The place of the judiciary in the 1924 Constitution of Turkey

by Selin Esen

Abstract: *La posizione del Giudiziario nella costituzione turca del 1924* - The 1924 Constitution is the first constitution of the Republic of Turkey. It represents a complete break with the Ottoman Empire. This paper discusses the principles and rules of the 1924 Constitution related to the judiciary, and studies the legal order and the organization of the judiciary during the period of this constitution in force.

Keywords: Judiciary; Judicial review; Independence of the judiciary; Constitutional review; Judicial guarantees

1. Introduction

The 1924 Constitution was adopted by the Grand National Assembly of Turkey (GNAT) on April 20, 1924. It was Turkey's first Magna Carta following the Proclamation of the Republic on October 29, 1923. The establishment of the Republic was tantamount to breaking with the legal, social, and economic legacy of the Ottoman Empire. In this regard, the 1924 Constitution served to create a new regime. In this regard, the 1924 text not only bared the basic Western constitutional features at that time but also had some particular elements.

This paper will discuss the place of the judicial branch within the 1924 Constitutional order considering its common and particular features. Accordingly, the general components of the Constitution, the locus and the structure of the judiciary, the approach of the Constitution to the protection of rights through the judiciary, the independence of the judiciary, and judicial control over the executive and legislative acts will be explained respectively.

2. Basic Features of the Constitution

Post-World War I developments had a significant impact on Turkish constitutionalism. The foundation of the 1924 Constitution rested the developments in this period. After the Ottomans were defeated in World War I, the Mudros Armistice, signed between the Ottoman Empire and Great Britain on behalf of the Allied powers on October 30, 1918, effectively ended the Ottoman Empire and led to the occupation and partition of the

Empire. An organized resistance against the occupation of the country, that is also called the Turkish War of Independence began in Anatolia under the leadership of Mustafa Kemal in 1919. To wage the war the Grand National Assembly (GNA) was established in Ankara on April 23, 1920, under the leadership of Mustafa Kemal (Atatürk), including former members of the Ottoman Parliament that had been officially dissolved on April 11, 1920 by the Allies. The GNA became the new *de facto* government in Anatolia.

The establishment of the GNA brought about important developments in Turkish constitutionalism. Firstly, the Assembly passed the 1921 Constitution on January 20, 1921. This Constitution corresponds to a radical break with the Ottoman constitutional order in several respects, such as the origin and exercise of sovereignty as well as the form of government. The 1876 Constitution of the Ottoman Empire did not explicitly recognize national sovereignty. Thus, Article 1 of the 1921 Constitution stipulates that "sovereignty belongs to the nation unconditionally" marking a decisive turning point from Ottoman constitutionalism. Hence, Article 1 was tantamount to the *de facto* abolishment of the monarchy that was sharing sovereignty with the nation.[1] The 1924 Constitution was a continuation of the 1921 Constitution in this matter. Indeed, Article 3 of the 1924 Constitution used this formulation verbatim. The fact that both the 1961 and the 1982 constitutions contain this provision indicates that the rule regarding the origin of sovereignty is an integral element of the Turkish constitutional identity.

The 1921 Constitution also revised the exercise of sovereignty. Efforts to limit the power of the monarch in the Ottoman Empire began in the 19th century. Similar to the developments in Western countries, the legislative power in the Ottoman Empire emerged from the monarch. In other words, some of the Sultan's powers were vested in the parliament as "legislative powers". The source of the executive was the Sultan. While the 1876 Constitution was in force, the source of the legislative power was in the executive. The establishment of the GNA completely changed it. Indeed, similar to the National Convention of the French Revolution, the Assembly was not simply a "parliament" exercising only legislative powers, but all powers were concentrated in the GNA. Accordingly, the 1921 Constitution established a system of "assembly government" based on the supremacy of the parliament, in which the Assembly assumed legislative, executive, and even some judicial powers. According to Mustafa Kemal Atatürk, the founder of the Republic, "constitutional monarchy" meant separation of powers. This regime contrived to pull the wool over the people's eyes. He believed that when the legislative and executive powers were separated and kept in different hands, it was inevitable that the executive power would overrule and dominate the others. Necessarily, there could be only one system of government compatible with the concept of national sovereignty, that of "assembly government".[2] He considered the absolute supremacy of

[1] B. Tanör, *Osmanlı-Türk Anayasal Gelişmeleri (1789-1980)* (10th ed), İstanbul, 2004, 255-256.

[2] İ. Arsel, "Constitutional Development of Turkey Since Republic", in 18 Ankara Üniversitesi Hukuk Fakültesi Dergisi, Vol. 1, 1961,39-40; B. Tanör, *Anayasal Gelişme Tezleri* (2nd ed), Istanbul, 2008,.27-28.

DPCE online
ISSN: 2037-6677

the parliament as a necessary instrument for victory against the occupation of foreign forces and for abolishing the Sultanate and Caliphate. The 1924 Constitution reiterated the principle of supremacy of the parliament.[3] Article 4 of the 1924 Constitution authorizing the GNA as the sole rightful representative of the nation to exercise sovereignty in the name of the nation was equivalent to Article 2 of the 1921 Constitution. Nonetheless, instead of maintaining the system of government of the 1921 document, the 1924 Constitution aimed at combining both the principles of the 1921 Constitution and the parliamentary system. The executive power emerged as a separate power by taking some of the powers of the Assembly under the 1924 Constitution. Accordingly, on the one hand, the 1924 document also stipulated that the legislative and executive powers were manifested and concentrated in the Assembly (Art 5), on the other hand, it provided the Assembly to exercise its legislative power directly (Art 6) and its executive power through the President of the Republic and the Council of Ministers (Art 7). In other words, the supremacy of the Assembly was retained, but the executive emerged as a separate power by assuming some of the functions of the Assembly. Correspondingly, the constitution recognized the collective responsibility of the Council of Ministers to the Assembly, which is the bedrock principle of the parliamentary system.

The 1924 Constitution was a result of the necessity of adapting the constitutional organization of the national and independent new Republic. Atatürk aimed to create a nation-state based on universal values and principles, strengthen the regime, and achieve social, economic, and legal reforms that would provide a complete rupture from the multinational and theocratic Ottoman Empire.[4] Article 104 of the Constitution which annulled both the 1876 Constitution and the 1921 Constitution also illustrates the purpose of this constitution to establish a singular and national legal order.[5]

The 18th-century philosophy and the principles of the French Revolution had a significant impact on the 1924 Constitution.[6] Thus, it envisaged unicameralism, a centralized government, and almost limitless discretionary power to the GNAT on legislative matters. Similar to other constitutions of its time, it was short and brief. Moreover, the priority of the drafters of the Constitution was modernizing society and the state with radical reforms. Accordingly, the Constitution had to be short and brief to operate as a facilitator of reforms. The Constitution rested upon the principle of republicanism to achieve these objectives. Indeed, the first article of the Constitution stated that the form of government was the republic. Moreover, Article 102 prohibited any modification of the form of government. Initially, Islam was retained as the state religion in Article 2.

[3] E. Teziç, *Türkiye'de 1961 Anayasasına göre Kanun Kavramı*, İstanbul, 1972, 32.; M. Soysal, *100 Soruda Anayasanın Anlamı* (3rd ed), Istanbul, 1976, 37.

[4] The GNA legally terminated the Ottoman Empire abolishing the monarchy on November 1, 1922, and declaring the Republic of Turkey on October 29, 1923. The Grand National Assembly of Turkey (GNAT) eliminated the caliphate on March 3, 1924, and sent members of the Ottoman dynasty into exile.

[5] Note that The 1921 Constitution did not repeal the 1876 Constitution. Provisions of the 1876 Constitution that were not contrary to the 1921 Constitution and its amendments remained in effect until the 1924 Constitution came into force.

[6] M. Kapani, *Kamu Hürriyetleri (*6th ed), Ankara, 1981, p.109.

The secular character of the state was implemented through the laws and the constitutional amendments in 1928 and 1937.

The approach of the 1924 Constitution on rights and freedoms was heavily influenced by the philosophy of the 18th century. Accordingly, the understanding of rights and freedoms of the Constitution was founded on the concept of natural rights. The definition of liberty was taken verbatim from the French Declaration of the Rights of Man and Citizen of 1789. According to Article 68, all citizens are endowed at birth with liberty and full right to the enjoyment thereof. Liberty consists of the right to live and enjoy life without harming others. The limits on freedom are "the boundaries of the freedom of others". Similar to the 1789 document and in accordance with liberalism's approach to human rights, the 1924 Constitution recognized mostly negative rights.[7] The constitutions of its time that acknowledged social rights or state obligations to provide food, work, and financial aid to the citizens in need such as the 1915 Danish, 1917 Mexican, and 1919 German constitutions did not engage the attention of the drafters of the 1924 Constitution.[8]

The Constitution did not include detailed provisions to ensure the exercise of rights and freedoms. One may claim that one of the significant reasons behind the lack of sufficient guarantees regarding rights and freedoms was the intertwinement of the concept of national sovereignty with the parliament. According to this approach, Assembly as the sole body to exercise national sovereignty was the greatest guarantee to protect the rights of the citizens. Safeguarding rights and freedoms through the limitation of political power was necessary when the nation shared sovereignty with the monarch. Drafters of the 1924 Constitution, influenced by the French Revolution, believed that limiting the will of the parliament would be tantamount to limit the will of the nation.[9] The assumption of alikeness between the nation and the Assembly resulted in the Constitution vesting unlimited discretionary power to the legislature in almost every matter.

The 1924 Constitution operated both under the single-party regime and in the multi-party period and formally remained in force until 1961. The Republican People's Party[10] ruled the country under one-party regime between 1925 and 1945. After World War II, the monolithic one-party structure relaxed its grip sufficiently to permit political opposition. Other political parties, i.e. National Development Party and the Democrat Party were founded. Democrat Party came into power with the freely contested

[7] M. Kapani, *Kamu Hürriyetleri*, cit, 110; Ahmet Mumcu, *1924 Anayasası*, in 2 Atatürk Araştırma Merkezi Dergisi 5, 1986, 396.

[8] Note that the only constitutional provision related to social rights was Article 80 guaranteed free education. Also, Article 74 stated that the expropriation compensation of the land and forests is to be taken to make the farmer land owner and nationalize the forests and the payment of these provisions are determined by special laws.

[9] M. Soysal, *100 Soruda Anayasanın Anlamı*, cit,46.

[10] The Association for the Defence of the Rights of Anatolia and Rumelia, founded in 1919 at the Sivas Congress, was transformed into the People's Party in 1923 under the leadership of Mustafa Kemal Atatürk and renamed the Republican People's Party in 1924.

DPCE online
ISSN: 2037-6677

general elections in 1950 and stayed in power until it was ousted by the military coup in 1960.

Observe that this constitution was not written for an authoritarian regime. It was democratic in spirit.[11] However, its democratic principles found a limited place of implementation. Understanding of the supremacy of the majority of the Parliament above all dominated the political life and legal system. Theoretical supremacy of the Assembly often transformed into the domination of the executive body, since normally the executive was composed of party leaders. Both in the single-party and the multi-party years, the authoritarian leadership of the chief executives and strong party discipline reduced the Assembly to a secondary role.[12] This approach created greater issues fulfilling the principle of the rule of law, including independence of the judiciary and the rights and freedoms, since it was tantamount to the supremacy of Democrat Party that obtained the majority in the GNAT for a decade.

3. The Locus of the Judiciary in the Constitution

The 1924 Constitution allocated Section IV to the judiciary. The constitution introduced the legislature and executive as a "power" under Section II and Section III respectively. Nonetheless, while Section IV stipulated the judiciary as a "power", Article 8 in Section I described it as a "right". According to Article 8, "Judicial right is exercised in the name of the nation by the independent courts established in accordance with the law". Clearly, separating the judiciary from the parliament and granting its independence in Article 8 strengthened the place and the reputation of the judiciary.[13] However, based on the fact that the Constitution rested upon the principles of unity and concentration of powers and supremacy of the Assembly, it was argued that describing the judiciary as a power created a contradiction.[14] At first glance, the formulation of the Constitution provided the separation of the judiciary from the legislature and executive, however, it did not include guarantees to achieve a minimum degree of the rule of law, including independence of the judicial branch. Courts exercised their powers in accordance with laws enacted by the Assembly. Since the Constitution did not limit the Assembly on the content of laws, the courts would be independent only to the extent granted by the Assembly.[15] Observe that, Atatürk, as the first elected President of the Republic, envisioned the judiciary as a supporter and guardian of the reforms.[16] In other words, the founder of the Republic did not conceive the judiciary as a branch to limit the legislature and executive, and to safeguard basic rights and freedoms. The shortcomings of the Constitution that facilitated the judiciary to remain

[11] E. Özbudun, *The Constitutional System of Turkey 1876 to the Present*, 2011, 8.

[12] E. Özbudun *The Constitutional System of Turkey 1876 to the Present*,cit, 7; Ömer Anayurt, *1924 Anayasası'nda Temel Hak ve Hürriyetler*, in 7 Gazi Üniversitesi Hukuk Fakültesi Dergi*si* 2, 2003, 176.

[13] B. Tanör, *Osmanlı-Türk Anayasal Gelişmeleri (1789-1980)*,cit, 306.

[14] E. Özbudun, *1924 Anayasası*, Istanbul, 2012, 53-55.

[15] A. Mumcu, *1924 Anayasası*,cit, 395-396.

[16] B.Tanör, *Osmanlı-Türk Anayasal Gelişmeleri (1789-1980)*, cit, 307-330.

under the influence of the legislature and the executive may be considered as a reflection of such consideration. As a result, taking into account the Constitution as a whole, one may claim that the constituent power did not pay much attention to the terminology and used terms such as authority, power, right, and duty as synonyms.[17]

4. Structure of the judiciary

The legal system which the 1924 constitutional order embraced rested upon the civil (Roman) law based on codified laws. The structure of the judiciary was founded on a secular legal system. However, as mentioned above, the original text of the 1924 Constitution did not provide a separation of state and religion. Indeed, the original document maintained in Article 2 the provision stipulating "the religion of the state is Islam" which was inserted into the 1921 Constitution in 1923. Also, Article 26 empowered the Assembly to execute the rules of the religion of Islam (*Sharia*). On the other hand, the Constitution did not place the provision of the 1921 Constitution stipulating laws and other regulations to be based on Islamic rules (*ahkam-ı fikhiye*). Subsequently, the Constitution embraced secularism by repealing the state religion in Article 2 and the relevant expression in Article 26 in 1928 and introduced the principle of secularism to Article 2 as a characteristic of the state in 1937.[18]

Notwithstanding, before these constitutional amendments were introduced to the Constitution, radical reforms began in the direction of modernization and secularization of society and the legal order. Starting from 1926 legal reception took place aiming at transforming the Republic based on a secular legal system. Accordingly, the Swiss Civil Code (1926), the first two sections of the Swiss Code of Obligations (1926), the Code of Civil Procedure of the Canton Neuchâtel, the Swiss Bankruptcy and Enforcement Law (1929), the Italian Criminal Code (1926), the German Code of Criminal Procedure (1929), and Swiss Federal Law on Bankruptcy (1932) were imported almost verbatim and enacted by the GNAT. A commercial code compiled from French, Belgian, Italian, and German sources as well as a maritime code largely based on the German model came into effect in 1926 and 1929 respectively. Both were substantially revised and incorporated into the new commercial code of 1956.[19]

The Civil Code of 1926 was the greatest stage for the secularization of the state and society. It introduced equality between women and men regarding matters on personality, family, inheritance, property, debt, etc. It was revolutionary for the woman's rights. Also, the Criminal Code of 1926

[17] E. Özbudun, *1924 Anayasası*, cit, 55.

[18] Six fundamental principles of the state were incorporated into Article 2 of the Constitution in 1937. According to these, the Turkish state is "republican, nationalist, populist, statist, secular, and revolutionary". The Constitution did not define or clarify these principles. However, they were explained in the Republican People's Party Congress in 1935 (*See* F. Ahmad, *The Turkish Experiment in Democracy 1950-1975*, London, 1977, 4-5).

[19] Z. Odyakmaz, *Cumhuriyetimizin 74. Yılında Hukuk Inkılabımızın temelini Oluşturan laiklik*, in *TBB Dergisi* 3 1996, 401-403.

DPCE online
ISSN: 2037-6677

provided a secular legal order by being silent on crimes in Islamic law, on the contrary, it criminalized acts against freedom of religion, conscience, and worship, in other words, guaranteed the freedom of religion and outlawed acts against the secular order.[20]

Observe that the first broad movement towards codification had taken place in the second half of the nineteenth and early twentieth centuries in the Ottoman Empire. The fundamental feature of these laws was that they were not derived from Islamic law and Ottoman customs, but were clearly inspired by European legislation[21]. Hence, they included secular institutions and rules that were contrary to Islamic law. However, Islamic law and secular laws remained to be applied together. Secular laws enacted since 1926 eliminated this legal duality and the Ottoman legal system was entirely repealed.

As a result of the codification movement, the Ottoman judicial organization and procedure also developed in the direction of secularism. New courts, namely *nizamiye* courts[22], were established in the 1860s alongside the *Sharia* courts[23] to resolve the disputes arising from the new laws. In addition to the *Sharia* and *nizamiye* courts, there were also community courts[24] and consular courts[25]. Extraterritorial privileges of the

[20] The Criminal Code of 1926 provided penalties for those who, by abusing religion, religious sentiments, or things religiously considered sacred, incite the people in any way to acts detrimental to the security of the state, or form associations for that purpose .... Political associations based on religion or religious sentiments may not be formed (Art. 163). It also provided penalties for religious leaders and preachers who in the exercise of their office, discredit or incite disobedience to the administration, laws, or executive measures (Art 241 and 242) or who conduct religious celebrations and processions outside recognized places of worship (Art 529) (B. Lewis, *The Emergence of Modern Turkey* (2nd ed), Oxford University Press, 1966, 412.)

[21] Many of them were adopted from France. For instance, the Commercial Law of 1850 was a reception of the French Commercial Law of 1849. The relevant French legislation was followed by Law on Prohibition of Bribery that was enacted in 1855. The Criminal Code of 1858 and the Criminal Procedural Law of 1879 were almost verbatim translations of the French Criminal Code of 1810. Later, Italy became another source of reception of foreign law. Indeed, the Criminal Code was broadly amended in 1911 taking into consideration of the Italian Criminal Code of 1899. Common law principles did not play any role in the transformation of the Ottoman legal system. (G. Bozkurt, *Batı Hukukunun Türkiye'de Benimsenmesi*, Ankara, 2010, 100-102.)

[22] B. Tanör, *Osmanlı-Türk Anayasal Gelişmeleri (1789-1980)*, cit, 101-102. The *nizamiye* courts had jurisdiction over Muslims and others in certain types of civil, commercial, and criminal cases, and applied the state laws and codes (modeled on French law), with final decisions made by the Ministry of Justice. (B. Z. Tamanaha, *Legal Pluralism Explained. History, Theory, Consequences*, Oxford University Press, 2021, 44-45).

[23] They dealt with matters between Muslims or between Muslims and non-Muslims, as well as criminal matters.

[24] The community courts of the non-Muslim communities (*millets*) heard civil, commercial, and criminal cases involving members of that group, applying religious law, subject to final decisions by the highest authority of the religious community.

[25] The capitulations involved a special status for foreigners, who were subject to their laws and courts under the authority of the foreign consul, while exempt from Ottoman law—a legal exception that later became known as extraterritoriality. Extraterritorial consular courts (1825-1923) had jurisdiction over foreigners and native Ottoman subjects with *protégé* status in civil, commercial, and criminal matters, and applied the

foreign communities with consular courts limited the Ottoman courts in their competence to cases involving Ottoman subjects only.

Note that the division of powers among the secular and religious courts was never clarified. Over time, the subordination of the *Sharia* courts to the religious authority of *Shaykh al-Islam* and the *nizamiye* courts to the Ministry of Justice led to a legal and jurisdictional dualism that caused uncertainty in both theory and practice. In this regard, the abolition of the *Sharia* Courts on April 8, 1924, was an extremely important step to end this issue and create a secular legal system.[26] Turkey effectively achieved legal institutionalization abolishing the consular courts in 1923 with the Treaty of Lausanne and the community courts in 1926 with the adoption of the Civil Code.[27]

As a result, the reorganization of legal and judicial order was the centerpiece of the national state-building efforts. The legal reforms of the Turkish Republic continued the Ottoman legal reforms of the Reorganization Period. However, while the legal reforms of the Ottoman Empire led to a divided legal system, the legal reforms of the Turkish Republic aimed to unify it under the state's legal hierarchy.[28]

Finally, as mentioned above, the legal reforms rested the Turkish legal system upon civil (Roman) law tradition. Similar to the French legal system, the structure of the judiciary adopted by the 1924 Constitutional order was grounded on the division between private and public. In other words, it was based on the jurisdictional dualism that separated the court system into ordinary courts and administrative courts that still remain in effect. The organization of the courts that was established starting from 1924 is read as follows:

The Court of Cassation: Ordinary courts were divided into civil and criminal courts. Commercial and cadastral courts were also established in some of the provinces. The appellate court for both civil and criminal matters is the Court of Cassation.[29] The 1924 Constitution did not specifically place the Court of Cassation. However, it was mentioned in articles 61, 62, and 63 where regulating High Court (*Divan-ı Âlı*). According to Law No. 834 on the Expansion of the Supreme Court Organization of 1926, the Court of Cassation consisted of 3 civil and 3 criminal sections. Each

law of the foreign nation, subject to final decisions by the embassies or high courts established by foreign powers. There were also mixed courts composed of Ottomans and foreigners that heard cases between Ottoman and foreign subjects in commercial matters, applying local and foreign sources of law, and subject to final decisions of the Ministry of Commerce (B. Z. Tamanaha, *Legal Pluralism Explained. History, Theory, Consequences*, cit, 45). Extraterritorial privileges of the foreign communities limited the Ottoman courts in their competence to cases involving Ottoman subjects only.

[26] A. Akgündüz, *Türk Hukuk Tarihi*, Istanbul, 2011, 277.

[27] T. Kayaoğlu, *Legal Imperialism. Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China, Cambridge University Press*, 2010, 136.

[28] T. Kayaoğlu, *Legal Imperialism. Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*,cit.

[29] The origin of the Court of Cassation dates back to the 19th century. In 1868 the High Council was reconstructed, and two new bodies were created, a Council for Judicial Orders (*Divan-i Ahkam-i Adliye*) and a Council of State (*Şurayi Devlet*). The former was a revised version of the earlier Council of Justice, with judicial functions.

DPCE online
ISSN: 2037-6677

section was composed of a chairperson and six judges.[30] The number of sections and their composition changed with the statutory amendments made at various times.[31]

Observe that military courts were set up outside the ordinary judicial system. The Military Court of Cassation was established by Military Procedure Law No. 1631 in 1930 as an appellate tribunal of the military courts. It was composed of two sections. Each section was formed with eight members, i.e. four officers and four lawyers. The president of the Court was appointed by the Council of Ministers from among the high-ranking officers.[32]

The Council of State: All cases governed by administrative law fall within the scope of the administrative courts. Note that, administrative law was not new to the Turkish legal order. It first appeared in the Ottoman Empire in 1839. The Ottoman Empire followed the French model in the field of public administration. Legal and institutional reforms started in the 1860s created the main administrative institutions of the present day, such as the provincial and local administrations, the Council of State, and the Court of Accounts. The Council of State was established with administrative and legislative functions in the Ottoman Empire in 1868 that was modeled by the French *Conseil d'Etat*. However, the 1876 Constitution reduced the jurisdictional powers of the Council of State and the importance of its legislative functions by creating a Parliament. Also, some of its functions were transferred to the Cabinet. The Council of State became a consultative body with an administrative character, similar to its evolution in France.

After the War of Independence, most of the institutions remaining from the Ottoman Empire were abolished, as was the Council of State in 1922. The 1924 Constitution under Article 51 re-established it. It is noteworthy that the Constitution gave place to the Council of State in Section III which regulated the executive power, instead of Section IV which organized the judiciary. However, at the same time, differently from the previous regime, the Constitution referred to "administrative lawsuits".[33] Indeed, the administrative jurisdiction established in 1868 was incomplete and ineffectual. As stated above, the Ottoman Council of State was not drawn up as a court. Accordingly, the new Council of State no longer had governmental functions or a political character. Its consultative and administrative functions within the 1924 constitutional order were to give opinions on draft laws and public service concession contracts and regulations, carry out functions laid down by laws and regulations, give opinions on matters presented to it by the government, and revise administrative processes. The Council was also to act as an administrative

[30] Ö. Tosun, *Temyiz Kararlarına Karşı Kanun Yolları*, in 38 İÜHFM 1-4, 195.

[31] For instance, according to a statutory alteration in 1935, the Court of Cassation consisted of four civil, four criminal, one commercial and, one bankruptcy sections. Each section included a chair and four members. (M. R. Belgesay, *Adliye* 1st Volume (3rd Ed), Istanbul, 1935, 131-132.

[32] N. İpeksümeroğlu, *Askeri Kaza Sistemine Bir Bakış*, in 8 Ankara Üniversitesi Hukuk Fakültesi Dergisi 1, 1951, 480.

[33] O. Karahanoğulları, *Türkiye'de İdari Yargı Tarihi*, TÜRK İDARİ YARGI TARİHÇESİ, 2005, 232.

tribunal. It supervised the conformity of administrative acts with the letter and the spirit of the law and the principles of "public service".[34]

Law No.669 on the Council of State of 1925 stipulated expressly the binding effect of the decisions of the Council. This provision created a significant difference between the Ottoman Council of State and the Council of State of the Republic. While implementation of the decisions of the Council of State against the administrative acts required approval of the administrative authority, i.e. the Sultan, the grand vizier, the minister, etc. in the Ottoman era, Law No.669 explicitly provided that decisions of the Council of State in the administrative cases would have legal effect without the approval of any authority.[35] Observe that, the GNAT also commented in 1934 that the judicial decisions of the Council of State were to be regarded in the same way as the judicial decisions of ordinary courts. Also, the 1946 reforms reiterated it. Thus, the Council of State became a genuine tribunal.[36]

In accordance with the 1924 Constitution and Law No.669 the Council started to operate in 1927 together with the administrative courts. The court has original jurisdiction over certain cases of special importance such as decrees of the Council of Ministers and ministerial acts. The court has appellate jurisdiction on almost any other case that involves the administration, in other words, cases are heart first at the administrative courts. The members of the Council of State would be selected by the GNAT from among the distinguished individuals who had knowledge and expertise. The Council was attached to the presidency of the Council of Ministers and had six sections. The number of sections was increased to nine, four with administrative functions and five with litigation. In each, there were a chairperson and four counselors.

The Court of Accounts: It was founded to audit revenues, expenditures, and assets of the administrative authorities. Similar to the Court of Cassation and the Council of State, the foundation of the Court of Accounts goes back to the 19th Century. It was founded based on the French model in 1862. Then it was featured in the 1876 Constitution.[37] The GNA took over some of its functions between 1920 and 1923. During this period, the auditing of the state revenues and expenditures was carried out by a special parliamentary committee. After the proclamation of the Republic, Law No. 374 on the Court of Accounts of 1923 and Article 100 of the 1924 Constitution reestablished the Court of Accounts. Accordingly, it would audit the revenues, expenditures, and assets of the State on behalf of the GNAT.[38] The president and members of the Court of Accounts would be elected by the Assembly from among those who were not members of the

[34] E. Örücü, *Conseil D'etat: The French Layer of Turkish Administrative Law*, in 49 International and Comparative Law Quarterly 3, 2000, 681.
[35] O. Karahanoğulları, *Türkiye'de İdari Yargı Tarihi*, cit, 232.
[36] E. Örücü, *Conseil D'etat: The French Layer of Turkish Administrative Law*, cit, 682.
[37] E. Akbulut, *Kamu Mali Yönetiminde Sayıştay'ın Rolü*, in Kamu Mali Yönetimi ve Denetimi Sempozyumu Kitabı, Izmir, 2011, 50-51.
[38] Ş. Gözübüyük, *Sayıştay ve Yargı Görevi*, in 21 Ankara Üniversitesi SBF Dergisi 4, 1966, 159.

DPCE online
ISSN: 2037-6677

Assembly.[39] Decisions of The Court of Cassation would be appealed to the Council of State.[40]

The Court of Jurisdictional Disputes: The 1924 Constitution did not provide for a special tribunal to resolve disputes between civil, administrative, and military courts stemming from their jurisdiction and judgments. Initially, this power was conferred on the Council of State by a law passed in 1926. Then the General Criminal Assembly of the Court of Cassation assumed this function in 1930. Finally, Law No. 4787 of 1945 created the Court of Jurisdictional Disputes. Members of this court were selected by the Court of Cassation, the Council of State, and the Military Court of Cassation.[41] The model was decisively French in organization, personnel, and function.[42]

The Supreme Electoral Council: Administration of elections and adjudication of electoral disputes by an independent body is an indispensable part of free and fair elections. The 1924 Constitution did not introduce such a body concerning the supervision of the elections. The Supreme Electoral Council, along with the provincial and district election boards concerning the administrative affairs and judicial disputes related to the elections was introduced by Law No. 5545 on Law on Election of the Members of the Parliament in 1950. According to Law No. 5545, the Council consisted of 11 members. Six of them would be selected from among the judges of the Court of Cassation and five members from among the members of the Council of State by secret vote. Law no. 6272 of 1954 stipulated that the First President of the Court of Cassation would also be the President of the Supreme Electoral Council. Decisions of the Supreme Electoral Council were final.[43]

The High Court: The Constitution envisaged establishing a High Court to try the members of the Council of Ministers, judges of the Court of Cassation, the Council of State, and the Attorney General for offenses related to their functions (Art 61). The GNAT would decide to set up the High Court when it deemed necessary (Art 67). The High Court would be composed of 21 members. Eleven of them would be selected by the Court of Cassation from among its members and the rest of the members would be selected by the Council of State from among its members (Art 62). The investigation would be carried out by the GNAT. The court was not permanent. The High Court would hear the case and deliver a judgment pursuant to laws. Judgments of the court were final (Art 65).

During the 1924 Constitution in force, the GNAT established the High Court four times.[44] The Assembly decided to establish the High Court twice in 1928. Two other proceedings before the High Court were held in

[39] A. Akgündüz, *Osmanlı'dan Cumhuriyet'e Sayıştay (Divan-ı Muhasebat)*, Istanbul, 2012, 136.

[40] Law No.2514 on the Court of Accounts of 1934. (Ş. Gözübüyük, *Sayıştay ve Yargı Görevi*, cit, 160).

[41] H. N. Kubalı, *Esas Teşkilat Hukuku Dersleri*, İstanbul, 1955, 85.

[42] E. Örücü, *Conseil D'etat: The French Layer of Turkish Administrative Law*, cit, 682.

[43] YSK Web Portal

[44] R. Kumaş, *İktidardan Yüce Divana*, İstanbul, 1990, 23.

1929 and 1948. The Assembly in all cases indicted the ministers for corruption offenses.[45]

Extraordinary Tribunals (Independence Courts): The 1924 Constitution, similar to the 1921 Constitution, did not place a provision prohibiting the creation of extraordinary tribunals. During the debates on the Constitution, a proposal to introduce a provision to the Constitution to ban extraordinary tribunals was rejected by the GNAT. Considering the rejection of such a proposal, one may claim that the Assembly did not wish to preclude the possibility of establishing extraordinary tribunals.[46]

During the War of Independence (1920–1923) and in the early years of the Republic (1923–1927) the Assembly established the extraordinary courts, called independence tribunals (*İstiklal Mahkemeleri*). These tribunals were revolutionary courts, as established during the French and Russian revolutions. However, unlike these cases, independence tribunals did not operate against or in favor of a certain social class, since the nature of the Turkish reforms had no class basis.[47] During the first period, the purpose of these tribunals was mainly to prevent and punish cooperation with the enemy, desertion, insurgency, and to maintain public security during the war. The Assembly established the first independence tribunals by enacting Law No. 21 on Fugitives in 1920. The tribunals consisted of one president and three members, and they were selected by the Assembly from among its members. The number and districts of tribunals would be decided by the Assembly on the proposal of the Council of Ministers. Judgments of these tribunals would be enforced "on behalf of the Grand National Assembly".[48] Independence tribunals were accountable to the Assembly. They were required to submit a report on their work to the GNA every fortnight. Note that these tribunals played an important role in quashing riots as well as in dealing with the deserters. Subsequently, the GNA passed Law No. 249 on Independence Tribunals in 1922 and repealed Law No.21. Due to the end of the War of Independence and the elimination of the desertion issue, the independence tribunals were dissolved.

After the 1924 Constitution came into effect, the Assembly reinstated the independence tribunals to deal with insurrections against the Republic and the opposition to the reforms and to impose its authority. They were *ad hoc* tribunals and set up when the Assembly deemed them necessary.[49] They were established by the Assembly in accordance with the Law No. 249 to try crimes against the Treason Act and uprisings in the eastern parts of Turkey in favor of the Sultan and the Caliphate in 1925 and assassination plotters against Mustafa Kemal in 1926. The Assembly selected a president, a

[45] R. Kumaş, *İktidardan Yüce Divana*, cit, 26 and 92.

[46] Ş. Gözübüyük, Z. Sezgin, *1924 Anayasası Hakkında Meclis Görüşmeleri*, Ankara, 1957, 414; B. Tanör, *Osmanlı-Türk Anayasal Gelişmeleri (1789-1980)*, cit, 307.

[47] E. Aybars, *İstiklal Mahkemeleri*, İzmir, 2006, 342.

[48] N. E. Keskin, *1920: Bağımsız ve Halka Doğru Yönetim*, in Açıklamalı Yönetim Zamandizini 1919-1928 Vol. I, N. E. Keskin, F. E. Çelik, R. Aydın et al (Eds), Ankara, 2012, 245.

[49] R. Akın, *TBMM Devleti (1920-1923) Birinci Meclis Döneminde Devlet Erkleri ve İdare*, Istanbul, 2014, 167.

prosecutor, and three members from among its members for each tribunal.[50] Similar to the independence tribunals established during the War of Independence, these tribunals also operated under the Assembly and exercised their powers on behalf of the GNAT. Judgments of the tribunals were final. However, death sentences would be executed with the approval of the GNAT.[51] Independence tribunals were abolished in 1927, but Law on Independence Tribunals remained in force until 1949. These tribunals were established in accordance with law, but they were inconsistent with some of the basic elements of the rule of law, including the principles of independence of the judiciary and fair trial, lawful judge, no punishment without law, individual criminal responsibility, a judgment given based on evidence, the right to have legal assistance, and the right to appeal.[52]

Observe that just before the military coup was staged on May 27, 1960, the GNAT assumed some extraordinary judicial functions through the parliamentary inquiry committees. These committees were empowered by Law No. 7468 on the Functions and Powers of the Inquiry Committees of the Turkish Grand National Assembly that was adopted on April 27, 1960. Law No. 7468 granted the inquiry committees broad judicial powers. It conferred the committees with the powers of prosecutors and regarded the inquiry committees' investigation as a preliminary inquiry proceeding. Among others, the committees had the authority to issue gag orders, arrest witnesses, take measures regarding the political demonstrations, meetings, and activities, and all kinds of measures and decisions that were deemed necessary for the investigation to be conducted safely. Decisions of such committees would be final and not be appealed. Clearly, Law No. 7468 was unconstitutional, since it granted the inquiry committees significant judicial and administrative powers and did not hold them accountable to any authority and they were not subject to any supervision. An inquiry committee based on Law 7468 was created on April 28, 1960, to investigate the allegations regarding the responsibility of the main opposition party (the Republican People's Party) and the press for the events that took place in the cities against the Democrat Party Government and accusations concerning the Republican People's Party's incitement of insurrection. The Committee was formed of 15 parliamentarians of the ruling party.[53] Among others, this committee arrested some of the witnesses, closed some of the national newspapers and magazines, confiscated communication documents, banned meetings, and suspended local elections.[54] Not only the

[50] İ. Ülker, *İstiklal Mahkemelerinin Kuruluşu ve Çalışmaları*, in 23 Selçuk Üniversitesi Hukuk Fakültesi Dergisi 1, 2015, 189-190.

[51] E. Aybars, *İstiklal Mahkemeleri*,cit, 129 and 344. This requirement was lifted for the independence tribunal in Ankara. (M. Goloğlu, *Devrimler ve Tepkileri* (3rd ed.), Istanbul, 2011, 227).

[52] M. Goloğlu, *Devrimler ve Tepkileri*, cit, 227.

[53] E. Özbudun, *Parlamenter Rejimde Parlamentonun Hükumeti Murakabe Vasıtaları*, Ankara, 1962, 116; C. Eroğul, *Demokrat Parti Tarihi* ve İdeolojisi, Istanbul, 2014, 232 and 229-230; S. Esen, *18 Nisan 1960 Tarihli Tahkikat Komisyonu*, in 34 Mülkiye Dergisi 267, 2010, 181.

[54] S. Esen, *18 Nisan 1960 Tarihli Tahkikat Komisyonu*, cit, 183-189.

establishment and Powers of the committee, but also its decisions were clearly unconstitutional.

5. Constitutional rules on the protection of basic rights through the judiciary

As noted above, the 1approach to freedoms of the 1924 Constitution was modeled on the French Declaration of the Rights of Man and the Citizen of 1789.[55] The Constitution provided basic principles to ensure the protection of the rights by the courts. Therefore, no person shall be brought before a court other than the one to which he/she is subject to law (Art 83). According to the 1924 document, cases not within the jurisdiction of the court can only be dismissed by decision of the court itself (Art 60). Everyone is free to use any legal means they deem necessary to defend their rights before the courts (Art 59). Judicial proceedings shall be open to the public. However, the court can order a secret hearing in cases provided by procedural laws (Art 58). Finally, no court is exempt from hearing a case within its jurisdiction (Art 60). As pointed out above, the principle of the lawful judge was not fully guaranteed since the Constitution did not prohibit the establishment of extraordinary tribunals. The principle of the "lawful judge" safeguards that the allocation of a judge to a case is made according to objective criteria. It seeks to prevent any undue interference with the administration of justice. It is further aimed at protecting and strengthening the confidence of the litigants and the public in the fairness and objectivity of the courts. Note that Article 89 of the 1876 Constitution explicitly prohibited the establishment of extraordinary tribunals.[56] In this regard, the 1924 Constitution lagged behind the 1876 document.[57]

Compared with Article 23 and Article 89 of the 1876 Constitution, the guarantees of the 1924 Constitution regarding the judiciary are deemed quite insufficient as the right to defense and effective remedy before a tribunal as indispensable elements of the rule of law were not the parcel of the Constitution.[58] Similar to the other rights and freedoms, the Constitution did not include detailed provisions on judicial rights to safeguard their implementation. As stated above, criterion on the "limits of limitation" of rights and freedoms was not formulated in the Constitution. Restricting rights and freedoms was left to the discretion of the Assembly.

6. Independence of Judiciary

An independent and impartial judiciary is one of the cornerstones of the rule of law. Judges and the judiciary as a whole should be impartial and independent of all external pressures and of each other so that those who appear before them and the public can have confidence that their cases will

[55] M. Kapani, *Kamu Hürriyetleri*, cit, 87.

[56] Art 89-Apart from the ordinary tribunals, there cannot, under any title whatever, be formed extraordinary tribunals or commissions to judge certain special cases.

[57] K. Gözler, *Türk Anayasa Hukuku*, Bursa 2000, 67.

[58] K. Gözler, *Türk Anayasa Hukuku*, cit, 67.

be decided fairly and in accordance with law. To provide impartiality to the judiciary the 1924 Constitution furnished some institutional and individual safeguards.

6.1 Institutional guarantees

The principles ensuring the independence of the courts were first enshrined in the 19th Century Ottoman constitutional documents, such as the 1875 Edict and the 1876 Constitution. The 1924 Constitution essentially retained these guarantees. Article 8 of the 1924 Constitution refered to "independent courts". According to Article 53 of the 1924 document, the organization, jurisdiction, and powers of the courts shall be determined by law. Article 54 provided fort he independence of judges in conducting trials by rendering their judgments. They were protected from all forms of interference and they are subject only to the law. The Assembly and the Council of Ministers could not modify, alter or delay the execution of the judgments of the courts. Obviously, it was a significant safeguard to ensure confidence in justice and the independence of the judiciary. However, this provision did not contain an absolute guarantee. Judicial powers conferred on the Assembly by the Constitution (Art 26), namely to issue partial or total amnesty; mitigate sentences and grant pardons; expedite judicial investigations and penalties; execute definitive sentences of death penalty handed down by the courts enabled the legislature to interfere with the decisions of the courts.

Moreover, to provide impartiality of the courts the Constitution prohibited judges to assume any private or public office other than those provided for in the law (Art 57). In fact, some laws made specific provisions on this matter. For example, the Commercial Code No. 865 of 1926 prohibited judges from engaging in commercial activities. It was forbidden for judges to be member of the Assembly or the city council while holding office. Civil Code No. 743 of 1926 outlawed judges in relevant guardianship offices to be appointed as guardians.[59]

6.2 Individual guarantees

According to the Constitution, judges can be removed from office only in cases and procedures prescribed by law (Art 55). According to Article 56, qualifications, rights and duties, salary, appointment, and dismissal of judges shall be prescribed by a special law. Accordingly, the relevant provisions granted the Parliament unlimited powers in matters relating to the judiciary[60]. It clearly undermined the principle of independence of courts.

The 1924 Constitution did not establish a autonomous body or a council composed primarily of judges which would be in charge of all the decisions concerning the recruitment, appointment, transfer, and discipline of judges. Law No. 766 on Judges of 1926 established a "selection board" (*Ayırma Meclisi*) to deal with these matters. The majority of the members of

[59] M.R. Belgesay, *Adliye*, cit, 157.

[60] R. G. Okandan, *20 Nisan 1340 Anayasamıza Göre Hakkı Kaza*,in 32 İstanbul Üniversitesi Hukuk Fakültesi Mecmuası 2-4, 424-426.

the board were from the Ministry of Justice. In other words, the Ministry played a key part in the formation of the board. According to Law No. 2556 on Judges of 1943, the board was formed of the first president of the Court of Cassation, four judges selected by the Minister of Justice from the Court of Cassation, directors for civil matters, criminal matters, and directors of the personnel department and the inspection board of the Ministry of Justice. Similar to Law No. 766, Law No. 2556 allowed the executive branch through the Ministry of Justice to exercise a great influence over the composition of the board. The board would prepare a list of judges to be promoted and the Minister of Justice would appoint them considering the list. The Minister also had the power to appoint judges of the Court of Cassation and the chairpersons of its sections and the chief public prosecutor. The president of the Court of Cassation would be appointed by the Council of Ministers.[61] Furthermore, the Minister of Justice had the authority to supervise the judges[62] and as a disciplinary authority, he had the power to impose a penalty.[63]

Law No. 2556 did not award the security of tenure for all judges. It granted this security only to those who received a certain amount of salary. In other words, no guarantees were given to judges whose base salary was less than 60 Turkish lira. Note that the majority of judges were effectively excluded from this security.[64] Obviously, this provision infringed on the principle of independence of the judiciary. Moreover, it contradicted the principle of equality guaranteed by Article 69 of the Constitution.[65]

Law No.1673 provided for the retirement of judges at the age of 65. However, this guarantee had been significantly weakened in two ways. First, the provision that allowed the first category judges over the age of 65 to remain in office for an additional three years at ministerial discretion gave the executive the power to influence judges.[66] Second, a statutory amendment made in 1949 allowed the ministry to dismiss judges at "discretion". In addition, another amendment made in 1953 gave the executive authority to retire *ex officio* judges who had already completed thirty years of service "on demand". The power of the executive branch was even expanded with another statutory amendment made in the following year. Therefore, the president and judges of the Court of Cassation who completed 25 years of service would also be able to be retired "on demand". As a result, neither the 1924 Constitution nor the related laws protected judges from being arbitrarily removed from office. Observe that, the Democrat Party Government, which remained in power from 1950 to 1960, abused this power to eliminate judges they saw as opposed to their

[61] N. Kunter, *Türkiye'de Kaza Kuvveti*, in 25 İstanbul Üniversitesi Hukuk Fakültesi Mecmuası 1-4, 1960, 52; M. Mumcuoğlu, *Hukuk Devletinde Bağımsız Yargının Yeri ve Bağımsız Yargının Türkiye Gelişimi*, in 46 Ankara Barosu Dergisi 2,1989, 282.

[62] Fatih Özkul, "Anayasalarımızda Yargı Bağımsızlığı ve Tarafsızlığı", *Ankara Barosu Dergisi* No.3, 2016, p. 219.

[63] E. Özbudun, *1924 Anayasası*, cit, 58.

[64] N. Kunter, *Türkiye'de Kaza Kuvveti*, cit, 52.

[65] M. Kapani, *İcra Organı Karşısında Hâkimlerin İstiklâli*, Ankara 1956, 110.

[66] N. Kunter, 1960, *Türkiye'de Kaza Kuvveti*, cit, 54.

authority.[67] Moreover, Law No.5434 on the Retirement Fund of 1949 stipulated that decisions regarding *ex officio* retirement were final and no legal action could be taken against such decisions. Obviously, this provision completely scooped the independence of the courts and the principle of the rule of law.

Law No. 2556 on Judges of 1934 also did not provide an explicit safeguard to prevent a judge from being transferred to the prosecutor's office without his/her consent. Indeed, it was not customary to seek the approval of the judge. Note that, during the debates on Article 56 of the Constitution in the Assembly a proposal ensuring change of the duty station of judges only to be subject to their consent was rejected.[68] The Minister of Justice had the authority to relocate a judge on the grounds of the shortage of judges in a judicial district. In addition, the abolition of a court, abolition and the reduction of the cadre of judges were all in the hands of the minister. If the judge rejected three appointment offers his/her salary might be cut. As a result, judges were constantly threatened with salary deprivation.[69] The Minister had the authority to supervise the judges. He had the mandate to summon a judge about an accusation against him/her and the judge was to be required to appear before the minister within the alloted time.[70]

Thus, the constitutional provisions concerning the independence of the judiciary did not constitute a safeguard against the legislator, since they recognized these guarantees "in accordance with the law" (Art 53,54,59). The Assembly exercised its discretion by entrusting broad and unchecked authority to the executive branch. Since the institutional and individual independence of the judiciary was not fully guaranteed in the Constitution and the judiciary was therefore under the influence of the executive, by the late 1950s all opposition political parties had reached an agreement to amend the Constitution to provide substantial guarantees for the independence of the judiciary.[71]

7. Judicial Review of the Executive and Legislative Branches

One of the indispensable components of the principle of the rule of law is the judicial control of the acts of the executive and the legislature. Hereinafter, the supervisory authority of the judiciary over these branches will be discussed within the framework of the 1924 Constitution.

7.1 Judicial review of administrative acts

Judicial control of the administrative acts and decisions began to be carried out in the 19th century in the Ottoman Empire. As stated above, the 1924

[67] For example, the Minister of Justice retired 23 judges and prosecutors, including some of the members of the Court of Cassation and the Chief Public Prosecutor, without their consent in 1956. (C. Eroğul, *Demokrat Parti Tarihi ve İdeolojisi*, cit, 119-120).

[68] E. Özbudun, *1924 Anayasası*, cit, 56.

[69] N. Kunter, *Türkiye'de Kaza Kuvveti*, cit, 53.

[70] M. R. Belgesay, *Adliye*, cit, 162.

[71] M. Soysal, *100 Soruda Anayasanın Anlamı*,cit, 59.

Constitution envisaged the Council of State (Art 51) to review the legality of the administrative acts and decisions. While the 1924 Constitution was in force, the Council emphasized the importance of judicial review of the administrative acts in its various decisions. According to the Council, the failure of administrative authorities to implement judicial decisions within a reasonable period of time was incompatible with the rule of law.[72]

Despite the Council of State's approach in favor of the rule of law, the 1924 constitutional period was problematic concerning the judicial control of the administrative acts and actions. First, part of the problem stemed from the Constitution. Indeed, the Constitution vested the Assembly with the power to examine the legality of regulations issued by the Council of Ministers indicating the implementation of the laws or designating matters ordered by the laws (Art 52). Clearly, a review of the legality of a regulation inheres to the judicial power and should be exercised by the administrative courts. This constitutional rule can be explained by the fact of the dominant effect of the principle of the supremacy of the parliament. Second, some of the administrative acts, such as administrative decisions on compulsory retirement[73] and suspension orders that disbar civil servants from exercising their powers or performing their duties[74] were not subject to judicial review by the laws. Third, the Council of State self-restrained by deeming that some of the administrative acts called "acts of state" or "acts of government" (*Acte de Gouvernment*) were political in nature, hence they fell without the scope of the judicial control. Acts of the state are described as the acts of the executive to protect the "compelling state interest", but not acts carried out within the framework of administrative capacity.[75] According to the Council of State's case law, matters related to the principle of reciprocity, resettlement, citizenship, and expulsion of foreigners were political in nature and were exempt from the judicial review.[76] Accordingly, the Council rejected to hear cases in these categories. Clearly, statutory exceptions to the judicial control of administrative acts and the doctrine of "act of state" were incompatible with the rule of law, as they constituted an exception to the principle of legality.

7.2 Judicial review of legislative acts

Article 103.2 of the Constitution stipulated the supremacy of the Constitution by stating "None of the provisions of this Constitution may be arbitrarily modified on any pretext; neither may the enforcement of any

[72] T. B. Balta, H. N. Kubalı, *Türkiye'de Hukuk Devleti Anlayışı*, in 15 Ankara Üniversitesi SBF Dergisi 3, 1960, 1-3 and 6.

[73] Ş. Ünal, *Anayasa Hukuku Açısından Mahkemelerin Bağımsızlığı ve Hakimlik Teminatı*, Ankara, 1994, 70-72.

[74] T. B. Balta, H. N. Kubalı, *Türkiye'de Hukuk Devleti Anlayışı*, cit, 8.

[75] İ. Giritli, P. Bilgen, T. Akgöner, K. Berk, *İdare Hukuku* (5th ed.), Istanbul, 2012, 11. The doctrine of acts of government originated from the judgments of the French Council of State in 1815. İ. Giritli, P. Bilgen, T. Akgöner, K. Berk, *İdare Hukuku*, cit,148.

[76] C. Kaya, *Danıştay İçtihatlarında Hükümet Tasarrufu Teorisinden Devletin Hükümranlık/Egemenlik Teorisine*, in 7 Uyusmazlık Mahkemesi Dergisi, 2016, 639-643; Ş. Gözübüyük, *Yönetsel Yargı* (33rd ed), Ankara, 2013, 22-23.

provision be suspended. No law may be contrary to the Constitution." However, the constitution did not furnish an explicit provisions on judicial review of laws to ensure the supremacy of the constitution. In fact, this matter was never discussed during the debates on the Constitution in the Assembly. Note that at the time the 1924 Constitution entered into force, the absence of the constitutional adjudication in Continental Europe was not exceptional. As mentioned above, the understanding of democracy in the Constitution was based on the supremacy of the parliament as the "sole lawful representative of the nation" and "it exercises sovereignty on behalf of the nation" (Art 4). This approach was not favorable to the judicial review of laws.

After the transition to a multi-party system in 1945 serious discussions about the constitutional review of laws began both at the academic and political levels. Law scholars at the time were divided over whether the courts could review the constitutionality of laws through concrete norm control. Some jurists argued that the courts did not have the authority to review the constitutionality of legislation, since Article 52 of the Constitution prohibited the judiciary from resolving conflicts between laws and regulations issued by the Council of Ministers. As a result, the courts *a fortiori* did not have the power to review the constitutionality of laws. In addition, Article 53 stipulated that the establishment, duties, and powers of the courts would be prescribed by law. However, no law conferred the courts the power to refrain from applying unconstitutional laws.[77] Furthermore, even though the interpretation of laws should be within the jurisdiction of the courts, Article 26 of the Constitution invested explicitly the parliament with the power to interpret laws.[78] Accordingly, considering the relevant constitutional provisions the power to review the constitutionality of laws *a fortio*ri should have belonged to the parliament.[79] During the debates on the Constitution, the majority of the members of the GNAT agreed that the Assembly should have the power to interpret laws in addition to the power to enact, modify, and repeal them. They believed that interpretation was as important as law-making and that the members of the Assembly were the best qualified to interpret them. According to the members of the Assembly, interpretation includes forming new opinions on the meaning of the law, and this power must rest with the parliament.[80] The exercise of the judicial power often requires courts to construe laws to apply them in particular cases and controversies. Judicial interpretation of the meaning of a law is

[77] S. S. Onar, *İdare Hukukunun Umumi Esasları*, Istanbul, 1952, 251- 254.

[78] Article 26- The Grand National Assembly itself executes the holy law; makes, amends, interprets, and abrogates laws; concludes conventions and treaties of peace with other states; declares war; examines and ratifies laws drafted by the Commission on the Budget; coins money; accepts or rejects all contracts or concessions involving financial responsibility; decrees partial or general amnesty; mitigates sentences and grants pardons; expedites judicial investigations and penalties; executes definitive sentences of capital punishment handed down by the courts.

[79] A. F. Başgil, *Esas Teşkilat ve Siyasi Rejim*, Istanbul, 1940, 39.

[80] E. C. Smith, *Debates on the Turkish Constitution of 1924*, in 13 Ankara Üniversitesi SBF Dergis*i* 3, 1958, 87.

authoritative in the matter before the court. Clearly, the GNAT's power to interpret the law contradicts the principle of separation of powers.[81]

On the other hand, some scholars argued that there was no constitutional impediment for judges to assess the constitutionality of the laws that they would apply in cases they heard and to omit the unconstitutional provisions.[82] The first constitutional basis for this argument was Article 102. This provision provided for the supremacy of the Constitution and aimed to ensure the lawfulness of state affairs. The constitutionality of laws should have been reviewed by the courts to provide the Constitution's supremacy. The second constitutional basis for the judicial review of the courts was Article 54 which provided for the independence of the judiciary and the prohibited alteration, modification, or delay of the enforcement of the court judgments.[83] Moreover, according to jurists who supported this view, if two separate provisions applied in a case, namely the Constitution and the law, conflicted with each other, the judge would be authorized to resolve the conflict and also would have the power to interpret the law. judge's noncompliance to apply an unconstitutional provision in a case would not be considered an intervention in the legislature, since the decision would be binding only on the parties involved.[84]

Since the Constitution did not explicitly recognize judicial review of the constitutionality of laws, the only form of constitutional control of laws effectively became *a priori* political review of the bills of the GNAT before they were enacted.[85] Also, the Assembly's power to interpret laws was construed as a form of political review of the laws. Therefore, a request for comments on a law would be sent by the Prime Minister's Office to the primary parliamentary committee whose report was the basis for the Plenary debate in the first reading of that law in the Assembly. The report of the primary committee on the interpretation of the law would be debated and adopted in the Plenary in the form of a resolution. Legislative comments on a law were considered equal to the law.[86] Note that the GNAT not only

[81] K. Gözler, *Hukukun Genel Teorisine Giriş*, Ankara, 1988, 162-164.

[82] E. Onar, *Kanunların Anayasaya Uygunluğunun Siyasal ve Yargısal Denetimi ve Yargısal Denetim Alanında Ülkemizde Öncüler*, Ankara, 2003, 165-166.

[83] B. N. Esen, *Anayasa Hukuku* (2nd ed), Ankara, 1946, 212; T. Feyzioğlu, *Kanunların Anayasaya Uygunluğunun Kazai Murakabesi*, Ankara, 1951, 251 et seq.

[84] T. Feyzioğlu, *Kanunların Anayasaya Uygunluğunun Kazai Murakabesi*, cit, 251 et seq; T. B. Balta, H. N. Kubalı, *Türkiye'de Hukuk Devleti Anlayışı*, cit, 5-6; B. Savcı, *Anayasaya Aykırılık Meselesi ve Özel Bir Kanun Yolu ile Düzenlenmesi*, in 15 Ankara Üniversitesi SBF Dergisi 1, 1960, 336.

[85] B. Tanör, *Osmanlı-Türk Anayasal Gelişmeleri (1789-1980)*, cit, 307.

[86] İ. Köküsarı, *Osmanlı-Türk Anayasal Tarihinde Yasama Yorumu ve Uygulanması*, in 67 Ankara Üniversitesi Hukuk Fakültesi Dergisi 4, 2018, 827-828. Note that the 1876 Constitution had empowered the upper chamber (*Meclisi Ayan*) to interpret the Constitution, the Court of Cassation, and the Council of State to interpret laws. However, contrary to the Constitution, the Ottoman Parliament had elucidated statutory provisions (İ. Köküsarı, *Osmanlı-Türk Anayasal Tarihinde Yasama Yorumu ve Uygulanması*, cit,.833 et seq).

DPCE online
ISSN: 2037-6677

interpreted laws but also the Constitution.[87] Statutory interpretation was mainly used between 1923 and 1927 during the secularization of the legal system and society and the modernization of the institutions. Indeed, legislative interpretation became a very practical tool for understanding newly enacted laws such as the Civil Code, the Code of Civil Procedure, the Penal Code, the Code of Obligations, and the Commercial Code.[88] Observe that during the 1950s, the number of statutory interpretations decreased considerably. For instance, between 1954 and 1957, the GNAT adopted a single resolution on this matter.[89]

Clearly, constitutional review of bills or the laws by the Assembly did not prevent the legislature from pasing unconstitutional laws or led to the repeal of an unconstitutional law for that reason. For example, during discussions of the Law on Headdress that required members of the parliament and civil servants to wear European-style hats in the Assembly in 1925, a member of the Assembly claimed that the bill was unconstitutional. However, the parliamentarian who was the sponsor of the bill alleged that the measures in the bill were only taken to preserve the Constitution. Then the Minister of Justice noted that the requirements of the interest of the country would never contradict the Constitution.[90]

During the 1924 Constitution in force, the courts were not enthusiastic to review the constitutionality of the laws. There were very few cases where the courts attempted to assume this power. Ultimately, the Court of Cassation and the Council of State concluded that judges had no such power. Indeed, in a ruling issued in 1931, the Grand Plenary Assembly of the Court of Cassation concluded that "the judge cannot refrain from applying any law because it is unconstitutional."[91] The Court of Cassation also remarked in another ruling in 1952 that the courts cannot avoid applying unconstitutional laws, because the Constitution does not grant them such power. Similarly, the Council of State in 1950 held that it had no jurisdiction over complaints concerning the constitutionality of a law, but the Council interpreted the law in accordance with the Constitution.[92]

Since the independence of the courts was seriously infringed by the actions of the ruling Democrat Party and the laws enacted in the 1950s, it did not seem feasible for the courts to carry out such a task. Indeed, the courts did generally not become a major obstacle to unconstitutional activities of the government.[93] As a result, the supremacy of the Constitution stipulated in Article 103 did not provide an effective guarantee to remain the parliament within the constitutional limits.

Still, proposals and requests for the establishment of a special court to furnish the supremacy of the Constitution escalated at the political level in

[87] Ş. Iba, *Türk Parlamento Hukukunda Yasama Tefsiri*, in 17 Ombudsman Akademik, 2022, 56.

[88] Ş. Iba, *Türk Parlamento Hukukunda Yasama Tefsiri*, cit, 57.

[89] İ. Köküsarı, *Osmanlı-Türk Anayasal Tarihinde Yasama Yorumu ve Uygulanması*, cit,.*842*.

[90] T. Z. Tunaya, *Siyasi Müesseseler ve Anayasa Hukuku* (3rd ed), Istanbul, 1975,113.

[91] M.Soysal, *100 Soruda Anayasanın Anlam*ı, cit, 47.

[92] S. S. Onar, *İdare Hukukunun Umumi Esasları*, cit, 187.

[93] M. Soysal, *100 Soruda Anayasanın Anlam*ı, cit,48.

the 1950s. Two separate bills to create a concrete judicial control of the constitutionality of norms were proposed in the GNAT in 1953 and 1958. However, none of them were even debated in the Plenary.[94] During this period, the establishment of a constitutional court took place in the programs of all opposition parties as a commitment.[95] Indeed, prior to the 1957 elections were held, the opposition parties proposed in a joint statement the creation of a constitutional court to prevent the enactment and implementation of unconstitutional laws.[96] These academic and political debates during this period did not encourage or furnish the courts to assume the power of judicial review of the laws. However, they paved the way for the establishment of an independent judiciary and the constitutional court in the 1961 Constitution.

8. Conclusion

The 1924 constitution was the result of the necessity to adjust the constitutional organization of the new Republic and consolidating the new regime. The constitution's primary goal was to establish an independent, national, and secular state rather than a state based on the rule of law and a strong judiciary. The constitution corresponds to the creation of a national judicial body eliminating the extraterritorial consular and community jurisdictions. In this sense, the 1924 Constitution ensured a national and fully sovereign state by providing a national judiciary. Furthermore, by repealing both the 1876 Constitution and the 1921 Constitution it established a single legal and judicial order.

The secular character of the judicial system of the Republic was also established when the 1924 Constitution was in force. The 1924 Constitution provided a formal separation of the judiciary from legislative and executive bodies, but it did not include effective guarantees for the independence and impartiality of judiciary. Insufficient constitutional safeguards on the independence of the judiciary and the basic rights and freedoms became more apparent after the transition to the multi-party rule in 1945. Especially undemocratic laws enacted by the Democrat Party majority, during the 1950s deepened the political polarization and prepared an environment that led to the military coup on May 27, 1960. Clearly, the absence of the judicial review of the laws and weaknesses of the administrative justice during the 1924 Constitutional period facilitated the undemocratic practices. Finally, the 1961 Constitution eliminated most of the shortcomings of the 1924 Constitution.

---

[94] The first attempt to limit the Parliament through judiciary came from a deputy in the Ottoman Parliament in 1915. Artin Efendi from Aleppo proposed a bill to the Ottoman Parliament to provide concrete control of the constitutionality of a norm to control the Union and Progress Party's *de facto* one-party regime and its decree-laws. However, this proposal was rejected by the Constitutional Committee of the Parliament.(T. Z. Tunaya, *Siyasi Müesseseler ve Anayasa Hukuku*, cit, 113).

[95] See the programs of the Nation Party of 1948, the Republican People's Party of 1953 and its Manifesto of 1959, Election Manifesto of The Freedom Party of 1957. (T. B. Balta, H.N. Kubalı, *Türkiye'de Hukuk Devleti Anlayışı*, cit, 2-3).

[96] M. Soysal, *100 Soruda Anayasanın Anlamı*, cit, 59.

DPCE online
ISSN: 2037-6677

Selin Esen
University of Ankara
Faculty of Law
Ankara Universitesi Hukuk Fakültesi
Cemal Gursel Cad.No.58
06590 Cebeci-Ankara/Turkey
selin.esen71@gmail.com