessity of an administrative science separate from administrative law was discussed in continental European countries, especially prominent at the annual congresses organized by the International Political Science Association (Balta,1967). Administrative law scholars Sıddık Sami Onar (1966) and Tahsin Bekir Balta (1967), participating in these meetings representing Turkey, wrote about the development of an administrative science dealing with the 'non-legal aspects of administration' in Turkey, emphasizing the need for cooperation between administrative law and administrative science. However, despite Onar and Balta's interest in the non-legal aspect of the administration, administrative science courses were not integrated into the curricula of the faculties of law. As Balta (1967b, p.19, 21) observed, although law education was necessary for the Faculties of Political Sciences and Economics, the Faculties of Law, which mainly focus on teaching branches of private law and criminal law, do not have a positive attitude to non-legal courses as well as public law branches. Başpınar (1967, p.8), who was a member of the Council of State at the time, also complained that "public law, which is becoming more and more influential, is not draw the necessary attention in educational institutions."

However, it should be noted that the legal approach continued to dominate the study and teaching of public administration for some time. In fact, according to a report written by United Nations experts on the TMEPAİ in 1953[47], legal education often

[46] The Central Government Organization Research Project of 1962 (MEHTAP).

[47] (Reports on the Preliminary Stages of the Establishment of the Institute of Public Administration for Turkey and the Middle East, 1954).

hindered students' understanding of management science. The report also highlighted that experienced managers tended to approach issues from a legal perspective rather than analyzing the situation. Similarly, Dodd (1965, p.77)[48] argued that a tendency towards excessive legalism plagued Turkish public administration.

As explained by Akbulut (2008, pp.7-8), public administration, termed 'administration' in Turkish administrative law, is structured as a component subordinated to the executive in the Turkish constitutional system. It is conceptualized as a tool for carrying out the goals and policies of the executive branch. Therefore, public administration is seen as a legal entity comprising administrative acts and actions. Matters concerning public administration are considered interpretations for the enforcement of laws and guiding the implementation in accordance with court rulings.

4.3.2. The 1961 Constitution: 'High Noon' of the Council of State

Following the 1954 and 1957 general elections, the DP administration faced growing opposition due to its increasing pressure. This ultimately led to the Military Intervention on May 27th, in which some of the colonels executed a military takeover, resulting in the arrest and subsequent trial of members of the DP government. According to Tanör (1991, pp.9-10), supporters of the coup described it as a 'positive and progressive' struggle for 'democracy and freedom.' However, those in the DP/JP line of the time asserted that May 27 was a resistance against the legislative and the executive bodies by a "military and university/intellectual collaboration" that "went against the national will and sovereignty." In the aftermath of the military takeover, a provisional military government headed by the National Unity Committee (NUC) came into power.

The NUC established a Constituent Assembly (*Kurucu Meslic*), structured as two chambers[49], to draft a new Constitution. During the interim period before the new Constitution, the NUC held both legislative and executive powers after making changes to the provisions of the 1924 Constitution through a provisional constitution

[48] Dodd worked as a professor of Public Administration at the Middle East Technical University in Ankara between 1959 and 1962.

[49] National Unity Committee and House of Representatives.

it enacted. This temporary constitution amended and abolished certain provisions of the 1924 Constitution (Özbudun, 1987, pp.27-28). By enacting laws restricting the security of civil servants, the new government started purges in universities and judicial bodies, as well as in the general administration, to "save the administration from partisan elements" and "make the administration functional" (Tutum, 1972, p.96).

According to Sümer's (2020, p.965-967) study on the "institutional continuity thesis" of the Council of State, the provisional article of Law No. 84, enacted in the aftermath of the 27 May military intervention, allowed for the removal of approximately three-quarters of the staff of the Council of State by retiring without explanation, including those who did not reach their retirement age. The Council of State was then re-established under a new list attached to the Law on Council of State, which was created in accordance with the newly established political regime. As a result, the NUC dismissed and replaced the presidents, members, and heads of chambers of the Council of State (Balta, 1972, p.69), which was seen as an attempt to harmonize the judicial structure with the NUC rule (Akyol, 2010, cited in Sümer, 2020, p. 975). Similarly, Azrak (2008, p.218) characterizes this 'close-open' process as a political interference in the independence of the Council of State. Karayalçın (1965, p. 268), who strongly opposed the expanded judicial control by the Council of State, ensured by the 1961 Constitution, explained the 'abolition' of the Council of State in 1960 as an expression of "the Council of State's inability to get rid of its status as an institution with *chronic problems*" despite its nearly century-long history.

In 1961, the promulgation of the new Constitution, widely called a 'constitution of reaction,' manifested a significant change in the relations among legislative, executive, and judicial branches. The post-war Constitutions of Italy and Germany inspired this new Constitution. The Constitution, based on the supremacy of the Constitution over TGNA, the Executive, and the Judiciary[50], was crafted in response to the issues encountered throughout the 1924 Constitution, which provided a basis for 'partisan administration,' particularly between 1953 and 1960 (Aksoy, 1966, p.viii). The 1961 Constitution symbolizes the transition from the principle of parliamentary supremacy

[50] Article 8/2: The provisions of the Constitution are fundamental rules of law binding on the legislative, executive and judicial organs, administrative authorities and individuals.

of the 1924 Constitution to constitutional supremacy, as argued by Tanör (1991, p.21). It introduced various measures to prevent the concentration of power, such as a parliamentary system based on the principle of separation of powers, a legislative branch consisting of two chambers of TGNA and Senate of the Republic, the executive divided between the central administration, local governments, and autonomous institutions and a greater emphasis on the judicial control of the executive and the legislative[51]. The 1961 Constitution, which aimed to achieve economic "development, social justice, and democracy together" (Tanör, 1991, p.82), adopted a pluralist democracy conception and relied on the philosophy of limited government and liberal democracy, with a detailed bill of rights with their safeguarding mechanisms. The judiciary was given more weight in the balance of powers than before, establishing the Constitutional Court[52], which became operational in 1962, to review the constitutionality of laws for the first time in Turkish jurisdiction (Özbudun, 1987, pp.22-30).

In addition to establishing the Constitutional Court, as part of its efforts to strengthen the judicial branch, the Constituent Assembly emphasized the importance of judicial independence and security of the tenure of judges. This included underlining the independence of courts in trialing cases and issuing judgments, stipulating that state organs fully comply with court decisions, and providing judges with security and tenure. To this end, the Constitution transferred the authority to decide on the personal affairs of judges (Öztürk, 1979, p.314), such as appointment, promotion, transfer, and disciplinary actions related to their profession, from the Ministry of Justice and to the Supreme Council of Judges[53], established in 1961 Constitution as a separate and independent entity made up of elected judges. The reasoning for Article 140 of the Constitution states that the election of the members of the Council of State was transferred from TGNA to the Constitutional Court due to its unique characteristics. The reasoning of Article 140 regulating the Council of State states that the Constitution brings together the Council of State and the Constitutional Court (Article 145) in a separate system that "supervises the actions of the political power and the

[51] Between articles 132 and 152 of the Constitution.

[52] Between articles 145 and 152 of the Constitution.

[53] Articles 143 and 144 of the Constitution.

administration" (Öztürk, 1979, p.308).

The 1961 Constitution brought about significant changes in the regulation of the Council of State. As reported by Onar (1966, p.205), during the drafting of the 1961 Constitution, the Istanbul Science Commission had proposed that the Council of State should remain within the executive branch and that a High Administrative Court should be established in the judicial branch to hear administrative cases. The 1961 Constitution, which did not adopt this view, moved the provision on the Council of State from the executive section to Article 140 of the judiciary section of the higher courts chapter. This article defined the Council of State as a high administrative court having judicial, administrative, and consultative duties. In the Constitution, the establishment and functioning of the Council of State and the status of its members are regulated in accordance with the principles of independence of courts and the security of tenure of judges. Thus, unlike the 1924 Constitution, the 1961 Constitution explicitly characterized the Council of State as a court with the power of judicial review over executive and administrative decisions. The Council of State Law No. 521 of 1964 regulated the establishment and functioning of the Council of State in accordance with the new constitution.

The 1961 Constitution also introduced the possibility of establishing lower administrative courts, as stated in the reasoning of Article 114 (Öztürk, 1979, pp.239-240). Additionally, the Constitution included comprehensive regulations[54] on the organization and operations of the administration and the status of civil servants. This was an improvement from the 1924 Constitution, which lacked any provisions regarding administrative structure. The 1961 Constitution established the principle of the integrity of administration, ensuring its structure and operation were well-defined. Additionally, the Constitution tried to balance the executive, which it regulated as a duty rather than an authority, through providing constitutional status for local governments as well as creating autonomous institutions such as Turkish Radio and Television (TRT) and the Universities in order to prevent centralization of power (Tanör, 1991, p.23).

The 1961 Constitution implemented enhanced measures for judicial review of

[54] Between articles 112 and 125 of the Constitution.

administrative actions, drawing from past experiences. Article 114 of the Constitution stipulates that the judicial authorities shall have the power to review all acts and actions of the administration without exception. The reasoning of this provision is as follows (Öztürk, 1979, pp.238-239):

> It is well-known that in many of our laws, legal remedies against administrative decisions related to those laws are closed. Although such provisions are contrary to the rule of law, the courts, after some hesitation, have dismissed the lawsuits. It has been deemed necessary to include this article in the new constitution not to give place and opportunity to past practices in any way.

An examination of Article 114 of the Constitution and its general reasoning reveals that the 1961 Constitution broadened the scope of the annulment action. Thus, it aimed to eliminate the previously imposed limitations placed on judicial review by the legislative. As a result, the administration was not granted absolute discretionary power. The Constitution abolished the category of acts of government, rendering all actions taken by the administration subject to judicial review, even those decisions made in exceptional circumstances (Öztürk, 1979, p.240). Additionally, under the 1924 Constitution, the legislative restraints that were in effect during the 1924 Constitution lost their validity following the annulment of the relevant laws by the Constitutional Court.

During the discussion of this article in the House of Representatives, a deputy suggested, "...there are some acts which, by their very nature, are not amenable to judicial review....This article.....will be problematic when it becomes an article of law..." Another deputy: "Are acts of government subject to judicial review?" Turan Güneş, spokesperson of the Commission, replied, ".... renowned people explain that there is no such thing as an act of government. In scientific terms, the way of judicial review of administrative acts will not be closed." The deputy who had asked a question about the act of government then proposed an amendment to this article, but it was not accepted (Tutanak Dergisi, 1961, cited in Karayalçın, 1966, p.25).

However, as Başpınar (1967, p. 7) wrote, the expansion of judicial review of the administration introduced by the 1961 Constitution, which was argued to restrict the discretionary power of the executive and the administration, was subject to criticism on the grounds that "it impeded the executive power," "slowed down rapid development" of the country and "restricted the rights of the political power" and

"national will."

Furthermore, the 1961 Constitution came under criticism for its perceived military elitism and bureaucratic tutelage, primarily for the existence of institutions such as the National Security Council (NSC), the SPO, and the judiciary (Tanör, 1991, p.23). The proponents of the DP did not support the new constitution, which was implemented as a result of the May 27 Coup. This intervention was perceived as unfair by the DP, the prominent political party of the 1950s (Özbudun, 2014, p.46). According to the constitutional thesis of Celal Bayar, one of the leading figures of DP, as "the common idea of the DP staff," the 1961 Constitution shares the exercise of sovereignty, which should be based on the constitutional principle of "unconditional national sovereignty," through the NUC (military), Universities (intellectuals), Constitutional Court (judiciary), TRT, SPO and non-elected members of the Republic Senate, thus bringing "new partners to the national will." According to Bayar's analysis, there were two conflicting perspectives on the state in Turkey after 1950 - one being an unconditional commitment to national sovereignty, adopted by the DP and enshrined in the 1924 Constitution, and the other being the view of sovereignty exercised through autonomous institutions embraced by the RPP and concretized in the1961 Constitution (Tanör, 1991, pp.29-34).

The Justice Party (JP), "the political heir of the DP" (Özbudun, 2014, p.46), held power through the 1965 elections after a series of coalition governments[55] established following the 1961 Constitution. During the reign of the JP, a new conflict arose between the government and the judiciary. After coming to power, the JP government undertook a comprehensive purge of the public administration, in Duran's words, "to create an administration in harmony with itself." Duran (1969, p.295) notes that this began with replacing senior civil servants but quickly extended to encompass junior civil servants and teachers. This period, which Aksoy (2009[1966], p.209) and Duran (1966a, p.134) refer to as a 'partisan administration,' saw the dismissal of top managers at State Economic Enterprises - critical institutions for economic advancement.

Ahead of the 1969 elections, the JP put forward a proposal for 'Constitutional Reform,'

[55] Between November 1961 and February 1965, Turkey was governed by three coalition cabinets.

which focused on reorganizing state organs to empower the executive branch to make decisions with the force of law, abolishing the Senate, reviewing autonomous institutions, and reorganizing the judiciary-executive relationship (Tanör, 1991, pp.34-35). During the JP period, the source of tension between the Council of State and the government was the Council of State's decisions of stay of execution and annulment regarding high officials who were dismissed or relocated by the JP government. The government frequently encountered challenges in adhering to some of the rulings of the Council of State and subsequently had to offer compensation for court judgments with which it did not comply.

These criticisms of the Council of State were addressed at a Turkish Law Institute seminar on March 26, 1966, following a newspaper article[56] written by Yaşar Karayalçın[57], a professor of Commercial Law. He called for this seminar to examine what the stay of execution decisions mean and "what problems they raise on all fronts." Karayalçın (1966, p.60) expressed his concerns about the Council of State in his writings, stating that 1964 Law No. 521 gave the Council of State freedom to act arbitrarily on matters of stay of execution. According to Karayalçın (1966a, p.58), in annulment cases, the elapsed time between the Council of State's stay of execution decision and the final judgment takes too long, which results in "interference in administrative activity" and "…...paralysis in administrative activities", particularly in the cases concerning matters of the student's disciplinary measures and exam results and appointment and relocation of civil servants. He further argued that if the Council of State continues this attitude, "it will lead to a deadlock in the administrative and political (life of the country) in the near future."

4.3.2.1. Turkish Law Institution Conference on "Council of State Decisions and Stay of Execution"

Muammer Aksoy (1966, p.v), President of the Turkish Law Institution[58], noted that

[56] Milliyet, February, 14, 1966 (Karayalçın, 1966, p.59).

[57] Karayalçın, in his study *The High Civil Servants Issue and the Stay of Execution,* (1966) brought together the expanded version of his speech at the Turkish Law Society seminar with his previous writings on the same subject.

[58] According to Article 2 of the Statute of the Turkish Law Society, the purpose of the organization is "to serve the development of the science of law, especially Turkish law based on the principles of Ataturk… For this purpose, the institution disseminates the idea of law, the science of law, and the

some ministers were not carrying out, or inactivating after a few days of implementation, decisions made by the Council of State regarding the suspension of high civil servants from their positions. This led to a debate on whether or not the decisions of the Council of State should be implemented immediately, as argued by public law scholars[59], most participated in the preparation of the 1961 Constitution, or if the government had absolute discretion in the matter, as claimed by politicians and two commercial law scholars[60]. The latter group proposed that the Council of State should refrain from issuing stays of execution and instead rule precedent that keeps these decisions beyond its control, particularly in cases where civil servants were suspended from duty. The former group articulated their dissatisfaction with the executive's position, emphasizing that compliance with court rulings was a constitutional responsibility and fundamental to perpetuate the rule of law. These scholars contended that firing government officials without just cause contradicts "the principle of administrative neutrality." Consequently, they maintained that the Council of State should annul any suspensions that did not adhere to the criteria of serving the public interest and lacking a legitimate and valid rationale. Additionally, scholars in this faction argued that the law for public servants did not exempt them from the implementation of stay of execution and that decisions about civil servants as acts of government were at odds with the values and principles of the 1961 Constitution (Aksoy, 1966, p.vıı).

According to Sarıca (1966, p.1), there were two sides to this debate: "those who defend the rule of law and the Council of State, one of the main protectors of the rule of law" and "those who defend the government and its executive instrument, the government." Karayalçın (1966, pp. 3-4) disagreed with Sarıca's classification, stating that he had no intention of supporting a political group or 'praising or belittling' the Council of

principles of the rule of law in the country, and it works to ensure that the practice is in accordance with these scientific principles and principles." (Aksoy, 1966, p.vııı-ıx).

[59] Administrative Law scholars:,Prof. Dr. Ragıp Sarıca, Prof. Dr. Lütfi Duran, Prof. Dr. Turan Güneş, Ord. Prof. Dr. Sıddık Sami Onar, Prof. Dr. Tahsin Bekir Balta, Doç. Dr. Mukbil Özyörük, and Doç. Dr. Şeref Gözübüyük (Onar, Balta, and Gözübüyük did not participate in the conference) (Aksoy, 1966, p.vı).

[60] Prof Dr. Yaşar Karayalçın and Doç Dr.Hayri Domaniç ("Domaniç did not come to the conference despite his exact promise") (Aksoy, 1966, p.vı).

State, approving of partisan or arbitrary administration.

According to Aksoy (1966, p.vii), contrary behavior to this situation would lead to 'arbitrary administration.' In the opening speech of the Seminar, Aksoy (1966, p.xi-xiv) noted that there was no consensus in the Institution's Board of Directors to hold the seminar because "the topic….is a political issue." However, he emphasized that the majority did not rely on "exaggerated pure legalism" and instead decided to discuss this issue comprehensively, which concerns lawyers, politicians, and the public in Turkey. He highlighted that the administrative law matters of the era cannot be fully understood within the confines of traditional administrative law.

Similarly, Sarıca (1966, pp.2-3) maintained that administrative law was intertwined with political science as a branch of public law, and matters relating to administrative law should be assessed in terms of legal technique and from a political science perspective. He asserted that the claim of the Council of State's 'generosity' in stay-of-execution rulings for high-ranking civil servants, which was the focus of the complaint, must be evaluated within the context of the prevailing political climate, including the mindset and systematic approach of those in power, particularly their apparent arbitrariness in transactions involving civil servants.

According to Karayalçın's (1966, pp.1-2) study, the topic of high civil servants and the stay of execution is a matter that intersects both politics and law. He stated that during the seminar, he focused solely on the legal aspect of the issue as a law scholar rather than a commercial law expert, leaving the political aspect out of scope. He argued that analysis centered on the theoretical framework and practice of the issue by the Council of State and the legal and political challenges arising from the practice concerning comparative law data. The criticisms and objections raised by Karayalçın in his study about the Council of State, in general, and the stay of execution decisions on the issue of high civil servants, in particular, can be categorized as follows:

Firstly, according to Karayalçın (1966, p.2), the issue of high civil servants and stay of execution is a complex matter involving the judiciary's intervention in politics. It is crucial to consider the stay of execution decisions as an extraordinary measure, as in France, and only to grant it when necessary (Karayalçın, 1966, p.7). However, according to Karayalçın (1966, pp.12-16), the Council of State in Turkey did not

exhibit the same level of rigor in making these decisions. While a stay-of-execution decision can prevent the administration from exercising its privilege of unilateral enforcement powers to carry out its duties, administrative courts are responsible for ensuring stability in the administration in accordance with administrative requirements and distributing rights. Unfortunately, the Council of State's general approach to stay-of-execution decisions, specifically those involving the appointments and transfers of high civil servants, led to a crisis in Turkish administrative and political life. In practice, stay-of-execution decisions take the form of interference with the public administration, and the decisions issued against transactions concerning high civil servants have led to a "danger of interference with the government" beyond interference with the public administration.

Secondly, Karayalçın (1966, pp.19-20) argued that the government must possess 'absolute discretion' in specific matters established by laws and court precedents. These decisions must be considered acts of government to be immune from judicial review. He (1966, p.47) further asserted that political and administrative officials are responsible for removing "high civil servants who hold critical positions within the administrative structure, where political views and trust are paramount" during political transition periods.

Thirdly, Karayalçın (1966, p.14) highlighted that in France, the issue of the non-fulfillment of the stay of execution and cancellation of decisions by the administration is considered an administrative law problem, which can be remedied through compensation. However, in Turkey, this problem has become a constitutional crisis.

In another article in which he criticized the Council of State, Karayalçın (1966, p.55) stated that the reason for the existence of separate administrative courts, apart from the civil courts, was "the inability of the civil courts to grasp the peculiarities of the administration... and the necessity to ensure stability in the administration." According to Karayalçın, since the written rules in administrative law are more limited than in private law, "the law-making function of the administrative judge" is broader than that of judges of civil courts. Therefore, in addition to being a reasonable jurist, the administrative judge should also be familiar with the characteristics and requirements of the administration. However, the Council of State makes inconsistent decisions regarding their reasoning and conclusions on the same issue.

According to Karayalçın's (1966 pp.12-14) article *Scandal in the Council of State?* in Journal of *Forum*, business owners and lawyers were spreading rumors about the Council of State. Karayalçın identified three possible reasons for the rumors: "slander, exploitation of private information, and abuse of power for personal gain," primarily centering around "decisions of stay of execution."

Karayalçın (1966a, p.72-73) posited that a 'conflict' between the "administration and the Council of State (a high judicial body)" had arisen due to the stay of execution decisions regarding high civil servants. This conflict had escalated into a more significant issue between the ruling party and the high judicial body, with Karayalçın suggesting that the root of the problem was "the interference of politics in justice" and vice versa - that is, the judiciary's intervention in political matters by substituting its own discretion for that of the administration. He further warned that if the judiciary continues to expand its involvement in politics, it could lead to a shift towards a system of governance by judges or a 'government of judges.'

According to Sarıca (1966a, p.27), a significant power imbalance exists between individuals and the administration. As a protective measure, the stay of execution emerged to safeguard individuals against the power of administration. The administration, armed with public power privileges like unilateral action, ex officio enforcement, and the presumption of legality, compels individuals to comply with its decisions. Sarıca stated that the Council of State's decision to suspend the execution of a case cannot be debated from any point of view. He concluded that the stay of execution orders provides a safeguard for both individuals and the legal order. Duran (1966, p.97) stated that the Civil Servants Law guarantees civil service security for civil servants and that the minimum condition of this guarantee was not to be dismissed from civil service status without cause.

4.3.2.2. The Problem of Exam Grades: "The Council of State Makes Students Pass the Class"

One significant issue among the criticisms directed at the Council of State during this period was the judicial review of the grades given to students in examinations, which was referred to as "the Council of State makes students pass the class." The role of the Council of State in the judicial review of the grading process of students, which

involves a significant degree of discretion, was criticized since, over time, the number of cases related to this issue increased, with some attributing the rise to the Council of State's perceived bias in favor of students. Responding to this criticism, Ülgen (1973, p.14), the President of Council of State, confirmed that the number of cases filed with the Council of State on this issue has increased over time[61] and stated that the fact that such cases were "decided against the administration on the basis of facts established by expert examinations" resulted in a more objective and rigorous evaluation of students' exam papers. Hence, the rate of annulment of these cases decreased.[62] Stating that "there is nothing consistent about these allegations," Ülgen (1973, p.14) characterized these as an attempt to "block the constructive role of the Council of State" in society.

As Yenice (1981, pp.15-16) quoted, during deliberation on Article 114 of the 1961 Constitution in the House of Representatives, law professor Necip Bilge (1961) argued that,

> Although the principle of subjecting all acts and actions of the administration to judicial review is very appropriate, applying this principle without exception in educational institutions in terms of teaching affairs may put the administration in challenging situations. For example, lawsuits filed by students who receive a failing grade may burden both the administration and the judicial authorities with unnecessary and exhausting burdens.[63]

Law Professor Bilge (1961) made a request to add a provision to Article 114 stating that "the exceptions shown in the law are reserved in terms of educational affairs." However, Turan Güneş, a spokesperson for the Commission and a law professor, responded that "the Commission did not support the proposal."

Similarly, in his critique of the Council of State, Karayalçın (1966, pp.5-6) expressed his dissatisfaction with the Council of State's stay of execution decisions, particularly in matters of school discipline and examinations. He argued that these rulings caused undue interference in the administrative process, resulting in 'paralysis' rather than

[61] The number of such cases increased from 340 in 1967 to 6672 in 1973 (Ülgen, 1973, p.14).

[62] The rate of annulled cases decreased from 35.3% in 1967 to 13.6% in 1973 (Ibid).

[63] Retrieved from https://www.kanunum.com/Tutanak/XXXX/TEMSILCILER-MECLISI-03051961-4-Cilt-0-Oturum_xxvid10658391_xxmid10658391_search#1065839. (accessed: 23.04.2022).

promoting stability in the administrative process. He further noted that in some cases, a lengthy time, sometimes years, would pass between the stay of execution decision and the final judgment of the case. This delay could lead to the case being dropped entirely, as seen with a student who graduated while their case was still pending with the Council of State.

The administrative law literature has presented differing views on whether assigning grades in examinations is an exercise of discretionary power. Balta (1972, p.138) contends that the grading of exams falls within the realm of discretionary power, while Tuncay (1972, p.156) argues that it does not involve selecting from various grading options. Instead, he asserts that grades are determined according to specific assessments and are not a matter of optional choice.

4.3.2.3. The 'Pasha of the Council of State'

Another prominent issue that drew criticism towards the Council of State during this period was its rulings resulting from judicial review of the personal affairs of military personnel. To express discontent with the decisions of the Council of State, military officers coined the term 'Pasha of the Council of State' for generals who were promoted through the ruling of the Council of State (Alan, 1998, p.526).

The matter of whether military personnel have the right to apply to administrative courts against military administrative authorities has a long history dating back to the 1930s and is discussed above within the context of acts of government. During a case brought before the Council of State, the Ministry of National Defense (MND) was asked for the registry record of an officer who had been dismissed from service due to their records. The MND then sought the opinion of the TGNA as to whether this matter could be included in the category of an act of government previously established by a TGNA interpretation decision[64]. In 1934, the TGNA passed Law No. 2515, which stated that cases related to military discipline should be referred to the TGNA instead of the Council of State. This decision was made based on the recommendation of the Council of Internal Affairs and Justice, which argued that these matters were beyond the judiciary's jurisdiction due to their unique nature. However, this decision was

[64] TGNA interpretation decision No. 457 of 1928 on the promotion procedures of those who participated in the War of Independence.

criticized by Onar (1966, pp.460-461), who viewed it as favoring political control over judicial control and, therefore, a return to the 'minister-judge' approach. Subsequently, the Military Court of Cassation was assigned to hear cases related to military personnel under Law No. 3410 of 1938. Finally, with Law No. 6142, dated 1953, disputes arising from the personal affairs of military personnel were assigned to the Council of State (Onar, 1966, p.462).

Article 9 of Law No. 4273 on the Promotion of Officers in force at the time stipulated that the promotion of officers to the rank of general required the consent of the Chief of the General Staff. In the context of military promotions, a significant point of contention revolved around the extent to which the discretionary powers vested in the Chief of the General Staff are subject to judicial review. The Council of State's 1963 Unification Decision addressed this issue. It concluded that:

> ….excluding administrative decisions from judicial review on the grounds that they are based on absolute discretionary power would be contrary to the principles of administrative law and Article 114 of the Constitution; such discretionary acts are subject to review in terms of purpose (Alan, 1998, p.527).

However, this ruling became a subject of criticism on the grounds of its potential for harming the army's high command (Karayalçın, 1966, p.28). Considering the establishment of the Military High Administrative Court (MHAC) following the 1971 constitutional amendment "a reaction to this ruling," Alan (1998, p.527) suggested that this ruling of the Council of State might be softened, and the discretion of the Chief of the General Staff could be limited to a review of 'manifest error.'

4.4. Assessment

The Council of State, established in the mid-19th century as part of the Ottoman modernization efforts inspired by the French model, focused on consultation, administrative, and legislative matters rather than administrative trials during the Ottoman era. It is a unique institution for its role in separating administrative and judicial functions, a distinction that was not previously clear in the Ottoman Classical period. Despite its critical function, mainly in preparing and implementing the modernization-westernization reforms of the late Ottoman era, the Council of State did not function as an administrative court.

The function of the Council of State as a separate administrative court responsible for

the judicial review of the executive and the administrative acts and actions developed during the Republican Period, when its administrative and consultative functions gradually faded.

However, the tradition of administrative courts reviewing the acts and actions of the administration and the executive for compliance with the law has not developed smoothly. The Council of State, functioning as an administrative court since 1927, was instituted as a constitutional entity under the 1924 Constitution. Throughout its history, the Council has encountered resistance from administrative authorities and government entities exercising political power. The challenges against the establishment of the system of judicial review of the administration were mainly due to the country's lack of experience with judicial review, stemming from its imperial past. The tradition of judicial review of the administration, established by the Council of State, on the model of the French *Conseil d'état* in accordance with Turkey's unique circumstances, has remained a subject of criticism reflecting Turkey's political and social conditions of the time. The power of the Council of State's judicial review has been gradually constrained by specific legislative and judicial restraints since the early years of the Republic. These restraints included limitations on the types of executive/administrative acts the Council of State could review and the scope of its rulings. Additionally, in its early years, the Council of State, inclined to avoid confrontation with the government, has imposed self-restraints on its authority, particularly by abstaining from reviewing executive acts of a political nature. Despite the gradual elimination of these restraints by the mechanisms it developed through its rulings and the expansion of its authority of judicial review with the regulation introduced by the 1961 Constitution, the criticism of the Council of State, particularly by the governments/executive, has continued to increase since the mid-1960s.

This tension between the political power/executive branch and the Council of State, which was not exempt from the social, economic, and political conditions of the period, has also been the subject of constitutional amendments since 1971. These legislative and judicial restraints on the Council of State were transformed into constitutional restraints as of 1971. In the early years of the Republic, the Council of State primarily handled tax and public personnel disputes. The political power/executive has been particularly critical of the Council of State until the 1971

constitutional amendment period, mainly regarding its decisions to stay execution and annulment decisions, particularly in cases brought by public employees against the administration/executive. In this period, the political power/executive and its

proponents contended that the Council of State interpreted and applied the power of judicial review over the acts of the executive/administration in a broad manner, particularly in cases concerning high-ranking bureaucrats.

The criticism that the Council of State has overstepped its authority and encroached upon the administration or government has persisted, albeit with variations in the specific cases it pertains to and the nature of the criticisms directed towards it over time. During the foundation years, restraints on the jurisdiction of the Council of State mainly on the governmental decisions having a political nature and the decisions concerning military personnel. With the transition to multi-party life, restrictions concentrated on the issues of public personnel who were ex officio retired or placed under the order of the ministry. In the aftermath of the 1965 elections, the criticisms, which seemed to have ended with the 1961 Constitution, turned to the topic of stay-of-execution decisions on high-ranking public personnel, issues related to students' exam grades, and decisions regarding the upper-echelon of the military.

CHAPTER 5

CONSTITUTIONAL RESTRAINTS ON ADMINISTRATIVE JURISDICTION IN TURKEY

5.1. Introduction

This chapter explores Constitutional and accompanying legislative restraints imposed on the Council of State, examining the political, legal, and administrative developments preceding these processes. The Constitutional restraints on administrative jurisdiction in Turkey were first introduced by the 1971 constitutional amendments, which limited the authority of the Council of State and expanded the power of the executive branch. This trend continued with the 1982 Constitution, which further curtailed the jurisdiction of the Council of State and strengthened the executive branch.

The Council of State faced increasing criticisms, which had relatively decreased since the 1961 Constitution. The expanded jurisdiction of the Council of State, granted by the 1961 Constitution, was attacked particularly after the 1965 elections, mainly due to its perceived interference in political processes. Moreover, the political and social turmoil of the late 1960s and early 1970s, coupled with the perceived weakness of the executive branch of the state, resulted in a military intervention in 1971, known as the March 12 Regime. This regime introduced Constitutional restraints on the judicial review of administration by the Council of State through the 1971 amendment to the 1961 Constitution. However, despite constitutional amendments to strengthen the executive power, the perception that the Council of State's control over the administration weakens the executive branch persisted. These discussions on the weakness of the executive power and the extent of the Council of State's judicial control over the executive and administration sparked a call for a new constitution. This tense political milieu resulted in a military coup in 1980, paving the way for a new constitution in 1982. The 1982 Constitution and other laws that preceded the

Constitution and the civilian government established after the 1983 election placed significant restraints on the judicial review of the executive and administration carried out by the Council of State and the newly established administrative and tax courts of the first instance. The constitutional restraints on the judicial review of administration continued with new amendments in 1999 and 2010.

This chapter of the thesis analyzes the restrictions imposed by the constitution and legislative on the jurisdiction of administrative courts/the Council of State. The study covers the period between 1971, when constitutional restraints on the Council of State were introduced, and 2017, when the Constitutional Amendments changed the governmental system. During this era, there were substantial shifts in the functions of the state due to the implementation of neo-liberal economic policies. These policies profoundly impacted Turkey's political, financial, and social processes. In examining the constitutional and legislative limitations, the chapter will refer to the response of the Council of State to the restraints and the political and social developments of the period, providing an elaborate understanding of the topic.

5.2. 1971 Interim Memorandum: Constitutional Restraints on the Council of State

As Sencer (1992, pp.125-126) articulated, the 1961 Constitution aimed to establish a social state while ensuring fundamental rights and freedoms. However, despite efforts to promote economic growth through five-year plans, the process resulted in economic segregation, political competition, and social unrest. Following the 1965 elections, the group representing the industrial and commercial sectors, which had grown throughout the planned development era, came to power. The party in power and the many small groups of counter-ideologies that seized the opportunity to be represented in parliament through the electoral law in force further fueled the conflict in parliament, increasing the political tension in Turkey. The turmoil caused by these developments culminated in an ultimatum issued by the Chief of the General Staff and the Force Commanders to the parliament on March 12, 1971. The Council of Ministers, formed upon the resignation of the government, declared martial law to end the prevailing 'anarchic environment.' To this end, the Council of Ministers, having peculiar characteristics to the extraordinary interim period, delimited the rights and freedoms

of individuals and introduced substantial amendments to the 1961 Constitution, which was believed to be responsible for adverse societal developments. This 'above party' interim government, supported by the Turkish Armed Forces, operated until 1973, when a multi-party system was restored (Özbudun, 1987, p.30).

As Tanör (1992, p.39) wrote, following the March 12 intervention, the press and business community intensified their reactions against the 1961 Constitution. The most criticized aspects of the Constitution were those related to autonomous institutions and the judicial control of execution and administration by the Council of State, which were alleged to have weakened state authority (Tanör, 1992, p.44). During the March 12 regime, three amendments[65] were made to the 1961 Constitution, the most significant being Law No. 1488 in September 1971. This amendment, which was justified on the grounds that 'the Constitution did not fit with the structure of society,' changed 34 articles. With this amendment, fundamental rights and duties and the legislative and judicial branches underwent changes that aimed to grant the executive branch more autonomy vis-à-vis the branches of the legislative and the judiciary. Under the 1961 Constitution, the executive function was considered a subordinate 'duty' to the powers of the legislative and judiciary, which had broad supervisory powers. However, as Sencer (1992, p.126) noted, this increased control of the judiciary, notably by the Constitutional Court and the Council of State, resulted in complaints mainly from the executive. Some argued that while the Constitutional Court overstepped its bounds by interfering with the legislative competence of the TGNA, the Council of State shared and interfered with the executive power and administrative functions of the state.

According to Tanör (1991, p.54), the constitutional amendments brought about significant changes in two critical areas of the Constitution: the establishment and functioning of state power and fundamental rights and freedoms. With the 1971 amendment, unclear concepts such as 'public interest,' 'national security,' 'public order,' and 'public morality,' which were frequently included in the Constitution, became grounds for restricting fundamental rights (Sencer, 1992, p.127). Tanör (1991,

[65] These amendments were made by Law No. 1421 of June 1971, Law No. 1488 of September 1971 and Law No. 1699 of March 1973.

pp. 54-60) summarizes the changes that occurred in this period as strengthening of the military authority against the civil authority. Additionally, the relationship between political decision-making bodies and the judiciary was redefined, and the executive was empowered, expanding state authority at the cost of individual rights. Alan (1998, p.23) described this process as "the end of the honeymoon between the Constitution and the Council of State and the beginning of a period of hard relations." Law No. 1488, which amended the 1961 Constitution, limited the judicial review of the administration by the Council of State.

First, the paragraph added at the end of Article 140 of the Constitution regulating the Council of State stipulated the establishment of the MHAC to review administrative acts and procedures concerning military personnel. The reasoning for this amendment was that such cases, "due to the peculiarity of military service… to be examined by a special chamber to be established within the Military Court of Cassation" (Öztürk, 1979, pp.308-309). As can be remembered from the period of 1924 Constitution discussions on the acts of government and the 1961 Constitutional era debate of 'Pasha of the Council of State,' the judicial review of these cases was initially assigned to the TGNA in 1934 to the Military Court of Cassation in 1938 and to the Council of State again in 1953 as a result of the debates on whether the Council of State should hear them. With Law No. 1602[66], enacted in accordance with the constitutional amendment, a new court, the MHAC, was established, and the resolution of administrative acts and actions concerning military personnel was assigned to this court. The MHAC was established in 1972 and operated as a separate military administrative court until its abolishment in 2017. However, as noted by Alan (1998, p.526), it sparked a new debate on the grounds of 'civilian vs. military duality' and the "disruption of unity and integrity" that it caused in the administrative judiciary.

In connection with this amendment, the amendment to Article 124 of the Constitution, which was justified on the grounds of preventing "widespread acts of violence" that "endanger the indivisible integrity of the country" and "the free democratic order" (Öztürk (1979, p.262), facilitated the declaration of martial law and increased the

59 Law No. 1602 on the Military High Administrative Court, which was published in the Official Gazette on 27.07.1972, has been repealed by Decree with the Force of Law No.694 on 25.08.2017.

possibility for civilians to be judged in martial law courts. Additionally, the amendment made to Article 136 of the Constitution, which was justified as "making it possible for crimes against the republic and those directly related to state security to be tried in specialized courts," allowed the establishment of State Security Courts, which are extra-ordinary courts (Öztürk, 1979, p.294).

Second, the previous provision of Article 114 of the Constitution reading, "the judicial authorities shall have the power to review all acts and actions of the administration without exception," was amended into "the judicial remedy is open against all actions and proceedings of the administration. Moreover, a new paragraph was added to Article 114 of the Constitution, which reads;

> Judicial power shall not be exercised in such a manner as to limit the fulfillment of executive duty in accordance with the forms and principles laid down by law. Judicial decisions cannot be made in the nature of administrative acts and actions.

Additionally, the title of Article 114 was changed from 'judicial review' to 'judicial remedy' to avoid confusion between concepts. The reasoning of the article states the rationale for these change as follows;

> ...in practice, the term 'judicial review' leads to misunderstandings in some cases, and it is intended to be understood as an authority enabling the judiciary to attempt ex officio control and to establish administrative actions and transactions by replacing the administration (Öztürk, 1979, p.239).

According to Alan (1998, p. 523), this amendment could be considered "a minor nuance," while the addition of the second paragraph signaled the start of an effort to curtail the boundaries of the administrative jurisdiction. Alan (1998, p. 524) contends that this provision, which was intended to "warn the Council of State," was most likely a reaction to the stay of execution decisions, which were said to be given in large numbers, and annulment decisions, arising from the discretionary acts and actions of the administration, ruled by the Council of State. According to Sencer (1992, p128), the provision that "decisions cannot be made in the nature of administrative actions" is intended to prevent the Council of State from rulings that would limit executive power through stay of execution or annulment decisions.

For Tanör (1991, p.56), this amendment endeavored to provide more flexibility for the

execution. Supporting this idea, Nihat Erim, head of the first non-partisan technocrat government formed after the withdrawal of the JP government, said in a television speech:

> I have seen and examined what the Council of State controls and does not control. In all circumstances, the actions of the administration must be monitored, but the administration must not be rendered incapable of functioning... (Bilgen 1995, cited in Azrak, 2008, p.218).

According to Azrak (2008, pp. 218-219), in this speech, the Prime Minister urged the Council of State not to subject the administration to strict control and triggered measures imposing restraints on judicial control of administration by the Council of State. In a similar vein, as quoted by (Yüce,1973, p.189), during a speech delivered in the Senate, Prime Minister Ferit Melen, the head of the third non-partisan technocratic government, emphasized the importance of restricting the intervention of the Council of State in cases where the law grants discretionary power to the administration by stating;

> The Council of State should not intervene where the law gives discretionary power to the administration….". He further called for the identification of suitable remedies to address such issues in his words: "….A remedy must be found for this[67].

Third, the judicial remedy against the decisions of the Supreme Council of Judges and the Supreme Council of Public Prosecutors regarding the personnel affairs of judges and public prosecutors were closed on the grounds that "their members are composed of high judges" and that "they do not need to be reviewed by administrative jurisdictions" (Öztürk, 1979, p.318). According to Günday (2022, p.52), since these decisions were administrative, their exclusion from judicial review indicates a constitutional restraint to judicial review of administrative acts and actions. The Constitutional Court annulled this amendment as unconstitutional in 1977[68].

In line with the criticism that the executive branch was weakened, which was at the center of the reactions against the 1961 Constitution, measures were taken to

[67] Retrieved from https://www.kanunum.com/Tutanak/XXXX/CUMHURIYET-SENATOSU-31011973-8-Cilt-12-Oturum_xxvid10514523_xxmid10514523_101_search#10514523_101. (accessed: 23.04.2022).

[68] Constitutional Court Case No. 1977/4.

strengthen the execution, notably the wing of Council of Ministers. In addition to the attempt to loosen the judicial review carried out by the Council of State, the authority of the Council of Ministers was expanded vis-à-vis the legislative to issue decrees with the force of law. The constitutional amendments have also incorporated empowering provisions for the Council of Ministers, including the authority to establish tax rates and their maximum limits, expropriation measures to safeguard coastal areas, and promoting tourism. Additionally, the autonomy of institutions such as TRT and universities, designed by the 1961 Constitution to prevent the concentration of power in the central administration, was reduced (Sencer, 1992, p.128).

Thus, the 1971 amendments empowered the executive while weakening the prohibition of judicial restraint introduced by the 1961 constitution. According to Sencer (1992, pp.130-132), the amendments made between 1971 and 1973 were a "legal manifestation of the political climate and exceptional circumstances" that arose during the enforcement of the 1961 Constitution. However, despite the amended constitution, both the non-partisan transitional government and the subsequent coalition governments of post-1973 elections, which lacked stable and continuous power, could not solve societal issues. Rather than addressing underlying social and economic factors, political leaders blamed the Constitution as the source of the problems, claiming that the Constitution did not allow for a strong executive branch and authorized the judiciary to replace the legislative and the executive branches.

Starting from the mid-1970s, Turkey underwent a new period of political crisis, the most concrete example of which was the inability of the TGNA to elect a new president for six months. This resulted in the dissolution of the political system (Özbudun,2014, p.46). In Tanör's (1991, p.82) words, the 1961 Constitution aimed to sustain the "development-welfare-democracy triangle" until the late 1970s, but it became unsustainable in the deepening crisis environment.

This instability ultimately culminated in the military takeover of September 12, 1980, which constituted a National Security Council (NSC) led by General Kenan Evren.
The Constituent Assembly, established by the NSC, drafted a New Constitution in 1982.

5.3. The Road to the 1982 Constitution and New Restraints on the Council of State

The increasing unrest of the late 1970s culminated in the declaration of martial law in several cities. This crisis triggered a new wave of criticism against the 1961 Constitution, which was seen as the source of the unrest. One notable critique was a more extreme version of Celal Bayar's constitutional thesis, developed in the aftermath of the 1965 elections.

The revised version of Celal Bayar's Constitutional thesis presented a significant criticism of the 1961 Constitution, labeling it "the source of anarchy and turmoil" (Tanör, 1991, p.61). Aligned with the DP and JP, Bayar, who had initially criticized the 1961 Constitution between 1965 and 70 for "introducing new partners in the exercise of national sovereignty," intensified his critique towards 1980, arguing that the 1961 Constitution "left nothing in the name of authority" despite the 1971-1973 amendments. To his criticism of 'bureaucratic partners' to state power, he added a new category of 'oligarchy of intellectuals' composed of state institutions like the Senate, universities, and the Council of State and civil society organizations such as the press and bar associations. He saw these groups, which led to the "devaluation of national will," as incompatible with his vision of democracy, which he believed, should be based on 'pure national will.' While he had previously stated that the 1961 constitution did not contradict his idea of democracy, he later shifted his stance and advocated for a 'strong state.' He argued that the 1961 constitution, which he described as a "loose fitting dress," led to a kind of 'freedom rampage' that weakened the state authority (Bozdağ 1978, cited in Tanör, 1991, p.62-63).

According to Tanör (1991, p.78-80), this perspective, which aligns with the DP line and corresponds to the center-right ideology, considers the interference with the national will through the separation of powers and judicial control as a factor "preventing the execution of government" and "devaluation of national will." The JP's role was notably prominent during the 1971-73 constitutional amendment, which advocated for the indivisibility of state power.Throughout the 1961 Constitution, they criticized the principles of separation of powers and the judicial control of the legislative and executive branches by the Council of State and the newly established Constitutional Court. The proponents of the JP objected to the establishment of

autonomous institutions and the Council of State. They contended that the inclusion of 'unelected' and "politically unaccountable structures" in the state administration would establish a form of 'tutelage system.'

Starting in 1980, the prime minister and the president general of the ruling party JP, Süleyman Demirel, engaged in extensive discussions about constitutional amendments. This was prompted by various issues, including the inconclusive presidential election, enacting a law that regulated a state of emergency between martial law and ordinary governance, and the Law on State Security Courts, specified in the Constitution.

In response to a journalist's question about his 1969 election manifesto, Demirel expressed his belief that "Turkey could not be governed with this Constitution." He also noted that some of the changes they had hoped to make to the Constitution were realized during the 1971 crisis, but they were not enough (Milliyet, 1980, cited in Balcıgil, 1982, p.36). In short, the 1971 constitutional amendments empowering the executive did not end the debates on the need for a new constitution, strengthening the executive.

5.3.1. Seminars for a New Constitution: Quest for a Strong Executive

In 1980, various civil society organizations and academic groups held seminars to discuss the amendment of the 1961 Constitution. The first event was the '*Tarabya* Seminar' on April 19, 1980, organized by the *Tercüman* Newspaper, with the theme of *Making the Political Regime Functional, Constitution, and Electoral System.* Another important seminar was held on May 10, 1980, titled *The Functioning of the Democratic Constitutional Order and the Realization of Constitutional Rights and Freedoms*, jointly organized by the İstanbul Bar Association and the Faculty of Political Sciences of İstanbul University.

A critical discussion on the topic was published on May 15, 1980, as an attachment to the Journal of *Yeni Forum*, entitled *Reform Proposal for Our Regime and Constitution.*

In the upcoming section of the thesis, these two seminars and the reform proposal will be analyzed, with a particular emphasis on executive and judiciary relations. The main

objective of this analysis is to examine the criticisms directed at the Council of State.

5.3.1.1. *Tarabya* Seminar

In the opening speech of the seminar[69], organized by *Tercüman* Newspaper and held at the *Tarabya* Hotel on April 19, 1980, Nazlı Ilıcak, editor-in-chief of *Tercüman* Newspaper, explained the reason for the seminar on "how to make the political regime workable, the Constitution and the Electoral Law" as the persisting and intensifying political crisis of Turkey. According to Ilıcak (1980, pp. 3-4), Turkey has faced a series of unstable coalition governments since the 1970s, leading to a weakened political system and overall 'political instability.' To address this issue, Ilıcak suggested implementing amendments to the Electoral Law and reducing the interventions outlined in the Constitution that hinder the executive branch, specifically through the judicial review of the executive and administrative acts and actions by the Council of State. Furthermore, Ilıcak noted that short-term coalition governments had a detrimental effect on administrative stability due to the frequent transfers and relocations of civil servants.

In a previous article published in February 1980[70], before the seminar, Ilıcak made allegations against the Council of State, the University Senate, and the Constitutional Court, claiming that they were "partners of the national will" (Ilıcak, 1980, cited in Balcıgil, 1982, p.22). On the day of the seminar, writing in her column under the title of *Constitution*[71] underlining negative aspects of the 1961 Constitution, Ilıcak stated that the judicial organs, specifically the Council of State, became an 'opposing power' to other organs of the state, disrupting the balance and harmony between them (Milliyet, 1980 cited in Balcıgil, 1982, p.46).

Karayalçın (1980, p.31), in his paper in this seminar, proposed that the executive branch should be regulated as a 'power' rather than a 'duty' like the legislative and judiciary branches. Karayalçın (1980, pp.32-34) stressed the need to reorganize the

[69] The seminar consisted of papers, discussions, questions, and opinions of journalists, academics, and politicians on the Constitutional Amendment and Electoral Law.

[70] Tercüman Newspaper, 17.02.1980.

[71] Milliyet Newpaper, 19.04.1980.

legislative-executive-judiciary relations in the constitution to eliminate the friction between the judiciary, reiterating his previous arguments from the 1966 seminar on stay of execution decisions. According to his suggestion, judicial bodies should strictly limit their activities to implementing the law within their jurisdictional sphere. He criticized the Council of State as the most problematic among judicial organs due to undue praise of the 'high Council of State' (1980a, p.124). He suggested that the Council of State should avoid making decisions in the nature of 'expediency review' (1980, p.37). To address the issues with the 1961 constitution, Karayalçın (1980, p.42) ultimately argued that the executive power should be strengthened through Constitutional amendments, and the parliamentary system should be replaced with the presidential system.

Within the seminar, Constitutional law professor Feyzioğlu (1980, pp.53-54) expressed concerns about the impact of partisanship on the Turkish administration. He argued that frequent changes in government resulted in significant upheaval each time, and their supporters were installed in positions within the bureaucracy. To address this problem, Feyzioğlu (1980, p.64) highlighted the importance of establishing a stable administration insulated from politics. While he acknowledged that some decisions of the Council of State were questionable, he cautioned against abandoning judicial review, which could exacerbate partisan tensions. According to Feyzioğlu (1980a, pp.88-89), the independence of the judiciary is the most distinguishing criterion between the rule of law, which has historically resulted from the independence of the judiciary from the executive, and arbitrary administration. Therefore, an independent judiciary should not be abandoned. However, he advocated establishing mechanisms to ensure judges' accountability, thus eliminating "the reign of judges" (1980a, p.92).

Feyzioğlu (1980a, p.92) emphasized that the court cannot have political preferences and that the judge should not substitute their own political/economic preference for policies of democratically elected political power. He further cautioned against adopting a presidential or semi-presidential system, which he considered could lead to 'executive tyranny' and was not well-suited to the peculiar circumstances of Turkish society.

During the discussion session, Aydın Yalçın (1980, p.74), a professor of economics,

proposed that the authority of the Council of State should be limited to bolster the executive without eliminating judicial review of the governmental administration. Senator by Quote Adnan Başer Kafaoğlu (1980, p.80) argued that the distribution of powers, duties, and responsibilities in the division of legislative-executive-judicial powers in the Constitution resulted in a group of "irresponsible and unaccountable judges" and therefore needed to be reorganized.

During the questions and opinions session of the seminar, Özyörük (1980, pp.84-85) argued that the 1961 Constitution lacked a proper separation of powers and instead established a 'hierarchy of powers' with the judiciary at the top. He pointed out that this elevated position of the judiciary resulted in the judiciary's intervention in the activities of both the legislative and executive branches, blurring their boundaries and functions. Additionally, he criticized the Constitution's tendency to weaken the executive branch while granting the judiciary absolute and unlimited power, which enabled it to make decisions without relying on the law. As an administrative law scholar[72], Özyörük (1980, pp.85-86) revealed that he and many other jurists had advocated for the abolition of the "category of acts of government" in the pre-1961 Constitution. However, the Council of State failed to respect the '*sine quo non'* discretionary power of the executive branch, instead acting to interfere with their functions and eliminate their discretionary powers.

In a similar vein to Karayalçın and Özyörük, administrative law scholar Giritli (1980, p.115) stated that he was critical of many rulings of the Council of State. Stating that he contributed to the 1961 Constitution but defended the 1971 amendments, too, Giritli argued that the Constitution was open to abuse by 'extremists' on the pretext of human rights and, therefore, corrective actions need to be implemented to address these deficiencies.

The *Tercüman* Newspaper *Tarabya* Seminar, whose views on the judiciary in general and the Council of State, in particular, are discussed above, included discussions on the electoral law and the presidential system as well as weak aspects of the 1961 Constitution. The main emphasis of the seminar was strengthening the executive

[72] At the time of this seminar, Mukbil Özyörük was a writer for *Tercüman* Newspaper and a member of the TRT Board of Directors.

branch, which would later become the fundamental philosophy of the 1982 constitution. Tanör (1991, p.75) points out that there were many critical opinions on the 1961 Constitution at the time of the seminar. However, the national broadcasting institution TRT broadcasted only on the *Tercüman* Seminar, which raised suspicions about creating conditions for a new constitution. For Karaman (1980,p.22), TRT's broadcast on the *Tercüman* Seminar was an attempt to "legitimize the secret work" on Constitutional amendments, which had been carried out secretly but leaked to the press.

5.3.1.2. İstanbul Bar Association and İstanbul University Faculty of Political Science Seminar

Contrary to the *Tercüman* Seminar, this seminar argued that the economic and social crisis in society was not caused by the constitution in force but rather by the failure to implement the rules and principles envisaged by the constitution. It asserted that the constitutional amendments made during the March 12 Regime "greatly damaged the democratic character of the Constitution" (1980, p.3).

Tunaya (1980, p.6), a constitutional law scholar and Dean of the İstanbul University Faculty of Political Sciences and seminar chairman, claimed that throughout Turkish history, since the Ottoman Constitutional Monarchy period, "political disputes were created under the guise of the constitution." Apaydın (1980, p.7), president of the İstanbul Bar Association, interpreted the current constitutional debates as an expression of "the longing for an authoritarian and totalitarian state." According to Apaydın (1980, p.10), the judicial organs, specifically the Constitutional Court and the Council of State, are "the '*sine qua non'* of the constitutional controlling mechanism for the protection of fundamental rights and freedoms." He further argued that the constitutional amendments made during the 12 March regime and the practice of not implementing the decisions of the Council of State prevented the operation of the system envisaged in the Constitution (1980, p.16). According to Apaydın (1980, p.17), one of the main objectives of the amendment of the Constitution was to exclude the acts and actions of the executive branch, notably the Council of Ministers, from the control of the Council of State.

At the seminar, Duran (1980, p.18) presented a paper analyzing the ongoing crisis in

Turkey and the proposed amendments to the Constitution. He argued that the crisis used as a reasoning for the constitutional amendment was merely a symptom of deeper societal issues, which he referred to as 'structural diseases.' Duran (1980, pp.19-20) also identified two distinct periods in which demands for constitutional amendments occurred while the 1961 Constitution was in effect. The first period, from 1961 to 1970, focused on the Constitution's failure to differentiate between elected and unelected officials. During this time, institutions such as the Constitutional Court, universities, and natural senatorship were deemed incompatible with the governance of the country on the grounds that they should be based on 'national will.' The second period, from 1970 to 1980, centered around the argument of the "weakness of the executive." He also cited the claim by officials of the 12 March Regime that "social development exceeded economic development" as the most concrete expression of the demand for constitutional amendments in this direction.

In his presentation, Natural Senator Karaman (1980, p.24), speaking on behalf of the National Unity Group of the TGNA, asserted that the Constitution was unfairly blamed for the current societal crisis, with some even labeling constitutionally protected social rights as a "source of anarchy." According to Karaman (1980, pp.25-26), recent proposals for a constitutional amendment were aimed at freeing the executive power from any control. He further argued that claims of the weakness of the executive were baseless, as the 1971 Constitutional amendment had already granted the executive the power to issue decrees with the force of law. He also suggested that constitutional debates were distracting public opinion from economic problems. Similarly, economist Aslan Başer Kafaoğlu (1980, pp.31-32) objected to the debates around the constitution, particularly regarding the perceived weakness of the executive branch, citing the example of the change of the governor and police chief of 67 provinces by the government as soon as it came to power. Kafaoğlu (1980, pp.39-40) argued that the Council of State defended civil servants from partisan persecution and that criticisms of the Council of State by right-wing media were no more than attempts to evade judicial control.

According to Sarıca (1980, p.46-47), the current problems in the country were not due to a weak executive but rather the consequence of economic policies implemented since the 1950s. Similarly, Tanilli (1980, p.50) argued that calls for constitutional

amendments to strengthen the executive were intended to limit judicial power and potentially enable tyranny for particular interests. Çelik (1980, pp.52-53) added that the crisis in the country could not be solely attributed to the judicial system, and a mere change of laws would not solve everything, as the legal system is just one component of 'superstructure.'

According to Savcı (1980, pp. 55-57), the issue purported to be a constitutional problem was, in fact, 'artificial.' He argued that the judicial review of administrative acts and actions by the Council of State should be consolidated to prevent possible abuse of political powers. Furthermore, he believed that the underlying objective of 'personal power' was rooted in the principle of strong executive authority.

Shortly after this seminar, held on May 10, 1980, in opposition to the allegations made in the *Tercüman* Seminar, the Journal of *Yeni Forum*[73] published a supplement under the title *Reform Proposal in our Regime and Constitution*[74].

5.3.1.3. Constitutional Reform Proposal of Journal of *Yeni Forum*

The entry of the reform proposal, titled *General Situation*, opens with the claim that Republican Turkey was going through the "most turbulent period" in its history. During this period, there was a lack of guarantee for life and property, the rule of law was neglected, the parliament functioned inadequately, the judiciary operated as an unaccountable "government of judges," the administration demonstrated partisanship, the political system exhibited instability, and the state was almost 'paralyzed.' The proposal attributed this crisis to "economic depression" and "international communism" that led to "extremism and separatism." The proposal called for a 'strong state' and a comprehensive constitutional reform to correct dysfunctional institutions and align them with the Turkish social structure to prevent further crises.

Yeni Forum's Constitutional Reform Proposal (1980, p.4) identifies the source of the

[73] *Yeni Forum,* vol.1, no.17, May 15, 1980.

[74] Tanör wrote that this report was based on previous studies conducted by Senator Adnan Başer Kafaoğlu and former MP Coşkun Kırca (Tanör, 1991, p.69).). However, the report states that it is the "*Yeni Forum's* address to the public" (1980, p.2); this study will refer to it as the "*Yeni Forum's* Constitutional Reform Proposal."

problem as the broad interpretation of "the powers of the judicial organs, particularly the Constitutional Court and the Council of State," rather than the text of the 1961 Constitution as the *Tercüman* Seminar suggested. According to the proposal, the 1961 Constitution's principle of separation of powers resulted in the dominance of the judiciary over the executive and legislative branches in practice. The proposal argues that the 1971 constitutional amendments failed to eliminate "this usurpation of power by the judiciary in its own favor." Additionally, the proposal criticized the electoral system and the Electoral Law for causing "party inflation" and "fragmentation of political forces." It further states that "unnecessary interference" by the judiciary weakens an already weak government and leads to political instability. The proposal suggests that all these factors have made "the current political system unworkable." Consequently, the constitutional institutions, electoral processes, parliament, the executive and its administrative apparatus, and the presidency should be reformed (Yeni Forum, 1980, p.5).

A closer look at the reform proposal regarding the judiciary-executive/administration relations and the Council of State reveals that :

According to the proposal (1980, pp. 21-22), the current constitutional provisions for public administration are sufficient. However, the proposal suggests increasing the central administration's control over local governments, universities, professional organizations with public institution status, and associations working for the public good. The aim is to prevent "extreme leftist and separatist activities."

Second, to ensure impartiality in the selection of public officials, the proposal (1980, p.22) suggests the formation of a committee tasked with evaluating civil servants. Constitutional regulations should ensure that individuals with beliefs that run counter to the principles and existence of the Republic cannot be appointed to public office. Additionally, the proposal recommends that appointments to the military, civil administration, and TRT be made through presidential and prime ministerial decrees in accordance with their wills.

Third, according to the proposal (1980, pp.25-31), it was recommended that the head of state, namely the presidential wing of the executive, be elected by the citizens with

enhanced authority. However, the proposal does not classify the suggested system for the head of state as a presidential or semi-presidential system.

Fourth, besides establishing State Security Courts, the proposal suggested changes in the status of the prosecutor's office, the military judiciary, the Court of Accounts, and the Constitutional Court. Regarding the judicial branch, the most significant criticism was directed to the Supreme Council of Judges, which is authorized to decide on the status and personal affairs of judges. The proposal (1980, p.22) found it inconvenient that judges elect their peers to decide on their appointment, promotion, dismissal, and discipline, creating a "completely separate community" of judges who are disconnected from the "community of voters" who hold the right to sovereignty. According to the proposal (1980, p.22-23), the system designed to ensure the independence of judges has had unintended consequences. It has paved the way for an unaccountable "government of judges" who undermine legal order and are detached from society.

The proposal attacked annulment decisions of the Council of State on disciplinary penalties imposed on civil servants, particularly on teachers, for their collective work stoppage. It claimed that the Council of State and the Constitutional Court "usurped authority." The constitutional proposal saw this as a "violation of the provisions of the Constitution" that regulate the powers of the judiciary and the principle of the rule of law. The proposal argued that this system, which makes judges accountable only to themselves and does not require them to be responsible to other authorities, particularly the nation, is incompatible with the democratic principle that each organ should be checked by the other. For the proposal, the judiciary is the only organ that supervises all other organs in Turkey, yet no other organ supervises it (Yeni Forum, 1980, p.23).

The proposed solution by *Yeni Forum* (1980, p.23) suggests that decisions regarding judges' matters be delegated to the President of the Republic based on recommendations by a council of judges. It is proposed that judges elect the majority of the council members. To understand public satisfaction with the judicial system, the government should also have a presence on this council, with voting rights. In certain extreme cases, the President may sign a decree to enable disciplinary and criminal

prosecution of judges. The courts should also be inspected by inspectors from the Ministry of Justice and inspectors with the status of judges under the Supreme Council of Judges. The Supreme Council of Judges should be chaired by the President of the Republic, with the Minister of Justice and the Prime Minister as voting members. Appeals on the decisions of the Supreme Council of Judges should be subjected to review by the Council of State.

The proposal's primary assessment of the Council of State is that the Turkish Council of State grants too many stay-of-execution decisions compared to the French *Conseil d'etat* (1980, p.2). However, the main criticism of the proposal (1980, p.23) against the Council of State is that decisions of the Council of State could weaken the state by "encroaching on the discretionary power of the administration and making decisions that resemble administrative acts." To address this, the proposal suggests constitutional regulation of the conditions for issuing a stay of execution, making it conditional on the occurrence of unavoidable and calculable material damage. Additionally, the President's approval should be required for the entry into force of stay of execution decisions and finalized annulment provisions issued in annulment lawsuits filed due to exceeding the authority of the administration. The President should also have the authority to revoke this approval when necessary.

According to the proposed reform, the MHAC should be eliminated as it "disrupts the unity of jurisprudence in the administrative judiciary." Instead, a new "Military Chamber" composed of military members should be established within the Council of State to take on the duties of the MHAC (Yeni Forum, 1980, p.23).

It is evident that the *Yeni Forum* proposals put forth a new constitution rather than amendment to the existing 1961 Constitution. The crux of these proposals lies in the emphasis on the presidential wing of the executive branch of government, which will be vested with extensive powers as the head of state. Additionally, the proposal calls for an increased role of the President in several administrative and judicial proceedings, as well as the strengthening of the central administration's control over local governments and autonomous institutions. One concerning aspect of the proposals is the potential for the executive branch to have more influence over the judiciary. This could happen through increased involvement of the President in

decisions related to annulment and stay of execution, which would require the approval of the President. Additionally, the proposed role of the President, the Minister of Justice, and the Prime Minister in the composition and decisions of the High Council of Judges raises concerns about the independence and impartiality of the judiciary.

5.3.2. 1980 Coup and Restrictions on the Council of State by National Security Council

The 1978-1980 crisis, a period of intense political and social unrest in Turkey, was characterized by economic instability, political polarization, and widespread violence. In this unresolved crisis environment, on September 12, 1980, the Turkish Armed Forces overthrew the government, declared martial law, and established a military regime under the National Security Council (NSC). The NSC, which suspended civilian authority and assumed governmental power, governed the country until December 1983, when civilian rule was restored after the November 1983 elections. During this period, the NSC, as the ruling body, had the power to pass laws, regulations, and decrees, and it established the Constituent Assembly, consisting of two wings, the NSC and the Consultative Assembly, through Law No.2485 of 1981[75]. The Consultative Assembly was assigned to draft a new Constitution, Law on Political Parties, and Electoral Law (Eroğul, 1993, pp.231-233).

The NSC did not interfere with the judiciary or abolish the 1961 Constitution but passed laws, regulations, and decrees to establish a new order compatible with its rule. Firstly, the NSC passed Law No. 2324[76] on Constitutional Order, which provided the constitutional basis for military rule and the framework for prospective restraints on judicial review. As noted by Yenice and Esin (1983, p.127), in accordance with Article 6 of Law No. 2324, the NSC was granted the authority to change the Constitution. The Article specified that any laws enacted by the NSC would be considered constitutional amendments if they did not comply with the 1961 Constitution and as amendments to existing laws if they did not comply with the current laws. Furthermore, the law

[75] Law No. 2485 on Constituent Assembly, published in Official Gazette on 30.06.1981- No. 17386-Duplicate.

[76] Law No.2324 on Constitutional Order, published in Official Gazette on 28.10.1980-No.17145, repealed by Law No.2709 on 06.12.1983.

imposed significant constraints on judicial review. These limitations included prohibition challenging the constitutionality of NSC-issued laws, decisions, or declarations (Article 3), the removal of the possibility of annulment and obtaining a stay of execution for decisions and declarations of the NSC, decrees of the Council of Ministers, and trilateral decrees (Article 4), and the abolition of the possibility of obtaining a stay of execution for the actions taken against public personnel (Article 5).

The restraints imposed upon the judiciary within the scope of this law were justified on the grounds that they were intended to be valid temporarily until the new Constitution came into force. Furthermore, these restrictions were presented as necessary due to the current state of emergency and the urgency of restoring order through measures implemented by the military administration (Gültekin, 1982, pp.149-150). After the establishment of TGNA following the 1983 general elections, Law No. 2324 was repealed, and the legislative constraints it imposed were abolished. The 1982 Constitution did not include the restriction imposed by this law on judicial review of actions taken by the Council of Ministers or joint decrees (Günday, 2022, p.54).

However, the NSC period reopened the debate on the limits of judicial review of the administration through laws it passed that granted immunity to certain executive and administrative acts and actions from judicial review of the Council of State. While a few of these limitations were not included in the 1982 Constitution, several others were included, and new restraints were set (Günday, 2022, pp. 53-54).

First, paragraph 3, added to Article 21 of Law No. 1602 on the MHAC by Law No. 2568[77] of 1981, stipulated that certain actions are exempt from judicial review. These actions include those carried out by the President of the Republic, the Supreme Military Council, and the Martial Law Commanders specified in Law No. 1402[78]. Additionally, any penalties imposed by disciplinary superiors for disciplinary offenses and violations are exempt from judicial review (Günday, 2022, p.53; Duran, 1982,

[77] Law No. 2568 on Amendments to the Law on the High Military Administrative Court and the Law on Military Judges, published in Official Gazette on 26.12.1981-No.17556.

[78] Law No. 1402 on Martial La, published in the Official Gazette on 05.05.1971-No. 13837, repealed by Law No 7145 on 31.07.2018.

p.434).

Second, Law No. 2461[79], dated 1981 and passed by the NSC, established the Supreme Council of Judges and Prosecutors (SCJP) by replacing and uniting the previously separate setups as the Supreme Council of Judges and the Supreme Council of Prosecutors. This law also closed the judicial remedy against decisions of the new council. According to Duran (1982, p.432), this law is the most significant legislation concerning the judiciary as it brought all judicial authorities together by authorizing the SCJP and the Minister of Justice to appoint, transfer, promote, and discipline all judges and public prosecutors and to establish, amend, and abolish courts. These changes centralized the power of the judiciary in the hands of the NSC.

Duran (1982a, p.53) asserted that the effect of this law was to reduce both the administrative and civil courts, together with their staff, to mere bureaucratic departments and civil servants under the executive, thus transforming the judiciary into a part of the executive rather than an independent branch of the state. As a result, they were placed under the jurisdiction and supervision of the NSC rule. Furthermore, Law No. 2661 of 1982[80], amending Law No. 2556[81] on Judges, equated the status of the civil judiciary and administrative judiciary judges. Duran (1982a, p.59) further argued that this law, supplemented by Law No. 2661 dated 1982, completely transformed the judicial system of the 1961 Constitution by fusing administrative jurisdiction and civil jurisdiction and undermined the distinctive characteristics of the separate administrative court system.

In a similar vein, Gültekin (1982, pp.150-151) argued that the transfer of training, assignment, and personal rights of judges and prosecutors to the SCJP through Law No. 2461, which left all proceedings concerning administrative judges and prosecutors

[79] Law No. 2461 on the High Council of Judges and Prosecutors, published in the Official Gazette on 14.05.1981-No.17340.

[80] Law No. 2661 on the Amendment of the Title and Certain Articles of Law No. 2556 on Judges and the Addition of Additional and Provisional Articles to this Law, published in the Official Gazette on 24.04.182-No.17674, repealed by Law No. 2802 on 26.02.1983.

[81] Law No. 2556 on Judges, published in Official Gazette on 14.07.1935-No.2751, repealed by Law No.2802 on 26.12.1983.

to the civil judiciary, likely to reduce efficiency and quality of administrative jurisdiction. According to Gültekin (1982, p.151), the tendency to equate administrative judges and prosecutors to judges and prosecutors of the civil judiciary may undermine the *raison d'être* of the separate administrative judiciary.

According to Duran (1982, p.432), decision number 54, made by the NSC on July 10, 1981, followed Law No. 2461, can be interpreted as a sign that the military administration would continue to make regulations concerning the Council of State. This decision, which postponed the election of the president, the president speaker of law, and the heads of departments of the Council of State, indicated that the NSC was trying to mold the Council of State according to its rule, further demonstrating its control over the judiciary.

Article 2 of the Procedure of Administrative Justice Act (PAJA), dated 1982, prohibited any judicial remedy against the Head of State for their direct actions. Additionally, the PAJA introduced a further limitation beyond the restrictive provisions introduced by the 1971 Constitutional Amendment. It stated that "administrative actions and proceedings are limited to the review of conformity with the law" and that "administrative courts may not conduct a review of expediency" (Duran, 1982, p.434). This prohibition of the review of expediency will trigger unending political and legal discussions.

Fourth, Law No.2670[82], dated 1982, amended Articles 135 and 136 of Civil Servants Law No. 657, banning any judicial remedy against warnings and reprimands given to civil servants (Günday, 2022, p.53).

Fifth, Article 3, added to Martial Law No. 1402 by Law No. 2342[83], closed judicial review of the administrative actions taken by the martial law commanders in exercising their powers granted under Law No. 1402 (Alan, 1998, p.536), which

[82] Law No. 2670 on the Amendment of Certain Articles, Repeal of Certain Articles and Addition of Certain Articles to the Civil Servants Law No. 657, published in Official Gazette on 16.05.1982-No.17696.

[83] Law No. 2342 on Amending Certain Articles of the Martial Law numbered 1402 and Adding 1 Additional and 2 Provisional Articles to the Law, published in Official Gazette on 15.11.1980-No. 17161.

resulted in a critical unification decision of the Council of State in 1989.

Both the constitutional restraints of the 12 March regime and the legislative restraints imposed by the NSC after the 12 September coup reveal the constraining influence of the military administration on the judicial review of the administration. Although most restrictions imposed during the NSC period were implemented temporarily, some restrictions continued to exist, either by being included in the 1982 Constitution or by laws enacted by the civilian government established after 1983. However, the January 1982 laws promulgated by the NSC under the title of 'reform' brought about new but permanent legislative restraints on the judicial review of administration. Furthermore, the 1982 Constitution, drafted under military rule, expanded the scope of restraints and gave them constitutional guarantees.

As noted by Coşkun (1993, p. 55) and Duran (1982, p. 431), among the arguments that the judicial review of the Council of State is too extensive, which started in the mid-1960s and increased from 1980 onwards, is the abolition of the Council of State and the transfer of its responsibility to a chamber of the Court of Cassation for the review of administrative acts and actions. When this was not fulfilled, the Ministry of Finance proposed the establishment of a separate Supreme Tax Court, distinct from the Council of State. On the other hand, a "unity of judiciary" system has been proposed on various occasions, advocating for eliminating separate administrative courts, like the Anglo-American jurisdiction, and instead, handling administrative cases within the civil court system. This proposal has usually been supported by scholars and judges with expertise in private law. The proposal has been criticized due to its perceived contradiction with the fundamental purpose of separate administrative courts, with concerns raised about its potential to undermine the integrity and peculiarity of the administrative jurisdiction.

5.3.3. The 1982 Reform of Administrative Judiciary

In January 1982, the NSC government, the rulemaking body in Turkey at the time, made significant changes to the administrative jurisdiction system by introducing three new laws[84], namely, Law No. 2575 of the Council of State, Law No. 2576 of the

[84] All dated 06.01.1982, published in Official Gazette on January 20, 1982-No.17580.

Establishment and Duties of Regional Administrative Courts, Administrative Courts and Tax Courts, and Law No. 2577 on Procedure of Administrative Justice Act (PAJA). The role of the NSC government in this reform was crucial, as it was responsible for formulating these laws. The new law of the Council of State has changed the structure and functioning of the Council of State, which was previously responsible for the judicial review of administration as the first and only administrative court, by emphasizing its function as an appellate authority rather than as a court of first instance. Law on the Regional Administrative Courts, Administrative Courts, and Tax Courts established the administrative and tax courts of the first instance. It terminated the Provincial and District Administrative Boards, Tax Objection and Appeal Commissions, and Customs Arbitration Committees, which previously functioned as administrative tribunals, although they did not have quality of courts. Administrative courts of first instance had been planned since the 1961 Constitution envisaged their establishment implicitly and attempted to be established since 1968, but they had not been until this law. The PAJA provided separate regulations for administrative jurisdiction procedure in Turkey, which was included in previous Law No.521 on the Council of State for the first time[85].

As Gültekin (1982, p.155) wrote, one of the reasonings of these laws is the elimination of drawbacks of the previous one-tiered trial system via a two-tiered system. The essence of the two-tiered trial system in administrative jurisdiction is that the Council of State, which in the past predominantly functioned as a first-instance administrative court, operates essentially as an appellate court aiming at unity of precedents in the administrative jurisdiction. The other justification was the removal of the boards, committees, or commissions, which functioned as first-instance administrative courts, although they were not independent courts, creating an unconstitutionality problem. These laws, presented as reforms in the administrative judiciary on these grounds, caused new debates, such as new legislative restraints on the judicial control of the administration and "convergence of administrative jurisdiction to civil jurisdiction" (Duran,1982a).

[85] Before this law, the rules on administrative procedure were included in Chapter 5, titled "Trial Procedures" of the Council of State Law No. 521. Earlier Laws on the Council of State also contained procedural rules (Duran, 1982)

The enactment of Law No. 2575 and Law No. 2577 sparked a new discussion on the "convergence of administrative jurisdiction to civil jurisdiction" and the potential loss of distinct characteristics of separate administrative courts. This is particularly highlighted by the increasing prevalence of private law-specific judicial procedures within the administrative jurisdiction.

Most significantly, as Alan (1982, p.31) highlighted, the PAJA introduced a new "concept of the limits of judicial control of administration" through its article 2/2. This article stated that "the judicial review of administrative acts and action is limited to control compatibility with the law." It had profound implications for the judicial review of administrative acts and actions. It also stipulated that administrative courts cannot review the appropriateness/expediency of administrative acts and actions, further implications for the boundaries of the judicial review of administration. Furthermore, the article repeated and went beyond the amendment introduced to article 114 of the 1961 Constitution through the 1971 Constitutional amendment by stipulating that:

> …No judicial ruling shall be passed which restricts the exercise of the executive function in accordance with the forms and principles prescribed by law, which has the quality of administrative action or act, or which removes discretionary powers (PAJA, 2003, p.166).

This provision, which would later be included in the constitution, initiated the debate on judicial review of the discretionary power of the administration and the prohibition of expediency review, which are the most complicated issues of administrative jurisdiction.

Finally, Article 2/3 excluded judicial review of the direct acts of the head of state, such as appointment and election of the members of the State Supervisory Board, Election of the members of the SCJP among the candidates nominated by the Council of State and the Court of Cassation and Election of the President of the Council of Higher Education (Alan, 1998, p. 533).

The issue of whether the acts of the President of the Republic are subject to judicial review was raised in 1979 in a case brought against the President of the Republic's

selection of senators by quota. In this decision taken under the 1961 Constitution, which removed the restrictions against judicial review of the administration, the Council of State refrained from reviewing the transaction on the grounds that it was reminiscent of the past practice of acts of government and excluded it from judicial review (Duran, 1982, p.435; Özay 1982, p.27). In this decision[86], the 5th Chamber of the Council of State, in a case brought by a candidate whose request for election as a senator of quota was tacitly rejected, dismissed the case by issuing a judgment of non-jurisdiction at the initial inspection state. In the reasoning of the judgment, it is stated that this act of the President is not an administrative act.

According to Alan (1982, pp.59-60), in addition to this direct restriction imposed by Article 2, this law also brought an "indirect restriction" through Article 27, which makes issuing a stay of execution decision in an annulment case difficult. This 'indirect restriction' refers to the procedural impediments introduced by Article 27, which later be included in the 1982 Constitution, that can make it challenging to issue a stay of execution decision in annulment cases.

These laws directly and indirectly impact the administrative jurisdiction process, imposing restraints on administrative jurisdiction. Additionally, administrative law scholars and Council of State judges have criticized executive practices during the enactment of these laws and the enactment process and method.

The first issue is the lack of transparency and consultation with the Council of State, which is problematic regarding its legitimacy. In the *Latest Developments in Administrative Justice Symposium*[87], Orhan Özdeş (1982, p.173), who was deputy chairman of the Council of State during the time these laws were being prepared, reported that the Council of State was not informed or asked for their opinion on the matter. He also expressed concern over the fact that the members of the administrative judiciary were not informed about these crucial laws that pertain to their field, only hearing that draft laws were discussed in the Specialized Commission of the NSC and

[86] The Council of State Chamber 5, February 16, 1979, E.1979/547, K.1979/575 (cited in Duran, 1987).

[87] Symposium was organized by the Council of State and Istanbul University Administrative Law and Administrative Sciences Research Center in June 1982 in Ankara.

the Constitutional Committee.

An anecdote quoted from Özdeş (1982, p.173) quintessentially exemplifies the conflict between the executive and the Council of State and the intervention of the executive in the process in which the administrative justice system was restructured. Özdeş reported that the drafts were given to them as a consequence of their efforts, and in this way, they had an opportunity to express their views in the commission. He said that during the commission deliberations, the representatives of some ministries had a negative attitude towards the *raison d'être* and principles of the administrative jurisdiction and that despite all their efforts, they could not convince the representatives of these ministries on this issue. He noted that the draft bill passed by the commission, which differed from the enacted version, was much more favorable in terms of the functioning of the administration. Özdeş believes that some provisions that were not accepted by the representatives of the ministries in the commission were subsequently removed. He underlined that their insistence that the judges of the Council of State be considered professional members of the Council of State, as regulated in the Council of State Law No. 521, was met with a reaction by a ministry representative. As reported by Özdeş, the representative of the ministry expressed his reaction in the words: "President, you are trying to squeeze our powers."

Nuri Alan, who was a member of the Council of State at the time of the re-enactment of these laws, claimed (1998, p.532) that the provisional Article 14 of Law No. 2577 was a "coup against the Council of State" and that caused almost like "the reconstitution of Council of State by the head of the state." Provisional Article 14 provides for a one-off election of members to vacant seats in the Council of State from among the candidates nominated by the SCJP. In accordance with the provisions of this law, he was appointed to vacant seats in the Council of State, and the high administrators of the Council of State were elected. Thus, the Head of State renewed almost all posts of the Council of State.

Additionally, as noted by Sabri Coşkun (1990, p.55), a retired member of the Constitutional Court at the *First National Administrative Law Congress*[88], the

[88] Held on May 1-4, 1990 in Ankara.

processes through which these laws were enacted reveal a concerning level of influence of the executive on the administrative judiciary. He noted that 16 high judges who were considered inconvenient to remain in the Council of State were removed by transferring to the newly established Regional Administrative Court Presidencies through the same provision. As Alan reports (1998, p.532), 12 of these judges requested retirement and left the judiciary. These processes, which resulted in the liquidation of judges of the Council of State, have significantly weakened the security of judges when considered together with laws[89] No. 2461 and 2611.

As explained in the section about the limitations on judicial power during the NSC era, Law No. 2461 and Law No. 2611 granted administrative judges the same status as judges of civil courts. As a result, the appointment, personal affairs, and discipline of administrative judges were subject to the SCJP, convened under the Chairmanship of the Minister of Justice. Duran (1982, p.435) argued that this would increase the influence of the executive over the administrative judiciary and reduce the effectiveness of administrative judicial review. He claimed that the new system is not more than a "judicial review-like appearance." Similarly, in the symposium, administrative law scholar Sait Güran (1982, p.168) asserted that the existing structures are only an "administrative judiciary in appearance."

In his article, *Administrative Judiciary Converged to Civil Judiciary*, administrative law scholar Lütfi Duran (1982a, p.54) argued that although the introduction of administrative courts of first instance may have been seen as progress, the administrative jurisdiction has lost its peculiar character by being modeled on the civil courts in terms of organization, status, duties, authority, functioning, and procedure. Another point that Duran (1982a, p.58) draws attention to regarding these laws is that the administrative judiciary took a fragmented appearance. According to Duran, these new laws on the administrative judiciary, on the one hand, caused the convergence of administrative courts to civil courts in a way that blurred the distinction between administrative judiciary and civil judiciary. On the other hand, establishing first-

[89]These laws brought the subordination of administrative judiciary judges to the Ministry of Justice, as well as civil court judges, and the execution of the personal affairs of judges by the High Council of Judges and Prosecutors, of which the Minister of Justice and the Undersecretary of Justice are members, and the expansion of the powers of the executive in the election of the members of this institution and of the higher judicial bodies, including the Council of State.

instance tax courts gave way to duality as tax courts and administrative courts in the administrative judiciary. Thus, together with the MHAC, a tripartite structure emerged in the administrative judiciary system consisting of military, administrative, and tax courts following the laws enacted within the scope of the 1982 administrative judiciary reform.

During its three years of government, the NSC granted the executive and its administrative apparatus extensive discretionary powers through its laws and decisions. On the other hand, the NSC imposed direct restrictions on the Council of State, which is responsible for judicial review of the executive and the administration. Afterward, the NSC was dissolved, and the Law on Constitutional Order and the Law on Constituent Assembly were abolished. However, the influence of the Consultative Assembly and the NSC, whose legal existence ceased with the formation of the Presidium of the TGNA, continued to be effective. The restrictions, introduced by the legislation during the NSC period before the new constitution, became subsequently constitutional provisions. Law No. 2461 on the SCJP, Law No. 2556 and Law No. 2661 on Judges and Prosecutors, Law No. 2575 on the Council of State, Law No. 2576 on Regional Administrative, Administrative, and Tax Courts, Law No. 2577 on Procedure of Administrative Justice, and amendments to Martial Law No. 1402 have turned into constitutional restraints. Thus, including these restraints in the Constitution made them secure and permanent.

5.4. The 1982 Constitution: Expansion of Constitutional Restraints

The 1982 Constitution[90], drafted by the Consultative Assembly and finalized by the NSC "in an undemocratic environment," was adopted through a referendum and entered into force on 9 November 1982[91]. Kenan Evren, head of the NSC, was deemed to be elected President of the Republic for seven years. After the adoption of the Constitution, the NSC exercised its powers of legislative and oversight of the executive until the TGNA was formed on December 6, 1983. Following the 1983 TGNA

[90] The 1982 Constitution Law No. 2709, published in Official Gazette on 20.10.1982- No.17844.

[91] The 1982 Constitution has undergone various amendments since its entry into force. The amendments relevant to the scope of this study are indicated under the relevant subject headings starting from the first to the last version, respectively.

elections, the Motherland Party (MP) came to power, marking a new phase in Turkish political and constitutional history regarding the distribution of power between the organs of the state and the relations between the state and society.

As Tanör argues (1991, p.147), the essence of the 1982 Constitution is strengthening state authority in contrast to Western liberal constitutionalism, which is based on the philosophy of limitation of political power. It is essential to recall that the Constitution Thesis of Celal Bayar, the *Tarabya*/*Tercüman* Newspaper Constitutional Seminar, and the *Yeni Forum* Constitutional Proposal[92], which preceded the 1982 Constitution, all emphasized the weakening of state authority and the drawback of loss of executive power. Similarly, as Tanör (1991, p.98) reports, the first speech of Kenan Evren, who announced the military coup of 12 September through Radio and TV, also emphasized "the vacuum of authority" in the governmental administration. In his subsequent speeches, Kenan Evren listed "consolidation of state power" among the objectives of the 12 September intervention. Furthermore, in his speeches introducing the Draft Constitution, he cited the need for authority as the primary reason for the new Constitution.

As Özbudun (2011, p.26) argued, the framers of the 1982 Constitution held the view that the political turmoil of the 1970s was caused by the decline of state power, particularly the insufficiency of the executive branch due to the overly restrictive measures on executive authority such as comprehensive judicial review applied by the 1961 Constitution. Therefore, the fundamental aim of the Constitution was to establish a "strong state and strong executive." Proving this claim, the preamble of the 1982 Constitution[93], which outlines the fundamental principles on which it is based, emphasizes that "the separation of powers does not imply an order of precedence among the organs of State, but refers solely to…cooperation and division of functions…" reflecting the reaction to the 1961 Constitution, which was believed to be based on the supremacy of judiciary vis-à-vis the executive branch.

[92] Tanör (1991, p.108) draws attention to the new Constitution's similarities with the 1958 French Constitution and the *Yeni Forum* proposals.

[93]Retrieved from: https://www.anayasa.gov.tr/media/7258/anayasa_eng.pdf (accessed: 20.12.2023).

The 1982 Constitution significantly changed the interrelationship of state organs and powers to strengthen the executive power. Firstly, the executive power, previously regarded as a 'function' in the 1961 Constitution, has been elevated to 'power and function' in Article 8 of the 1982 Constitution to make it equal to the judiciary and the legislative. The reasoning of Article 8 states that:

> During the drafting of the 1961 Constitution, it was observed that the dangers to the rights and freedoms of the individual in Turkey constantly came from the executive power… However, in modern life, the executive power is the brain of the state and the engine from which its motive power is derived. That is why, between 1960 and 1980, some governments lacked the power to make decisions. The executive has been removed from being an organ subject to the legislature, and .... the executive has been organized as a force that has the necessary powers and fulfills the duties assigned to it by law (T.C. Anayasası-gerekçeli-, 2019, p.31)[94].

Furthermore, the 1982 Constitution strengthened the executive against the legislative and the judiciary. Article 116 of the Constitution strengthened the executive vis-à-vis the legislative through mechanisms such as facilitating the renewal of elections by the President (Tanör, 1991, p.116). Within the executive branch, it has also made arrangements to increase centralization in the administration and to expand the powers of the President. To ensure centralization within the administration, the 1982 Constitution reduced the autonomy of autonomous institutions such as TRT and universities, which were expanded with the 1961 Constitution, and gave the central administration more authority over local governments (Tanör,1991, pp.119-120). As Duran (1988, p.48) points out, the executive, which 'inwardly' strengthened its position among state organs vis-à-vis the legislature and the executive, has also 'outwardly' increased its power over civil society and individuals. He noted that the former is done through constitutional regulation, while the latter is embodied in the form of laws and administrative regulations and procedures. The executive or administrative power, organized abstractly in the Constitution, manifests its concrete reflection on individuals and society through laws, regulatory, or administrative acts.

By adopting a unique approach to strengthening the executive power, the 1982

[94] Retrieved from: https://www.anayasa.gov.tr/media/7465/gerekceli_anayasa_2021.pdf (accessed: 20.10.2023)

Constitution aimed to increase the power of the presidential wing of the executive branch. This approach differed from the usual practice in parliamentary governments, where the executive is reinforced by granting more power to the Council of Ministers and the Prime Minister. In pursuit of its objectives, the 1982 Constitution granted the President the authority to perform several significant tasks exempt from judicial review. In the case of martial law and emergency, the Constitution gave the Council of Ministers the power to take necessary measures without being bound by laws and the Constitution. According to Duran (1988, p.69), this situation has led to a "personal power" that has the potential to turn into arbitrary rule rather than a strong executive. Additionally, to remove obstacles to the executive in general and the President in particular, the 1982 Constitution introduced constitutional restraints directly stipulated in the constitution, prohibiting judicial control of the administration and the executive.

In Günday's (1990, p.140) words, besides the exclusion of certain administrative acts from judicial review through the Constitution itself, the Constitution has also introduced "indefinite restrictions," which are not predictable as compared to the legislative restraints imposed by the laws in the pre-1982 period. He contends that all acts of a particular authority or body were excluded from judicial review by the 1982 Constitution, while under the 1924 Constitution, "only specific administrative acts" were excluded from judicial review. Under the 1982 Constitution, the legislative branch has broad powers to limit judicial review through legislative restraints because the authorization of organs and bodies to enact administrative acts is determined through law. Consequently, the 1982 Constitution introduced new constitutional restraints and allowed prospective legislative restraints instead of eliminating the existing limitations on the judicial review of the executive and the administration.

The Law on the Council of State and the PAJA enacted during the NSC period and the rules on the establishment and procedure of the Council of State were incorporated as constitutional rules into the 1982 Constitution, which came into force after the promulgation of these laws. A closer look at Article 125 on 'judicial remedy,' Article 104 and Article 105 on the 'President of the Republic' and Article 155 on 'the Council of State' of the Constitution, which were shaped on the basis of these laws, will reveal that the legislative restraints introduced by these laws during the NSC period have reappeared in the form of constitutional restraints in the 1982 Constitution.

First, Article 125 of the Constitution, titled 'Judicial remedy,' reiterates the statement of Article 114 of the 1961 Constitution, which was amended through 1971 constitutional amendments: "Recourse to judicial review shall be available against all acts and actions of the administration." However, Articles 125/2 and 105/2 of the Constitution reiterate the provision of the PAJA, enacted during the NSC period, which excludes administrative acts signed by the President ex officio from judicial review. According to the version adopted by the Consultative Assembly, the reasoning for article 105/2 was "to indicate how the principle of the irresponsibility of the head of state would be applied in a parliamentary regime."

Furthermore, the Constitution does not limit the acts of the President, which can be performed independently without the signatures of the relevant minister and prime minister, to the election and appointment procedures mentioned in Article 104 and Article 105. According to the last paragraph of Article 105, other actions specified in other laws that the President may perform independently are immune to judicial review. In line with these provisions of the Constitution, many regulations, such as the Law on the TRT Corporation and the Law on Higher Education, authorize the President to issue administrative acts independent of the Prime Minister and the relevant minister. Therefore, the 1982 Constitution also allowed for the creation of an undefined and indirect category of legislative restraint on the administrative acts of the President, which it excluded from judicial review through constitutional restraint (Günday, 1990, pp.140-141).

Second, in addition to the actions taken by the President alone, Article 125, paragraph 2, excludes the decisions of the Supreme Military Council from judicial review. The reasoning of the version of Article 125 of the Constitution, which the NSC Constitutional Commission finalized, is that:

> ...taking into account the nature and importance of the decisions of the Supreme Military Council concerning the promotion and retirement of personnel serving in the Turkish Armed Forces, these decisions should be excluded from administrative judicial review (Anayasa-gerekçeli, 2019, p.754).

During the National Security Council discussions, in response to the question as to

which decisions of the Supreme Military Council were meant by this provision, the Chairman of the Constitutional Commission, Judge Major General Muzaffer Başkaynak, stated that "the actions concerning promotion and retirement as set out in Law No. 929 are meant"[95].

Separation from the armed forces due to indiscipline or immorality in accordance with Articles 50/b and 50/c of the Turkish Armed Forces Personnel Law No. 926 and according to Article 54 of Law No. 929 amended by Law No. 3475, the promotion procedures of colonels and generals based on the evaluation of the Supreme Military Council were previously subject to the review of the Council of State and then the MHAC (Günday, 1990, p.141). The 1982 Constitution explicitly excluded personnel matters, such as the promotion of military personnel, from judicial review. As will be remembered, this issue had been a point of contention since the 1930s and had been previously handled by the TGNA, the Military Court of Cassation, the Council of State, and ultimately the MHAC due to the assertions of "Pasha of the Council of State."

Third, Article 159/3 of the 1982 Constitution excludes all decisions of the SCJP from judicial review. Thus, administrative actions regarding judges and prosecutors, including administrative court judges, such as their admission to the profession, appointment, transfer, and suspension from the profession, are excluded from judicial review. The issue of judicial review of the decisions of the SCJP has been the subject of debate in various constitutional amendments. As will be remembered, established by the 1961 Constitution and composed entirely of judges, decisions of the Supreme Council of Judges and Supreme Council of Prosecutors were open to judicial review. However, following the constitutional amendment made by Law No. 1488 of 1971, the decisions of these Councils were closed to judicial remedy. This law allowed the executive to influence these Councils by authorizing the Minister of Justice to chair the Councils when deemed necessary. In 1977, the Constitutional Court annulled the constitutional amendment that closed judicial review of these Councils' decisions on the grounds that it was "contrary to the rule of law."

[95] 1st Period, 7th Volume, 118th Session, pages: 383-384 cited in Constitution with Reasoning, The Constitutional Court, pp.755-756).

As highlighted by Günday (1990, p.142), the 1982 Constitution, "as a reaction to this decision of the Constitutional Court," closed the judicial remedy against the decisions of the SCJP. According to the 1982 Constitution, the decisions of the SCJP, chaired by the Ministry of Justice, in which the Undersecretary of the Minister of Justice is a natural member and the President and the executive have an increased influence in the selection and appointment of its members, are excluded from judicial review. This is detrimental to the independence of administrative judges who are responsible for reviewing the actions of the executive and the administration, as well as the security of tenure of judges. This article of the Constitution transformed the legislative restraints of Law No. 2461 on the SCJP of 1981 during the NSC period, which stated that the decisions of the Council were excluded from judicial review, into a constitutional restraint. The Advisory Council justified this prohibition on the ground that the Council "operates in accordance with the principles of the independence of the courts and the guarantee of judgeship" (T.C. Anayasası-gerekçeli,2019, p.1002).

Based on Günday's (1990, p.142) distinction, the 1982 Constitution created indirect restrictions by authorizing the legislative in addition to direct constitutional restraints. Paragraph 3 of Article 129 of the 1982 Constitution states that "disciplinary penalties, except for warning and reprimand penalties, cannot be excluded from judicial review," and thus allowed passing laws on the exclusion of warning and reprimand penalties from judicial review. The most typical example of this situation is the amendment of the 4th paragraph of Article 136 of the Civil Servants Law No. 657 with Law No. 2670. Thereby, the warning and reprimand penalties given to public personnel subject to Law No. 657 were excluded from judicial review.

In addition, as Günday (1990, p.142) stated, some provisions in the Constitution made it possible for the provisions to restrict the scope of a judicial review. In line with the provision of the provisional Article 2 of the Constitution, the NSC, which continued to exercise legislative authority after adopting the new constitution, undertook to enact the laws envisaged in the constitution without leaving it to the TGNA. During this period, the NSC enacted laws concerning the judiciary, such as Law No. 2802 on Judges and Prosecutors, Law No. 2797 on the Court of Cassation, Law No. 2845 on

the Establishment and Trial Procedures of State Security Courts (Tanör, 1991, pp.111-112). Furthermore, laws enacted during the NSC period were exempted from constitutionality review through the temporary arrangements of the newly adopted Constitution. The most effective provision to ensure the permanence of the interim period of the NSC is the provisional Article 15 of the Constitution. Paragraph 3 of Provisional Article 15 excludes all regulations enacted during the interim period and having the character of legislative acts from the judicial review of the Constitutional Court. Thus, as asserted by Eroğul (1993, p.237), these laws, which the Constitutional Court cannot review, were allowed to become permanent even if they were unconstitutional owing to the judicial immunity they have. Moreover, the legislative restraints placed on judicial review of administrative acts by these laws would continue to exist.

One illustrative example of such a legal amendment can be found in the amendment to Law No.1402 on Martial Law, introduced by Law No. 2342 on the Constitutional Order of 1980. Another example is the administrative actions of competent authorities during the Extraordinary Administrative Procedures, in which administrative bodies are authorized to exercise extensive discretionary power. According to the 1987 Decree Law No.285 on the Establishment of the Governorate of the State of Emergency Region, administrative actions related to exercising the powers granted to the Governor of the State of Emergency Region were closed to judicial review. Subsequently, Decree-Law No.413, enacted by the Council of Ministers convened under the chairmanship of the President, amended the State of Emergency Law No. 2935. The administrative actions related to exercising the powers granted to the Minister of Internal Affairs and governors by this law were excluded from judicial review. These decrees-laws, imposing restraints on judicial review, continued to exist because they could not be challenged in the Constitutional Court due to the "prohibition of application to the constitutional court with the claim of unconstitutionality of decrees-laws issued in states of emergency and martial law" as stated in Article 148/1 of the 1982 Constitution (Günday, 1990, p.143).

Moreover, through these decree-laws, the executive branch has curtailed judicial reviews of executive and administrative acts and actions contrary to previous

legislative and constitutional restraints.

Another restriction stipulated by the 1982 Constitution is the inclusion of the provision of the PAJA, enacted by the NSC in 1982, concerning the stay of execution, which made ruling stay of execution difficult. According to paragraph 5 of Article 125, a stay of execution decision can only be ruled if both conditions of "if the implementation of an administrative act should result in damages which are difficult or impossible to compensate for" and "if this act is clearly unlawful" are met simultaneously. Additionally, the ability to rule such a stay of execution during exceptional circumstances may be restricted through law, making it more challenging to rule a stay of execution decision than in ordinary circumstances. The reasoning of the article prepared by the Advisory Council is that "taking into account the discussions that arise in practice regarding stay of execution decisions, it has been tried to clearly state in which cases a stay of execution decision can be ruled." These regulations, which make ruling a stay of execution difficult, can be explained as a reaction to the allegations of the mid-1960s claims that the Council of State had issued an excessive number of stays of execution, interrupting the effectiveness of governmental administration. Furthermore, not content with this hardening, in 1990, with the amendment made to the PAJA by Law No. 3622, appealing the stay of execution decisions issued by the courts of first instance was made possible (Alan, 1998, pp.537-538).

Moreover, Article 155 of the 1982 Constitution, which regulates the Council of State, defines the role of the Council of State as both a court of first and last instance in the judicial review of administration. According to the Constitution, the Council of State, in addition to hearing administrative cases, provides its opinion on draft laws sent by the Prime Minister and the Council of Ministers and reviews draft regulations (*tüzük*), concession agreements, and contracts. As stated in the reasoning of the text adopted by the Consultative Assembly (Article 167[96]), the Council of State fulfills an advisory function and is an administrative court. However, a 1990 amendment to the Council of State Law limited its duty to "express its opinion on draft laws and examine draft regulations." This amendment to Article 48 of Law No. 2575 on the Council of State stipulates that the Council of State's examination of draft laws and proposals shall be

[96] Version before its redaction by the Constitutional Council of the NSC.

limited to examining their conformity with the Constitution. In contrast, the examination of draft statutes shall be limited to assessing their conformity with the law and the Constitution. However, this amendment was canceled by the Constitutional Court[97] in 1991 (Tan, 2020, p.679).

The 1982 Constitution contains provisions that limit the ability of the judiciary to review executive and administrative decisions. These provisions include both direct constitutional restraints and indirect legislative measures that permit the enactment of laws restricting judicial review. Additionally, the Constitution includes cautionary provisions to prevent overly broad review of administrative and executive actions. The concept of "natural limits of administrative jurisdiction," as described by Günday (1990, p.144), was initially introduced in the Constitution through the 1971 amendments and further elaborated in Article 2 of the PAJA, enacted during the NSC period. This concept was later included in Article 125 of the 1982 Constitution. Accordingly, first, the power of administrative jurisdiction is limited to the determination of the conformity of administrative acts and actions with law. Second, no judicial decision may be made in a manner that restricts the exercise of the executive function in accordance with the form and principles set out in the law. Third, judicial decisions having the quality of administrative action and act cannot be given. Fourth, judicial decisions cannot be made to remove the discretionary power of the administration. However, Article 125 of the 1982 Constitution did not include the phrase "the administrative courts cannot review the expediency of an administrative action[98]," which is included in the PAJA and the reasoning of the constitutional text adopted by the Consultative Assembly.

According to Örücü (2000a, p.346), this article represents a more restraining version of Article 114 of the 1961 Constitution, which the 1971 Constitutional Amendment subsequently constrained. She contends that these amendments were a response to the perceived excessive intervention of the Council of State in reviewing the appropriateness/expediency of administrative decisions.

[97] Constitutional Court case number: K.991/15, Official Gazette: July 24, 1992-No. 21335.

[98] This issue will be discussed in the context of the 2010 Constitutional amendments, and its details will be analyzed in the next Chapter.

Administrative law scholars and practitioners have emphasized that these prohibitions, which constitute the natural limits of the administrative judiciary, were already included in the precedents and doctrine of the Council of State before their inclusion in the Constitution in 1971. Therefore, their inclusion in the Constitution was unnecessary. According to the Constitutional Commission of the National Security Council, the reasoning of the article is "to clarify the limits of administrative jurisdiction." The natural limits of the administrative judiciary and the concept of the prohibition of expediency review have triggered endless debates in Turkish political and legal history.

It is important to note that, opening parenthesis, the breakthrough decision issued by the Council of State on Law No. 1402, which brought a legislative restraint on the judicial review, will be examined under the following title.

5.4.1. The Ruling of Council of State on Law No.1402

Law No. 2301 of 1980[99], enacted by the NSC, added a new paragraph to Article 2 of Law No. 1402 on Martial Law. This provision authorized martial law commanders to request from relevant public organizations that public servants from their regions deemed inconvenient to remain in the office on the grounds of general security, public order, or lack of usefulness of their services be removed from their regions or dismissed. As mentioned above, judicial review of the administrative actions taken by the martial law commanders was prohibited by the additional Article 3 of Law No. 1402. Since Article 3 of Law No. 2324 on the Constitutional Order prohibited the challenge of the unconstitutionality of laws enacted by the NSC, the unconstitutionality of these amendments, which imposed restrictions on judicial review of these laws, could not be challenged before the Constitutional Court. In addition, the last paragraph of the provisional Article 15 of the 1982 Constitution closed the way for the annulment of the laws enacted during the NSC period before the Constitutional Court.

Under this provision of Law on Martial Law, many public officials at all levels,

[99] Law No. 2301 on Amending Certain Provisions of the Martial Law and Adding Certain Provisions to this Law dated 19.09.1980, published in Official Gazette on 21.09.1980 No.17112.

including professors and teachers, were dismissed or suspended from duty at the request of the martial law commanders by their institutions. Moreover, the provisional article added to the Martial Law in 1982 by Law No. 2766[100] stipulated that public personnel[101] whose duties were terminated upon the request of martial law commanders "cannot return to the office again." On the other hand, Law No. 2766 also introduced the possibility for martial law commanders to re-examine the cases of public personnel whose employment was terminated upon the request of martial law commanders and to lift the decision of "deemed inconvenient to remain in the office" issued against them. Thus, some public servants had their "deemed inconvenient to remain in office" orders lifted, and some were reinstated by their respective administrations. However, in the lawsuits filed by those whom their institution did not reinstate despite the lifting of the decision, administrative courts ruled for annulment, stating that the lifting of the "deemed inconvenient to remain in the office" decision has the quality of reversal of the dismissal acts (Coşkun, 1990, pp.57-58).

As reported by Coşkun (1990, p.57), in the lawsuits filed by those against whom the "deemed inconvenient remain in the office" decision was not lifted to prevent them from being reinstated after the lifting of martial law, the 5th Chamber of the Council of State issued inconsistent decisions[102] regarding the provision "they cannot be employed in public services again" added to Law No. 1402 by Law No. 2766.

Additionally, Zabunoğlu (1982, pp.100-101) wrote that, in some cases, some administrators in the administrative organization, where the public personnel worked, initiated such proceedings, requesting the removal, suspension, or relocation of the public personnel from their posts from the martial law commanders. However, according to law, it must be initiated by the martial law authorities and approved by the martial law commanders. The Council of State refrained from reviewing these

[100] Law No. 2766 on Amendment of Certain Articles of the Martial Law No. 1402, , published in Official Gazette on 30.12.1982-No.17914.

[101] Civil servants, other public officials, and workers in public service.

[102] While the decision of the 5th Chamber dated 14.4.1988 and numbered K.1286 stated that the provision should be limited to the duration of martial law, other decisions stated the contrary (Official Gazette, February 9, 1990-20428 p. 67).

transactions, even though they were not carried out as prescribed by law.

Upon the request of the 5th Chamber of the Council of State to unify the decisions, the Council of State issued a significant precedent unifying the decisions[103] on these public personnel, known as '1402s (*1402likler)'* in Turkish legal and political history. In its 1989 precedent, the Council of State General Assembly on the Unification of Judgments ruled, by the majority of votes, that "the provision "...cannot be employed in public services again" in the last paragraph of Article 2 of the Martial Law No. 1402, as amended by Law No. 2766, should be applied limited to the duration of the martial law to public personnel whose duties are terminated upon the request of the martial law commanders" (The Council of State, 1989)[104]. Thus, these public officials were allowed to return to their duties upon their request and without loss of qualifications.

In this decision, the Council of State adopted the method of interpretation in harmony with the Constitution, which it had used for the first time in 1950, before the establishment of the Constitutional Court in Turkey. With this method of interpretation, the administrative court judge first confirms the scope and content of the rule to be applied in the case to the Constitution by interpreting it (Azrak, 1992, pp.333-334). Alan (1997, p.34) states that the title of "substitute constitutional judge" for administrative court judges stems from the fact that they apply this method of interpretation.

In the decision, it is stated that Articles 15 and 122 of the 1982 Constitution, which allow for the restriction of fundamental rights and freedoms more than in ordinary cases, are in force depending on the circumstances requiring the declaration of martial law and are a temporary situation that ends with the disappearance of these requirements. In addition, the decision states that the legal provision that constitutes the basis of these transactions is contrary to the right to enter the public service

[103] The Council of State General Assembly on the Unification of Judgments E.1988/6, K.1989/4, 07.12.1989, published in Official Gazette on 09.09.1990-No.20428.

[104] The Council of State General Assembly on the Unification of Judgments E.1988/6, K.1989/4, 07.12.1989, (retrieved from kanunum.com on May 1, 2024).

regulated in Article 70 of the Constitution and the principle of equality before the law in Article 10. In this way, the Council of State overcame the restriction on judicial review imposed by law by interpreting it in terms of the constitutionality of the law.

5.4.2. Post-1983 Developments: Neo-Liberal Policies

After the 6 November 1983 elections, the MP Government, headed by Prime Minister Turgut Özal, came to power. The MP government enacted various regulations to exclude some administrative acts and actions from judicial review. The Council of State annulled some of these regulations, decrees, and administrative procedures. Some of the cases that were most discussed at the time were (Coşkun, 1990, pp.55-56):

The Council of State issued a stay of execution and then annulled the Bylaw on the Oral Examination of Judge Candidates. In response, as Coşkun (1990, p.56) reports, the government did not open an exam for administrative jurisdiction candidate judges for about four years, leading to a human resource problem for the administrative courts. During this period, administrative acts taken by the government and administrations regarding the construction of parking lots in *Zafer Park* and *Güven Park*, located in the city center of Ankara, and administrative acts regarding the dismissal of contracted personnel were annulled.

Privatization transactions of *ÇİTOSAN (1987),* the State Economic Enterprise (SEE) to which the cement and soil industry was affiliated, and *USAŞ (1989),* the SEE that carries out aircraft shuttle services of Turkish Airlines. Following the annulment of the transactions to sell *ÇİTOSAN* and *USAŞ* to foreigners through block sales, the Council of Ministers issued a "decision in principle," stating that "the implementation of the annulment rulings is legally impossible." However, the Council of State also annulled this decision of the Council of Ministers [105] (Tan, 2015, p.413).

In the years following these annulments, the decisions of the Constitutional Court and the Council of State that invalidated privatization transactions sparked lively debates

[105] 10th Chamber of the Council of State, 28.05.2004, E.202/4061, K.2004/5219, Danıştay Kararlar Dergisi, No.6, P. 236.

between the political authorities and the legal and judicial circles in Turkey. Before moving on to these debates, briefly portraying Turkey's structural adjustment policies would be helpful. These policies were rooted in the 24 January 1980 decisions and were mainly implemented during the post-1983 MP government period, of which privatizations in Turkey were also a crucial component.

In 1983, the MP government initiated a structural adjustment program to replace an import substitution development policy with an export promotion policy. Alongside changes in economic policies, new trends have emerged in the role of the state in the economy and society, public administrative structures and processes, and legal regulations and jurisdictional processes. These changes have been implemented under the title of reform. The crisis in Turkey was primarily attributed to the burdensome public bureaucracy, the heavily regulated economy, and extensive control over governmental administration, which was equated with inefficiency and red tape. As a solution, policies were implemented to downsize the public sector, manage it with private sector rationality, and introduce liberalization and deregulation in the economy. The principles of neo-liberal economic policies and the new right ideology influence the contemporary globalized movement of capital. This has led to significant changes in the structure and operations of public administration and the paradigm that dominates the discipline of public administration. The process involves narrowing the scope of public administration and public services, privatizing state-owned enterprises, and changing the public personnel regime. This has been accompanied by the NPM approach in the discipline of public administration (Aksoy, 2003, p.553).

In conjunction with these policies, characterized by the reduction of the public sector and privatization, the role of the state in delivering public services has been redefined, leading to a quest for administrative mechanisms better suited for providing public services more effectively and efficiently. The concepts and institutions of administrative law, as the branch of law applied to public administrative processes and the separate administrative court system applying this law, have also come under questioning, particularly in countries where the Continental European legal system is employed (Tan, 2003, p.633). This process, described by Tan (2003, p.634-635) as the transition from legal rationality to economic-managerial rationality, proposes focusing on concrete results rather than compliance with abstract legal rules and on ends rather

than means in administrative-legal relations.

Akıllıoğlu (1990, p.3) defined this as '*economisme*,' which means that public administrative affairs are taken out of the context of classical administrative law and handled through procedures peculiar to private law. Tan (2003, pp. 638-642) asserts that managerial rationality influences administrative structures, procedures, personnel regimes, and judicial review of public administration. In his view, judicial review should extend beyond reviewing conformity with the law. The examination of public administration should focus on "efficiency, effectiveness, and economy," and judicial review should be supported by new extra-judicial audit mechanisms.

This process started in Turkey in the early 1980s and has gained momentum since 1999. In this process, defined as the second generation of structural reforms, many legal arrangements were made, existing administrative institutions were changed, and new institutions were built to regulate the market under the *Transition to a Strong Economy Program* (Ercan, 2003, p. 26).

Since the mid-80s, privatization practices have started in Turkey with the privatization of the SEEs. The Council of State annulled the first privatizations of *ÇİTOSAN* and *USAŞ*.

The Council of State in the Ottoman period primarily had advisory and legislative functions, but during the Republican period, it transitioned to judicial functions. Initially, the Council of State mainly handled taxation and public personnel cases. However, as the role of the state evolved, the Council of State began to diversify the range of cases it dealt with. Since the post-1983 period, the Council of State has actively participated in economic matters due to the increasing administrative transactions related to the economy, such as public service concession contracts and privatization transactions in Turkey.

The 1982 Constitution has faced criticism mainly for its origins in a military coup and has undergone several amendments since 1987. The 1999 Constitutional amendments in Turkey are primarily associated with privatization efforts. These changes have

significantly impacted the jurisdiction of the Council of State concerning judicial review, international arbitration in public service concession contracts, privatization, and the role of administrative courts in these matters.

5.5. 1999 Constitutional Amendments: Constitutionalization of Privatization

As Ardıçoğlu (2008, pp.220-221) articulates, in Turkey, the privatization process started in 1984[106] and achieved to have a legal framework in 1994[107]. The judiciary, particularly the Constitutional Court and the Council of State, was seen as an obstacle to privatization practices. In the process, culminating in the 1999 Constitutional Amendments, the most controversial issue was the controversies regarding the privatizations based on the build-operate-transfer model. Until Law No. 3996[108] of 1994, which stipulated that the procedure of provision of certain public services by the private sector through the build-operate-transfer model shall be subject to the provisions of private law contracts, the Council of State regarded these contracts as public service concession contracts. However, the Constitutional Court later annulled this law[109]. The 1999 constitutional amendment took place after the Constitutional Court annulled Law No. 3996, which enabled contracts based on the build-operate-transfer procedure to be brought before civil courts as a private law conract rather than treated as administrative law contracts under the jurisdiction of administrative courts.

Law No. 4446 of 1999[110] amended three articles of the Constitution—Articles 47, 125, and 155—regarding the role of administrative courts and the Constitutional Court in public service concession contracts, privatization, and international arbitration transactions. Additionally, Law No. 2575 on the Council of State was amended along

[106] Law No. 2983 Law on Promotion of Savings and Acceleration of Public Investments, published in Official Gazette on 17.03.1984-No:18344.

[107] Law No.4046 Law on Privatisation Practices, published in Official Gazette on 27.11.1994-No: 22124.

[108] Law No. 3996 Law on the Construction of Certain Investments and Services under the Build-Operate-Transfer Model, published in the Official Gazette on 13.06.1994-No:21959.

[109] Constitutional Court case number: K.1995/23.

[110] Law No.4446 Amending Certain Articles of the Constitution of the Republic of Turkey, published in Official Gazette on 14.08.1999-No:23786.

with this constitutional amendment.

The first amendment was to Article 47, whose title was changed from 'Nationalization' to 'Nationalization and Privatization,' two paragraphs on privatization were added to the existing text of the article on nationalization by Law No.4446. The reasoning of the article of the amendment proposal (T.C. Anayasası-gerekçeli-, 2019, p.269) states the rationale of this provision as "giving privatization a constitutional basis for the first time." This is the first provision on privatization in the Turkish Constitution. The newly-added first paragraph reads, "Principles and rules concerning the privatization of enterprises and assets owned by the State, state economic enterprises and other public, corporate bodies shall be prescribed by law[111]." The other paragraph reads;

> Those investments and services carried out by the state, state economic enterprises, and other public corporate bodies, which could be performed by and delegated to persons and corporate bodies through private law contracts, shall be determined by law[112].

The constitutional provision was seen as a response to earlier annulment decisions made by the Council of State and the Constitutional Court regarding privatization transactions. These decisions were viewed as judicial resistance to the privatization efforts of the executive. It was also suggested that making privatization a constitutional matter was a way to overcome resistance from the Council of State and the Constitutional Court. Örücü (2000a, p.347) argued that the Turkish Council of State has historically opposed privatizations resulting reduction of the jurisdiction of administrative courts.

These amendments triggered vigorous discussions in TGNA: According to *the Report of the Constitutional Commission* on the amendment of Article 47 (T.C. Anayasası-gerekçeli- 2019, p.270): "This amendment will provide a legal basis, discipline and principle for privatization"... some members considered this amendment as "a guarantee" and stated that "governments will no longer be able to privatize on their own and that this area will be regulated by law under parliamentary supervision." In this way, the privatization issue will be discussed on a national scale, and subjective evaluations will be prevented. On the other hand, some members also argued,

[111] Retrieved from https://www.anayasa.gov.tr/media/7258/anayasa_eng.pdf (accessed: 20.12.2023)
[112] Ibid.

according to the report, that "the purpose of this regulation is to eliminate the review of the Council of State if any public service is transferred to the private sector through private law contracts…." According to the Commission's report, in response to oppositions, the Minister argued that:

- The concepts of public service, public interest, and public order have changed over time according to social needs and gained a new content,
- Public services do not necessarily have to be carried out by the public sector. Instead, the private sector can provide them through public service concession contracts,
- Although the content of this article was previously included in many legislations, the privatization transactions were annuled by the courts due to lack of constitutional basis,
- The constitutional amendment would provide the constitutional basis for new privatization models, including the build-operate-transfer,
- The Council of State would only express its opinion on public service concession contracts, and the Council of Ministers would take the final decision,
- The purpose of the provision is to overcome an existing legal problem.

The second amendment was to Article 125, which starts with "recourse to judicial review shall be available against all actions and acts of administration."[113] With Law No. 4446, the added sentences read;

> In concessions, conditions, and contracts concerning public services, national or international arbitration may be suggested to settle the disputes arising from them. Only those disputes involving an element of foreignness may be submitted to international arbitration.[114]

According to the Constitutional Commission Report (T.C. Anayasası-gerekçeli-,2019, p.758), the worries expressed during the discussion of this amendment were as bypassing Turkish law and Turkish judiciary and that the primary purpose of

[113] Retrieved from: https://www.anayasa.gov.tr/media/7258/anayasa_eng.pdf (accessed: 20.12.2023).

[114] Ibid.

arbitrations is to relieve local companies from the supervision of the Council of State rather than empowering foreign capital.

The third amendment was to Article 155 of the Constitution, titled 'Council of State.' Law No.4446 amended the second paragraph of Article 155[115]:

> The Council of State shall try administrative cases, give its opinion within two months on the conditions and the contracts under which concessions are granted concerning public services, settle administrative disputes, and discharge other duties prescribed by law.

The Council of State used to be responsible for reviewing concession contracts prior to the amendment of Article 155. However, the amendment has reduced its supervisory role regarding concession contracts. The article's reasoning for this amendment states, "..a similar provision was included in the 1924 Constitution…" In *the Constitutional Commission Report*, it is stated that the examination of the Council of State takes long time, but the problem is not only the duration but also the fact that the Council of State does not recognize contracts with arbitration clauses as valid and that the Council of State will only give its opinion.

According to Örücü (2000, p.346), the 1999 Amendments, which should be regarded as an addition to the prohibition of reviewing the expediency of administrative act in Article 2/2 of PAJA and should be seen as a response to the Council of State's excessive scrutiny of administrative acts and actions.

Tan (2020, p.666) argued that these amendments were necessary in response to foreign capital to accommodate the demand for foreign investment in the built-operate-transfer method. Additionally, the amendments addressed foreign investors' preference for international arbitration outside the national jurisdiction, including the Council of State, in resolving disputes arising from implementing these contracts.

As articulated by Örücü (2008, pp.42-43), substantive amendments to the 1982 Constitution were enacted in 2001 and 2004, explicitly addressing fundamental rights

[115] Ibid.

and freedoms to advance democratization in line with EU harmonization efforts. After the November 3, 2002, general elections, the Justice and Development Party (JDP) came to power. This resulted in a change in the discussions around constitutional amendments due to the tensions between the JDP government and the President of the Republic. The President of the time frequently vetoed the legislation and decisions, mainly concerning appointments, enacted by the JDP government besides applying to the Constitutional Court for annulment cases for laws passed by the JDP majority in the parliament. As a consequence of the Presidential veto and the annulment by the Constitutional Court, many laws, particularly those related to 'Public Administration Reform' and privatization procedures, could not be implemented. On April 27, 2007, the Turkish Armed Forces issued a warning statement, known as 'e-coup,'[116] to the government, drawing attention to the JDP's actions that were deemed incompatible with the constitutional principle of secularism, as the existing president's term was close to ending. The subsequent election crisis of the President of the Republic, followed by a controversial ruling of the Constitutional Court regarding the election procedure of the President of the Republic by TGNA, paved the way for the constitutional amendment of 2007, which enabled the citizens to elect the President of the Republic directly.

In 2010, the JDP Government proposed a new but comprehensive Constitutional amendment package encompassing various articles of the 1982 Constitution, ranging from fundamental rights to financial and economic provisions with a specific focus on the judiciary.

5.6. 2010 Constitutional Amendments: Restructuring of the Judicial Branch

The process resulting in the 2010 constitutional amendments, which were the subject of intense debates regarding their content, preparation, and adoption, started with the submission of Law No. 5982[117] to the Turkish Parliament on 30 March 2010. The proposed constitutional amendments, encompassing a wide array of constitutional

[116] This is because the declaration was published on the website of the General Staff (Örücü, 2008, p.43).

[117] Law No. 5982 on Amending Certain Articles of the Constitution of the Republic of Turkey, published in the Official Gazette on 13.05. 2010-No.27580.

issues, have been drafted as a unified package composed of twenty-six articles. The law was ratified by the TGNA on May 7, 2010, and enforced on May 13, 2010, following its publication in the Official Gazette. On September 12, 2010, coinciding with the anniversary of the 1980 coup, the amendments were approved through a referendum, resulting in 58 % of the votes in favor. The package encompassed a multitude of amendments to the 1982 Constitution regarding the sections of the judiciary, executive, legislative, fundamental rights and duties, financial and economic provisions, and general provisions. However, the focal point of the 2010 Constitutional amendment package was the restructuring of the judiciary (Gönenç, 2010, p.1), particularly the Constitutional Court and the SCJP, which have been significant actors in Turkish politics. The package also included provisions on the scope of judicial review of administrative acts and actions.

The ruling JDP government has presented the amendment package as a Constitutional Reform aimed at reducing the influence of the 1980 coup on the 1982 Constitution, which was a product of a military coup and has been the subject of legitimacy concerns. However, Örücü (2011, p. 11) asserted that the amendments to the 1982 Constitution did not deviate from the fundamental essence and underlying principles of the prior version of the 1982 Constitution. The amendments failed to address all the criticisms directed at the Constitution and did not diminish the extensive powers of the presidential wing of the executive branch granted by the 1982 Constitution. Additionally, as Örücü (2011, p.13) points out, the referendum process took place as a vote of confidence given to the JDP government rather than voting for a constitutional amendment. Furthermore, in the referendum, the amendment package, prepared entirely by the ruling JDP and did not involve a broad consensus with the opposition parties, was subjected to a consolidated vote of yes or no rather than a separate vote on each article contained within the package. All these resulted in substantial criticism against the Constitutional Amendment process regarding its formulation, voting procedures, and substance. In their criticism, the opponents claimed that they were designed to undermine the autonomy of the judiciary and enhance the executive's influence over it (see Kaboğlu,2012; Sevinç,2010) in contrast to the government's portrayal of it as constitutional reforms aimed at eliminating 'military tutelage.'

The proponents of the amendments argued that these changes have effectively dismantled the "bureaucratic tutelage" system entrenched in the judiciary since the

1961 Constitution, reaching its peak in the 1982 Constitution. From this perspective, Hakyemez (2012, pp.546, 561) argued that as the influence of 'bureaucratic tutelage' gradually increased in the 2000s through judicial bodies and their contentious rulings, the government launched Constitutional amendments in 2010 to counter the judiciary's challenge to its discretionary decisions and actions.

A closer look at the 2010 constitutional amendments on the judiciary reveals that the Constitutional Court and the SCJP are at the forefront. Since 1962, when it became operational, the Constitutional Court, supervising the parliament by examining the constitutionality of laws, hearing closure cases against political parties, and trying politicians as the Supreme Court, has played a critical role in Turkish politics. In this respect, the judges of the Constitutional Court, who have the crucial function of ensuring that the state acts within the framework of rules of law, were claimed to make decisions in line with their own ideology in politically charged cases by hiding behind the abstractness of the review criteria. The Constitutional Court has also been criticized for exceeding the review of legality by reviewing the expediency of the case and engaging in judicial activism (Hakyemez,2012, p.444-445).

In the mid-2000s, tensions between the government and the judiciary notably escalated, particularly involving the Constitutional Court and the Chief Public Prosecutor's Office of the Court of Cassation, which can initiate a party closure case. This is mainly due to controversial rulings of the Constitutional Court on the Presidential Election of 2007, also known as the '367 Decision,'[118] and the party closure case of 2008 against the ruling party JDP, which resulted in partial sanctions against the party (Hakyemez, 2012, pp.546-555). According to Hakyemez (2012, p.545), these tensions revived the discussions on the scope and limits of the control by the judiciary, such as judicial activism, the government of judges (*juristocracy*), expediency review, and the separation of powers.

[118] Constitutional Court E.2007/45, K.2007/54 dated 1.5.2007.

The SCJP's structure has been criticized for being perceived as an elitist judicial body, creating a closed circuit between the Court of Cassation-Council of State and the SCJP. It is seen as detached from society, and its democratic legitimacy is questioned due to its formation (Hakyemez, 2012, p.556).

The composition of the Constitutional Court and the SCJP, subject to significant criticism regarding their structure and composition, changed by the 2010 constitutional amendments. The amendment allowed individuals to apply directly to the Constitutional Court for violations of their rights protected under the *European Convention on Human Rights.* Secondly, the amendment removed the prohibition to recourse judicial remedy against the decisions of the SCJP regarding the dismissal of judges. However, while increasing the number of non-judicial members in the formation of the Constitutional Court, amendments did not diminish the President's role in selecting and appointing members of these institutions. Furthermore, the frequently criticized provision of the Constitution, according to which the Minister of Justice chairs the SCJP and the undersecretary of the Ministry of Justice is an ex officio member of the SCJP, was not amended.

In the context of public administration and the execution, the amendment established the Ombudsman Institution as a non-judicial mechanism for resolving disputes between administrative bodies and individual citizens. Additionally, the amendment nullified the provision outlined in paragraph 3 of Article 129 of the Constitution and then stipulated by the Civil Servants Law, which exempts disciplinary actions of warnings and reprimands for public officials from judicial scrutiny. These regulations enhance individual freedoms by enabling them to assert their rights against the administrative and executive branches, thereby expanding the scope of judicial review in administrative courts.

Similarly, the amendment also abolished the judicial immunity of the decisions made by the Supreme Military Council concerning dismissal from the armed forces. However, the amendment removed the prohibition of judicial review of the decisions of the Supreme Military Council solely on dismissal from office, as is the case with the decisions of the Council of Judges and Prosecutors. It will be recalled that the 1982

Constitution imposed constitutional restraints on judicial review on all decisions of the SCJP and the Supreme Military Council. The amendment only removes the constitutional restriction on dismissal decisions of both Councils, but not on other acts such as appointments, promotions, and relocations. Furthermore, it did not eliminate the constitutional restraints of judicial review on the acts carried out solely by the President, as stipulated in the PAJA and the 1982 Constitution. The provision stipulating that the Constitutional Court cannot be applied against decree-laws that have the power to indirectly curtail judicial review of the administration was not abolished. However, Provisional Article 15 of the Constitution, which excluded the regulations issued during the 1980 military coup from judicial review and indirectly limited the judicial review of the administration, was abolished.

The 2010 constitutional amendment introduced a significant change in the scope of judicial review of administrative actions. Specifically, the amendment constitutionalized the prohibition of expediency review, which had previously been outlined in the PAJA, by adding the phrase "… and in no case may it be used as a review of expediency.[119]"

5.7. Post-2010 Developments in Turkish Administrative Judiciary

In 2014, the administrative judiciary system underwent a new reform with Article 18 of Law No. 6545[120], which added a new article of 20/A titled Expedited Judgment to the PAJA. The reasoning of Law No. 6545 defines the urgent trial procedure as "a limited number of types of proceedings, the delay of the decision of which may have unbearable or impossible consequences for both the administration and the claimants." In article 20/A, these types of proceedings to which expedited judgment applies are the urgent expropriation procedures, the decisions of the High Council of Privatization, the sale, allocation, and leasing procedures under the Tourism Incentive Law, the decisions resulting from environmental impact assessment under the Environmental Law, the Presidential decisions made under the Law on the Transformation of Areas

[119] The debate on expediency review will be examined in detail in the next chapter of the thesis.

[120] Law No. 6545 Amending the Turkish Penal Code and Certain Laws, published in Official Gazette on 28.06.2014-No:26044.

Under Disaster Risk, and specific tender procedures. With the expedited procedure, the time limit for filing a lawsuit, the defense rights of the parties, and the investigative powers of the court are limited, the judgment procedure is shortened, and only appeal is specified as a legal remedy to streamline trial procedures.

According to Karahanoğulları (2019, p.219), the employment of the urgent trial procedure can be viewed as a "methodological limit" that restricts the plaintiff's ability to pursue their rights and curtails the investigative powers of courts. For him, this procedure, which is exclusively implemented in cases concerning construction, public tenders, and allocating public resources to the market, aims to meet the demands of capital owners in these areas.

An action for annulment for Article 20/A on the expedited trial procedure was filed with the Constitutional Court on the grounds of unconstitutionality (Tan, 2020, p.1192-1193). However, the Constitutional Court[121] did not annulled this article of the law and ruled that:

> Subjecting the disputes arising from the transactions mentioned above to an expedited trial procedure to resolve them as soon as possible due to their importance and characteristics... is not contrary to the principle of the rule of law and the constitutional provisions regulating the judicial remedy against all kinds of actions and transactions of the administration…..Although the shortening of the time limits constitutes an interference with the freedom to seek justice, it is based on a legitimate aim to bring disputes before the judicial authorities as soon as possible. It does not impose an unreasonable restriction on using the right to sue and reply.

Similarly, according to Article 20/B of the Administrative Trial Procedure Law No. 2577, lawsuits related to the central and common exams administered by the Ministry of National Education and the Measurement, Selection, and Placement Centre, including disputes over exam results, shall follow an expedited trial procedure.

Law No. 6545 restructured the Regional Administrative Courts and reorganized their duties by amending Article 3 of Law No. 2576 on establishment and duties of Regional Administrative Courts, Administrative Courts, and Tax Courts. The changes

[121] Constitutional Court case number: K. 2015/31, Official Gazette 13.06.2015 -No.29385.

introduced the appeal court system (*istinaf*) prior to the appellate procedure before the Council of State by authorizing the regional administrative courts to examine and decide on the appeals against the final decisions of the administrative courts of first instance, which are open to appeal. In this way, the administrative justice system has become a three-tier system in some cases. After the appeal examination, if the regional administrative court finds the decision of the court of first instance to be unlawful, it shall annul this decision and adjudicate the case itself[122]. The decisions of the regional administrative court, which are not open to appellate before the Council of State, are final.

On 16 April 2017, the Constitutional Amendment, adopted following the referendum, made significant amendments directly related to administrative law, such as the abolition of the military judiciary, regulations on the Council of Judges and Prosecutors, and the election procedure of the President. The change in the system of government, which was brought about by changes in the process of election of the President of the Republic, entered into force on 9 July 2018, when the President of the Republic took office as a result of the TGNA and Presidential elections held on 24 June 2018.

The most significant change brought by the 2017 Constitutional amendment and with the arrangements made by the Decree Law No.703 regarding the Council of State is that the duty of the Council of State as a high advisory body to review the draft laws sent by the government was abolished with the abolition of the Prime Ministry and the Council of Ministers and the regulations (t*üzük*) in the hierarchy of norms with the new governmental system. Hence, the advisory and administrative functions of the Council of State are limited to issuing opinions on concession agreements and contracts and, in cases provided for by law, deciding on other administrative matters.

Another significant change brought about by the 2017 constitutional amendment regarding the administrative judiciary was the abolition of the MHAC, which functioned as the second highest court in the administrative jurisdiction, together with

[122] Article 45/4 of Law No. 2576 on Establishment and Duties of Regional Administrative Courts, Administrative Courts, and Tax Courts.

the Council of State. The establishment, duties, and powers of the MHAC, the establishment of which was stipulated by the 1971 amendments to the 1961 Constitution, were regulated by Law No. 1602 of 1972. Regulated under Article 157 of the 1982 Constitution, the MHAC changed to adopting the 1982 Constitution and the 2010 Constitutional amendments. The MHAC, which operated as a high court with a special duty to examine disputes concerning administrative acts and actions related to military service and involving military personnel as a first and last instance administrative court, was abolished together with the military judiciary. The article's reasoning for the proposed law, which was abolished by Law No. 6771 of 2017 amending the Constitution, stated that the abolition of the court was to "adapt to the newly established governmental system."

5.8. Assessment

The examination of the Constitutional and relevant legal amendments indicates that within Turkish political history, the administrative courts, notably the Council of State, tend to overstep their bounds in the perception of political power. Therefore, there has been an emphasis on clarifying the limits of administrative jurisdiction through legislation and the Constitution. This perspective has received support from various segments of society, including civil society organizations, media, and academics who aligned with the political power of the era. These groups have played a crucial role in shaping public opinion and influencing the direction of the debate over the authority of the Council of State. It is believed that these limits should be clearly defined at the legal and constitutional levels. As a result, holders of political power have gradually reminded the Council of State of these boundaries through constitutional and legislative amendments. Despite occasional circumvention of these restrictions through its rulings, the Council of State has faced increasing limitations and warnings.

The restraints, previously established through legislation and the Council of State itself, gained constitutional status following the 1971 Constitutional Amendment. Since then, these amendments have been portrayed as necessary for bolstering the authority of the state/executive, which had become weakened in the face of the judiciary and could not carry out its duties. Over time, legislative texts and constitutions have increasingly included provisions stipulating that judicial decisions

cannot curtail executive power, replace administrative functions, or eliminate discretionary authority and that judicial power is restricted to ensuring adherence to the law and cannot be subject to assessments of expediency. Thus, the primary areas of concern are identified as the judicial control of the discretionary power of administration and the examination of expediency.

Before the 1982 Constitution, there were conflicts, particularly evident in decisions regarding the stay of execution and annulment cases brought by public employees against the executive/administration. These cases, which often involved disputes over public personnel issues, were a significant source of friction between the executive branch, administrative authorities and the Council of State. However, after 1982, this tension became more pronounced, particularly in cases related to privatization, environmental cases, and the economic policy of the government. The following chapter will provide skeching of these types of rulings by the Council of State, which exemplify the tension between the executive branch, administrative authorities and the Council of State.

CHAPTER 6

EXPEDIENCY-LEGALITY CONTROVERSY IN TURKISH ADMINISTRATIVE JURISDICTION

6.1. Introduction

The previous chapters of this thesis have detailed the restraints imposed on Turkish administrative jurisdiction through laws and constitutional amendments, which have restricted judicial review of executive/administrative acts and actions. In addition to exempting specific administrative acts and actions from judicial review, the Constitution contains provisions that impose general limitations on administrative courts regarding the judicial review of administrative acts and actions. These limitations include refraining from issuing judgments that have the quality of administrative acts, eliminating administrative discretion, preventing the executive branch from carrying out its legally prescribed duties, and reviewing matters of expediency. Commonly known as the prohibition of expediency review, the primary aim of these constraints is to prevent administrative courts from encroaching upon the discretionary powers of the executive branch and administrative authorities.

The concept of expediency review is closely tied to the discretionary power of the administration and is often used interchangeably. Judicial review of administrative expediency has been seen as a counterpoint to legality review. These two forms of control are not contradictory and can be hard to distinguish. As a result, the topic of legality versus expediency, a complex and elusive concept, presents the most challenging aspect regarding the extent of judicial review of administrative acts and actions. This complexity is particularly evident in the judicial review of administrative acts based on administrative discretion, forming the crux of the tension between public administration/the executive and administrative law/jurisdiction in Turkish jurisprudence. Similarly, despite its critical importance, the boundary between

expediency and administrative discretion has not been clearly defined.

The concept of expediency review has been a highly contentious issue in Turkish administrative jurisdiction, drawing significant attention, particularly before the 2010 constitutional amendments. It became prominent due to the claim that the Council of State and administrative courts exceeded their jurisdiction by reviewing the expediency of administrative acts as part of their legality review. This alleged overreach by the administrative courts was argued to hinder efficient governmental administration. Therefore, expediency plays a vital role in shaping the relationship between the executive/administration and the administrative courts in Turkey, particularly in economic and environmental cases. In these instances, the administrative authority exercises extensive and intricate discretionary power. The issue of expediency has been a source of tension between the political power and the Council of State in Turkey, particularly since its introduction into legislation in 1981 and until its constitutional entrenchment in 2010.

In this chapter, the thesis analyzes the concept of expediency review as it is portrayed in Turkish administrative law literature, Turkish legislation, and the decisions of the Turkish Council of State, which play the primary role in the expediency discourse. The chapter begins with exploring the conceptual debates surrounding expediency review, its linkage to the judicial review of administrative discretion, and its underpinnings in Turkish legislation. It subsequently scrutinizes specific cases from the precedents of the Council of State that illustrate the tension between expediency and legality while also emphasizing the complexities posed by the issue of expediency review and administrative discretion in Turkish politics. The chapter aims to highlight that the technical legal and jurisdictional discourse concerning expediency review is intricately intertwined with the political processes of Turkey.

6.2. The Concept of Expediency in Administrative Law

In the field of administrative law/jurisdiction, it is conventionally assumed that the primary responsibility of the administrative courts is to conduct judicial review of administrative acts and actions to ensure that the administration complies with the law, as mandated by the notion of law-bound state.

This review is limited to determining the legality of administrative acts and actions

and does not extend to reviewing the expediency of the administrative acts. With the 2010 Constitutional Amendment, this rule became a constitutional provision, explicitly prohibiting administrative courts from conducting expediency reviews. Article 125 of the Constitution reads, "...judicial power is limited to the review of the legality of administrative actions and acts, and in no case may it be used as a review of expediency." The reasoning for the 2010 constitutional amendment asserted that expediency review refers to "...the negative use of executive power" (T.C. Anayasası-gerekçeli-,2019, p. 761).

In a similar vein, Gözübüyük (2008, cited in Kaya, 2011, p.176) contends that the expediency review implies the interference of the administrative courts with administrative matters, granting administrative courts the authority to determine administrative policies. Consequently, this means that the judiciary, which is not accountable to the legislative and executive branches or the public, supplants the administrative power. From this point of view, the prohibition of expediency review aims to prevent administrative courts from encroaching on the jurisdiction of the administration in the judicial review of administrative acts, which is confined to the legality review. In this respect, drawing the legal framework and the boundaries of the judicial review of administrative acts seems to be a technical issue. However, for reasons to be explained below, since the first years of the 1980s, there has been a debate on the expediency review, which goes beyond its legal and judicial dimensions. This debate reveals the politicized tension between the political power, involving the executive and the administrative functions, and the Council of State, which holds the authority to review the acts and actions of the political power. As analyzed in the previous chapters of this thesis, this tension has taken various forms since the establishment of the Council of State in the mid-19th century.

This practical problem, often described as a matter of delineating the boundaries of administrative jurisdiction in the review of the executive and the administration, implies that the administrative courts are subject to certain limitations in their operation. More precisely, this means that some actions taken by the administration and the executive, driven by political power and embodied as administrative acts or actions, may be immune to judicial review. Hence, the concepts of 'legality review,' 'administrative discretion,' and 'expediency review' play a central role in legislation,

judicial practice, and academic studies regarding the topic of expediency. These concepts encapsulate the actions of political power that are either exempt from judicial review or attempted to be exempted. They also reflect the efforts of (administrative) courts to bring these actions under control or intensify their control over these actions.

Although the prohibition of the expediency review, a self-evident, deep-seated principle of administrative law frequently cited in the decisions of the Council of State, has become a constitutional rule, it has remained blurred. Additionally, the English articles authored by Turkish academics (e.g., Örücü, 2000: merits review), the English translations of the PAJA by Altıparmak (2003: appropriateness), and the English translation of the Turkish Constitution, published by TGNA (2019: expediency) propose differing wordings for the English equivalent of the French concept of '*opportunité.'* This concept was recently referred to in Turkish administrative law expediency *(yerindelik).* It was previously referred to as compliance with affairs *(maslahata uygunluk)* (see Onar, 1966) or compliance with necessities *(ihtiyaca uygunluk)* (see Kıratlı, 1967).

In addition to these complexities associated with its content and conceptual framework, there are also practical challenges in precisely defining expediency review through empirical examination of the decisions of the Council of State, which is the ultimate authority in the reification of expediency. This is because its decisions are not amenable to making generalizations, as the concept of expediency is determined on a case-by-case basis contingent on the specific circumstances of each concrete case. Nevertheless, it is essential to examine the definition provided by the Council of State since precedents of the Council of State shape the concept of expediency.

In a 1986 decision, frequently cited in administrative law literature for the definition of the concept of expediency review (i.e., Duran, 1987, p.8; Kaya, 2001, p.272), the Council of State[123] defined expediency as follows:

> ...After the control of compliance with law in terms of all these elements and after the transaction is deemed to comply with law, the issue that is outside the field of control of the administrative judiciary is related to the field expediency, for example, the use of the administration's preference in favor of this or that

[123] 5th Chamber of the Council of State, E.1985/596, K.1986/1084 dated 23.10.1986, Danıştay Dergisi, No.66-67, p.255-257.

> person when making an administrative action for persons in the same legal situation, or the failure to make judicial decisions in the nature of administrative actions and transactions by taking the action of administrations...

According to Duran (1987, p.8), the Council of State did not clearly explain the difference between discretionary power and expediency in this ruling. As a natural consequence of the principle of equality, the administration must provide the court with reasoning and concrete evidence of its preference for one person over another in equal situations. Therefore, Duran argues that the example given in this judgment does not correspond to the area of expediency.

According to a 1987 decision of the Council of State[124], expediency is;

> ...in cases where administrations are equipped with the discretionary power to choose one of the multiple options to carry out a particular public service effectively and efficiently and to present the public interest more concretely, the review to be carried out by administrative courts is limited to investigating and determining whether the option preferred by the administration and its implementation is in accordance with law. Decisions of the administrative courts, given in a way that forces the administration to choose one of these options or to act or act in a particular direction, thus exceeding the limit of legality in the control of administrative actions and entering into the control expediency, cannot comply with the Constitution, legal rules and principles of administrative law.

As these decisions of the Council of State and the Constitutional provision indicate, expediency reviews demarcate the boundary of legality control that administrative courts are required not to exceed when reviewing administrative acts. However, it is often challenging to differentiate between legality and expediency, as they tend to be intertwined. The meaning of legality review, which is the natural consequence of the principles of the rule of law and the principle of legality of the administration, is self-evident. However, establishing the fundamental criteria to determine the extent of the legality review, which essentially sets the jurisdictional boundaries of administrative courts, is a complex endeavor.

As Yenice and Esin (1983) highlighted, the first question is whether the factual basis of administrative acts, previously beyond judicial review, is considered in evaluating

[124] 5th Chamber of the Council of State, E.1987/2389, K.1987/1610, dated 23.11.1987, Danıştay Dergisi, No.70-71, pp.255-258.

their legality. Administration performs administrative acts and actions based on material facts. Therefore, when the administrative courts review administrative acts and actions, it is obligatory to assess whether the material facts constituting the basis of the administrative act are proper and consistent, given the possibility that the administration is making errors in characterizing these facts. If material facts that technically fall outside the limits of legality are excluded from judicial review, the review of legality will be incomplete. According to Yenice and Esin (1983, p.136), administrative courts cannot determine at an abstract level whether administrative acts and actions exceed the limits of legality or enter the field expediency without assessing the specific details of the case. This requires consideration of factual basis as well as legal dimensions. "When conducting judicial review of an administrative act for compliance with the law, it is essential to consider the normative dimension, known as 'desideratum,' and the material fact, also referred to as 'factum,' as Akıllıoğlu (2013, p.44, 60) calls. These two aspects cannot be easily distinguished due to the ontological unity between legality, which involves a normative assessment, and the material fact.

Secondly, the concept of law has a much broader content than the concept of legislation. When reviewing the administration's compliance with the law, administrative courts review statutory regulations and ensure that administrative acts adhere to all written rules of law, notably the Constitution, including its general philosophy and general principles of law, such as equality and non-retroactivity. General principles of administrative law, such as administrative orderliness and proportionality, are also regarded as a standard for review (Ayaydın, 2011, p.509). Additionally, vague concepts such as public interest, public service requirements, and public order, frequently cited in statutory regulations and the decisions of the Council of State, complicate the demarcation of the boundaries of compliance with the law.

Despite this abstractness and ambiguity, various definitions have been developed in the administrative law literature to explain the concept of expediency. For instance, according to Chapman (1970, cited in Güven,1985, p.146), the review of expediency, which indicates administrative policy and necessity, aims to ensure that public authorities act according to the policy set by the government and the legislature.

In French administrative law, as often referenced in Turkish administrative law

literature, Vedel (1973, cited in Alan, 1982, p.49) defines the judge of administrative court as a judge of legality, not a 'judge of expediency,' and the administrative judge reviews the legality of administrative action, not the exercise of discretion. If they control the choice of administration, they will abandon their task to ensure obedience to the law and place themself in the position of a hierarchical superior of the administration. Similarly, according to Odent (1970-1971, cited in Alan, 1982, p.59), the unpleasant consequences of an administrative act do not constitute grounds for annulment. The appropriateness of a decision does not impact its legality. When judges review the appropriateness of administrative action, they substitute their judgment for that of the administration, ultimately replacing the active administration.

In the same vein, Mendes (2016,p.8), writing on EU administrative law, notes that French administrative law scholars "contraposes the legality to *opportunité* (expediency), which qualifies as a "freedom of choice on the relation between the two" and "dividing line between the legality and the *opportunité* moves to detriment of the latter as judicial review expands." Mendes (2016,p.10) noted that expediency and discretion are used synonymously, as in the French jurist Hauriou's phrase, there is an "overlap between the two." In the same study, Mendes mentions the distinction between discretion and merits (*merito*), valid in Italian administrative law. Mendes wrote that;

> the concept of "*merito* is defined in negative terms," "similar to the French concept of *opportunité*," meaning "an area of free administrative activity, regarding the choice of options that are equally valid, reasonable and proportional in line with the public interest." "The merit of discretionary choice is thus not subject to judicial control of legality" (Clarich, 2015, cited in Mendes, 2016, p.10).

The merits review by the administrative tribunals, which has been applied in the Australian administrative jurisdiction since the 1970s, and its separation from judicial review conducted by the courts are reminiscent of the expediency control in Turkish and French administrative law. Peter Cane (2000, p.220), writing from an Anglo-American perspective, argues that "judicial review and merits review are not mutually exclusive," one of the criteria to distinguish judicial review is "(it) is about the legality of the administrative decisions, not their merits." Another frequent distinction in common law, as Cane reports, is that in the judicial review, courts are not allowed "to substitute its decision for that of the administrator." Alternatively, "merit review

tribunals... interfere with administrative policy decisions." Cane (2000, p.221) asserts that "there is no analytically clear distinction between the legality of the administrative decision and their 'merits.'

As indicated by these quotations, expediency review is frequently juxtaposed with administrative discretion and positioned in contrast to legality review in various legal systems, as is Turkish administrative law. Turkish administrative law scholars and practitioners define it as "supervision of administrative acts in terms of compliance with the administrative requiremenst" (Kiper, 1980, p.19; Kaya, 2001, p.271). Yenice and Esin (1983, p.136) argue that expediency review entails the administration evaluating public service requirements, exercising its discretionary powers, and selecting the most appropriate option by considering each case's specific characteristics and unique circumstances. Thus, the concepts of administrative discretion and expediency are closely interconnected and are sometimes used synonymously in the literature, as pointed out by Karatepe (1991, p.85).

According to Oytan (1990, p.156), the realm of expediency, which falls within the realm of discretionary power, is the part of the discretionary power that is outside the control of conformity with the law. Conversely, Akıllıoğlu (1990, p.9) argues that making a distinction between the areas of administrative discretion and expediency would mean that the former would be recognized as "the free area granted to the administration by legal rules" and the latter as "the area that cannot be controlled since legal rules do not regulate it." However, the basic philosophy of administrative law is that the administration is bound by law in all its acts and actions. According to Akıllıoğlu (1990, pp.9-10), expediency is a category that should be rejected as it would mean "no control at all" or "purely discretionary action," which has no place in a contemporary rule of law.

Duran (1987, p.8) argues that in the context of the modern rule of law, detailed regulations typically impose orders or prohibitions on the executive branch and administrative bodies, governing their behaviors positively or negatively. As a result, it is uncommon for the administration to have a realm of expediency, and the intervention of the judiciary in this domain is a scarce possibility. He suggests that expediency can only arise when the administration has complete discretion to decide whether to act, including determining the timing, location, methods, means, and

justifications for carrying it out. Duran (1987, p.8) further argues that these elements, which encompass the entirety of the transaction, fall outside the scope of judicial review because they are not regulated by legislation.

The notion of expediency, defined as "alignment with the requirements of the administration," as briefly outlined in administrative law literature, presents a significant practical challenge worth considering. As a concept, it refers to an area where the administration can exercise discretionary power in line with its own requirements and rationality. In this respect, it can be considered as a technical counterpart of the acts of the government of the executive, which is regarded beyond judicial review due to its political nature in the administrative apparatus of the government. The acts of government about the high-level administration of the country are relatively limited and discernible through interpretation or listing by the legislative or judiciary. This has been the case in Turkey's experience. Unlike executive affairs, the field of public administration, which involves the day-to-day management of various administrative activities, is characterized by a significant degree of discretionary power. This necessitates implementing detailed administrative measures, as administrative bodies are in constant and close contact with individual citizens. In contrast to acts of government, it is almost impossible to clearly define and delineate the scope of expediency in many aspects of everyday administrative activity. The challenge lies in the ever-changing boundaries of administrative discretion, which are too intricate to calculate and predict accurately.

6.2.1. The Roots of the Expediency Debate in Turkish Legislation

The discussions concerning the claim of the administrative courts review the expediency of administrative acts can be traced back to the 1940s, according to Özdemir (2024, pp.500-501). The 1971 Constitutional Amendment introduced specific legal arrangements that imply the administrative judiciary exceeds its jurisdiction of legality review, sparking a debate underlying the expediency matter. The text and reasoning of the 1971 constitutional amendment to Article 114 of the 1961 Constitution did not include the term 'expediency.' Instead, it used the phrases "judicial power shall not be used in such a way as to restrict the execution of the executive duty that follows the form and principles set out in the law" and "judicial decisions cannot be made in the nature of administrative acts and actions." The

phrases, while not explicitly mentioning expediency, can be interpreted as indirect references to the realm of expediency, indicating what should not be done in the judicial review of the administration for the administrative jurisdiction, like the prohibition of expediency review.

In December 1981, during the NSC Government, an amendment was made to Article 21 of the Law on the MHAC of 1972 by Law No. 2568[125]. This amendment, which prohibited expediency review, explicitly stated that "there can be no expediency review." This was a significant development in the history of Turkish administrative law, representing the first introduction of the concept of expediency into legislation. According to Article 2/2 of the PAJA, enacted in January 1982 during the NSC period, administrative courts are prohibited from reviewing the expediency of administrative decisions. In the PAJA, the phrase "administrative courts cannot review expediency" is stipulated as one of the limits of judicial control over the administration (Özdemir, 2024, pp. 501-504).

Article 125 of the 1982 Constitution, promulgated in November 1982, included new provisions concerning the limits of judicial review. It stipulated that "Judicial power is limited to the review of the legality of administrative actions and acts" and that "no judicial ruling shall be passed which removes discretionary powers." These additions supplemented the existing restraints on the jurisdiction of administrative courts in the judicial review of administrative acts. According to Karahanoğulları (2011, p.50), the 'unique' aspect of Article 125 is that it limits judicial review to ensuring conformity with the law and prohibits the removal of discretionary power through judicial decisions. Unlike the laws enacted during the NSC period, the 1982 Constitution does not include an explicit prohibition on expediency review besides these indirect and implying provisions.

However, the reasoning of Article 133, drafted by the Consultative Assembly and later finalized as Article 125 of the 1982 Constitution by the NSC, specifies that "judicial review of the administration is confined to ensuring adherence of administrative acts to the law. As a result, the judicial body is not empowered to review expediency of

[125] Law No. 2568 Amending the Law on the Military High Administrative Court and the Law on Military Judges, published in the Official Gazette on 26.12.1981-No: 17556.

administrative actions" (T.C. Anayasası-gerekçeli-, 2019, p.754). In other words, the "concept of expediency," which was initially supposed to be included in the 1982 Constitution, was ultimately left out of final version.

Karahanoğulları (2011, pp- 51-53) reported that the NSC session, held on January 6, 1982, in which the PAJA was discussed, mainly concentrated on the prohibition of expediency. The Head of State, his advisors, and the Minister of Justice engaged in a noteworthy discussion on the newly introduced concept of expediency[126] as follows:

> HEAD OF STATE (KENAN EVREN): What does 'expediency' mean in the second paragraph? I guess it is a new phrase… "Review of expediency"… What is the former phrase for this?
>
> ŞEREF GÖZÜBÜYÜK (Legal Advisor to the President): This is the review of appropriateness, which has entered our legal language.
>
> .....
>
> HEAD OF STATE: 'Appropriateness' has become 'expediency.'
>
> İLHAN ÖZTRAK (The Minister of the State): It can also be called 'compliance with the affair.'
>
> HEAD OF STATE: Yes… Is it compliant with the affair or not?
>
> MILITARY JUDGE BRIGADIER MUZAFFER BAŞKAYNAK (Head of the Justice Commission): That is, those kinds of courts will not be able to assess whether this kind of administrative transactions or acts are compliant with the affair or not.
>
> HEAD OF STATE: "They may not."
>
> .....
>
> MINISTER OF JUSTICE CEVDET MENTEŞ: ... The administration will exercise its discretion, considering the public interest. While exercising this right of discretion... it will make a choice: "Which one does the public interest require?" The administrative judiciary will not be able to intervene in these options. It will not be able to intervene in the form of "Which of these options is appropriate and which is not?"...
>
> .....

[126] National Security Council, Discussions on the Administrative Trial Procedure Law, National Security Council Journal of Minutes, C.6, Birleşim: 91, dated 06.01.1982, pp.5-10. Retrieved from https://www.kanunum.com/Tutanak/XXXX/MILLI-GUVENLIK-KONSEYI-06011982-6-Cilt-1-Oturum_xxvid10629679_xxmid10629679_search#10629679. (accessed: 18.01.2023).

KEMALETTİN ALİ KAŞİFOGLU (The Delegate of the Ministry of Justice): I have heard it for the first time and found it very strange.

HEAD of STATE: I also have found it strange.

KEMALETTİN ALİ KAŞİFOĞLU (The Delegate of the Ministry of Justice):... I say let us find another word.

.....

MILITARY JUDGE BRIGADIER MUZAFFER BAŞKAYNAK (Head of the Justice Commission): I think the word fits the need better than suitability to the requirements. Whether such a decision is suitable or not requires the court to decide.

AIR FORCE JUDGE COLONEL ZEKİ GÜNGÖR (Speaker of the Justice Commission): "Is this option appropriate?" The administration will decide; the judiciary cannot intervene in this.

HEAD of STATE: It cannot control whether it is expedient. The dictionary meaning of this is "expediency."

MINISTER OF STATE İLHAN ÖZTRAK: We analyzed the law before introducing this phrase and concluded that it is correct, Mr. President.

HEAD of STATE: In legal practice, judges may not know the term 'expediency'; they refer to a dictionary and may not find it.

KEMALETTİN ALİ KAŞİFOĞLU (The Delegate of the Ministry of Justice): I have been a judge for forty-two years and heard 'expediency' for the first time.

AIR FORCE JUDGE COLONEL ZEKİ GÜNGÖR (Speaker of the Justice Committee): Mr. President, 'expediency' is a new term that has entered administrative doctrine; unfortunately, dictionaries do not explain it.

MILITARY JUDGE BRIGADIER MUZAFFER BAŞKAYNAK (Head of the Justice Committee): We talked to academics from related schools about this issue; they said they are going to teach this to students and their books involve that phrase.

.....

AIR FORCE JUDGE COLONEL ZEKI GUNGOR (Speaker of the Justice Committee): That concept should be improved within the doctrine.

.....

SEREF GOZUBUYUK (Legal Advisor of the President): Mr. President, it is the translation of '*opportunité*' ***(in French)***. The best term in Turkish is 'expediency' *(yerindelik).*

HEAD of STATE: .expediency, let us call it "compliance with the affair."

.....

SEREF GOZUBUYUK (Legal Advisor of the President): Mr. President, it does not cause any problem in practice. My books have involved it for ten years in the field of administrative judiciary.

HEAD of STATE: For ten years?

SEREF GOZUBUYUK (Legal Advisor of the President): Yes, it is mentioned in decisions of the Council of State and used by academics teaching administrative sciences; it is not new. (…) Let me give you an example: Now, selecting a place for an open bazaar in Çankaya may not be subject to a lawsuit. Will the bazaar be established in a particular place or another? The administration determines the appropriateness of the decision. When an expropriation is made to build a school, should a particular land or another one be expropriated? That is not within the scope of jurisdiction; the appropriateness of the affair is not arguable; that is commonly viewed as it is at the discretion of the administration. (…)

HEAD of STATE: I understand.

.....

As evident from these talks, the meaning of the concept was not known when the prohibition of expediency review was first introduced into the legislation. Yenice and Esin (1983, p.127) argue that the exclusion of the expediency review from the text of the 1982 Constitution was due to the challenge of defining its limits, as the concept was not easily discernible. They argued that the existing limitations on reviewing administrative discretion were considered sufficient to serve the intended purpose. Similarly, Duran (1987, p.4) asserted that although the PAJA of the same year included the prohibition of review expediency, the Constitution did not include the concept due to the ambiguity of the concept. Despite this ambiguity, the prohibition of expediency review became a constitutional rule with the 2010 amendment to the 1982 Constitution.

The phrase "in no case may it (judicial power) be used as a review of expediency" was added to Article 125 of the 1982 Constitution through an amendment made by Law No. 5982 in 2010[127]. According to the reasoning for the amendment (T.C. Anayasası-

[127] Law No. 5982 Amending Certain Articles of the Constitution of the Republic of Turkey, published in the Official Gazette on 13.05.2010-No:27580.

gerekçeli-, 2019, p.763), the proposal states that judicial decisions were being made in a manner that did not comply with the prohibition of expediency review in practice. The amendment that emphasized expediency review in the Constitution aims to prevent such practices. "The inclusion of this principle in the Constitution is to have originated from judicial practice and is intended to serve a preventive function. Expediency review is defined as "the negative use of executive power." A closer examination of the reasoning reveals that the administrative judiciary is being accused of overstepping its boundaries by conducting expediency reviews in the realm of executive authority.

The TGNA General Assembly Discussions on Article 11 of Law No. 5982 on the Amendment of the Constitution, which added the prohibition of expediency review to Article 125, had fierce debates. Atila Emek, MP of the opposition Party RPP, in his speech on his motion on the relevant article[128], argued that;

> ...In our country, the judiciary does not carry out expediency reviews. The proposal turns a situation that does not exist in practice into a constitutional provision and reduces the judicial function to procedural examination, which is incompatible with the rule of law. In this respect, the amendment, which will have no concrete function, should be removed from the proposal's text...

The 2010 Constitutional Amendment also sparked considerable public debate due to its unique provision prohibiting expediency review. Journalist Sönmez (2010)[129] argued that the amendment was primarily intended to facilitate the government's privatization efforts, which the Council of State had annulled previously. Sönmez also contended that the amendment sought to diminish judicial review of administrative acts and actions by framing it as a prohibition of expediency review, reducing it to a mere procedural check.

Civil Society Organizations also participated in discussions on constitutionalizing the prohibition of expediency review. In the *Constitutional Package - Opinions and Suggestions*, the Chamber of Electrical Engineers (CEE) articulated its stance on the 2010 Constitutional amendment, emphasizing the inclusion of the prohibition of

[128] Retrieved from https://www.kanunum.com/referandum/index.php?action=open&name=madde125 (accessed: 2.6. 2024).

[129] Retrieved from https://sendika.org/2010/08/anayasadan-yerindelik-ayiklamasi-ve-tupras-ornegi-mustafa-sonmez-cumhuriyet-45675 (accessed: 2.6. 2024).

expediency review in the Constitution. The CEE underlined that this constitutional provision aimed to exert pressure on the judiciary "under the guise of 'expediency.'" The CEE (2010, pp.10-12) asserted that this regulation means that "we will prevent some judgments of the judicial organs regarding the legal control of the acts and procedures of the administration." The main target here is the annulment decisions concerning privatization transactions.

Administrative law scholars have varying opinions on constitutionalizing the prohibition of expediency review, asserting that the constitutional provisions outlining the boundaries of administrative jurisdiction are among the classical principles already in existence and applied by administrative courts. For example, Ayaydın (2011, p.528) argued that there is no need to explicitly specify these principles in the Constitution. Additionally, Ayaydın (2011, p. 531) asserted that it is essential to consider the potential desire of political powers to evade judicial review with the help of unclear boundaries and extent of expediency. Hakyemez (2010, p.396) acknowledged that the problem would not be solved by prohibiting expediency review by a constitutional rule. However, he argued that the practice of judicial activism is prevalent in Turkish jurisdiction, and the Constitution included this "reactionary rule" because the Council of State, in particular, conducted its review in a manner that embodies expediency review. As Ayaydın (2011, pp.529-530) argues, the legal boundaries stipulated in the Constitution are directive, serving as a reminder of the functions and limitations of administrative courts. This is because there are no sanctions in case of non-compliance with the prohibitions stipulated in Article 125 of the Constitution and Article 2 of PAJA. Additionally, the administrators cannot refuse to implement a decision of an administrative court on the basis that it contravenes the limitations outlined in the Constitution and the law. Even in cases where there is suspicion that the judgments of the administrative court do not adhere to constitutional limitations, they will continue to have legal consequences. As a result, the regulations about the boundaries of administrative jurisdiction are not norms having legal consequences but rather serve as guidance for administrative courts. It will ultimately be within the purview of the judicial system to ascertain the interpretation and scope of these constraints.

When all these evaluations are considered, the conclusion regarding the concept of expediency is that the concept is frequently referred to in Turkish administrative law,

administrative, judicial practice, theory, and legislation as the limit of judicial review of administrative acts and actions. However, expediency is conceptualized abstractly, making determining its concrete content and scope difficult. It is not straightforward to distinguish the concept of expediency even from the concept of legality, which is positioned as its opposite. To differentiate it from the concept of administrative discretion, often used interchangeably, is almost impossible. Additionally, considering the processes of its incorporation into legislation and the Constitution in Turkey, the issue of expediency is not only a legal term but also a political concept. Ironically, the determination of what falls within the realm of expediency, which belongs to the administrative domain and should not be subject to judicial interference, is, by its very nature, within the purview of administrative courts. The delineation of boundaries between the sphere of expediency and the sphere of legality is established by administrative courts/judges during the judicial review of discretionary acts. The concept of expediency is a method developed during the judicial review of administrative acts based on administrative discretion to verify administrative discretion, as quoted by Demirkol (Çağlar, 1991, cited in Demirkol, 2000, p.401).

The subsequent section of the thesis examines the concept of administrative discretion and its judicial review, which is the principal factor influencing the notion of expediency.

6.3. Judicial Review of Administrative Discretion and Legality vs. Expediency Controversy

As with the concept of expediency, there is no consensus on the concept of administrative discretion, which lies within the intersection between the public administration and the administrative law/jurisdiction. In Azrak's (2011, p.17) words, administrative discretion has become a kind of "self-defense area" for the administration in response to the intensification of judicial review. According to Azrak (2011, p.17), an 'antagonistic' and tense relationship exists between the 'active administration,' seeking to expand and shape its jurisdiction in line with its own needs and tendencies, and the administrative judiciary, aiming to tighten its control over the administration. This intersection between administrative and jurisdictional domains has undergone several changes throughout the history of Turkish administrative jurisdiction. These changes have been brought about by laws and interpretation

decisions of the legislative, some of which exclude judicial review of certain administrative acts and actions. In response, the Council of State increased its control through legal methods developed through its precedents. Consequently, the boundaries of discretion, expediency, and legality have become increasingly blurred.

6.3.1. Challenges in the Judicial Review of Administrative Discretion

Administrative discretion, in its simplest sense, refers to the freedom of the administration to act and make decisions as it deems appropriate under specific circumstances. The governmental administration inherently involves varying degrees of discretion depending on the situation due to the wide-ranging and complex tasks undertaken by the administration. According to classical constitutionalism, in modern democratic states governed by the rule of law, the discretionary power of the government is limited by the law and subject to judicial review to prevent its arbitrary use. This is based on the principle of the legality of administration, which ensures that governmental administration cannot have absolute and unlimited power. Therefore, as frequently emphasized in the administrative law literature, discretionary power does not imply absolute freedom of the administration but rather "freedom within the framework of legal rules" (Sürbehan, 1970, p.77; Yayla, 1964,p.201; Kargın, 1959, p. 11). Furthermore, the exercise of administrative discretion, as granted by legal rules, is also subject to judicial control to ensure compliance with these rules.

As addressed in nearly all administrative law studies concerning administrative discretion, a fundamental issue is raised regarding the extent to which legal rules can entirely predetermine the acts and actions of the administration. This raises two additional questions: Can the law comprehensively regulate every aspect of administrative activities? Second, is predetermining practical details of administrative action such as timing, location, and methods feasible? The answer to the first question, which stems from the principle of legality of the administration at an abstract level, is that it is impractical for legal rules to envisage all administrative actions in every detail. As for the second question, it is not always feasible to predetermine the practical details of administrative actions, as the actual implementation will vary in each specific case. Consequently, while abstract and general legal rules outline the overall procedures and actions of the administration, their discrete application in practice is left to the administrative discretion, informed by its technical expertise and experience

in the related area of responsibility.

This approach outlined above has been endorsed by the Council of State, as articulated in the 1970 decision[130]; "...all activities of the administration cannot be regulated by binding them to previously established principles... administrations must be given freedom of action within the rules of law."

However, the practical application of this postulate, which has been established at an abstract and theoretical level, has given rise to two new questions, as noted by Yayla (1964, p.201). First, how will the practical boundaries of this area of administrative discretion, granted to administration by legal rules, be determined, and what criteria are they be based on? Second, what will be the extent of judicial review of acts and actions of the administration based on discretionary power, which reviews whether the administration has operated within these boundaries?

In administrative law literature, the standard method to define discretionary power is to contrast it to bounded competence. Bounded competence refers to "the obligation of the administration to take specific administrative action by adopting a particular solution when certain conditions and circumstances are met" (Günday, 2022, p.64). However, as French administrative law scholar Hauroiou (cited in Yayla, 1964) suggests, every administrative action involves varying degrees of discretion, indicating that discretion is fundamentally a matter of degree. This means that the executive/administration inevitably has the freedom to act within the framework of the law rather than being rigidly bound by predetermined rules in all of its activities. Moreover, there cannot be an administrative act based entirely on discretionary power, nor is there an absolute bounded power that leaves no room for discretion to the administration. Thus, administrative power typically involves a combination of discretionary and bounded elements rather than being purely one or the other.

The discretionary power of the administration, which denotes the freedom of administration to act within the confines of the law, is distinctly different from the arbitrary administrative actions that were prevalent prior to the establishment of the rule of law. At that time, the administration had the authority to operate without

[130] Chamber 5 of the Council of State dated 26.03.1970, E.1969/4331, K.1970/1004, Danıştay Dergisi, No.1, p.202.

restraints (Yayla, 1964, pp.201-202). The expansion and increasing complexity of the responsibilities of states in economic and social spheres made it impractical to regulate all aspects of administrative activities in advance through legal rules. The flexibility required for the public administration to carry out its duties obliges determining its discretionary power on a case-by-case basis. However, according to an established administrative law principle, the 'discretionary right' does not "authorize the administration to dispute the clear provisions of the law," and the 'discretionary right' is nothing but the application of the general rules of law into the concrete cases (Kargın,1959, pp.12-13). Moreover, the administration's "unauthorized acts and actions have nothing to do with the 'right of discretion,' and the administration should consider the purpose of the law that granted discretion when exercising the 'right of discretion'" (Kargın,1959 pp.18-20). As Balta (1972, p.134) argues, the law allows the administration a certain degree of freedom to identify the most suitable solution based on the specific circumstances of the situation. In essence, the administration is granted discretionary power not to make arbitrary choices but to assess the necessity of its action; discretion is not beyond judicial review. Hence, judicial review is imperative to decide whether this discretionary power is exercised in conformity with the established rules and legal principles.

According to the widely accepted approach in administrative law literature, questioning the freedom of the administration to make or not to make a particular decision is the first step in determining the existence of administrative discretion. The second step is evaluating the freedom to choose between equal options. These two are common characteristics of discretionary power. Moreover, permissive and open-to-interpretation expressions in legal texts, along with vague concepts such as national security, public interest, general morality, service requirements, and upon the necessity, manifest administrative discretion (Kaya, 2001, pp.257-258; Demirkol,2000, p.393).

The definition of discretionary power and subsequent judicial review of administrative acts based on such power pose a significant challenge to the theory of administrative law and the practice of administrative jurisdiction. The lack of a clear delineation of discretionary power in practice leads to contentious debates on the scope of judicial review. In Turkish administrative law literature, opinions on the extent of review of

administrative discretion vary widely, ranging from advocating for limited review to approaching the existence of administrative discretion with skepticism. For example, Gözler (2009, cited in Kaya, 2011, p.175) suggests that the review should be limited to "manifest errors of discretion" and "violation of the principle of proportionality." Conversely, Karahanoğulları (2011, p.497), who argues that administrative discretion is a characteristic that defines one of the aspects of administrative powers rather than constituting a distinct type of power, is skeptical about the very existence of such authorization.

Kıratlı (1967, p.31), who is critical of intense review of administrative discretion, argued that while the increasing duties of the state expanded the discretionary power of administration horizontally, the principle of adherence to the law restricts this power vertically through judicial review. Yenice and Esin (1983, pp.131-132) explained that in the absence of explicit legal rules directing the actions of the administration, the administration is vested with discretionary power, allowing it autonomy in decision-making within its scope of duty. This discretionary power provides the administration an optional area of freedom to deliver public services effectively and serve the public interest. However, in exercising this authority, the administration must safeguard the rights and freedoms of the recipients of public services, adhere to objective criteria, uphold the principle of equality, and refrain from arbitrary or self-interested actions. Referring to the German Administrative Procedure Code, Yenice and Esin (1983, pp.132-133) conclude that ".... the administration is obliged to use its discretionary power in accordance with the purpose for which it was given discretionary power and to use it within the legal limits of discretion." Any use of discretionary power that exceeds the legal limits of the discretionary power or deviates from the intended purpose is considered unlawful. Therefore, exercising discretionary power is not unlimited; it must adhere to these principles and is also subject to judicial review.

Although there is a consensus that the discretionary power of the administration is not unlimited and is subject to judicial review, judicial review of administrative acts based on administrative discretion brings many challenges. First, as Çağlar (1991, p.44) noted, the administrative judge resolves the immediate dispute and establishes the applicable law for the case. Consequently, through the interpretation of norms, the judge can adjust the level of scrutiny. Özay (1982, p.19) contends that this unique

feature of administrative jurisdiction, which he names "bidimensionality," distinguishes it from civil jurisdiction. This characteristic entails that the administrative judiciary makes judgments and determines the grounds for judgment. This stems from the nature of administrative law/jurisdiction, which has developed through the gradual accumulation of precedents rather than written codes. Similarly, the administrative function, which is in a constant state of change in response to technological, social, economic, and political requirements, along with the evolving role of the state, obliges a great deal of discretionary power. Consequently, in the context of judicial review of the public administration, both the public administration/administrator and the administrative court/administrative judge possess broad discretionary powers. This mutual broad discretion paves the way for a clash of discretions, unlike in other branches of law. Therefore, the flexibility and discretion inherent in both public administration and administrative judiciary constantly reproduce the boundary problem between the administration and the administrative courts.

Second, neither the French *Conseil d'état* nor the Turkish Council of State have developed precise criteria defining legality, expediency, or discretion. Administrative courts/judges hold the ultimate authority in determining the boundaries of legality, expediency, and discretion. Consequently, the Council of State/administrative courts could broaden the scope of reviewing administrative acts based on discretionary power, despite the limitations imposed on judicial review, as they shape the content and standards for these concepts. As Kıratlı (1967, p.21) noted, the administrative judge is empowered to create law and establish legal principles in administrative law, primarily based on case law. Thus, there seems to be no boundary between legality vs. administrative necessity on the one hand and discretion vs. bounded competence on the other, which the administrative court cannot overcome. Kıratlı (1967, pp.31-32) asserts that in numerous instances, the Council of State, through creating its own legal rules and principles, converts the discretionary power of administration into a bounded competence by broadening the realm of legality while narrowing the scope of *opportunité.*

Similarly, Hakyemez (2012, pp. 556-557) highlights that in liberal constitutionalism, the executive branch and administrative bodies are guided by the principle of judicial

independence. However, administrative courts often exceed their authority by reviewing the expediency of the matter that should be left to the administration. This raises questions about the boundaries of discretionary power and expediency, which are not clearly defined and have significant implications for the division of duties between the executive and judicial branches and the constitutional principle of separation of powers (Daştan, 2003, p.321).

Conversely, Özay (1982, p.21) points out that political powers may prioritize expediency over legality in their actions, potentially leading to the violation of minority rights by the majority when left out of judicial control. According to Özay (1982, p.82), administrative courts should have unrestricted supervisory power as they represent the rule of law and ensure that the administration complies with the law. This is essential for upholding the democratic rule of law and preventing the excessive expansion of governmental power. Similarly, Günday (2022, p.67), citing Swiss administrative law scholar Huber, argued that the discretionary power of the administration may become a "Trojan Horse," by which the government infringes upon individual rights and freedoms without a legal basis.

Judicial review of administrative acts based on discretionary power is at the center of endless debates since the boundaries and content of the concepts of legality-expediency and administrative discretion are not clearly defined. Therefore, the limits of judicial review cannot be determined. Moreover, the ultimate authority to determine the limits of expediency, discretionary power, and legality, which are exclusively peculiar to the administrative domain, belongs to the administrative court, which has the authority to review and annul administrative acts and actions.

As Yenice and Esin (1983, p135) pointed out, discretionary power is viewed as an unfettered power by the administrative bodies and the executive branch and intended to be excluded from judicial review. The administration and the executive often question the annulment and stay of execution decisions made by administrative courts. These courts possess the authority to examine and invalidate administrative actions while defining the practical scope and boundaries of discretion and expediency, which are unique to administrative authority. This situation becomes more evident, particularly in cases where vague concepts such as public interest, public order, public service requirements, general principles of law, and principles of administrative law

whose content is controversial are taken as the ground for annulment. Furthermore, as previously noted, in the economic and administrative activities of the executive branch, such as privatizations and infrastructure investments, where the administrative discretion involves technical and complex matters, and in administrative actions with environmental implications, the conflict between political authority and the Council of State intensifies and becomes politicized.

6.4. Cases Illustrating Legality-Expediency Controversy: '*Gökova*' and '*PETKİM*'

This section of the thesis examines two influential rulings by the Council of State[131], the '*Gökova*' and '*PETKİM*' cases, illustrating the controversy and ambiguity surrounding the legality-expediency review. These cases have sparked heated debates in Turkish political history and administrative law literature regarding the extent of judicial review over discretionary acts. This analysis concentrates primarily on the standpoint of the Council of State rather than those of the courts of first instance, emphasizing the balance between expediency and legality, as well as the intensity and the scope of the review of the Council of State when controlling these transactions. As the principal administrative court responsible for judicial review of the public administration, the Council of State holds the ultimate authority in establishing the boundaries between expediency and legality and presides over certain cases as the court of first instance.

Administrative courts are theoretically tasked with reviewing administrative acts and actions for compliance with the law rather than for expediency. In administrative jurisdiction practice, however, the demarcation line between legality and expediency is often blurred. This is because the law's realm is unclear, and the Council of State defines its scope broadly by employing general principles of law or vague terms such as public interest and public service requirements. This ambiguity becomes particularly apparent in cases involving discretion with complex technical aspects and political components, where the distinction between legal rule and administrative/governmental exigencies is unclear. Drawing a consistent and holistic

[131] The selection of these cases considers administrative law literature and public debates. The original forms of the rulings are verified from primary sources such as the Journal of Decisions of the Council of State and jurisprudence software: https://www.kanunum.com., as far as possible.

portrayal of the Council of State's stance on the intensity and scope of the judicial review of administrative acts based on discretionary power is not possible due to the uniqueness of each case and the variations in its stance over time. The precedents of the Council of State change across cases with no objectively discernible pattern. However, administrative law literature widely acknowledges that the review of administrative discretion was initially limited to cases of 'manifest error' and 'misuse of authority,' indicating restrictive scrutiny (Akıllıoğlu,1990, p.8).

In the administrative law literature, the most cited example of a case that limits the judicial review of an administrative act based on discretionary power to the criterion of "manifest error" and does not result in annulment is the 1986 decision known as the "*Gökova* Decision[132]."

The High Coordination Council for Economic Affairs has decided to establish the *Kemerköy* Thermal Power Plant in *Kemerköy, Milas* District of *Muğla* Province. This project was included in the 1983 investment program as a project by the Council of Ministers. However, an action for annulment was filed against this decision of the Council of Ministers and related transactions allegedly contrary to the public interest and law. The 10th Chamber of the Council of State reviewed the case, and its 1986 decisions ruled that:

> ...the decision to establish a thermal power plant on the shore of *Gökova* Bay falls within the discretionary power of the competent administrative authorities. The exercise of discretion in evaluating the public service requirements and technical and economic conditions is ultimately related to site selection... There was no "manifest error" in the characterization of the material facts and in the exercise of discretion in the proceedings regarding the determination of the location of the power plant; apart from the issues mentioned above, the judicial system does not have the legal authority to restrict or remove the discretionary power of the administrative body regarding the site selection of the thermal power plant.

In its ruling, the Council of State narrowed the focus to the location selection and limited the review scope to 'manifest error' and the characterization of the material facts. Ultimately, it did not conduct a comprehensive review, found the transaction

[132] Retrieved from: https://www.kanunum.com/Danistay/1984-2739/10-Daire-1984-2739-E,-1986-1451-K,-24061986-T_xxvid183550_xxmid183550_search#183550 (accessed: 03.06.2024) Chamber 10 of the Council of the State E.1984/2739, K.1986/1451 dated 24.06.1986.

lawful, and did not annul it. The Council of State did not challenge the reasoning for the "technical and economic necessity" decision to construct a new thermal power plant in the region. Aksoylu (2011, p.152) contended that this ruling of the Council of State reflected an economic development-based approach, justifying it on the basis of the phrase "compatibility with economic development objectives in the protection of the environment" of the pre-2006 Environmental Law. Similarly, Kaboğlu (1989, p.111) argued that in the Council of State's *Gökova* ruling, "economic development" precedes the environmental right enshrined in the Constitution.

In *Gökova* case, the Council of State has followed the conventional approach, as described by Akıllıoğlu (1990,p.8), regarding the control of discretionary power. Akıllıoğlu explains that the conventional/negative approach to reviewing discretionary power limits the review of administrative discretion to specific instances such as 'misuse of power,' 'manifest error,' and 'manifest error of assessment.' Furthermore, in these instances, the burden of proof of these specific circumstances lies with the claimant. Akıllıoğlu (1990, p.8) points out that since the 1940s, the Council of State has moved away from the traditional approach for reviewing discretionary power and has a consistent stance to subject such acts to a broad and intensive review without requiring any specific reason.

This approach has been particularly evident in the precedents related to civil servant law, sparking intense debate in Turkish political and legal history. The Council of State's decisions to suspend execution and annul cases brought by civil servants in the 1950s, mid-1960s, and 1970s created severe controversy, with claims that the scope of the review was too broad, as examined in the previous chapters of this thesis. Akıllıoğlu (1990, p.9) argues that the Council of State has gradually accepted restrictions, which later became a constitutional rule through the 1971 Constitutional amendment.

Building on Akkıllıoğlu's explanation, the 1986 ruling of the Council of State on the case of *Gökova* illustrates the restricted review approach, influenced by post-1971 Constitutional restraints imposed on the administrative jurisdictions.

In contrast to the restrictive approach in reviewing the *Gökova* Case on the basis of precedent of manifest error, the Council of State adopted a comprehensive review

approach, interpreted as an expediency review, in reviewing the *PETKİM* Case.

PETKİM[133] was designated for privatization in the Privatization Program with the Decree of the Council of Ministers in 1987. The High Board of Privatization decided to privatize 51% of public shares of *PETKİM* through a block sale. The request for a stay of execution in the annulment case regarding the privatization transaction was rejected by the 13th Chamber of the Council of State. Following an appeal against the 13th Chamber's decision to reject the stay of execution, the Administrative Appeals Board of the Council of State ruled that the execution of the decision regarding the privatization of *PETKİM* should be suspended. In its 2007 ruling, the Board stated that:

> ...since Law No. 4046 aims to increase efficiency in the economy and reduce public expenditures in privatization practices, it is concluded that there is no "superior public interest" in the privatization of 51% of the public shares of *PETKİM,* a large petrochemical complex whose production capacity has increased with the investments made and which is profitable in our country where the demand for petrochemical products is constantly increasing (Ayitas & Oder, 2008, p.x).

Although the P*ETKİM* case ultimately resulted in the 'non-annulment' of the privatization in 2008, the stay of execution decision issued by the Council of State in 2007 faced criticism, mainly due to the phrase 'superior public interest' referred to as the reasoning of stay of execution decision. Hakyemez (2012, p.556-557) viewed this ruling as an overarch and a clear example of attempting to invalidate various government actions beyond legal control and exercising expediency review.

This decision regarding *PETKİM* sparked debates in the TGNA. During his speech on the 2010 constitutional amendments[134], MP Şahin Mengü presented the opposition party of RPP's views on the matter, addressing the ruling party, the JDP;

> ...Let me read you a ruling of the Council of State which has angered and disturbed you. The decision regarding *PETKİM*...Administrative procedures and actions are based on public interest, and when you violate this, the Council of State annuls them... In a society where the public interest is not respected,

[133] Petrochemicals Holding Joint Stock Company.

[134] Retrieved from https://www.kanunum.com/Tutanak-Dergi/XXXX/Tutanaklar,-23-Donem,-4-Yasama-Yili,-93-Birlesim_xxvid1714098_xxmid1714098_search#1714098. (accessed: 09.07.2023).

the judiciary intervenes...

This decision, which ultimately resulted in the non-annulment of the privatization of *PETKİM*, can be interpreted as a comprehensive review by the Council of State due to the abstract nature of the phrase 'superior public interest' stated by the Council of State as the grounds for stay of execution.

The ruling party, the JDP, published a booklet entitled *Questions and Answers on the Constitutional Amendment Package* on the eve of the 2010 constitutional amendment. Question 11 within the booklet (2010, p.40) is, "Is there any provision in the amendment package that would restrict judicial control over the administration?" The booklet responds, stating, "...Many privatization decisions were annulled based on the subjective concept of public interest, thus creating many difficulties for global capital to invest in Turkey."

These rulings illustrate the contrasting stances taken by the Council of State in its comprehensive and restrictive review of discretionary power, providing the thesis with compelling examples. They highlight the absence of a uniform standard for reviewing discretionary power, as the changes in the depth and scope of the review lack precise criteria, creating ambiguity in the extent of judicial review of administrative acts and actions. This ambiguity makes the review process vulnerable to manipulation by the Council of State and the executive branch and administrative authorities. Consequently, the lack of clarity in the discretionary authority of the Council of State and the executive/administration leads to allegations of overstepping boundaries on both sides, blurring the boundaries of jurisdictions, and competence between administrative courts and the executive/administration. Furthermore, the emphasis on the country's economic policies in both decisions suggests that the Council of State's rulings are not divorced from political processes rather than representing an objective technical legal/juridical standard.

6.5. Assessment

The concept of expediency review, which represents the last stage in the historical tension between the Council of State and the executive/administrative, is highly abstract and vague. This inherent ambiguity makes it susceptible to manipulation by the courts and the executive/administration, leading to significant debates following

judicial decisions regarding administrative acts based on discretionary power. In particular, in context of the annulments issued by the Council of State concerning discretionary acts and actions of the government involving complex technicality and political components, the concept of expediency becomes the topic of political tension. The discussions surrounding the expediency control, which resulted in the 2010 Constitutional amendment, provided the rationale for imposing constitutional constraints on administrative courts.

CHAPTER 7

CONCLUSION

The thesis examined the tension between legalism and managerialism in American public administration and the legality-expediency controversy in Turkish administrative law, contextualizing within the overarching public administration/law dichotomy. It focused on examining these debates' historical and intellectual origins, presenting law and public administration as conflicting fields. The aim is to elucidate the dichotomy between these interconnected spheres, particularly within the operational framework of contemporary rule-of-law states.

The framework outlined in this thesis is interdisciplinary, centering on the dual context of American public administration and Turkish administrative law. The thesis has taken the legalism-managerialism debate in American public administration as the starting point. Subsequently, it concentrated on the legality-expediency controversy of Turkish public administration. The study attempted to establish an analytical framework for conceptualizing the nexus between legalism-managerialism and legality-expediency debate in the surrounding public administration/law dichotomy context. The research employed a descriptive and explanatory approach in analyzing the dichotomous relationship between public administration and law from a political science and public administration perspective.

The public administration processes in contemporary liberal democratic societies take place within the framework of legal rules and are closely connected with legal regulations and judicial practices in several ways. However, a noticeable gap exists in the existing scholarship, indicating a significant need for further research and comprehension. The presence of this gap and its underlying reasons was the motivation behind this study. To this end, the thesis provided a general portrayal of the interplay between public administration and law by analyzing the relevant literature for a

descriptive purpose. It concluded that contemporary democratic states derive their legitimacy from rational-legal rules, and their administrative structures, encompassing bureaucratic organizations, are intrinsically linked to the domain of law, as postulated by the Weberian political theory. Subsequently, it examined the role of law in public administration theory and practice, emphasizing the judicial review of public administration, one of the quintessential illustrations of the conflict between public administration and law/judiciary.

The thesis affirms that the law is one of the crucial components of public administration, ensuring accountability and regulation of public administrative processes. The judicial review of public administration and the interplay between public administration and the courts are prominent factors shaping the relationship between the two. Through the external control of administrative acts and actions to ensure conformity with the law, judicial review challenges public administration by having the authority to invalidate administrative acts and actions. The primary issue underlying the conflict between public administration and the judiciary/law is the judicial review of administrative discretion.

In the Anglo-American legal system, judicial review of administrative actions is the responsibility of regular courts. This differs from the Continental European legal system, where a specialized branch of administrative law and separate administrative courts emerged after the French Revolution under the influence of Napoleonic reforms. In the post-revolutionary era, ordinary courts in France were prohibited from controlling administration as they were viewed as representatives of the *ancien regime*. This was an intentional strategy by the revolutionary government to separate judicial and administrative powers to minimize the judicial influence on administrative affairs. In Anglo-American jurisprudence, the development of administrative law occurred relatively late as French *droit administratif* was regarded as contradictory to the Anglo-American conception of the rule of law.

The study closely examined American public administration to uncover the historical and intellectual foundations of the legalism-managerialism tension, which is the starting point of the thesis. In doing so, the thesis employed an explanatory approach

to trace the evolution of American public administration since the late 19th-century progressive movement, shedding light on the causes and consequences of the legalism-managerialism tension. The study delineated four periods in the relationship between American public administration and the law, shaped by the extent of state intervention in economic and social relations through administrative agencies and their interaction with the courts.

The first period corresponds to political reforms of the American Progressive Movement (1890-the 1920s). In this period, critics of the 'spoils system' enacted the Pendleton Act of 1883 and set up the CSC. They aimed to curb political influence in public administration and introduce a merit-based, permanent employment system for government officials. Additionally, the ICC, which is responsible for regulating industry at the federal level, was established in 1887. Having a 'stateless' origin, the United States, based on the principles of constitutionalism, classical liberalism, and limited government, was often seen as a society with a minimal state characterized by 'uneasiness' towards administrative power. This approach draws from Lockean natural law and Montesquieu's theory of the separation of powers. The CSC and the ICC, which introduced federal-level administrative regulation, represented the emergence of the American 'administrative state.'

In 1887, Woodrow Wilson advocated for an independent study of administration distinct from politics, focusing on managerial aspects and practical administrative issues rather than structural, constitutional, and legal matters. Wilson also argued that administrators should be granted broad discretion to carry out administrative tasks efficiently. Frank Goodnow (1900) further developed this idea, although he was the first to introduce administrative law to the United States in 1893. The discipline of public administration has developed autonomously, emphasizing managerial values such as efficiency, effectiveness, and economy. This emphasis was further strengthened by Taylor's scientific management in 1912. Leonard White's 1926 textbook explicitly stated that the discipline of public administration should be oriented towards managerialism rather than legalism. This period symbolizes the very beginning of the tension between legalism and managerialism in American public administration.

Throughout this period, the ABA, under the presidency of Elihu Root (1916), expressed concerns about the regulation and control of administrative agencies. They mainly focused on the discretionary and adjudicative actions of these agencies, aiming to make them consistent with the principle of the rule of law. Initially, the courts did not consider themselves authorized to control administrative agencies as Congress did not explicitly address the issue. Beginning in 1902, the courts started to check the discretionary power of administrative agencies.

The second period was the New Deal era (1933-1938), which also persisted throughout and in the aftermath of World War II. President Roosevelt embarked on a new economic policy to address pressing social and economic problems. New Deal policies expanded administrative agencies and strengthened executive power within a regulatory state. By the late 1930s, Congress began delegating broad legislative power to these agencies, enabling administrators to enact rules, issue adjudicative orders, and formulate policies. The administrative agencies, strengthened by the rulemaking power added to the existing adjudicative power, paved the way for a 'full-fledged administrative state,' whose foundations were laid in the progressive era. This period also represented orthodox public administration's 'high noon,' encapsulated in POSDCORB by Gulick and Urwick in 1937. Additionally, the courts, which had exercised intense control over administrative discretion since the early 1900s, began to adopt a deferential stance towards administrative expertise from the mid-1930s to the 1950s. In this period, the influence of law and the judiciary on administrative agencies was limited.

However, the growth of administrative agencies, which exercised combined legislative, adjudicative, and administrative powers, increased concerns over their constitutional legitimacy. In 1937, Roosevelt's *President's Committee on Administrative Management,* which advocated for enhancing presidential power, submitted a report to Roosevelt. The report claimed that these agencies formed a 'headless fourth branch' outside the conventional constitutional separation of powers. Additionally, the ABA, which had been critical of powers exercised by administrative agencies, formed the SCAL in 1933. The Committee's 1938 report, primarily written by Roscoe Pound, Chairman of the ABA and previous Dean of Harvard Law School, emphasized the potential danger of 'administrative absolutism.' The report mainly

criticized the adjudicative function of administrative agencies as they did not have independence of courts and tenure of judges. The report described them as 'administration without law.' On the other hand, some jurists supported and justified Roosevelt's New Deal policy, such as Felix Frankfurter and James Landis.

The third period began in 1946 and signifies increased interaction between the legal system and administrative agencies. The legitimacy debates of the previous period and the emphasis of the ABA on the necessity of administrative law regulating the supervision of administrative agencies resulted in the promulgation of the APA by Congress in 1946. This act is considered the start of American administrative law and introduced procedural rules for rulemaking, adjudicative powers of administrative agencies, and judicial review of administrative discretion. The procedural rules of APA and subsequent legislation concerning administrative activity led to increased involvement of law and the judiciary in public administrative processes. In this process, the courts moved away from their previous deferential stance. The US courts began to issue decisions questioning the constitutional legitimacy of administrative agencies.

During the 1960s and 1970s, the courts established rules through their jurisprudence to exert strict control over administrative agencies, making administrators liable to citizens and accountable to the public. *The Warren and Burger Cour of the DC Circuit* consistently adopted a rigorous 'hard look' review, thus developing the 'public law litigation framework.' This increased interaction between courts, legal rules, and administrative agencies is referred to as 'involuntary partnership' due to the dominancy of courts. However, this 'partnership' highlighted the legal/juridical aspects of public administration, leading to increased attention to law-related topics in the teaching and scholarship of public administration beginning in the 1950s.

However, the increased involvement of the judiciary in public administrative processes drew criticism regarding judges' competence in administrative affairs, the democratic accountability of non-elected judges, and the possible convergence of courts with administrative bodies.

The fourth period, which began in the mid-1970s, was marked by a growing emphasis on managerial practices in public administration. The public management approach,

which emerged in the late 1970s and early 1980s, and the 'Reinventing Government' movement of the early 1990s, underlined the importance of managerial values rather than legal and judicial requirements. This managerial approach challenged the existing legal framework and judicial processes, which were viewed as hindrances to reform and sources of inefficiency due to their restrictive impact on administrative discretion and flexibility. During this era, the literature on public administration, mainly shaped by the global prevalence of new public management reforms, has shifted its focus to conventional managerial concerns, emphasizing efficiency and performance orientation. Public administration scholars such as Rosenbloom and Rohr have extensively investigated the legal and constitutional aspects of public administration. The intersection of law and public administration has seen increased interest since the 2000s.

The conflict between law and administration in American public administration revolved around prioritizing legal or managerial values in public administration processes, the constitutional legitimacy of administrative agencies, and the judicial control of administrative processes. The antagonism in law and administration in Turkey appeared in the form of historical friction between the Council of State and the executive branch. This conflict has evolved in conjunction with constitutional amendments and broader political processes in Turkey. To address this, the thesis looked at constitutional amendments, legislations with their reasoning, and parliamentary minutes to examine the changing role and competency of the Council of State within carious historical periods and its interactions with the executive branch.

The Council of State was established in 1868 as part of the Ottoman State's efforts to modernization and westernization. It was influenced by the French *Conseil d'état* and served as an advisory and administrative body with legislative and jurisdictional responsibilities. However, its judicial authority was limited, and its decisions required executive approval, similar to the early years of the *French Conseil d'état*. Over time, the functions of the Council of State declined, and it was eventually abolished in 1922, along with other institutions of the Sultanate. The Council of State, established and operated under the executive branch, has faced various criticisms due to unfair appointments and being an institution approving rather than controlling the executive. The Council of State was instituted with the enactment of the 1924 Constitution

following the establishment of the Republic, and its operations in Ankara started in 1927. In the 1924 Constitution, the Council of State was positioned within the executive branch and had the dual functions of administration and judiciary. During the Republican era, it became the judicial body responsible for reviewing executive and administrative acts. Initially viewed with suspicion as an Ottoman institution, the Council of State hesitated to examine the acts of the administration and the executive, avoiding conflicts with the government, which came from the sultanate tradition and being unaccustomed to judicial control. In its early years, the Council of State received criticism for the lengthy duration of case resolutions. Lower and middle-level managers were initially reluctant to comply with adverse decisions made by the Council of State. However, there were generally no significant conflicts between the executive branch and the Council of State.

Before the 1934 decision by the TGNA, there was confusion about the Council of State's role as an executive institution performing judicial review and its status vis-à-vis parliamentary supremacy. The TGNA had the authority to overrule the Council of State's rulings upon application by the aggrieved party to the TGNA Petitions Commission. However, after the 1934 decision, the Council of State's rulings were considered court decisions. Additionally, the TGNA exerted a restrictive influence on the Council of State through interpretative decisions, especially in matters related to the trial of military personnel. During this period, the TGNA described some decisions regarding the country's high administration and politics as acts of government. The Council of State avoided reviewing acts of government by restricting itself. The restricting influence of TGNA on the Council of State resulted from the parliamentary system based on parliamentary supremacy, the blurred separation between the executive and the legislative branches, and the Rousseauian idea of national will at the time. Nonetheless, there were no substantial conflicts between the Council of State, whose members were elected by the TGNA, and the executive, closely intertwined with the legislative branch.

However, the transition to the multi-party system in 1946 changed this situation. The ruling party the RPP, holding the parliamentary majority, started to pass laws that evade judicial review of administrative acts on appointments and dismissals of public servants with whom it did not want to work. At that time, such laws continued to be

implemented because the constitutional court responsible for supervising the constitutionality of statutes had not been established yet. Over time, the Council of State abandoned its hesitant attitude of the first years, reviewed such acts in terms of constitutionality, and annulled them.

The laws, closing judicial review of administrative actions, known as legislative restraint, were widely implemented during the DP rule following the 1950 elections. The DP focused its criticism on the bureaucracy of the single-party era. It expanded the scope of these laws following their reelection after the 1954 elections, preventing judicial review of public officials' ex officio retirement and their placement under ministerial orders. This expansion extended to include faculty members and higher judiciary. The DP government argued that such transactions should considered administrative discretion. However, the Council of State countered by reviewing these transactions for constitutionality and public interest, ultimately annulling them. This tension between the Council of State and the political power, which revolved around legislative restraint on public personnel affairs and the scope of judicial review of administrative discretion, persisted until the 1960 military coup.

The 1961 Constitution, enacted after the 1960 military takeover, significantly strengthened the status of the Council of State. Firstly, the 1961 Constitution clarified the role of the Council of State by regulating it under the section of the judiciary and put an end to the confusion surrounding its identity. Secondly, the Constitution stipulated that "no act or procedure of the administration shall be beyond judicial review," intending to eliminate legislative and judicial self-restraints in the judicial review of the executive/administrative acts. Thirdly, the newly established judicial bodies, including the Constitutional Court, the Supreme Council of Judges, and the Supreme Council of Public Prosecutors, bolstered the judiciary's status. The ruling party's criticism of the Council of State in the aftermath of the 1965 elections ended this 'high noon' period of the Council of State.

The JP, which succeeded the DP, criticized the Council of State, the Constitutional Court, the Senate, and the newly established autonomous administrative court as "new partners of the national will" under the *Constitution Thesis*, formulated by Celal Bayar, an influential figure in the former DP government. The JP embarked on a thorough

purge within the bureaucracy to harmonize bureaucracy with its rule. Advocating for a strong government, the JP targeted the Council of State for its stay of execution and annulment decisions in cases concerning public personnel. The critique of the JP was reinforced by some scholars of law, who argued that the Council of State was obscuring the administration. The *Tercüman* Newspaper also included writings in this direction. During this period, the most criticized decisions of the Council of State were the stay-of-execution decisions in favor of public officials, cases concerning the disciplinary and grading procedures of students, and decisions concerning military personnel.

In 1966, it was discussed in detail at the *Conference of the Turkish Law Institution*, held on the call upon critics of the Council of State. In the conference, the scholars of administrative and constitutional law contended that the decisions of the Council of State are a requirement of the rule of law. However, critics suggested that the decisions taken by the government on high civil servants should be considered acts of government and excluded from judicial review. Besides advocating for expansive discretion for governmental administration, critics asserted that expansive control conducted by the Council of State is likely to result in 'government by judges', that is, the intervention of the judiciary in politics.

The 1971 amendments to the 1961 Constitution, which followed the interim memorandum of the military, known as the 12 March Regime, represented a new era in the relationship between the Council of State and the executive branch. These amendments reinforced the restraints on the Council of State, previously imposed by the legislative branch, with the Constitutional restraints. The rationale behind these amendments was that the existing "Constitution did not fit the structure of society." The extensive control of the Council of State, which entailed sharing executive power and administrative functions and excessively interfering with them, was seen as undermining the authority of the state.

The 1971 Constitutional Amendment brought about several changes regarding the executive and the Council of State relations. Firstly, it transformed the executive's role from a function to a function and power, granting the executive the authority to issue decrees with the force of law, effectively delegating significant legislative power to

the executive. Secondly, the amendments introduced vague concepts such as public interest, national security, and public order as grounds for restricting individual rights, leading to ambiguity in the standards for judicial review of administrative actions. Thirdly, establishing a specialized administrative court for controlling the acts concerning military personnel was stipulated to respond to the longstanding uncertainty and tension between the political power and the Council of State. However, this led to a dual administrative jurisdiction, military and civil. Fourthly, the amendment indirectly restricted the article regulating the judicial review of all administrative action without restriction by stating that judicial remedy is open to all administrative action and also mentioned that the judiciary should not issue decisions that interfere with the performance of executive functions or constitute administrative acts. During the 12 March Regime, government leaders expressed the view that the Council of State should not interfere with the discretionary power of the administration.

The social turmoil and economic crisis of the 1970s, which resulted in the declaration of martial law in many cities in the late 1970s, also significantly affected the relations between the executive and the Council of State on the basis of a critique of the 1961 Constitution. Celal Bayar, who hardened his constitutional thesis, attacked the Council of State, labeling it 'the source of anarchy and turmoil.' He condemned the employees of state institutions, including the Council of State, for being an 'oligarchy of intellectuals' and 'devaluating national will.' Bayar's thesis described the 1961 Constitution as a 'loose-fitting dress.' During this period, judicial bodies, including the Council of State, were accused of obstructing the execution of the state and overruling the national will by becoming partners in the state administration despite being unelected and unaccountable.

From the early 1980s, the JP had a growing advocacy to formulate a new constitution. The call for constitutional reform was also the subject of extensive discussions within the media and civil society, manifesting in seminars and formulating constitutional proposals, proposing amendments concerning the Council of State. The first event was the *Tarabya Seminar by Tercüman Newspaper*, which focused on the Constitution and the electoral system. The seminar proposed that a constitutional amendment should remove obstacles to executive power, particularly those imposed by the Council of

State. It also expressed concerns about the dominance of judges, describing them as 'irresponsible and unaccountable,' which led to a hierarchy of powers with the judiciary at the top. During the seminar, academics and columnists criticized the Council of State's decision to replace executive power with an 'expediency review.'

The second was *the Istanbul Bar Association and Istanbul University Faculty of Political Science Seminar*, which directed its criticism to the 12 Mart regime rather than the 1961 Constitution and the Council of State, arguing that the 1971 amendments damaged the Constitution's democratic character.

The third was *the Constitutional Reform Proposal published in the Journal of Yeni Forum.* The proposal asserted that the judiciary acted as an unaccountable government by judges, the administration was partisan, and the state was paralyzed due to 'economic crisis' and 'international communism.' As a panacea, the proposal called for a 'strong state and constitutional reform' to correct dysfunctional institutions and harmonize them with the Turkish social structure to prevent future crises. According to the *Yeni Forum* proposal, the issue stemmed from misinterpreting the constitutional rules governing judicial bodies' powers, including the Council of State. This broad interpretation, thus, resulted in an expansive review of executive and administrative actions, exceeding powers and the judiciary's dominance over the executive and legislative branches.

The proposal also suggests that public administration should be centralized, the presidential wing of the executive should be strengthened, and the Supreme Council of Judges, which was claimed to create a 'completely separate community' separate from voters, should be reformed and should involve the Minister of Judges and the Prime Minister. The proposal reiterated the government's claim concerning judges and criticized the annulment and stay-of-execution decisions of the Council of State on cases concerning civil servants. According to the proposal, the Council of State favors civil servants vis-à-vis governmental administration and encroaches on administrative discretion.

All these discussions ended up with the military takeover of 12 September 1980, with the assertion that there was a 'vacuum of authority' and a need for the 'consolidation

of state power.' The military government, established by the NSC, enacted laws to limit the authority of the Council of State, stating that its powers were specific to the transitional period until a new Constitution was enacted. Laws enacted by the military government exempted certain administrative acts from judicial review. Some of the regulations of these laws were included in the new Constitution of 1982. Prior to the 1982 Constitution, three crucial laws concerning the administrative judiciary were promulgated during the military rule of 1982 and remained in effect after the cessation of military rule. With these laws, lower administrative and tax courts responsible for the judicial review of the administrative acts and actions, which had been carried out by the Council of State alone, were established, and the Council of State was designed more as a court of appeal.

However, these laws bring about the most significant change: the explicit provisions regarding limits of judicial review of the administration. The PAJA specifies that the judicial review of administrative acts is confined to legality review. Administrative courts are not allowed to review the expediency of administrative acts. Going beyond the constitutional provision brought by the 1971 amendments, the law also states that judicial decisions cannot restrict the exercise of executive power as long as it is in accordance with the law. They are not authorized to make decisions with the characteristics of an administrative act, which removes administrative discretion. This provision, which would later be included in the constitution, sparked a debate on judicial review of the discretionary power of the administration and the prohibition of expediency review - the most complicated issue of administrative jurisdiction. Additionally, the law prohibited the judicial review of the direct actions of the head of state.

The new 1982 Constitution, based on the idea of a 'strong state and strong executive,' entered into force during this military administration. One year after the constitution was promulgated, with the 1983 elections, the MP assumed power with a new economic policy. The main objective of the 1982 Constitution was to expand the authority of the presidential wing of the executive branch. It broadened the scope of existing constitutional limitations concerning the Council of State and permitted the implementation of additional legislative restrictions. Furthermore, the Constitution reaffirmed the PAJA except for the term 'expediency review.' Additionally, it made

it more difficult to issue a stay-of-execution decision in the judicial review of administrative actions.

In 1983, the MP government began a structural adjustment program to shift from an import substitution development policy to an export promotion policy. The crisis in Turkey was attributed to a cumbersome public bureaucracy, an economy with extensive regulations, and broad governmental control, which was considered inefficient and bureaucratic. In response, measures were taken to reduce the scale of the public sector, integrate private sector principles into its administration, and introduce economic liberalization and deregulation in line with neo-liberal economic policies and new-right ideology.This process involved reducing the scope of public administration and services, privatizing state-owned enterprises, and reforming the public personnel regime, often through the NPM approach in public administration. Starting in 1999, a new wave of structural reforms, known as the second generation of structural reforms, was introduced. These reforms involved significant legal adjustments, restructuring administrative institutions, and establishing new regulatory bodies. These efforts were part of the *Transition to a Strong Economy Program* to revitalize the market.

During the process between 1983 and 1999, which culminated in the 1999 Constitutional Amendments, a highly debated issue between the Council of State and the executive revolved around the privatization efforts employing the build-operate-transfer model, which the Council of State frequently invalidated. The 1999 Constitutional Amendment enshrined privatization as a constitutional provision and permitted international arbitration in transactions involving foreign entities and public service concession contracts. Furthermore, the amendment curtailed the advisory role of the Council of State in public service concession contracts.

During this period, there was notable tension between the Council of State and the executive in matters involving economic transactions, such as privatization, concession contracts, and the build-operate-transfer model. The focus was on the argument that the Council of State had surpassed the boundaries of legality review and had begun to intervene in the realm of expediency. Critics contended that the Council of State exceeded its competence in decisions related to privatization and significant public investments, where administrative discretion is extensive and intricate, by

interfering with matters of expediency. They argued that vague concepts like public interest and service requirements, which served as the basis for the Council of State's annulment decisions, lacked a legal basis and fell within the realm of expediency. Additionally, it was argued that the excessive review by the Council of State extends the bounds of legality review and encroaches on administrative discretion and expertise, leading to inefficiency and obstructing public administration reforms.

The claim that the Council of State has overstepped its legal boundaries by scrutinizing the expediency of administrative acts and limiting the government's discretionary power has been a critical subject of public debate leading up to the 2010 Constitutional amendments suggested by the JDP Government. With the 2010 Constitutional amendments, the prohibition of expediency review became a constitutional rule. A clear definition of the expediency of administrative actions, which is mainly used synonymously with administrative discretion, has not been developed. Shortly, it points to the non-legal, purely administrative aspect of the administrative proceeding.

Based on the insights of administrative law practitioners and scholars, the concept of expediency in Turkish administrative law, which originates from French administrative law, represents a fundamental principle in administrative jurisdiction practice. This principle dictates that administrative courts are only authorized to review administrative acts and actions for compliance with the law and are not permitted to interfere in the independent sphere of the administration as defined by legal rules. In administrative jurisdiction, the competency to determine the scope of expediency falls to the administrative court during the jurisdictional process and is contingent upon the specific circumstances of each case. Despite the constitutional provision prohibiting the review of expediency, the lack of clear delineation and the ultimate delineation by the administrative courts have raised questions about its constitutional status. In legal discussions and reasoning of the law, it has been asserted that this rule serves as a caution to the Council of State, similar to past regulations concerning the judicial review of the administration.

This discussion, which can be interpreted as a reminder to the Council of State of its limits vis-à-vis the administration/execution, leads to the issue of the boundary between the legal and non-legal/administrative/managerial aspects of the

administrative process. The Council of State has attempted to define the field of expediency with its decisions since the mid-1980s. The examination of the '*Gökova*' and '*PETKİM*' cases, often cited as examples of narrow and extensive reviews of the Council of State, demonstrates the lack of precise criteria in the judicial review of discretionary acts that trigger claims of expediency review. In the *Gökova* Case of 1986, the Council of State delimited the extent of judicial review of the transaction of the Council of Ministers, considering discretionary elements through the review of 'manifest error,' thereby indicating a restricted scope of review. The Council of State's 2008 decision concerning a stay of execution decision on the *PETKİM* case was heavily criticized for its extensive review. The criticism stemmed from the vague concept of 'superior public interest' employed by the Council of State in the reasoning of the ruling. Despite this decision concerning the stay of execution of the privatization of *PETKİM*, which sparked extensive debates on the scope of review and expediency prior to its conclusion, ultimately, it was not annulled by the Council of State. The *Gökova* Decision by the Council of State addressed the issue of economic development but did not specifically consider the plaintiffs' concerns regarding the 'public interest' and environmental impacts of the thermal power plant. The decision to suspend the execution concerning the privatization of *PETKİM* was justified on the grounds of the "superior public interest" associated with the privatization decision. These rulings demonstrate the complexity of defining the concept and delineating the scope and content of expediency, and the Council of State's position on this matter may evolve over time.

The lack of clarity in the scope and boundaries of the field of expediency, which is considered outside the scope of judicial review, makes the concept open to manipulation. The difficulty in controlling discretionary acts and actions of the executive/public administration has become more complex due to the concept of expediency, particularly in economic and environmental matters where the executive branch needs to make quick and flexible decisions. Furthermore, as a young and uncodified branch of law, the judicial practice of administrative law has developed in line with its precedents. This situation has resulted in a more discretionary power by judges in administrative jurisdiction than in civil and criminal jurisdiction. In parallel with the changing role of the state, the public administration, which is in a state of constant change, needs flexibility and discretion in its operations. Therefore, the

discretionary power inherent in both fields has resulted in a conflict of discretionary powers, which has become more complex with the concept of expediency.
The increasing demand for expertise, flexibility, and discretion in contemporary capitalist economies has posed a significant dilemma for public administrative processes operating within the framework of the contemporary rule of law and rational-legal bureaucracy. Hence, the legality-expediency controversy, discussed from technical and juridical perspectives within administrative law and intertwined with constitutional processes, represents the contemporary manifestation of the historical friction between the Turkish Council of State and the executive branch. Additionally, this discussion has certain similarities with the legalism-managerialism debate in the American public administration literature regarding the dichotomous relationship between public administration and law.

First, both debates touch upon the constitutional principle of separation of powers, which involves dividing state authority into legislative, executive, and judiciary branches to prevent the concentration of power and safeguard individual rights and liberties. In this framework, administrative power is subordinated to these branches as a tool of the executive. Within the constitutional separation of powers scheme, the critical relationship between the administration and the judiciary is the judicial control of public administration to ensure democratic accountability of administrative processes and prevent arbitrary exercise of administrative power.

As indicated in the research, the longstanding conflict between the executive/administration and the Council of State, the supreme administrative court responsible for overseeing the acts and actions of the executive, is central to the debate on the legality-expediency in Turkish administrative law. The Council of State's authority to control the executive/administration, acting as an administrative court with the ability to control, suspend, and annul acts and actions of the executive/administration, has sparked controversy due to it being perceived as judicial interference in executive and administrative decision-making. In Turkey, the foundation of a parliamentary system of government was initially based on parliamentary supremacy, granting a relatively subordinate role for the executive power in relation to the legislative, which is considered a reflection of the national will. However, successive constitutional amendments have resulted in a gradual

expansion of the executive authority. The extensive executive power exercised by the political power has confronted the annulment and stay of execution rulings of the Council of State, which gradually increased the extent of judicial review on the executive and administrative acts and actions. This has resulted in tension between the Council of State and the political power, wielding the legislative and executive power with administrative bodies.

Historically, the friction between the Council of State and the executive mainly revolved around public personnel disputes before the 1980s. However, since the 1980s, with the implementation of neoliberal economic policies and NPM reforms, this friction has moved into transactions with economic character and those with environmental impacts. These transactions, involving privatizations and large-scale governmental investments, predominantly rely on complex technical expertise and broad discretionary power. In addition to susceptibility to manipulation, this poses an added difficulty in distinguishing the boundary between legality-expediency review. The Council of State's supervision of these acts and actions, particularly the annulment decisions based on vague concepts such as 'public interest' and ' public service requirements,' have been perceived by the political power as an interference in the executive sphere and administrative discretion by the judiciary. This perception culminated in the allegations of 'government by judges', 'judicial tutelage,' and 'judicial activism,' all stemming from the perception of the Council of State/administrative courts 'usurping executive power.' The Council of State has justified its decisions by relying on the rule of law and the constitutional principle of the legality of administration.

The conflict between the Council of State and the executive/administration began with discussions on the limits of judicial review of the discretionary power of the administration. Since the early 1980s, this conflict has centered on the debate over expediency-legality review. This ongoing friction between the (administrative) judiciary and the executive poses a severe challenge to the classical constitutional separation of powers scheme, mainly in the context of judicial review of discretionary acts and the controversy on the legality/expediency, given the lack of a clear demarcation between the boundaries of the judiciary and the executive/administration.

As discussed above, the tension between managerialism and legalism in the American public administration arose from the perceived incompatibility between administrative agencies and the constitutional principle of the separation of powers. The American 'administrative state' emerged during the late 19th century Progressive Reforms in response to growing societal needs following the Civil War. This era saw the creation of administrative agencies that granted adjudicative, rulemaking, and administrative power to undertake federal-level administrative functions. Since these agencies were not regulated in the American Constitution, they were regarded as a 'headless fourth branch' in the tripartite division of power of the Constitution. The expansion of administrative agencies and their exercise of adjudicative, rulemaking, and discretionary powers at the federal level raised questions about their constitutionality, as these agencies were not originally included in the Constitution. The proliferation of these agencies during the New Deal era in the 1930s, coupled with increased legislative delegation and strengthening of the executive, further intensified the criticism from scholars and practitioners of law/courts.

The expansion of executive authority and administrative empowerment was viewed as running counter to the traditional separation of powers outlined in the American Constitution, which is rooted in the concept of limited government from classical liberalism. Influenced by the ideas of Locke and Montesquieu, the framers of the US Constitution aimed primarily to safeguard individual rights and liberties against the arbitrary exercise of governmental power. The separation of powers, designed to prevent the concentration of power, is regarded as the core mechanism to protect individual rights and liberties in a democratic constitutional government. The growth of the American 'administrative state,' which involves strengthening the executive branch and accumulation of the adjudicative, rulemaking, and administrative powers within administrative agencies, has been viewed as contradicting the constitutional principle of the separation of powers.

In sum, discussions on the separation of powers in the context of the legality-expediency debate in Turkey are rooted in the assertion that (administrative) courts exceed their authority in relation to the executive branch when reviewing the acts and actions of the administration. Meanwhile, in the US, the constitutional separation of powers about administrative agencies is a theoretical discussion concerning the

constitutional status and powers of administrative agencies.

Second, both debates refer to the question of legitimacy, which is closely associated with the notion of separation of powers. Administrative agencies, whose existence is regarded as controversial within the American constitutional separation of power framework, have faced a 'legitimacy crisis' as they are not regulated in the constitution and do not have democratic accountability. This problem, which was approached from the perspective of constitutional law and democratic legitimacy, was addressed with the enactment of the APA in 1946. The APA, which regulates procedures of adjudicative and rulemaking powers and the process for judicial review of administrative discretion, functioned as a legitimizing instrument for administrative power and culminated in US administrative law.

The debate over the expediency-legality review in Turkey has its roots in the historical tension between the Council of State and the executive branch. Given Turkey's imperial past, the concept of judicial review of executive/administrative acts and actions by an administrative court posed a challenge. As explored in the thesis, the Council of State faced difficulties establishing itself as a court responsible for judicial oversight of the executive power. Its initial hesitant stance, the reversal of its decisions by the TGNA, the exclusion of certain administrative acts and procedures from judicial review by the TGNA's interpretation decision, and the Council of State's self-restraint in refraining from reviewing these administrative acts and procedures all reflect this situation. The Council of State has abandoned its initial hesitancy by expanding the scope of its review and constitutional consolidation of its status as an administrative court. However, legal and constitutional restraints on the judicial review of the Council of State have persisted. The assertions that the Council of State exceeds the bounds of legality review, conducts expediency review, and establishes tutelage over the executive indicate doubts about the legitimacy of its review of the executive/administration.

As a result, In Turkey, the Council of State as an administrative court and the US administrative agencies have legitimacy problems. This divergence stems from differences in the conceptualization of the state and administrative power rooted in each country's jurisprudential traditions and historical peculiarities. In the American

context, administrative power emerged after establishing the democratic state and the rule of law. In contrast, in Turkey, as in absolute monarchies in Europe, administrative power existed before the conception of the rule of law and the constitutional democratic state. As the latecomer, the administrative agencies in the former and the Council of State in the latter were thus confronted with legitimacy issues. In the United States, the development of administrative power occurred relatively late in comparison to continental European countries and Turkey. Consequently, the idea of judicial review of the administration and a distinct branch of administrative law has taken place relatively late.

Third, discussions on legalism-managerialism and legality-expediency have been shaped by the interplay between executive-judiciary and administrative bodies-courts. As examined in the thesis, the scope of judicial review of the administration, which is conducted by separate administrative courts in Turkey and ordinary courts in the United States, has changed periodically. In the US, until the 1902 decision of the Supreme Court, which ruled administrative agencies should be controlled in cases of error of law and excess of authority, courts had been hesitant in judicial review of the administration. In the progressive period, when the administrative state began to emerge, newly established administrative agencies were subject to judicial review, especially regarding discretion. In the New Deal era, regarding strengthening administrative agencies and executive power, the courts have adopted a more deferential attitude on the grounds of administrative expertise. After the judicial review of the administration gained a legislative framework with the enactment of the APA in 1946, the courts' control over agencies increased. Since the 1960s, the scope and intensity of supervision of administrative agencies have increased through the precedents developed by the courts. After the 1984 Chevron Case, the courts returned to their deferential attitude toward administrative expertise. The increasing interaction between courts and administrative agencies has increased the interest in legal issues in American public administration, which was distant from legal issues with a managerial orientation. This interest culminated in a corpus of literature on the relationship between law and public administration in American public administration.

Although it is not possible to give specific dates in Turkey, unlike in the US, the Council of State, which was initially more hesitant, has expanded the scope and

intensity of judicial review of the administrative acts and actions. Nevertheless, drawing general conclusions to periodize the scope and intensity of its judicial review is not possible. In certain cases, such as the '*Gökova*,' it is confined to manifest error or misuse of authority, while in some cases, it is expansive, triggering expediency claims.

Fourth, the legalism-managerialism tension and the controversy surrounding legality-expediency ultimately revolves around the boundaries of administrative discretion. While a rule-bound framework is necessary in public administrative processes, some degree of administrative discretion is equally vital. This presents a challenge in determining the balance between administrative discretion and legal rules and the extent of judicial oversight to prevent arbitrary use of administrative discretion. Hence, the conflict relies on the tension between preventing the arbitrary exercise of administrative power and recognizing administrative expertise.

The current dispute between the Council of State and the executive branch, known as the legality-expediency controversy, stems from disagreement regarding the extent of judicial review over discretionary acts and actions. At the core of the managerialism-legalism tension lies the argument that managerial discretion and expertise are essential for ensuring efficiency, whereas rigidity of legal rules and formalism may limit administrative discretion and flexibility, leading to inefficiency. However, the debate in Turkish administrative law is the claim that the Council of State encroaches on administrative discretion and its more specific form of expediency by going beyond legality control. The debate in American public administration concerns legal control of the broad discretionary power exercised by administrative agencies, which sometimes combines legislative, administrative, and judicial functions.

Fifth, in connection with the previous discussion on administrative discretion, the legalism-managerialism tension and the legality-administration controversy are about prioritizing legal requirements such as legality, accountability, and control versus practical administrative/managerial values such as efficiency, result orientation, and performance in public administrative processes.

In American public administration, the field of public administration emphasizes the implementation of business-like, scientifically based managerial principles, which is seen as 'one best way of' public administration. This approach, known as

managerialism, strongly emphasizes efficiency and prioritizes managerial principles over legal perspectives, which was regarded as too formalistic and a source of inefficiency. The aim is to establish public administration as an independent discipline separate from political science and law.

The Turkish public administration has historically had a legalistic approach, even though it has adopted a managerial-based NPM approach. The debate between the Council of State, which prioritizes the legality of public administration and the rule of law, and the executive/administration, which emphasizes result-orientation and performance, exemplifies the ongoing debate on prioritization of legal or managerial values in the public administrative process.

Sixth, the legalism-managerialism tension of American public administration and the legality-expediency controversy of Turkish administrative law are intricately linked to specific historical contexts and have been significantly shaped by political, economic, and social factors. Consequently, these concepts transcend mere abstract and analytical categories and are instead grounded in concrete historical processes.

The research from these two separate discussions from different countries and disciplines indicates that the legality-expediency debate, much like legalism-managerialism, illustrates the dichotomous relationship between public administration and law. As explained in the thesis, by underlining one of the 'tension points' in public administrative processes, both legalism-managerialism and legality-expediency propose 'binary alternatives' for the theory and practice of public administration.

The study examined the relationship between public administration and law, which has received little attention in the literature. It sought to address this relatively neglected aspect and aimed to incorporate a category of mainstream public administration, originated in American public administration, into the context of Turkish administrative law. This has the potential to facilitate further research in this area.

The thesis faced challenges in effectively covering the topic of public administration and law due to the vast historical period it encompassed. Additionally, the research

findings may not be easily generalized across different disciplines and legal contexts. The study's most significant limitation was the inability to conduct an in-depth empirical analysis due to the unavailability of all decisions of the Council of State. These limitations underslines the need for further empirical research in this area, considering the depth and breadth of the analysis.

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APPENDICES

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B. TURKISH SUMMARY / TÜRKÇE ÖZET

Kamu yönetimi disiplinin temel ikilemlerinden biri olan kamu yönetimi/hukuk ikiliği bağlamında, Amerikan kamu yönetimindeki hukuksallık-işletmecilik ve Türk idare hukukundaki hukukilik-yerindelik tartışmasını inceleyen tez, bu iki tartışmanın tarihsel ve entelektüel temellerini, siyaset bilimi ve kamu yönetimi bakış açısıyla araştırmaktadır. Tez, Amerikan kamu yönetimi ve Türk idare hukuku olmak üzere ikili bir bağlam içermektedir. Kamu yönetimi disiplininde yaygın kabul gördüğü üzere, kamu yönetiminin ayrı bir disiplin olarak doğuşu, Woodrow Wilson'ın 1887 tarihli *The Study of Administration* adlı makalesine dayanmaktadır. Bu nedenle, bağımsız kamu yönetimi disiplininin 'doğum yeri' olarak kabul edilen Amerikan kamu yönetimi literatürü, çalışmanın başlangıç noktası olarak alınmıştır. İnceleme, ilgili literatüre egemen olan hukuksallık-işletmecilik geriliminin, tarihsel süreçte Amerikan Devleti'nin değişen rolü doğrultusunda farklılaşan tezahürlerini inceleyerek başlamaktadır. Daha sonra, Türk idare hukukundaki hukukilik-yerindelik tartışmasının temelinde yer alan ve anayasa değişiklikleri ile somutlaşan, Danıştay ile yürütme arasındaki tarihsel gerilime odaklanmaktadır. Bu inceleme, Amerikan kamu yönetimi literatürü ve bu literatürde değinilen yargı kararları ile Türk Anayasa Değişiklikleri, ilgili mevzuat ve gerekçeleri, meclis tutanakları, idare ve anayasa hukukuna ilişkin seminerler ve Danıştay ile yürütme arasındaki tarihsel sürtüşmeyi gösteren Danıştay içtihatlarının analizi doğrultusunda yapılmıştır.

Kamu yönetimi ve hukuk arasındaki dikotomi ilişkisini örnekleyen bu iki tartışma, farklı disiplinlerde ve farklı hukuki geleneklere sahip ülkelerde ortaya çıkmış olmalarına rağmen, kuvvetler ayrılığı, idarenin takdir yetkisinin hukuki sınırları ve yargısal denetimi ile idari kurumların ve idare mahkemelerinin meşruiyeti ile ilgili olarak dikkate değer benzerlikler taşımaktadır. Bununla birlikte, her iki tartışma, ortaya çıktıkları ülkelerin özgül tarihsel ve siyasi koşulları doğrultusunda şekillenen farklılıklar da göstermektedir. İki tartışma arasındaki temel farklılık, odak noktalarıdır: Amerika'daki hukuksallık-işletmecilik tartışması, idari kurumların anayasal meşruiyetinin sorgulanması temelinde ortaya çıkarken, Türkiye'deki hukukilik-yerindelik tartışması, Danıştay'ın yürütme ve idare üzerindeki yargısal denetiminin

kapsamına ilişkin, siyasi iktidar tarafından ileri sürülen Danıştay'a yönelik eleştiriler ve beraberinde gelen yasal ve anayasal kısıntılar ekseninde ilerlemiştir.

Görece yeni bir akademik çalışma alanı olarak kamu yönetimi disiplini, ortaya çıkışından bu yana, inceleme nesnesi, sınırları ve yönteminin ne olduğu konusunda bir belirsizlik içinde olmuştur. Kamu yönetimi literatüründe bu belirsizlik, 'kimlik bunalımı' olarak adlandırılmaktadır (Üstüner, 2022, p.1). Ayrıca, hukuk, işletme, siyaset bilimi gibi sosyal bilimlerin farklı alanlarının kesişiminde yer alan ve bu alanların etkisi altında gelişen kamu yönetimi (Rosenbloom, 1983, s.219; Wright, 2011, s.96), bağımsız bir disiplin olarak bu disiplinlerden özerkleşme uğraşısı içindedir. Kamu yönetimi disiplini, Amerika'daki başlangıç yıllarından itibaren, alanın kurucuları Woodrow Wilson (1887), Frank Goodnow (1900) ve Leonard White (1926) tarafından, disiplini, disiplinin kaynağı olan siyaset biliminden ayrıştırmak amacıyla işletmecilik yönelimli bir çalışma alanı (Rosenbloom ve Naff, 2008, s.1) olarak tanımlanmıştır. Esasen, kamu yönetimi alanının, kendisine kaynaklık eden siyaset bilimi gibi, (anayasa) hukuku ile de ilişkili olduğunu kabul eden erken dönem kamu yönetimi yazarları, disipline bilimsel ve özerk bir nitelik kazandırmak için, henüz yeni gelişmekte olan bu çalışma alanında, işletmecilik ilkelerine dayalı bir bakış açısını benimsemişlerdir (Becket ve Koenig, 2005, s. ix). Disiplinin başlangıç dönemine egemen olan işletmecilik yaklaşımı, işletmeciliği, siyaset bilimi ve hukuk alanları karşısında birbirine zıt alternatif yaklaşımlar olarak konumlandırmıştır. Bu durum, kamu yönetimi alanındaki akademik çalışma ve eğitim-öğretim süreçlerinde bu alanlara karşı mesafeli bir tutum ile sonuçlanmıştır.

Kamu yönetiminin, siyaset bilimi ile ilişkisinde olduğu gibi, hukuk ile dikotomiye dayalı bir ilişki içinde olduğu kabulü, anaakım Amerikan kamu yönetimini tanımlayan karakteristik bir nitelik halini almıştır. Buna göre, verimlilik, performans ve sonuç odaklılık gibi işletmecilik ilkeleri ile hesap verilebilirlik ve adalet gibi hukuk ilkeleri, kamu yönetimi teori ve uygulamasında birbirlerine alternatif teşkil eden, zıt yaklaşımlardır. Bu anlayışın sonucu olarak, hukuksal ilkelere bağlılık, kamu yönetsel süreçlerde "verimliliği, etkinliği ve ekonomikliği" sağlamaya yönelik işletme yönetimi ilkelerine dayalı yönetsel reformlar karşısında bir engel olarak görülmektedir (Christensen ve diğerleri, 2011, s. i125-i126). Bu yaklaşım, özellikle 1980 sonrası bütün dünyada yaygınlık kazanan neo-liberal ekonomik politikalar ve Yeni Kamu

İşletmeciliğine dayalı kamu yönetimi reformları sonrasında, dünya genelinde anaakım kamu yönetimi literatürü tarafından genel kabul görmüştür.

Günümüz demokratik hukuk devleti yapısı içinde, bütün kurumlar gibi, kamu yönetimi kurumları da hukuki kurallarla düzenlenmiştir. Ayrıca, Weberyan otorite modeline göre, yasal-ussal otoriteye dayalı çağdaş devletlerin kamu yönetimi örgütleri, bürokratik örgütlerden oluşmaktadır. Bu nedenle, devletin kamu politikalarının uygulanmasından ve kamu hizmetlerinin yerine getirilmesinden sorumlu kamu yönetimine ilişkin süreçlerde, hukuk önemli bir rol oynamaktadır.

Fişek'in (1974, ss.138-140) belirttiği gibi, yapı, işleyiş, personel gibi pek çok kamu yönetsel süreç, hukuksal biçimlerde, hukuksal görünümde somutlaşır. Ayrıca, Kıta Avrupası ülkelerinde kamu yönetimine ilişkin konular, yakın zamana kadar idare hukuku kapsamında incelenmiştir. Avrupa'da olduğu gibi Türkiye'de de idareye ilişkin konular, 1950 Barker Raporu'na kadar olan süreçte, Fransız idare hukuku geleneği etkisi altında gelişen idare hukuku kapsamında ele alınmıştır. 1950li yıllarda AÜSBF, TODAİE ve ODTÜ İdari Bilimler Fakültesinde verilmeye başlanan, Amerikan kamu yönetimi anlayışına dayanan, kamu yönetimi dersleri, "idarenin hukuk dışı yönlerini" incelemeye başlamıştır. Ancak, 1980lerden itibaren dünya genelinde olduğu gibi Türkiye'de de etkili olan Yeni Kamu İşletmeciliği yaklaşımı ile işletmecilik eksenli kamu yönetimi yaklaşımı öne çıkmakla birlikte, Türk kamu yönetimi eğitimi ve pratiğinde hukuksal yaklaşımın etkisi ortadan kalkmış değildir.

Literatürde, kamu yönetimi ile hukuk ilişkisini inceleyen yazılarda genel olarak hukuk, hukuk devleti ve idarenin hukukiliği ilkeleri ile ilişkili olarak kamu yönetiminin yasal çerçevesi, kamu yönetsel işlevlerin yerine getirilmesinin bir aracı ya da idarenin yargısal denetimi kapsamında bir hesap verilebilirlik ve kontrol mekanizması olarak kurgulanmıştır. Çok boyutlu bir konu olan hukuk ve kamu yönetimi ilişkisinin tüm yönleri ile alınması, bu tezin kapsamını aşacak boyuttadır. Bu nedenle tez, kamu yönetimi ile hukukun birbirine zıt alternatifler olarak gerilimli bir ilişki içinde oldukları varsayımına dayanan, kamu yönetimi/hukuk dikotomisine odaklanmaktadır. Hukuk ve kamu yönetimdeki gerilimli ilişkinin tipik örneği, idarenin yargısal denetimi pratiğidir.

Kamu yönetiminin hukuka bağlılığını güvence altına almanın bir aracı olarak önemli bir işlev gören idarenin yargısal denetiminde, temel olarak iki sistem uygulanmaktadır. Her ne kadar devlet-toplum, özel-kamusal gibi ayrımlar gibi, aralarındaki sınır giderek bulanıklaşsa da açıklayıcı işlevselliğini koruyan geleneksel ayrıma göre bu iki sistem; Kıta Avrupası ve Anglo-Amerikan hukuk sistemleridir. İlkinde, idarenin yargısal denetimi, ayrı idare mahkemeleri tarafından yerine getirilirken, ikincisinde, idarenin yargısal denetimi, genel mahkemeler tarafından yerine getirilmektedir. Bu ayrımla ilişkili olarak, kamu hukukunun bir alt dalı olan idare hukuku ilk olarak, Kıta Avrupası hukuk geleneğine dahil olan Fransa'da, *Conseil d'état'*ın yargısal kararları ile oluşmuştur. Anglo-Amerikan hukuk geleneğinde, idari kurumların ve ayrı bir idare hukuku alanının gelişimi daha ileri tarihlerde gerçekleşmiştir.

Türkiye'de uzun yıllar tek başına idarenin yargısal denetiminden sorumlu olan Danıştay, Fransız *Conseil d'état* örneği esas alınarak, 19.yy. Osmanlı Batılılaşma Reformları kapsamında 1868'de dönemin başkenti İstanbul'da kurulmuştur. Başlangıçta, ağırlıklı olarak devlete idari konularda görüş bildirmek, uygulanmakta olan hukuki ve idari reformlarla ilişkili mevzuat geliştirmek ve uygulamak gibi görevler yerine getiren Danıştayın (*Şurayı Devlet),* yargısal faaliyetleri, kamu hizmeti imtiyaz sözleşmelerinin denetimi gibi konularla sınırlı kalmıştır. Ayrıca, Danıştayın aldığı kararların geçerlik kazanması, Sadrazam onayını gerektirmekteydi. Danıştayın faaliyet alanı, Osmanlı Devleti'nin ilk Anayasası *Kanuni Esasi (1876)* sonrasında giderek daralmıştır. Yürütme erki altında kurulan ve faaliyet gösteren Danıştay, liyakatsiz atamalar ve idareyi denetlemek yerine idarenin faaliyetlerini onaylamakla yetinen bir kurum olması gibi nedenlerle eleştirilerle karşı karşıya kalmıştır. İstanbul Şurayı Devlet, 1922'de diğer saltanat kurumları ile birlikte kaldırılmıştır.

Kuruluşundan itibaren çeşitli eleştirilerin hedefi olan Danıştay ile yasama organının çoğunluğu ile yürütme gücünü elinde bulunduran siyasi iktidar arasındaki ilişki, tarihsel olarak gerilimli olmuştur. Bu gerilimin nedeni, Danıştayın bir idari yargı organı olarak yürütmenin ve idarenin işlemlerini denetlemek suretiyle vermiş olduğu yürütmeyi durdurma ve iptal kararlarıdır. Bu durum, özellikle takdir yetkisine dayalı idari işlemlerin yargısal denetimi sonrası verilen iptal kararlarında belirginleşmektedir. Esasen yürütme gücü ile (idari) yargı arasında gerçekleşen bu

gerilim, Türkiye'deki Anayasa değişikliklerinin de konularından biri olmuştur.
2010 Anayasa değişiklikleri öncesi sıklıkla gündeme gelen, yerindelik-hukukilik denetimi tartışması, Danıştay ile yürütme erki arasındaki tarihsel gerilimin güncel görünümünü ifade etmektedir. Beraberinde pek çok siyasi tartışmayı da tetikleyen hukukilik-yerindelik tartışması, Türk idare hukuku literatüründe, idarenin takdir yetkisine dayalı işlemlerin yargısal denetiminin kapsam ve yoğunluğu ekseninde; teknik, hukuki, yargısal bir konu olarak ele alınmıştır. Ancak, hukukilik-yerindelik tartışması ve temelinde yer alan yürütme-(idari) yargı ilişkisi, siyaset bilimi ve kamu yönetimi alanının da ilgi alanı kapsamındadır. Hukukilik-yerindelik tartışmasının, Amerikan kamu yönetimindeki hukuksallık-işletmecilik tartışmasında olduğu gibi, kamu yönetimi/hukuk dikotomisinin örneklerinden biri olduğunu ileri süren bu tez, her iki tartışmanın tarihsel ve entelektüel temellerini araştırmaktadır. Bu araştırmayı yapmak için Amerikan kamu yönetimindeki hukuksallık-işletmecilik tartışması, tezin başlangıç noktası olarak alınmıştır. Tez, öncelikle Amerikan kamu yönetimindeki hukuksallık-işletmecilik geriliminin tarihsel ve entelektüel temelleri ile devletin değişen rolü doğrultusunda farklı tarihsel ve siyasal süreçlerde farklı biçimlerde ortaya çıkan görünümlerini incelemekle başlamaktadır. Çalışma daha sonra, Türk idare hukukundaki hukukilik-yerindelik tartışmasına odaklanmaktadır.

Bağımsız bir disiplin olarak Amerika'da ortaya çıktığı kabul edilen kamu yönetimi disiplininin ortaya çıkışı ve gelişimi, 19.yy. Amerikan toplumunda ortaya çıkan endüstrileşme, kentleşme gibi toplumsal, ekonomik sorunlar ile devlet bürokrasisinde ortaya çıkan siyasi yozlaşma gibi sorunlara çözüm olarak kurulan idari kurumların (*administrative agency*) federal düzeyde yaygınlaşmasıyla ilişkilidir. Amerikan Devletinde reform sürecine (*Progressive Movement*) işaret eden 1890-1920 arası dönemde ülke genelinde faaliyet göstermek üzere kurulan ilk idari kurumlar, 1883'te kurulan Kamu Personeli Komisyonu ve 1887'de kurulan Devletlerarası Ticaret Komisyonudur. Başkan Franklin Roosevelt döneminde uygulamaya konulan ve II. Dünya Savaşı sonrası dönemi kapsayacak biçimde devam eden 'Yeni Düzen' (*New Deal)* politikaları (1932-1952) döneminde, federal düzeyde faaliyet gösteren idari kurumların sayısı artmıştır. Ulusal düzeyde bankacılık, ulaştırma, tarım, kamu personeli gibi kamusal faaliyetlerin yürütülmesinden sorumlu idari kurumların yaygınlaşması, klasik liberalizmin sınırlı devlet anlayışı esasına dayalı olarak kurulan Amerika Birleşik Devletleri'nde, toplumsal ve ekonomik alana müdahil olan

düzenleyici devlet anlayışına geçişi temsil etmektedir. Batı Avrupa'da refah devleti olarak nitelenen bu yeni devlet anlayışı, idari kurumların ve idari faaliyetlerin artışına referansla, Amerika'da 'İdari Devlet' (*administrative state)* olarak adlandırılmıştır. Amerika'da idari devlet, devlet yapısı ve işleyişinde yürütme erkinin güçlenmesi ve bürokratik kurumların yaygınlaşması anlamına gelmektedir.

Federal düzeyde faaliyet gösteren idari kurumların ilk kurulduğu dönem olan 19.yy. sonlarındaki reform dönemi, aynı zamanda kamu yönetiminin, siyaset bilimi ve hukuktan ayrı, bağımsız bir disiplin olarak kurulduğu döneme denk düşmektedir. Alanın kurucusu Wilson, kamu yönetiminin, siyasetten ve kamu hukukundan ayrı, özel sektör işletmeleri gibi işletmecilik ilkelerine dayanan bir çalışma alanı olması ve idarecilerin geniş takdir yetkileri ile donatılması gerektiğini ileri sürmüştür. Wilson'un belirlediği bu çerçeve, Amerikan kamu yönetiminin ilk yazarları Goodnow, White ve Willoughby tarafından geliştirilmiştir. İşletme ilkelerine dayalı kamu yönetimi anlayışı, Taylor'un 1912 tarihli 'bilimsel yönetim' yaklaşımı ile desteklenmiş, Gulick ve Urwick'in 1937 tarihli '*POSCORB* ilkeleri' ile en gelişmiş dönemine ulaşmıştır.

19.yy. sonu reform dönemi ile 1930lar ve 1940ların Yeni Düzen dönemine egemen olan klasik kamu yönetimi anlayışı, idari kurumların ve yürütmenin göreli güçlü olduğu bir dönemde ortaya çıkmıştır. Aynı zamanda bu dönem, devlet yönetiminde 'büyük buhran' gibi ekonomik ve toplumsal sorunlarla mücadele sürecinde pragmatik önlemlerin öne çıktığı, yapısal ve ilkesel boyutun geri plana itildiği bir döneme işaret etmektedir. Ayrıca, yürütme erkinin ve idari organların anayasal ve hukuksal ilkelere önceliklendirildiği bu dönemde, uzmanlığa sahip oldukları alanlarda, idari işlevlerin yanı sıra, pragmatik çözümleri esnek ve hızlı biçimde uygulamasını sağlamak amacıyla idari kurumlar, yargı (*adjudication*) ve yasama (*rulemaking*) yetkileriyle de donatılmışlardır. Ancak idari kurumların üstlendiği yargı ve yasama işlevleri, Amerikan Anayasası'nın esasını oluşturan kuvvetler ayrılığı ilkesine aykırı biçimde, devlete ait yetkilerin idari kurumlarda toplanması, anlamına geliyordu. Bu durum, idari kurumlara özellikle hukukçular tarafından yöneltilen eleştirilerin kaynağı olmuştur.

İdari kurumlara yöneltilen ilk eleştiri, Başkan Roosevelt'e, kendisine bağlı çalışan bir komite tarafından sunulan raporda belirtildiği gibi, idari kurumların, üçlü kuvvetler

ayrılığı esasına dayalı Amerikan Anayasası'nda yer almadığı, bu nedenle de Anayasal meşruiyeti sorunlu, 'başsız bir dördüncü organ' haline geldiği eleştirisidir. Diğer eleştiri, Amerika Barolar Birliği tarafından dile getirilen, idari kurumlar tarafından kullanılan yargısal yetkinin, bu kurumların bağımsız bir mahkeme, idarecilerin de yargıç niteliği taşımadığı, bu nedenle de hukuk devleti ilkesine aykırı olduğu eleştirisidir. İdari kurumlara yönelik eleştirilerini istikrarlı bir biçimde sürdüren Amerika Barolar Birliği, oluşturduğu bir komisyona hazırlattığı yıllık raporlarda, 1930lardan itibaren Kongre tarafından yasama yetkisi de delege edilen idari kurumların kullandığı yargı ve yasama yetkilerinin, anayasal kuvvetler ayrılığı ilkesini ihlal ettiğini, bu nedenle de bu kurumları denetleyecek ayrı idare mahkemeleri ve idare hukukunun oluşması gerektiğini belirtmişlerdir. 1937 yılında ikinci kez seçilen Roosevelt döneminde genişleyen düzenleyici devlet uygulaması ve sayısı ve yetkileri daha da artan idari otoriteler karşısında, eleştirilerinin dozunu artıran Amerika Barolar Birliğine bağlı kurulan komite, 1938'de yayımladığı raporda, idari otoritelerin, bir tür 'hukuksuz idare' anlamına geldiğini ve 'idari mutlakiyet' potansiyeli taşıdığını ileri sürmüştür.

İdari kurumların anayasal kuvvetler ayrılığı çerçevesinde bir 'anomali' olduğu, idari kurumlara güç delegasyonunun anaysaya aykırılığı etrafında yükselen bu eleştiriler, Freedman (1975) tarafından, Amerikan kamu yönetiminde 'kriz' olarak nitelenmiştir. Freedman'a göre idari kurumlarının meşruiyet krizinin asıl nedeni, Amerikan Anayasasının temelini oluşturan kuvvetler ayrılığı ilkesinin yanı sıra, Amerikan toplumunun tarihsel olarak devletin ekonomik alandaki düzenleyici rolüne ve bürokrasiye şüpheyle yaklaşıyor olmasıdır. Ayrıca bütün idari otoritelerin her alanda beklenen performansı gösterememesi de idari otoritelerin meşruiyetine yönelik tartışmaları artırmıştır. Ancak öte yandan, aralarında Roosevelt'e hukuki danışmanlık yapan Felix Frankfurter ve James Landis gibi bazı hukukçular da Yeni Düzen politikalarını meşrulaştıran çalışmalarıyla idari kurumları desteklemişlerdir.

İdari kurumların anayasal meşruluğuna yönelik bu tartışmalar, Kongre'nin 1946 yılında İdari Usûl Yasası'nı (*Administrative Procedure Act*) kabul etmesiyle sonuçlanmıştır. Amerikan İdari Usûl Yasası, idari otoriteler tarafından kullanılan yargılama ve yasama yetkilerine ve idarenin takdir yetkisinin yargısal denetimine ilişkin usul kuralları koymak suretiyle, idari otoriteler için yasal çerçeveyi

oluşturmuştur. Bu yasa, idari otoritelerin yargısal denetimini de yasal çerçeveye kavuşturmuş olması nedeniyle, aynı zamanda Amerikan idare hukukunun başlangıç belgesi olarak kabul edilmektedir. Yasa aynı zamanda, yargısal denetim yoluyla idari kurumların anayasal ve hukuki meşruiyetini sağlayarak, anayasa ile idari kurumlar arasındaki gerilimi uzlaştırma işlevi de görmüştür. 1946 sonrası artış gösteren idarenin yargısal denetimi pratiği, daha önce kısıtlı düzeyde olan mahkemeler ile idari otoriteler ve kamu yönetimi arasındaki etkileşimi artırmıştır.

Amerika Birleşik Devletleri'nde gerek Yüksek Mahkeme gerek alt derece mahkemeler, 19.yy. boyunca, idarenin yargısal denetimi konusunda genel yetkili olmadıkları varsayımıyla hareket etme eğilimi göstermişlerdir. Bu dönemde çok sık uygulanmayan idarenin yargısal denetimi, kısıtlı bir yargısal denetim niteliğindeydi. Yüksek Mahkeme, 1902 tarihli bir kararı ile birey hak ve özgürlüklerini ihlal potansiyeli taşıyan, idarecilerin olası keyfi ve kontrolsüz davranışlarını önlemek amacıyla, idarenin takdir yetkisinin yargısal denetiminin zorunlu olduğuna hükmetmiştir. Yüksek Mahkemenin bu kararı ile idari kurumların hesap verilebilirliğini ve idari kurumların demokratik meşruiyetini sağlamak hedeflenmiştir (Breger,2007, ss.86-87). Breger'e göre, Yüksek Mahkemenin bu kararı, Amerika'da federal düzeyde faaliyet gösteren ilk idari kurumların kurulduğu, kamu yönetsel faaliyetlerin artış gösterdiği ve kamu yönetimi disiplinin gelişmeye başladığı döneme tekabül etmektedir. Gelişmekte olan 'idari devlet' anlayışının sonucu olarak, idari kurumların ve idari otoritelerin artan esneklik ihtiyacı, bürokratların takdir yetkisinin de artması anlamına gelmekteydi. 1902 kararı, kontrole tabi olmayan bu yetkinin yarattığı hukuki meşruiyet ve hesap verilebilirlik sorununun, yargısal denetim yoluyla çözülmesi amacını gütmekteydi. Roosevelt'in Yeni Düzen politikasının uygulamaya konulduğu 1930ların ortalarına kadar mahkemeler, idari kurumlar, özellikle idarecilerin takdir yetkileri üzerinde sıkı denetim uygulamışlardır.

Gely ve Spiller'e (1992, ss.55-57) göre mahkemeler, 1936 yılına kadar yürütmenin güçlenmesine ve idari kurumların geniş takdir yetkisi kullanmalarına karşıt bir duruş sergilemişlerdir. Öte yandan Roosevelt, ikinci kez seçilip başkanlık görevine başladığı 1937'den itibaren genişlettiği Yeni Düzen politikalarına, gerektiğinde mahkemelerin de reforma tabi tutulacağını ekledi. Bu olasılık, mahkemelerin yetkilerinin kısıtlamasına yönelik bir tartışmayı da beraberinde getirdi. Kongrede yapılan

tartışmaların ortak kabulü, mahkemelerin 'yargısal denetim sınırlarını aştığı' iddiası idi. Mahkemelerin yetkilerinin kısıtlanmasına yönelik bu önerilerin hiçbiri uygulamaya geçirilmedi. Ancak, kararlarının Kongrede rahatsızlık yarattığının ayırdına varan mahkemeler, 1937'den itibaren, idari kurumların yargısal denetiminde sıkı denetim anlayışını terk ederek, genel olarak idari kurumların uzmanlığa dayalı kararlarına riayet eden yargı kararları vermeye başlamışlardır. Mahkemelerin, idari kurumların kararlarına karşı uyumlu tutumu, Yeni Düzen politikalarının da sona erdiği 1950lere kadar devam etmiştir.

Amerika'da 1950lerden itibaren, özellikte de 1946 tarihli İdari Usûl Yasası'nın etkisiyle, mahkemeler, idari otoriteler üzerindeki denetimlerini sıkılaştırmaya başlamışlardır. 1960lar ve 70lerden itibaren mahkemeler, geliştirdikleri içtihatlar yoluyla idari kurumların yargısal denetiminin kapsamını ve derinliğini artırmaya yönelik yeni mekanizmalar oluşturmuşlardır. Bunlardan biri de 'kamu hukuku davası' modelidir (Roberts, 2008). Bu durum, idari otoriteler ve mahkemeler arasındaki etkileşimi yoğunlaştırmıştır. Bu ilişkide, mahkemelerin sıkı denetimi ve baskın rolünü dikkate alan Yargıç Bazelon (1976) bu etkileşimi, 'gönülsüz bir birliktelik' olarak nitelendirmiştir. Mahkemelerin idari kurumlar üzerindeki sıkı ve kapsamlı denetimi, 1984 tarihli *Chevron* Kararına kadar devam etmiştir. *Chevron* kararı sonrası mahkemeler, kimi durumlarda idari kurumların kararlarının yerine geçecek kararlar anlamına gelen sıkı denetim yaklaşımını terk ederek, idari kurumların uzmanlıklarına karşı daha riayetkâr ve müsamahakâr bir tutum takınmaya başlamışlardır. *Chevron* Doktrini daha sonra mahkemelerin, idari kurumların yargısal denetiminde olağan tutumu haline gelmiştir (Breger, 2007, p.108).

Kuruluş ve gelişim dönemi yürütme gücünün ve idarenin daha etkin olduğu döneme tekabül eden kamu yönetimi disiplini de yürütme odaklı, idari gerekleri ön plana çıkaran ve işletmeci bir yönelim içinde olmuştur. Bu durum kamu yönetimi disiplininde hukuksal, yargısal süreçlere karşı mesafeli bir tutuma neden olmuştur. Ancak 1946 İdari Usûl Yasası, Amerika Birleşik Devletleri'nin yasama organı Kongrenin Rosenbloom (2000) tarafından adlandırıldığı biçimiyle, yasama merkezli (*legislative-centered*) bir kamu yönetimi anlayışının da ortaya çıkması ile sonuçlanmıştır. Rosenbloom (1983), mahkemelerle idari kurumlar arasındaki artan etkileşimi de kamu yönetiminin yargısallaşması (*judicialization*) olarak adlandırmaktadır. Yasama organı Kongre ve yargı organı mahkemelerin idari

kurumlar üzerindeki artan etkisi, kamu yönetimi literatüründe de karşılık bulmuştur. Rosenbloom (1983), Cooper (1984), Rohr (1986) başta olmak üzere, kamu yönetimi alanında çalışan akademisyenler, kamu yönetiminin hukuk ile ilişkisini inceleyen çalışmalar yapmaya başlamışlardır. Bu literatür daha çok, kamu yönetiminin anayasal meşruluğu ve yeni gelişmekte olan Amerikan idare hukukunun, idari kurumların ve idarenin takdir yetkisinin yargısal denetimi yoluyla, bu meşruiyet sorununa getirdiği çözümlerin tartışılması ile ilgilenmiştir.

Mahkemelerin kamu yönetimi süreçlerinde artan rolü de mahkemelerin ve yargıçların, dolaylı yoldan kamu politikalarının oluşum süreçlerine müdahalesi sonucunu doğurmuştur. Bu durum, yargıçların hesap verme sorumluluğu taşımadan yetki kullanıyor olması ve mahkemeler ile idari kurumlar arasındaki ayrımın aşınması ekseninde eleştirilerle karşılaşmıştır (Rosenbloom, 1991).

Amerikan kamu yönetimi literatürünün hukuksal ve yargısal süreçlere ilgisi, 1970lerin sonunda Amerika'da ortaya çıkan "kamu işletmeciliği okulu" ve 1990larda uygulanan "Yönetimin Yeniden İcadı" yaklaşımlarıyla birlikte giderek silikleşmiştir. 1980lerde İngiltere'de ortaya çıkan ve dünya genelinde yaygınlık kazanan yeni kamu işletmeciliği yaklaşımı, işletme yönelimli, hukuksallık ve işletmeciliği karşıt konumlandıran geleneksel Amerikan kamu yönetimi anlayışının yaygınlaşması ile sonuçlanmıştır. Ancak küresel yönetişim yaklaşımı, özellikle yumuşak hukuk (*soft law)* ve yargı dışı denetim mekanizmaları (*alternative dispute resolution methods*) gibi araçlarla kamu yönetimsel ve hukuksal süreçler arasındaki geleneksel ayrımın aşınması ve bu süreçlerin birbirleri ile yakınsaması ile sonuçlanmıştır (Harlow, 2005). 2000 sonrası Avrupa ve Amerika'da çeşitli konferans ve çalışma gruplarında kamu yönetimi ile hukuk birlikteliğini vurgulayan çalışmalar yeniden ortaya çıkmaya başlamıştır.

Siyaset bilimi ve hukuktan ayrı, işletme yönelimli bir disiplin olarak Amerika'da ilk ortaya çıktığından beri kamu yönetiminin hukuk ile ilişkisi, devlet yönetiminde ve idari süreçlerde, birbirinin alternatifi, zıt yaklaşımlar olarak bir tür dikotomi ilişkisi olarak betimlenmiştir. Amerikan kamu yönetimi literatüründe kamu yönetimi/hukuk dikotomisi olarak isimlendirilen bu karşıtlık ilişkisi, ilk olarak hukuksallık-işletmecilik gerilimi olarak ortaya çıkmıştır.

Ancak, Amerikan devletinin farklı tarihsel ve siyasi süreçlerinde, idari kurumlar ve kamu yönetimi ile mahkemelerin, yasama organının değişen ilişkileri doğrultusunda bu gerilim, farklı görünümler almıştır. Anayasa hukuku-kamu yönetimi disiplini, hukuksal değerler-işletmeci değerler, mahkemeler- idari kurumlar, hukukçular-idareciler gerilimi, Amerikan kamu yönetimindeki hukuksallık-işletmecilik geriliminin farklı görünümlerini temsil ederek, kamu yönetimi/hukuk dikotomisinin özgün tarihsel örneklerini oluşturmaktadır.

Temelde, yürütme erki ile (idari) yargı organı olarak Danıştay arasındaki tarihsel gerileme dayanan Türk idare hukukundaki hukukilik-yerindelik tartışması, Amerikan kamu yönetimindeki yasallık-işletmecilik tartışması ile benzerlikler taşımaktadır. Her iki tartışma da idari süreçlerde hukuksal ilkeler ile idari gerekleri, birbirine zıt alternatif yaklaşımlar olarak konumlandırmaktadır. İdarenin yargısal denetimi sürecinde Danıştay ile yürütme organı ve idare arasında ortaya çıkan gerilimli ilişki, Türkiye'deki bütün siyasi süreçlerde olduğu gibi anayasal süreçler doğrultusunda biçimlenmiştir (Tunaya, 1980; Sencer, 1984a).

Cumhuriyetin ilanından sonra kabul edilen 1924 Anayasası ile yeniden kurulması öngörülen Danıştay, 1927 yılında başkent Ankara'da faaliyete geçmiştir. 1924 Anayasası'nda yürütme bölümünde düzenlen Danıştay, idari ve yargısal olmak üzere iki fonksiyon üstlenmiştir. Osmanlı Şurayı Devletinin aksine, Cumhuriyet döneminde Danıştay, idareyi denetlemekle görevli bir idare mahkemesi niteliği ile öne çıkmıştır. Yeniden kuruluşu sürecinde, bir Osmanlı kurumu olarak kuşkuyla karşılanan Danıştay, saltanat geleneğinden gelen ve henüz yargısal denetime alışık olmayan hükümetle çatışmaktan kaçınmış, idare ve yürütmenin işlemlerini denetlemek konusunda çekingen bir tutum sergilemiştir. İlk yıllarında Danıştay'ın karşılaştığı eleştiriler, daha çok davaların sonuçlanmasının uzun sürmesi ve henüz yeni gelişmekte olan idari yargı usulüne ilişkin konulardan kaynaklanmıştır (Mimaroğlu, 1945).

Danıştayın Anayasa'nın yargı bölümü yerine yürütme bölümünde düzenlenmiş olması ve dönemin meclis üstünlüğü anlayışına dayalı hükümet sistemi nedeniyle Cumhuriyet'in yıllarında Danıştayın kimliği konusunda da bir karmaşa yaşanmıştır. Danıştay kararlarının mahkeme kararı niteliği taşıdığına hükmeden 1934 tarihli kararı öncesinde TBMM, davayı kaybeden tarafın Dilekçe Komisyonuna başvurması üzerine

Danıştayın kararını bozma yetkisine sahipti. TBMM, özellikle askeri personele ilişkin konularda verdiği yorum kararları ile, bu kararları, Danıştayın yargısal denetim alanından çıkarmak suretiyle de, Danıştay üzerinde kısıtlayıcı etkide bulunmuştur. TBMM ayrıca yorum kararları ile idari nitelikteki pek çok kararı, "hükümetin yüksek siyasetine ilişkin hükümet tasarrufu kategorisine dahil olduğu" gerekçesiyle yargı denetimi dışında tutmuştur. Üyeleri TBMM tarafından atanan Danıştay, hükümet tasarruflarını, davanın esasına girmeden ilk inceleme aşamasında reddederek kendisine 'yargı kısıntısı" uygulamış ve hükümet tasarruflarını incelemekten kaçınmıştır. Mimaroğlu'nun (1945) belirttiği üzere, başlangıçta bazı alt ve orta düzey yöneticiler, Danıştay'ın verdiği aleyhte kararlara uyma konusunda isteksiz davranmışlardır. Ancak, Cumhuriyetin ilk yıllarında, henüz yasama erkinden tam olarak ayrışmamış yürütme erki ile Danıştay arasında dikkate değer bir çatışma yaşanmamıştır.

Danıştay ile hükümet arasındaki uyumlu ilişki, 1946 yılında çok partili sisteme geçişe kadar devam etmiştir. 1946 sonrası dönemde, meclis çoğunluğunu elinde bulunduran iktidar partisi Cumhuriyet Halk Partisi (CHP), idare hukuku literatüründe 'yasama kısıntısı' olarak adlandırılan yasalar çıkarmıştır. Bu kısıntılar özelikle, iktidar partisinin birlikte çalışmak istemediği kamu görevlilerinin atama ve görevden alınmalarına ilişkin idari işlemlerin yargı denetimi dışında tutulmasını olanaklı kılma amacına yönelmiştir. Kanunların anayasaya uygunluğunu denetlemekle görevli bir anayasa mahkemesi henüz kurulmadığı için bu tür yasalar iptal edilmeden uygulanma olanağı bulabilmiştir.

İdari işlemlerin yargısal denetimini yolunu kapatan bu yasalar, 1950 seçimlerinden sonra iktidara gelen ve CHP dönemi bürokrasisini temel eleştiri hedefi olarak konumlandıran Demokrat Parti (DP) döneminde yaygınlaşmıştır. DP, 1954 seçimlerinde yeniden iktidara geldiğinde, bu yasaların kapsamını öğretim üyeleri ve yüksek yargı üyelerini kapsayacak şekilde genişleterek, kamu görevlilerini resen emekliye sevk etmeye ve bakanlık emrine almaya yönelik idari işlemleri, yargı denetimi dışında tutmuştur. DP İktidarı yasama kısıntılarını, bu tür işlemlerin idarenin takdir yetkisi kapsamında olduğu, bu nedenle de yargı denetimi dışında tutulması gerektiği iddiası ile meşrulaştırmıştır. Ancak Danıştay, kamu görevlilerinin resen emekliye sevk edilmesi ve bakanlık emrine alınmasına yönelik bu işlemleri, anayasaya

uygunluk ve kamu yararı açısından inceleyerek iptal etmiştir. Danıştay ve siyasi iktidar arasında, kamu personeline ilişkin idari işlemlerin yargısal denetimine getirilen yasama kısıntıları ve idarenin takdir yetkisinin denetimi ekseninde ilerleyen bu gerginlik, 1960 askeri darbesine kadar devam etmiştir.

1960 askeri darbesinden sonra yürürlüğe giren 1961 Anayasası, Danıştayın statüsünü önemli ölçüde güçlendirmiştir. Öncelikle, 1961 Anayasası, Danıştayı yargı bölümü altında düzenleyerek yargısal rolünü ve idare mahkemesi statüsünü netleştirerek kimlik karmaşasına son vermiştir. İkinci olarak, Anayasa, yürütme ve idarenin işlem ve eylemlerinin yargısal denetiminde, yasama ve yargı kısıntılarına son vermek amacıyla "idarenin hiçbir eylem veya işlemi yargısal denetimin dışında tutulamaz" hükmünü koymuştur. Üçüncüsü, Anayasa Mahkemesi, Yüksek Hâkimler Kurulu ve Yüksek Savcıları Kurulu gibi kurumlar aracılığıyla yargının statüsünü güçlendirmiştir.

1965 seçimleri sonrası iktidara gelen ve DP'nin halefi Adalet Partisi (AP), Celal Bayar'ın anayasa tezi doğrultusunda, Danıştay, Anayasa Mahkemesi, Cumhuriyet Senatosu ile TRT ve üniversiteler gibi kuruluşları, "milli iradenin yeni ortakları" olarak nitelendirerek sert bir biçimde eleştirmiştir (Tanör, 1991, ss.29-30). AP iktidarı, bürokrasiyi kendi iktidarı ile uyumlu hale getirmek için kapsamlı bir tasfiye hareketi başlatmıştır. Kamu personeline ilişkin davalarda yürütmeyi durdurma ve iptal kararları veren Danıştay, AP iktidarının eleştirilerine hedef olmuştur. Bu dönemde, Danıştayın en çok eleştirilen kararları, öğrencilerin disiplin ve sınav notlarına ilişkin kararlar, askeri personelin terfilerine ilişkin kararlar ve yüksek memurlar lehine verdiği yürütmeyi durdurma kararları olmuştur.

Danıştaya yönelik bu eleştiriler, 1966'da Türk Hukuk Kurumu tarafından düzenlenen *Danıştay Kararları ve Yürütmenin Durdurulması* Konferansı'nda ayrıntılı olarak tartışılmıştır. Konferansta, idare ve anayasa hukukçuları, Danıştay kararlarının hukukun üstünlüğünün bir gereği olduğunu ileri sürerken, Danıştayı eleştirenler, hükümetin yüksek memurlar hakkında verdiği kararların hükümet tasarrufu kategorisi olarak değerlendirilerek yargı denetimi dışında tutulması ve idarenin takdir yetkisinin genişletilmesi gerektiğini ileri sürmüşlerdir. Danıştaya yönelik eleştiriler temel olarak, yargısal denetimin kapsamının geniş tutulduğu, bu durumun bir tür "hakimler

hükümeti" potansiyeli taşıdığı ve yargının siyasete müdahalesi sonucunu doğurduğu iddialarına dayanmaktadır (bkz. Karayalçın,1966).

1961 Anayasası'nda, 12 Mart Askeri Muhtırası sonrasında yapılan 1971 değişiklikleri, Danıştay ile yürütme ilişkisini önemli ölçüde etkilemiştir. Bu değişikliklerle, Danıştay üzerindeki sınırlama çabası, bir yandan Anayasal nitelik kazanırken diğer yandan da yürütme erkinin güçlendirilmesi amacına yönelmiştir. Tartışmalar, "1961 Anayasasının toplumsal yapıya uymadığı", Danıştayın idarenin yargısal denetiminde yargılama yetkisinin kapsamını geniş tuttuğu, bu durumun yürütme yetkisi ve idari işleve aşırı müdahale anlamına geldiği ve bu şekilde yürütme iktidarının adeta Danıştay tarafından paylaşıldığı ve sonuç olarak da devletin otoritesinin zayıflatıldığı iddiaları etrafında ilerlemiştir.

1971 Anayasa değişiklikleri ilk olarak yürütme erkini, bakanlar kuruluna kanun hükmünde kararname çıkarma yetkisi vermek, anayasada görev olarak tanımlanan yürütmenin bir görev ve yetki olduğunu düzenlemek suretiyle güçlendirmiştir. İkincisi, kamu yararı, milli güvenlik güvenlik ve kamu düzeni gibi belirsiz kavramların, bireysel hakların kısıtlanması için gerekçe olarak kullanılmasını olanaklı kılarak idari işlemlerin yargısal denetimine ilişkin standartların bulanıklaşmasına neden olmuştur. Üçüncüsü, askeri personele ilişkin idari işlemlerin yargısal denetimiyle görevli bir askeri yüksek idare mahkemesinin kurulmasını öngörerek idari yargıda, askeri ve sivil olmak üzere ikili bir yapıya neden olmuştur. Dördüncüsü, anayasanın idarenin yargısal denetimine ilişkin maddesinde değişiklik yaparak idarenin yargısal denetimine dolaylı kısıtlamalar getirmiştir. 1971 Askeri Muhtırası sonrasında kurulan partiler üstü hükümetler de Danıştayın idarenin takdir yetkisine müdahale etmemesi gerektiği yönünde açıklamalarda bulunmuşlardır.

1970'li yıllarda yaşanan toplumsal çalkantı ve ekonomik kriz, 1970'lerin sonlarında birçok kentte sıkıyönetim ilanıyla sonuçlanmıştır. Bu dönemde Anayasa tezini daha da sertleştiren Celal Bayar, Danıştayı "anarşi ve kargaşanın kaynağı" olarak nitelemiştir. Ayrıca, Danıştay da dahil olmak üzere devlet kurumlarında çalışanları 'aydın oligarşisi' oluşturmak ve 'milli iradeyi değersizleştirmekle' itham etmiştir. Bu dönemde Danıştay da dahil olmak üzere yargı organları, seçimler sonucu oluşmadıkları, dolayısıyla demokratik hesap verilebilirlikten yoksun oldukları, buna rağmen devletin yönetimine ortak oldukları, devletin yönetilmesini engelledikleri ve

milli iradeyi yok saydıkları iddialarının hedefi olmuşlardır.

1980'lerin başından itibaren AP, yeni bir anayasa yapılması gereğini vurgulamaya başlamıştır. Anayasa reformu çağrısına, medya ve sivil toplum kuruluşları, seminerler, anayasa değişikliği önerileri ile karşılık vermiştir. Bunlardan ilki, Tercüman Gazetesi'nin düzenlediği *Anayasa ve Seçim Sistemi* Semineridir. Güçlü yürütme vurgusuna dayanan bu seminerde genel olarak yargının en üstte olduğu bir 'güçler hiyerarşisine' yol açtığı iddia edilmiştir. Danıştay ise "yerindelik denetimi" aracılığı ile yürütme erkine müdahalede bulunan, yürütme organını zaafa düşüren bir unsur olarak nitelenmiştir. İkincisi ise, 1961 Anayasası ve Danıştaydan ziyade 12 Mart rejimini eleştiren, 1971 değişikliklerinin Anayasanın demokratik karakterini zedelediğini savunan, İstanbul Barosu ve İstanbul Üniversitesi Siyasal Bilgiler Fakültesi tarafından düzenlenen *Demokratik Anayasal Düzenin İşlerliği Anayasal Hak ve Özgürlüklerin Yaşama Geçirilmesi* Semineridir. Üçüncüsü, *Yeni Forum* Dergisi'nde yayımlanan *Rejim ve Anayasamızda Reform* önerisi başlıklı reform önerisidir. Yeni Forum'un önerisine göre sorun, Danıştay da dahil olmak üzere yargı organlarının, yetkilerini düzenleyen anayasal kuralları yanlış yorumlamak suretiyle yetkilerini aşmalarıdır. Öneriye göre bu durum, yargının, yürütme ve yasama organları üzerinde hakimiyet kurmasına yol açmıştır. Danıştayın memurlarla ilgili davalardaki iptal ve yürütmeyi durdurma kararlarını eleştiren Anayasa önerisine göre Danıştay, hükümet karşısında memurları kayırmakta ve idarenin takdir yetkisi alanına girmektedir.

Bütün bu tartışmalar, 12 Eylül 1980 askeri darbesi ile sonuçlanmıştır. Milli Güvenlik Kurulu (MGK) tarafından kurulan askeri hükümet çıkardığı yasalarla, Danıştayın yetkilerini sınırlayan, bazı idari işlemleri yargı denetimi dışında tutan düzenlemeler yapmıştır. Bu yasaların bazı düzenlemeleri, 1982 Anayasası'nda yer alarak kalıcı hale getirilmiştir. 1982 Anayasası öncesi askeri yönetim döneminde, idari yargıya ilişkin *Danıştay Kanunu*, *Bölge İdare Mahkemeleri, İdare Mahkemeleri ve Vergi Mahkemelerinin Kuruluşu Hakkında Kanun* ve *İdari Yargılama Usulü Kanunu*'ndan (IYUK) oluşan üç önemli yasa çıkarılmıştır. Bu yasalarla, daha önce yalnızca Danıştay tarafından yürütülen idarenin yargı denetimini yapmakla görevli, alt derece idare ve vergi mahkemeleri ile bölge idare mahkemelerinin kuruluşu öngörülmüş, Danıştayın ağırlıklı olarak bir temyiz mahkemesi olarak faaliyet göstermesi amaçlanmıştır.

Askeri hükümet döneminde çıkarılan bu yasalardan IYUK, idarenin yargısal denetimine ilişkin önemli düzenlenmeler içermektedir. Öncelikle Cumhurbaşkanının tek başına yaptığı işlemleri, yargı denetimi dışında tutan IYUK, "yerindelik denetimi yasağına" ilişkin açık bir düzenleme getirmiştir.

"Güçlü devlet ve güçlü yürütme" anlayışına dayanan, yürütmenin cumhurbaşkanlığı kanadını güçlendiren 1982 Anayasası, Kasım 1982'de Resmî Gazete 'de yayımlanarak yürürlüğe girmiştir. Yeni Anayasa, Danıştay ile ilgili 1971 Anayasa değişiklikleri ile getirilen anayasal kısıntıların kapsamını genişletmenin yanı sıra ek yasal kısıtlamaların uygulanmasını olanaklı kılan düzenlemeler içermektedir. 1983 seçimlerinin ardından iktidara gelen Anavatan Partisi (ANAP) hükümeti, ithal ikameci kalkınma politikasından ihracata dayalı sanayileşme politikasına geçmek için yapısal bir uyum programı başlatmıştır. Bu dönemde benimsenen neo-liberal ekonomi politikaları, yeni sağ ideoloji ve Yeni Kamu İşletmeciliğine anlayışına dayanan kamu yönetimi reformları doğrultusunda, kamu hizmetlerinin daraltılması, kamuya ait işletmelerin özelleştirilmesi ve kamu personel rejiminin dönüştürülmesi amaçlanmıştır.

Bu süreçte hükümet tarafından alınan pek çok özelleştirme kararı ve yap-işlet-devret modeline dayanan sözleşmeler Danıştay tarafından iptal edilmiştir. Bu durum, siyasi iktidar ile Danıştay arasında özellikle ekonomik nitelikli idari işlem ve eylemlerin denetimi konusunda yeni bir gerilimi tetiklemiştir. Bu süreç, 1999 Anayasa değişikliğe ile sonuçlanmıştır. Yapılan değişiklikle, özelleştirme anayasal bir hüküm haline getirilmiş, yabancı kuruluşlarla kamu hizmeti imtiyaz sözleşmelerini ilgilendiren işlemlerde uluslararası tahkim olanaklı kılınmıştır. Anayasa değişikliği ayrıca, Danıştayın kamu hizmeti imtiyaz sözleşmelerindeki danışmanlık işlevini kısıtlamıştır.

Bu dönemde, özelleştirme, kamu hizmeti imtiyaz sözleşmeleri ve yap-işlet-devret modeli gibi ekonomik nitelikli işlemleri ilgilendiren konularda Danıştay ile yürütme arasında belirgin bir gerginlik yaşanmıştır. Tartışmaların odak noktası, Danıştay'ın hukukilik denetiminin sınırlarını aştığı ve yerindelik alanına müdahale etmeye başladığı iddiasıdır. Danıştayın iptal kararlarına dayanak teşkil eden kamu yararı ve hizmet gereği gibi belirsiz kavramların hukuki dayanaktan yoksun olduğu ve yerindelik alanına girdiği ileri sürülmüştür Ayrıca, Danıştayın hukukilik denetiminin sınırlarını geniş yorumlamak suretiyle idarenin takdir yetkisine ve teknik uzmanlığa

dayalı işlemlerine müdahalede bulunarak kamu yönetimi reformlarını engellediği, verimsizliğe yol açtığı ileri sürülmüştür.

Danıştayın idari işlemlerin yerindeliğini denetlemek suretiyle idarenin takdir yetkisini kısıtladığı, hukukilik denetimi sınırlarını aştığı iddiası, dönemin iktidar partisi Adalet ve Kalınma Partisinin önerdiği 2010 Anayasa değişikliği öncesinde, kamuoyunda önemli bir tartışma konusu olmuştur. 2010 Anayasa değişikliğiyle birlikte yerindelik denetimi yasağı, anayasal bir kural haline gelmiştir

Türk idare hukukuna, Fransız idare hukukundaki *opportunité* kavramının karşılığı olarak geçen yerindelik, çoğu kez idarenin takdir yetkisi ile eş anlamlı kullanılmaktadır. İdarenin takdir yetkisi ile sıkı ilişki olan yerindelik, içeriği ve sınırlı belirsiz bir kavramdır. Ne Fransız idare hukukunda ne de Türk idare hukukunda, idari işlem ve eylemlerin yargısal denetiminde hukukilik ve yerindelik alanının sınırlarını net biçimde ayıran bir kriter geliştirilebilmiş değildir. Teorik olarak idarenin yargısal denetiminin hukukilik denetimi ile sınırlı olması, yerindelik denetimi yapılamayacağı kuralı, idari yargı pratiğinde önemli tartışmalara yol açmıştır. Esas itibarıyla idareye özgü bir alan olan, hukuk kuralları ile düzenlenmesi ve yargısal denetimi mümkün olmayan yerindelik alanının sınırı, idare mahkemeleri tarafından, idari işlemin yargısal denetimi sırasında her somut olayın koşullarına göre belirlenmektedir. Dolayısıyla, münhasıran idareye ait olması gereken alanın sınırları, idareyi denetleyen yargı organı tarafından belirlenmektedir. İdari yargı organlarının sahip olduğu bu yetki, yerindelik alanının sınırlarının belirsizliği nedeniyle, hukuki tartışmaların yanı sıra siyasi tartışmalara da neden olmuştur.

Yürütme erkini elinde bulunduran siyasi iktidar genel olarak, Danıştayın hukukilik denetiminin kapsamını kamu yararı, hizmet gerekleri gibi belirsiz kavramlar kullanmak suretiyle genişlettiğini, bu şekilde idarenin yerindelik alanına müdahalede bulunduğunu, idarenin takdir yetkisini kısıtladığını iddia etmektedir. Bu durum daha çok idarenin takdir yetkisinin daha karmaşık ve teknik nitelik aldığı, ekonomik ve siyasi etkileri olan, hükümetin büyük ölçekli yatırımları, özelleştirme işlemleri ve çevre hukukunu ilgilendiren idari işlemlerde belirginleşmektedir. Bu tür işlemlerde Danıştayın ve idare mahkemesinin verdiği yürütmeyi durdurma ve iptal kararları, sonrasında siyasi iktidar/yürütme ve Danıştay/idare mahkemeleri arasında önemli bir

gerilim kaynağı olmuştur.

İdare hukuku literatüründe Danıştayın hukukilik denetiminin kapsamını dar tuttuğu yönünde yorumlanan Gökova Kararı (bkz. Kaboğlu, 1989) ve geniş biçimde yorumladığı biçiminde yorumlanan PETKİM Kararı (bkz. Hakyemez,2008), hukukilik-yerindelik tartışmasında iki karşıt örnek olarak gösterilebilir. Gökova kararında (1986) Danıştay, idarenin takdir yetkisinin denetimini, "açık hata" ile sınırlı tutup işlemi hukuka uygun bulmuştur. PETKİM'in (2008) özelleştirme sürecindeki bir yürütmeyi durdurma kararında ise takdir yetkisinin denetiminde "üstün kamu yararı" ölçütünü esas almıştır. PETKİM Kararı ve üstün kamu yararı içtihadı, Danıştaya yönelen yerindelik denetimi yaptığı iddialarında sıklıkla örnek verilen bir karardır.

Danıştayın hükümetin özelleştirme işlemleri, büyük ölçekli yatırımları ve çevresel etkileri bulunan işlemlerde, somut olayın koşullarına göre verdiği kararlar, takdir yetkisine dayalı işlemlerin yargısal denetiminin ölçütleri ve yerindelik-hukukilik tartışmasına ilişkin genellenebilir sonuçlar vermemektedir. Ancak 1980 öncesi dönemde kamu görevlilerine ilişkin idari işlemler, 1980 sonrası ise ekonomik ve çevresel etkileri olan özelleştirme, büyük ölçekli kamu yatırımları ekseninde ortaya idarenin takdir yetkisinin denetimi, hukukilik-yerindelik tartışması, yürütme ve (idari) yargı arasında gerilimli bir ilişkiye neden olmuştur.

Türk idare hukukundaki bu tartışma, yukarıda incelenen Amerikan kamu yönetimindeki hukuksallık-işletmecilik tartışması ile benzerlikler taşımaktadır. Her iki tartışma da kamu yönetimi disiplinin temel ikilemlerinden biri olan kamu yönetimi/hukuk dikotomisinin özgün örnekleridir.

Öncelikle, her iki tartışmanın da temelinde, anayasal kuvvetler ayrılığı ilkesi yer almaktadır. Esasen, yürütmenin erkinin güçlendiği tarihsel ve siyasi dönemlerde, hükümetin ve idarenin işlemlerinin yargısal denetimi, yürütmenin ve idarenin idari işlevleri karşısında bir engel ve sınır ihlali olarak görülmektedir.

İkinci olarak, her iki tartışma, meşruiyet konusu ekseninde yapılmaktadır. Amerikan kamu yönetimindeki, hukuksallık-işletmecilik tartışması, anayasal kuvvetler ayrılığı ilkesi karşısında idari kurumların meşruluğunun sorgulanması temelinde ortaya çıkmıştır. Ancak Türkiye'deki yerindelik-hukukilik tartışmasının temelinde, Osmanlı

Döneminde geçerli olan tutuk adalet uygulaması, Cumhuriyetin ilk yıllarında Danıştayın çekingen tutumu ve hükümet tasarrufu sayılan işlemleri denetlemekte kendini sınırlaması dikkate alındığında, idare mahkemesi olarak Danıştayın hükümetin ve idarenin işlem ve eylemlerinin denetiminde kendini kabul ettirme ve bu alanda meşruiyetini sağlama çabası yer almaktadır.

Üçüncüsü, her iki tartışma da mahkemeler ve yürütüme/idare arasındaki etkileşimin yoğunluğu doğrultusunda şekillenmiştir. Amerika'da genel mahkemeler tarafından yapılan idari kurumların işlemlemlerinin denetiminin yoğunluğu, kesin tarihler verilebilecek dönemsel değişime uğramaktadır. Bu yoğunluk, idari kurumlar ve mahkemeler arasındaki ilişkiye yönelik, akademide, siyasette ve sivil toplumda ortaya çıkan gelişmeler ve tartışmalar doğrultusunda biçimlenmektedir. Türkiye'de ayrı idare mahkemeleri tarafından yapılan idarenin yargısal denetiminin yoğunluğu, Amerika'da olduğu gibi net tarihler verilmesini olanaklı kılmamaktadır. Ancak, daha önce tartışıldığı üzere, Danıştayın denetiminin kapsam ve yoğunluğunu giderek artırmış, bu durum, siyasi iktidarın, yürütmenin ve idarenin tepkisiyle karşılaşmıştır.

Dördüncüsü, her iki tartışma da idarenin takdir yetkisinin hukuki sınırları ve yargısal denetimi ekseninde yapılmaktadır. Amerika'da başlangıçta idarenin genişleyen takdir yetkisinin yargısal denetim yoluyla sınırlanıp denetim altına alınması gerektiği tartışması, ilerleyen tarihsel dönemlerde, idarenin uzmanlık alanı olan konularda takdir yetkisine dayalı işlemlerine karşı daha müsamahakâr bir yaklaşımla sonuçlanmıştır. Türkiye'de idarenin takdir yetkisinin denetimine ilişkin tartışmalar, hukukilik-yerindelik tartışması ile sonuçlanmıştır.

Beşincisi, Amerikan kamu yönetimindeki hukuksallık-işletmecilik ve Türk idare hukukundaki hukukilik-yerindelik tartışması esas itibarıyla, idari süreçlerde hukuksal ilkeler ile idari gereklerin önceliklendirilmesi sorununa dayanmaktadır.

Altıncısı, her iki tartışma da soyut ve teknik nitelikte tartışmalar gibi görünmekle birlikte, içinde bulundukları tarihsel ve politik süreçlerin etkisiyle biçimlenen somut politik, toplumsal olgulardır.

Sonuç olarak, birbirine karşıt, alternatif seçenekler biçiminde konumlandırılan hukuk ve kamu yönetimi alanları, tarihsel ve politik süreçte değişen, dinamik bir ilişki içindedirler.

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