Chapter 9
Judicial Review of Budget in Turkish Law

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9.1 Introduction

The Republic of Turkey was founded in 1923 and the first constitution of the Republic entered into force the following year. The Constitution of 1924 brought together the legislative and executive powers under the Grand National Assembly of Turkey (GNAT), the only representative of the nation. The legislative power was to be exercised directly by the GNAT. It was adopted as a principle that the laws could not be in conflict with the Constitution, yet no mechanism responsible for inspecting existence of any violation or no sanction against any violation was included in the Constitution. The executive power was to come out from inside the legislature and be responsible vis-a-vis the legislative power. The system established by the Constitution of 1924 also had the characteristics of parliamentary system, as it stipulated that the executive power could be exercised by a separate body headed by the President and the Prime Minister to be determined by him. During this constitutional period, which would remain in force until 1960, multi-party democratic political life was adopted in 1946.

The 1961 Constitution defined the Republic of Turkey as a democratic, secular, social state of law based on the human rights and the fundamental principles set forth in the Preamble of the Constitution. Again, sovereignty belonged to the nation. The nation was to exercise its sovereignty through the bodies in line with the principles laid down by the Constitution. The Constitution of 1961, which included the constitutional judgment (judicial review of the laws, rules of procedures of GNAT and decree-laws after 1971 in terms of their compliance with the Constitution) as a requirement of the rule of law, stipulated the establishment of a Constitutional Court for this purpose (Kaboğlu 1994; Öden 1999) and the rights and freedoms were regulated comprehensively.

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H. Kıral and T. Akdemir (eds.), *Public Financial Management Reforms in Turkey: Progress and Challenges, Volume 1*, Accounting, Finance, Sustainability, Governance & Fraud: Theory and Application, https://doi.org/10.1007/978-981-15-1914-7_9

The Constitution of 1982, just like the Constitution of 1961, defined the Republic of Turkey, as a democratic, secular, social state of law based on the human rights and the fundamental principles set forth in the Preamble of the Constitution. As was the case in the previous two Constitutions, sovereignty, according to this Constitution, unconditionally belongs to the nation. The nation shall exercise its sovereignty by means of the authorized organs in accordance with the principles laid down by the Constitution. This Constitution further strengthened the executive body against the legislature in terms of exercise of sovereignty, and adopted the principle of protecting the "indivisible integrity of the state with its country and its nation" rather than the individual in terms of fundamental rights and freedoms, and showed a pro-authority understanding. In the catalogue of fundamental rights and freedoms, firstly the principle of homework is highlighted, which is followed by right. With regard to the constitutional jurisdiction, the Constitution of 1982 maintained, until June 24, 2018, the stance of 1961 Constitution adopted following the 1971 amendment (judicial review of the laws, rules of procedures of GNAT and decree-laws in terms of their compliance with the Constitution). Following a constitutional amendment to be effective from this date, the constitutional jurisdictions are texts, laws, the Rules of Procedure of the Turkish Grand National Assembly and Presidential Decree. To take effect as of the mentioned date following the Constitutional amendment, the texts which are subject to constitutional jurisdiction are the laws, rules of procedures of GNAT, and the Presidential decrees. A minor amendment (amendment in the characterization of parties) was also made in the list of those authorized to file an annulment action.

According to the constitutional jurisdiction adopted by the 1982 Constitution, the decisions of the Constitutional Court are final; decisions cannot be disclosed without providing rationale in writing. The court, when annulling the provision of law or Decree, cannot establish a provision in a way that will lead to a new application, acting as a legislator. Court decisions are not backward. The court decisions are not retrospective. The decisions of the Supreme Court bind the legislative, executive and judicial bodies, administrative authorities, and real and legal persons.

The State of Law, with the shortest expression, refers to ensuring the rule of law. The rule of law is not enough, it is also necessary to improve the rights and ensure that the legal system is fair. In its many decisions in the 1961 and 1982 Constitutional periods, which adopted the principle of the rule of law and the constitutional jurisdiction, the Turkish Constitutional Court defined the rule of law in its Decision Docket No. 1963/124, D. 1963/243 (D.R.: 11.10.1963) as follows: a state which respects human rights and establishes a fair legal order protecting these rights and considers it necessary to maintain this, and which acts in compliance with the law and constitution in all its activities. One of the prerequisites for being a state of law is to adopt the principle of separation of powers, and another one is that the state equips its legal system with constitutional jurisdiction. The constitutions of 1961 and 1982 adopted the principle of separation of powers and carefully drawn the duties and jurisdictions of the legislative, executive, and judicial powers. The constitutional jurisdiction established by the 1961 Constitution was also regulated by the 1982 Constitution. For more than half a century, the Constitutional Court has fulfilled its

function as a constitutional jurisdiction and supervises the legislature's compliance with the law.

Power of the purse was introduced into the Turkish legal system by the Constitution of 1876 in the period of the Ottoman Empire, much earlier than the principle of rule of law. Some of the budget provisions of this Constitution were amended in 1908, and thus, power of the purse was rendered more functional.

These three powers, whose powers and responsibilities are regulated, in detail, based on the principle of separation of powers in the current Constitution, play an important role in the audit of the budget.

As required by "power of the purse", an audit is conducted on the budget by the legislative power at various stages, namely, submission to the legislative body by the executive body of the draft budget (after 24 June 2018 budget "proposal"), debate on the proposal, the implementation of the adopted budget, and debate on finalization of draft final act (after June 24, 2018, "proposal") which indicates the results of the implementation. Direct audit on the executive within the scope of the budget process is mainly carried out through questions, motions of censure, general interview, parliamentary research, parliamentary inquiry and vote of confidence (after June 24, 2018, question, general interview, parliamentary research), and other audit methods such as making legal arrangements on public expenditure, revenues, and assets are also applied. The indirect audit of the legislature on the executive within the scope of the budget process is carried out by having all public accounts and assets examined by the Court of Accounts. The Constitution regulates how the legislature will audit the results of the budget implementation. The Law No. 5018 also states that the audits carried out by the legislative body after the implementation of the budget are conducted over the accountability reports, final account draft laws and statements of general conformity ("direct audit" and "external audit").

The audit of the budget by the executive power is carried out by the competent authorities of the administration during the implementation of the budget. Such audit can be conducted either during the undertaking and realization stages of the expenditures or over the spending documents, other documents and accounts after the expenditure is made.

The audit of the budget by the judiciary power is the examination and inspection by the Court of Accounts, which is an independent judicial organ, after the powers delegated to the executive by the legislative power through executive budget law have been exercised, over their reflections in the account records. In other words, the judicial review of the budget (budget implementation) is mainly carried out by the Court of Accounts. Such audit is performed on the accounts and transactions of the responsible persons after the implementation of the budget.

After evaluating the arrangements on the power of the purse in Turkey from a historical perspective, this study will discuss judicial review of the budget in the following two axes: judicial review (the Court of Accounts) of the budget (budget implementation) and judicial review (Constitutional Court) of the constitutionality of the budget laws. In the "Conclusion" section, a situation analysis will be carried out on the audits conducted by the Court of Accounts and the Constitutional Court, and an evaluation will be made in this regard.

9.2 An Evaluation from Historical Perspective: Regulations Regarding the Power of the Purse in Turkey

Most of today's constitutional institutions (by the way, budget) are based on the Magna Carta Libertatum (the Great Charter of the Liberties) proclaimed by King Homeless John in England in 1215. This is considered to be the first document regarding "power of the purse."

> …In the UK, the king was frequently demanding tax to cover the costs of the ongoing battles in the 12th and 13th centuries. The British people and the barons began to complain about the heavy taxes that the king demanded and feel uneasy. On the request and insistence of the Barons, King John had to sign the Great Charter, called Magna Carta Libertatum, on 15 June 1215 near London. This charter became a constitutional rule in the following years not only in the country where it was born, but also in many countries of the world. (Mutluer et al. 2011, p. 44)

As a political institution evolving, in eight-hundred years, from the proclamation of Magna Carta to the present, the parliaments have been the places where the power of the purse is represented the most (Canbay and Gerger 2012). The power of the purse held by the parliaments still maintains its dignity and is mostly regulated in constitutions.

The power of the purse is, in its simplest definition, the right to determine and approve the type and amount of public revenues and public expenditures.

One of the issues widely discussed in our public finance literature is "state budget." The state budget refers to a document containing the revenue and expenditure estimates of the state for a certain period of time and the permission (authorization) given for this document or for the use of this document (Yüksel 2011, p. 1211).

Our country's public finance met the concept of power of the purse and budget organization, in modern sense, for the first time, in the middle of nineteenth century, that is, during the Ottoman Empire and 20 years before the first Constitution proclaimed in 1876. Inspired by the financial system of Western countries, it was aimed to modernize and improve Ottoman finance. However, the budget implementation in the Ottoman Empire from 1855 to 1876 was unsuccessful, despite all efforts, according to some financiers (Erçin 1938).

Divan-ı Muhasebat, which formed the core of the Court of Accounts, was founded in 1863 during the Ottoman Empire.

The constitution of 1876, which allowed the Ottoman Empire to shift to parliamentary monarchy, naturally regulated the "power of the purse". The constitution adopted the principle of the legality of taxes. It was highlighted that the budget was the law showing annual revenue and expenditure estimates, and that imposing, distribution and collection of taxes would be based on the budget law to be enacted every year. The method of discussing the budget in parliament was indicated and the content of the budget law (articles and annexed tables) was specified (Kili and Gözübüyük 1985, pp. 41–42).

Divan-ı Muhasebat has become a constitutional institution when its duties and authorities were regulated in Article 105 of the Constitution of 1876. According to

this article, *Divan-ı Muhasebat* would be established to examine (audit) the accounts of the civil servants who are authorized to purchase and spend state assets and inspect the accounts prepared by the departments, and to present its final assessment in this regard to the *Heyeti Mebusan* (chamber of Deputies) each year by means of a special report. In 1878, a Decree was issued to regulate the formation and duties of *Divan-ı Muhasebat*.

Since the Ottoman Parliament was abolished within two years of its inauguration, in 1878, they had to wait until 1908, (Second Constitutional Period) when the Constitution was put into force, to fulfill the requirement of the power of the purse. After that date, efforts were made to modernize Ottoman finance. In 1910, a provisional law (General Accounting Provisional Law) was enacted, which envisaged equipping of public finances and budget with modern principles. The modernization efforts in this area were hampered by the eruption of World War II (Ministry of Finance 2000; Öner 2007)

The 1921 Constitution, composed of very few articles, issued by the Turkish Grand National Assembly under the conditions of the War of Independence, contained no provision related to the power of the purse or other financial issues. In the years of the War of Independence, the yearly budget laws issued by the Grand National Assembly of Turkey took Ottoman budget law as basis and the budgets were carefully discussed in the Turkish Grand National Assembly (Ministry of Finance 1994; Yüksel 2010).

Following the proclamation of the Republic, *Divan-ı Muhasebat* (Court of Accounts) was re-established with the "Law on the Election Procedures of *Divan-ı Muhasebat*" of November 24, 1923 and no. 374. In Article 1 of this Law, which totally consists of 6 articles, it was stated that *Divan-ı Muhasebat* was affiliated to the Grand National Assembly and was obliged to inspect the government revenues and expenditures on its behalf. Apart from the election and dismissal procedures of the president and members, the law did not make any other arrangements.

The provisions of the 1924 Constitution on the power of the purse were largely a repetition of the provisions of 1876 Constitution. The most important difference was that the Constitution of 1924 gave the sovereignty to the nation. According to Article 100 of the 1924 Constitution, *Divan-ı Muhasebat* was established, as affiliated to the Grand National Assembly, which was responsible for auditing the government revenues and expenditures according to a special law.

In 1927, the General Accounting Law, which regulates the management and accounting of all state properties and which will remain in force for approximately 80 years (until the end of 2005), was enacted. According to that Law, which is also referred to as "Constitution of finance," the state property consisted of all kinds of taxes and duties imposed and collected by the State and all cashes, bills and all kinds of movable and immovable properties and their proceedings and yields and sales prices. The budget was defined as "the law that indicates the annual revenue and expenditure estimates of government institutions and organisations and authorises their implementation." The Law, which includes budgetary principles, determines in detail the principles that revenues and expenditures will be subject to, and lists the actors (**authorizing officer**, **assessment officer** and **accountant**) in the financial affairs and transactions together with their duties, powers and responsibilities, and

stipulates that the taxes to be collected and the expenditures to be made each fiscal year will be determined by the budget law. The General Accounting Law stipulated that the state budget (budget law) would consist of a text and 7 tables annexed to it.

The General Accounting Law included two other types of budgets, other than the "**general budget**" law: budgets whose expenditures are covered by their own revenues and those managed outside the general budget ("**annexed budget**") and budgets including local expenditures and revenues ("**special budget**"). Draft annexed budget (for example, General Directorate of Post, Telegraph and Telephone) would be submitted to the Parliament by the Ministry of Finance, along with the general budget draft law. The accounts and transactions of annexed and special budgets were subject to the provisions of the General Accounting Law, without prejudice to the written statements in their special laws (Ministry of Finance and Customs 1992). A separate budget law was enacted for each of the annexed budgets of more than 30.

According to Article 1 of the General Accounting Law No. 1050 enacted in 1927, the administration and accounting of all State properties would be subject to this Law. In articles 8, 9, and 10 of the Law, **three important actors of the financial system (assessment officer, bookkeeper/accountant, and authorizing officer)** are defined and in Article 11 the duties of the actors are listed. Accordingly, revenue assessment officers were responsible for assessing and accrual of revenues and proceedings and enabling their collection; expenditure assessment officers were responsible for accrual of expenditures; authorizing officers were responsible for having the accrued expenditures paid; and the accountants (treasurer) were responsible for executing collection and payments. This article and other provisions of the Law on the duties of these actors were of great importance for judicial review of the accounts by *Divan-ı Muhasebat*.

"Law on Court of Accounts" No. 2514, which was enacted in 1934, rearranged the establishment and functioning of the Court of Accounts and abolished the scattered legislation applied until that date. As stipulated in Article 1 of the Law, *Divan-ı Muhasebat* was responsible for inspecting all revenues, expenditures, properties, and accounts of the State on behalf of the Parliament in accordance with the provisions of this law and reviewing and judging the accounts of those who buy and spend State property. Article 11 of the Law lists the duties of *Divan-ı Muhasebat*. The article also provides for the judicial task against the three important actors of the financial system (authorizing officer, assessment officer and accountant), other than auditing duty: the prosecution of the accountants (treasurers) and, where appropriate, the second degree authorizing officers and the accrual officers.

The Constitution of 1961, which adopted a two-assembly parliament, included among the duties and powers of GNAT under Article 64 the following duty and power: "debate and adopt the bills on the State budget and final accounts" in addition to "enacting, amending and abolishing laws." This Constitution regulated the procedure of debate on and adoption of the laws in Article 92, and regulated the procedure of debate on and adoption of the budget laws in Article 94. Another important regulation governing the power of the purse was Article 126. Expenditures of the State and of public corporate bodies other than public economic enterprises would be effected in accordance with the annual budgets. The manner in which the general

and annexed budgets are to be drawn up and applied would be defined by law (General Accounting Law). The following sentence of the article was very important in terms of constitutional jurisdiction: "No provisions other than those pertaining to the budget shall be incorporated in the budget law."

Divan-ı Muhasebat was re-established and its functions were redefined under its new name, Turkish Court of Accounts (TCA), by the Constitution of the 1961 in Article 127. Mentioned article assigned the TCA the duties of "auditing all revenues, expenditures and properties of general and annexed budget administrations on behalf of the Grand National Assembly of Turkey, reaching final decision concerning the accounts and transactions of those responsible, and examining, auditing and deciding matters stipulated by laws".

In order to comply with the provisions of the 1961 Constitution, the Turkish Court of Accounts Law No. 832 was enacted in 1967. According to Article 1 of Law No. 832, the TCA The Court of Accounts shall be charged with auditing, on behalf of the Turkish Grand National Assembly, the revenues, expenditures, and property of the government offices financed by the general and annexed budgets; taking final decision by trying the accounts and acts of the responsible officials; and performing other tasks conferred on it by various laws in matters related to examining, auditing, and passing judgement. Article 28 states its judicial duty as, "TCA takes final decision by trying the accounts and acts of the responsible officials."

During the 1961 Constitutional period, the main principles of budget law were set out in the relevant articles of the Constitution, in the General Accounting Law and in the budget laws enacted each year. Yearly draft budgets of annexed budgets of more than 30 were enacted separately. In the 1950s, the number of articles in the "general budget" law, which is between 20 and 25, increased rapidly in the period of 1961 Constitution, reached 105 in 1975, followed by 89-93 articles in the subsequent years. The number of articles in the budget law was 75 in 1981 and 77 in 1982, just before the enforcement of 1982 Constitution.

The Constitution of 1982 also gave the GNAT the duty and power of "discussing and adopting the state's budget and final account laws, other than the duty and authority to "discuss, adopt and repeal laws." Article 161 and the following articles were related to the budget law: The expenditures of the government and public legal entities other than the public economic enterprises, shall be made in accordance with the annual budgets, the beginning of the fiscal year and how the general and annexed budgets will be prepared and implemented will be determined by law. No provisions other than those pertaining to the budget shall be incorporated in the budget law. The manner in which the Budget Commission was established and the way in which the budget would be discussed in the GNAT committees and in the General Assembly were also elaborated.

In the 1982 Constitutional period, the implementation of a separate budget law for each of the annexed budget administrations was quitted and a single annexed budget law was enacted to cover all of the annexed budget administrations: "1985 Fiscal Year Budget Law" and "1985 Fiscal Year Budget Law for Annexed Budget Administrations." This practice continued until 2005 (including 2005).

Public Financial Management and Control Law No. 5018, which abolished the General Accounting Law, abrogated funds and all government revenues and expenditures and the debts were completely covered by the budget and it was ensured that they were subject to legislative review. This way, an important step was taken in order for the Court of Accounts to pass to an audit concept that focuses on the whole financial structure of the institution rather than addressing the transactions individually and to turn it into a more comprehensive report-generating structure. (https://www.sayistay.gov.tr/tr/?p=2&CategoryId=120, Date of access/28.12.2018).

In 2006 and the following years, only one budget law (Central Government Budget Law) started to be enacted for "general budget," "special budget" and "regulatory and supervisory agencies" all of which together constitute "central government" within the framework of the definitions in Law No. 5018. Law No. 5018 has adopted the procedure of Law No. 1050 on the content of budgets: a text and tables annexed to it.

With the TCA Law No. 6085, all activities using public resources were included in the audit scope of the Court of Accounts and the Prime Ministry Supreme Auditing Board, which audits state-owned enterprises, was incorporated into the Court of Auditors, and thus, the dual structure in external audit was terminated. With this Law, the TCA has been repositioned in line with today's conditions, international standards and contemporary developments in management and auditing.

Considering the number of articles in the budgets (general budget) enacted during the 1982 Constitutional period, it is obvious that in the period of 1984–1995 the number of articles was between 60-70. In the period of 1984–2001, the number of articles was 70 and over and in 2002–2005 such number constantly fell down from 63 to 39. During 1984–2005 the number of articles in the annexed budget law was in the range of 10–20. In 2006 and the following years, when the central government budget law was enacted, the number of articles in the budget law fell steadily: 34 in 2006 and 15 in 2018.

Power of the purse which was introduced to Turkish legal system by the Constitution of 1876, has been rendered even more functional by the constitutional and legal regulations and through implementations within 143 years, and it became a constitutional principle of the legal system. The Court of Accounts, which is authorized and charged with the judicial review of budget implementations, has an important function in the establishment of the power of the purse. With the introduction of the rule of law to the Turkish legal system under the 1961 Constitution, the Constitutional Court started to conduct the constitutional review of the budget law. Constitutional review of the budget law in Turkey has a history and experience of over half a century.

9.3 Judicial Review of Budget (Budget Implementations) in Turkey

The duty and power of determining whether public expenditures are duly made in the Turkish legal system and whether they are made in a way intended for performance or not (Mutluer et al. 2011) is assigned to the TCA. Today, TCA is one of the most fundamental and respected institutions of the Constitutional system, with the auditing and judicial function it assumes on behalf of the GNAT.

The auditing duty and the judicial function of the TCA are regulated in Article 160 of the Constitution. Accordingly, the Court of Auditors is in charge with auditing all revenues, expenditures, and properties of the public administrations included in the central government budget and those of social security institutions and taking final decision about the accounts and transactions of those responsible to check on behalf of the Grand National Assembly of Turkey, reaching final decision concerning the accounts and transactions of those responsible, and examining, auditing, and taking final decision concerning the matters stipulated by laws. The TCA shall also audit and finalise the accounts and transactions of local administrations.

During the Ottoman Empire, the duties and powers of the responsible in the Turkish public financial management established in 1910 were strictly regulated and subject to the judicial review of *Divan-ı Muhasebat*.

In the General Accounting Law No. 1050, which was enacted in 1927, **assessment officer, bookkeeper/accountant, and authorizing officer** were considered three important actors of the financial system. Revenue assessment officers were responsible for assessing and accrual of revenues and proceedings and enabling their collection; expenditure assessment officers were responsible for accrual of expenditures; authorizing officers were responsible for having the accrued expenditures paid; and the accountants (treasurer) were responsible for executing collection and payments. This article and other provisions of the Law on the duties of these actors were of great importance for the judicial review of the accounts by *Divan-ı Muhasebat*.

Article 2 of the TCA Law No. 6085, which was enacted in 2010, defines regularity audit as a type of regularity audit, defines **compliance audit** as, "audit pertaining to the examination of the compliance of accounts and transactions related to the revenues, expenditures and assets of public administrations with laws and other legal arrangements" and defines **trial of account** as, "taking final decision by judicial procedure on whether the accounts and transactions of those responsible specified in laws are in compliance with the legislation, and the legal remedies related to this." According to the TCA Law, the public loss refers to the "public loss specified in the Public Financial Management and Control Law".

Article 71 of Law No. 5018 defines the public loss as "bringing an obstacle to the increase or causing a decrease in the public resource as a result of a decision, transaction or action that violates the legislation and that stems from intention, flaw or negligence of public officers" and regulates in detail the issues to be considered when determining the public loss.

According to article 5 of TCA Law no. 6085 the duties of TCA are as follows:

(a) to audit the financial activities, decisions and transactions of public administrations within the framework of accountability and submit accurate, sufficient, timely information and reports to the Turkish Grand National Assembly on the results of these audits;
(b) to audit whether or not accounts and transactions of public administrations within the scope of the general government with respect to their revenues, expenditures, and assets are in compliance with laws and other legal arrangements, and **take final decision on matters related to public loss arising from the accounts and transactions of those responsible;**
(c) to submit the Statement of General Conformity to the Grand National Assembly of Turkey;
(d) to perform the duties of examining, auditing, and taking final decision prescribed by laws.

The TCA fulfills its duties in accordance with the mentioned provision of the Constitution and the TCA Law No. 6085. In the event of any conflict during the audit, which is its main function, the matter is transferred to the TCA judiciary.

Articles 48–53 of the TCA Law regulates the "Trial of Account." "Where a matter resulting in public loss is detected by auditors in the course of audits of the accounts and transactions of public administrations within the scope of the general government, defence statements of those responsible shall be taken, and judicial reports shall be prepared as of the end of the fiscal year (Article 48). The procedure for the execution of TCA writs is provided in Article 53. Accordingly, the writs of TCA shall be executed within 90 days after they become final. Heads of public administrations to whom writs are sent shall be responsible for the implementation of the writ. The amount of indemnification stated in the writ shall be subject to interest, as defined in laws, as of the date of decision, and shall be collected in accordance with the provisions of Law on the Execution and Bankruptcy.

The judicial activity of the TCA begins with the results of compliance audits. In its Decision Docket No. 2011/21, D.: 2013/3 taken upon a request for annulment concerning TCA Law, the Constitutional Court stated, "… TCA carries out a judicial activity in terms of its duty of taking final decision about the accounts and transactions of the responsible persons and in this framework, its decisions are deemed rulings as which are final, and no application to or appeal in any authority or institution including the judicial bodies is allowed against such rulings, and it is concluded that TCA is a court of account which takes decisions with judicial results." According to the Constitutional Court, the TCA carries out a judicial activity with respect to the duty of finalising the accounts and transactions of those responsible. TCA is a court of account that makes decisions with judicial results.

In terms of trial of account, the Law no. 1050, which remained in force until 2006, did not consider whether there had been any intent, flaw or negligence of the officer performing the transaction, except for some special cases; i.e., perfect responsibility was taken as basis. Law No. 5018, which has been in force since 2006, is completely different from the Law no. 1050 on this matter and has made the responsibility a defective responsibility (Mutluer et al. 2011, p. 482).

The actors in the public financial management introduced by the Law No. 5018 are the **head of public administration, authorizing officers, realization officer and accounting officer**.

According to Article 11 of Law No. 5018, the head of public administration is the highest administrator in the ministries and other public administrations, whereas it is the governor in special provincial administrations and the mayor in municipalities (Until June 24, 2018, head of public administration was the undersecretary in the ministries). The President determines the highest administrator in the ministries.

The heads of public administrations are accountable to the Minister for fulfilling the duties and responsibilities set out in the second paragraph of Article 11, and to their local councils in local administrations. The heads of public administrations fulfills the requirements of this responsibility through authorizing officers, the financial services unit and internal auditors.

In accordance with Article 31 of the Law, Head of each spending unit to which appropriation is allocated with the budget is the **authorizing officer**. The article indicates how to determine the authorize spending and the authorizing officers in different situations. Authorizing officers may effect expenditures up to the amount of the appropriation foreseen in the budget and authorizing officers who are supplied with the appropriations via appropriation dispatch document may effect expenditures up to the amount of appropriation allocated

According to Article 33 of the Law, The realization of the expenditures shall be completed when the payment order, which is prepared by the person determined by the authorizing officers, is signed by the authorizing officer and upon the payment of the due amount to the rightful person. Upon the spending instruction, **realization officers** shall perform the duties of having the work to be done, receiving goods or services, completing the receiving formalities, documenting and issuing the documents required for payment. Realization officers shall be responsible for the duties and transactions they should perform in the framework of this Law.

According to the Article 61 of the Law, accounting services include; collecting revenues and receivables; making payments to the payees; receiving, keeping, and sending to the concerned authorities the deposits and the values that can be expressed as money; and keeping records of all other financial transactions as well as issuing reports thereon. Persons performing these transactions shall be **accounting officers**. The civil service positions and titles shall have no effect on being qualified as the accounting officer. The accounting officer is responsible for performing these services and duly keeping accounting records transparent and accessible.

Accounting officers are responsible for the provisions regarding payment included under second paragraph of article 34 and for controlling of payments stated in the third paragraph of this article. The duty of the authorizing officer and accounting officer cannot be combined on one person. Those performing ex-ante control duty in the financial services unit cannot be on duty in the financial transaction process.

According to Law No. 5018, the main responsibility rests with the authorizing officer. However, the accounting officer and the realization officer assume some responsibilities within the framework of the duties stipulated in the Law No. 5018. In accordance with Law No. 5018, ministers are accountable to the President of the

Republic for effective, economic, and efficient use of public resources (from 2006, when the Law no. 5018 entered into force, to June 24, 2018, they were accountable to the Prime Minister and the Parliament).

The heads of public administrations are accountable to the Minister for fulfilling the responsibilities set out in Article 11 of the Law no 5018, and to their local councils in local administrations.

Law No. 5018 enacted in 2003 reorganised the Turkish public financial management and control system with a different approach, which directly affected the TCA's judicial review of budget implementations. Arrangements have been made in line with international norms with regard to auditing and the responsible who are subject to audit as well as their responsibilities, and the principle of conducting financial management and control under the management responsibility of public administrations has been adopted. It is envisaged that public administrations be subject to regularity and performance audits, and public officials be accountable for both in terms of compliance and performance due to their financial transactions. The balance of authority and responsibility was tried to be established during the public spending process, and the audit was conducted before, during, and after the implementation phase; and it was intended to create an efficient internal control, internal audit, and ex-ante financial control system. The scope of the external audit was extended in a way to be left to TCA. Law No. 5018 stipulated reporting activities to ensure the transparency of public activities, introduced the accountability rule, advised the budget to be formulated in a certain scope, avoiding going beyond that scope and tried to ensure fiscal discipline this way, foresaw performance indicators and made accounting systems accrual based. The new TCA No. 6085 was enacted in 2010 in accordance with the approach adopted by Law No. 5018. The Law No. 6085 both modernized the audit procedure of the TCA and expanded its audit area.

Law No. 5018 tried to establish the balance of authority and responsibility during the public spending process and accountability was highlighted. However, it drew up a responsibility area which was too wide and the responsibilities have not been clearly defined. The law mostly refers to fiscal responsibility under the name of accountability. With the entry into force of the Law No. 5018, "internal control" gained importance, and importance was also attached to making the financial decisions and transactions be subject to performance audits in order to determine whether public resources are managed within the framework of the principles of economy, effectiveness, and efficiency, apart from being subject to audit in terms of their compliance with the legislation. However, the fact that the institutions do not have an adequate infrastructure and adequate knowledge and experience limit the feasibility of performance audits.

Risk analysis should be conducted in order to establish, implement, monitor, and develop internal control systems in public administrations. In line with the organizational structure, authorities, duties, and responsibilities of the institutions defined in the legislation, a large number of business processes and a large number of control products are available, yet the infrastructure for ensuring the existing structures to meet the criteria set has not been completed. Therefore, internal control systems in

public institutions cannot be adequately audited and generating data or making evaluations related to internal control systems in public administrations are not sufficiently possible.

As internal control standards have not been established yet, internal audit units of institutions have not yet been able to adequately assess their internal control systems. The current audits are performed by internal audit units within the framework of relevant legislation and activities carried out. Furthermore, the existence of an independent internal audit system will ensure the establishment of an efficient and transparent financial management and control system. However, internal audit units do not yet have an independence at international standards. There are also deficiencies in the perception of internal audit. What the internal auditing focuses on is to ensure that the system operates at a desired level in a way to obtain and use the institutional resources effectively, economically, and efficiently, not to find the shortcomings, defects or errors of the employees. Failure to clarify the organizational structure of the internal audit units and how they will be managed cause the internal audit units to remain weak.

9.4 Judicial Review of the Constitutionality of Budget Law (Constitutional Court)

9.4.1 1961 Constitutional Period

Upon the first application made in 1965, the Constitutional Court first looked for answers to the following questions on the nature, scope, and situation of the budget laws: Can the "budget laws" be considered as "laws" before the Constitution and the legal system? Can the tables contained in the budget laws be considered as a whole together with the text of the law? Are the budget laws subject to constitutional jurisdiction?

According to the Constitutional Court's statement in its Decision Docket No.1965/19, D. 1965/42, although there are debates in the doctrine over the definition of formal and material law, the provisions of the Constitution and the General Accounting Law clearly and unquestionably show that the budget is a law. The articles of budget law and the tables annexed to these articles together form the "budget law." Like other laws, budget laws may be subject of annulment cases.

The Court, having examined the request for annulment on the merits (on the basis of the spending formulas included in R-signed tables annexed to Article 16 of the Budget Law), rules that the spending formulas were in violation of Article 82 of the Constitution and annulled the spending formulas.

The second lawsuit in constitutional jurisdiction was filed in 1968 for the 1968 Fiscal Year Budget Law with the claim that the provisions of budget law were in conflict with the Constitution. The subject of the case was the request for annulment of relevant provision of the Budget Law with the claim that the Budget Law provision

which stipulated that the Civil Servants Law would not be applied in the fiscal year of 1968 and until entry into force of General Cadre Law was in conflict with the last paragraph of Article 126 of the Constitution (No provisions other than those pertaining to the budget shall be incorporated in the budget law).

As stated by the Court in its Decision Docket No. 1968/24, D. 1969/4, the provision of the Budget Law, which is requested to be annulled, postpones the enforcement of some provisions of the Civil Servants Law to an indefinite date in the fiscal year of 1968. The regulation subject to annulment request includes a provision which has been duly discussed and approved and which amends an "ordinary" clause of the law declared in accordance with the Constitution.

According to the Court, the statements "enacting, amending and repealing laws" and "debating and adopting the "draft budget laws" included in Article 64 of the Constitution are two separate power groups. In other words, enacting laws, making amendments to a law that enacted before or repealing a law is the savings of the GNAT with the same nature. Budgets are a kind of "special nature" power of the GNAT. As a natural result of the powers stated separately for "budget laws" and "ordinary laws" under Article 64 of the Constitution, the draft budget laws or draft amendments to the budget laws are debated and adopted in accordance with the procedures the budgets are subject to, whereas other draft laws and draft amendments to such laws are debated and adopted in accordance with the procedures they are subject to. The provision of Article 64 of the Constitution considers budget laws as a kind of law different from ordinary laws. One of the rules of the law is that to amend or abolish a document created in accordance with certain procedures is only possible by going through the same procedures. If it is necessary to change the enforcement dates of the law by postponing entry into force of some articles of the Civil Servants Law, a draft law to be prepared in this way shall be submitted to the GNAT, be subject to the procedures on draft laws and enacted in accordance with the principles under Articles 91–93 of the Constitution. The fact that the regulation to be made by the ordinary law is made by the budget law is in conflict with the intent of Article 64. The Budget Law arrangement which is the subject of the request must be annulled.

The Court draws attention to the enactment processes during 1924 and 1961 Constitutional periods.

> "… The Constitution of 1924 contained exactly the same and a single procedure for debating and adopting budget laws and other laws in the Grand National Assembly of Turkey. (…)
>
> Therefore, in the former practice, it was possible and common to place, in any law, an appropriation item related to budget, and to place, in budget laws, a provision related to other laws.
>
> However, as per the provisions of the 1961 Constitution, it was not possible to place, in the draft laws, an appropriation clause related to budget. Because, as explained above, the debate and adoption procedures of the articles of a draft law which are not related to budget are different from the articles related to budget. In this case, it is not possible to combine the provisions of a separate nature in a draft arrangement…"
>
> The Court examined the request within the framework of the statement "No provisions other than those pertaining to the budget shall be incorporated in the budget law" included under article 126 of the Constitution.

> "…The statement of the last sentence of Article 126 of the Constitution (the provision related to budget) must be considered as explanatory provisions with regard to the budget implementations, facilitating or completing the practice, not in the sense of the provision of a financial nature, provided that it is not a new provision which may be a subject of law.
>
> Accordingly, the fact that a provision of law requires spending from the budget cannot be a reason for it to be considered a provision related to budgetary provision provided for in Article 126. Because almost every law can have one or more provisions that require spending from the budget…"

The Court ruled that the provision of the Budget Law which was subject of annulment request was in conflict with the provisions of Articles 64, 92, and 126 of the Constitution. This assessment based on the distinction of "ordinary law-budget law" and the criteria of "being relate to budget" stated in the relevant provision was transformed into case-law for the 1961 and 1982 constitutions (Yüksel 1993).

"Provisional" budget law no. 1789, which was enacted for 1974, was argued to be contrary to various articles of the Constitution and these articles were requested to be annulled.

The Court firstly examined the constitutionality of the provisional budget organization which was not regulated in the Constitution and the Law No. 1050. According to the Court, Law No. 1789 was a real "budget law" in the sense of both a provisional law and in terms of its main issues, and it was enacted in accordance with the methods laid down by the Constitution for the debate on budgets. The fact that the provisional budget law is not, as envisaged in Article 126 of the Constitution, annual and covers a maximum period of three months cannot change its nature. In exceptional cases entailed by the requirements and necessities of state life, although the main rule is annual budget, the work may be carried out with provisional budgets, and under the condition that ordinary budgets are made on annual basis, a mandatory and provisional measure such as "provisional budget" is not in violation with the Constitution.

The Court found that the provisional budget law was amending a provision of an ordinary law and annulled the articles which are subject of annulment request, on the basis of its justifications in its Decision Docket No. 1974/9, D. 1974/22 on the 1968 Budget Act. The provisional budget organization was included in the Public Financial Management and Control Law, entered into force in 2006, and also in the Constitution, through 2017 amendment.

9.4.2 1982 Constitutional Period

During 1982 Constitutional period, the first of the Constitutional Court decisions on the budget laws was given on the annulment request for a total of 5 articles of the 1990 Fiscal Year Budget Law. The importance of the mentioned first Decision Merit 1990/6, D. 1990/17 of the 1982 Constitutional period was to show the stance of the Court regarding the annulment requests for budget laws in the new constitutional period. The decision commented on the constitutional jurisdiction as follows:

> …As stated in the rationale of Article 161 of the Constitution, budget laws are separate from other laws. If, as a requirement of this constitutional principle, a rule of law can be amended by a rule of law of the same nature, then the budget laws can also be made in the same manner with a budget law amended drafted and adopted in the same way, as a natural result of that, a rule of law cannot be amended and abolished with a budget law nor a budget law can be amended and abolished with a rule of law in general sense. The term 'provisions related to budget', which must be understood as explanatory provisions, also points at an obligation provided that the budget does not cover a rule which is related to the implementation of the budget, which facilitates implementation and which may be the subject of a law. …

The Court did not consider as facilitating the implementation of the budget or explanatory the provision of the 1990 Fiscal Year Budget Law which was subject of request for annulment, and it annulled that provision which was not related to the budget and in conflict with the constitutional principle, especially Article 161 of the Constitution. Considering the Decisions Docket No. 1991/16, D. 1991/19 and Docket No.1991/37, D. 1991/44, the interpretation made by the Court in 1961 Constitutional period on "Provision related to budget" was stuck to in 1982 constitutional period.

According to the 1982 Constitution, the annulment decisions of the Constitutional Court could not be explained without justification. However, the writing of decisions involving long justifications lasted a month, sometimes a few months. An article which had been annulled by the Court could not be enforced because of the delay in writing the justification of annulment.

With the application made to the Constitutional Court in 1993 with the request of the annulment of certain provisions of a decree, it was also requested to cease the execution of the provisions of which are subject of the request for annulment.

Upon that request, the Court stayed the execution of the provision of Decree which it had annulled with its Decision Docket No. 1993/33, D. 1993/40-1, in order to prevent any situation which could be difficult and impossible to remedy which might stem from application, until the annulment decision took effect. The inclusion of the institution "stay of execution" in the constitutional jurisdiction somehow was important not only for other laws and decrees but also for the budget laws; maybe even more important. Because, the rationale of the decisions that ruled the requests for the annulment of the budget law provisions was explained mostly after the end of the fiscal year and the annulment decisions were not functional since the fiscal year ended. In the new case, when the annulment of the provision of the budget law was decided in March, the Court could stay the enforcement of the provision on the same day in a short decision, to prevent any situation which could be difficult and impossible to remedy which might stem from application, until the annulment decision took effect. As a matter of fact, shortly afterward, on the same day with the annulment decision of June 1995 with regard to 1995 budget, the execution of 13 clauses of the budget law was stayed with Decision Docket No. 1995/2, D. Stay of Execution 1995/1. Upon stay of execution of many articles of the 1996 budget in the middle of the fiscal year, a draft law was rapidly enacted by Law No. 4160 to ensure that some provisions included in the budget laws are regulated in the relevant laws. Stay of execution is a meaningful and effective institution for disciplining budget law.

In its Decision Docket No. 2015/7, D. 2016/47 as a result of request for the annulment of some provisions of 2015 Central Government Budget Law, the Constitutional Court added a new criterion, "**power of the purse**," to its other two criteria which it had been using for a long time.

According to the court, power of the purse means that the legislature vests the authority, with set limits, to the executive to collect and to spend government revenues on behalf of the public and audits the results. "Power of the purse" refers to the power to determine and approve the type and amount of taxes, similar revenues, and public expenditures. Such power belongs to the legislative body composed of representatives elected by the public. The budget is the basic responsibility mechanism of the government against the Parliament. The Parliament authorizes the government, through budget, to collect revenues and spend, and audits the proper use of this power through final account law, which is part of the budget process.

According to the Court, considering the structure of the budget, it is possible for the budget to function well as long as the basic budgetary principles are respected. Budgetary principles mean the rules to be considered in relation to preparation, debate on, approval and auditing of the budget. These principles are nationally and internationally recognized principles that are essential for the realization of the basic characteristics and objectives of government budgets.

The Court, explaining power of the purse approach this way with reference to the budgetary principles, decided that the power vested to the legislature to collect and spend government revenues on behalf of the public, had partly been given to the ministers or institutions concerned with the rules which are subject of the case, and thus vested broad powers without being subject to any limitations in an unspecified area. In addition to the principle "No provisions other than those pertaining to the budget shall be incorporated in the budget law," the Court stated that **it also violates power of the purse of the Parliament**. Even though the power of the purse criterion has been used alongside the other two criteria, an innovation has emerged in the case-law of the Constitutional Court regarding this issue. The court can now use the power of the purse criterion more frequently in terms of budgetary laws.

Until recently, the provisions contained in the tables annexed to the budget laws were not much of a subject for annulment requests. Especially after 2010, it is observed that the annulment requests for the provisions of table (E) have increased and some of these requests have resulted in annulment.

At least one annulment and/or stay of execution decision was taken regarding almost every year's budget law between 1990–2018. Number of the articles annulled, either wholly or partly, was 11 in 1996, 18 in 1991, and 19 in 1995 (Yüksel 2007, p. 135).

It is understood that 4 articles were annulled in 1990, 1 article was annulled in 1993'te, 3 articles were annulled in 1994, 1 article was annulled in 1997, 5 articles were annulled in 1998, 1 article was annulled in 1999, 6 articles were annulled in 2001, 4 articles were annulled in 2002, 11 articles were annulled in 2003, 8 articles were annulled in 2004, 2005, and 2006 per each, 2 articles were annulled in 2007, 1 article was annulled in 2009, 3 articles were annulled in 2015, 2 articles were annulled in 2016, and 1 article was annulled in 2017.

Budget laws consist of a text and annexed tables. From 1962 to 1984 when the constitutional jurisdiction began functioning, a budget law (general budget) and more than 30 annexed budget laws were enacted in each fiscal year, each of which was amended at least once during the fiscal year. As of 1984, as a requirement of the approach of the 1982 Constitution, a budget law (general budget) and only one "annexed budget administrations budget law" were started to be enacted in every fiscal year. In 2006 and the following years, in accordance with the provisions of the Law No. 5018, only one budget law (Central Government Budget Law) was started to be enacted for the administrations within the scope of general budget and the annexed budget administrations.

In 2005 and previous years, the total number of articles of the "general budget" and "annexed budget" laws enacted in accordance with the General Accounting Law was around 80–90. In 2006 and the following years, several laws have been enacted in order to eliminate budgetary provisions that are not related to the budget. As a result of this elimination and the fact that the Public Financial Management and Control Law stipulated that only one budget law shall be issued under the name of "Central Government Budget Law" for each fiscal year, number of articles in budget laws began to fell firstly to 30s and then 15, as was the case in 2018. "Considering the ideal number of articles in the budget laws, current constitutional provisions and interpretation style in constitutional jurisdiction, it should not exceed 15" (Yüksel 2007, p. 153). When "maximum 15 articles" was foreseen, it was assumed that the subjects which are obliged to be governed in budget laws, as a minimum requirement, (expenditure, revenue, balance, table notes, explanations of budgetary transactions and Treasury transactions and some other issues provided that the Constitutional limits are respected) would be subject of separate articles. This reduction in the number of articles was similarly reflected in the decrease in the number of pages and words (Yüksel 1999, 2000, 2012).

9.5 Conclusion and Evaluation

This chapter addresses judicial review of budget implementations (accounts and transactions of the responsible) by TCA and the audit by the Constitutional Court on compliance of budget laws with the constitution.

From the founding of the Republic until 2003, in nearly 80 years, the TCA has carried out a judicial review of the budget implementations within the framework of the relevant constitutional arrangements, the TCA Law and the provisions of the Law no. 1050 and the approach adopted by them. In 2003, Law No. 5018 with a different approach was enacted. The prerequisite for the success of judicial review of the Court of Accounts is the good construction and good functioning of the new public financial management and control system stipulated by Law No. 5018.

It is difficult to say that the new approach introduced by Law No. 5018 is sufficiently internalized in public financial management and an efficient internal control system has been created. As mentioned in the relevant section, many problems are

encountered. The internalization of the approach will obviously take some more time. While the fact that the audit procedure of the TCA is amended and modernized and the judicial review area of TCA on budget is expanded through new TCA Law in 2010 is a positive development, some problems are encountered regarding the mentioned audit. With its increased duties regarding audit and reporting, the TCA should increase its administrative capacity and make its audit approach compatible with the new approach envisaged by the Law No. 5018 shortly. More importantly, the success of the external audit of a public administration (TCA audit) is related to the success of internal control and internal audit. The success of the TCA reporting and the level of importance attributed to these reports by the legislative body have a direct impact on the success of external audit.

The number of decisions on which the Constitutional Court concluded requests for the annulment of certain provisions of the budget laws upon the requests submitted to itself in the period of 1962–2018 has already exceeded 100. Except for the inclusion of the stay of execution in constitutional jurisdiction in 1993, no material amendment was made to the Constitutional provisions governing the constitutional jurisdiction, and the arrangements of 1961 and 1982 Constitutions on constitutional jurisdiction were, in a way, maintained. In 2006, the law regulating the financial system (General Accounting Law) was replaced by another law with a different content and philosophy (Public Financial Management and Control Law). The criteria developed by the Court in assessing the constitutionality of the provisions of the budget law remained the same in both constitutional periods, despite the minor changes in the constitutional arrangements and the replacement of the Law 1050 by the Law No. 5018. It can easily be said that the case-law has stabilized.

In its numerous decisions in which it finalized the requests for the annulment/stay of execution of the provisions of the Budget Law, the Constitutional Court used two criteria referred to below in the period of 1962–2018 and based its decisions on its case-law based on these criteria ("violation of power of purse" was used as the third criterion in 2016 and 2017).

- Budget law is a type of law different from other laws, as can be understood from the provisions of the 1961 and 1982 Constitutions that regulate the duties of the GNAT. The Constitution maker regulates the procedures for the enactment and amendment of these two types of laws in different ways. The procedure set for a type of law should not be applied to another type of law (**separation of ordinary law—budget law**).
- No provisions other than "those pertaining to the budget" shall be incorporated in the budget law as clearly laid down in 1961 and 1982 Constitutions. Provided that it does not cover a rule that may be the subject of a law, the words "those pertaining to the budget" are the regulations that explain the budget and facilitate its implementation **("relevancy" of provision to the budget**).

The articles included in the budget laws in the period of 1962–2018 can be gathered under three groups in terms of the possibility of being subject to annulment/stay of execution.

The first group of provisions are the provisions that are explicitly stated in "ordinary" laws or in the laws regulating the financial system (General Accounting Law/Public Financial Management and Control Law) to be included in budget laws. To the extent that they comply with the reference in "ordinary" laws or in the laws regulating the financial system and do not exceed the limits specified therein, it is almost impossible for the provisions of this group to be subject to annulment/stay of execution.

"Provisions not applicable" as referred to in the 1990s, "Provisions not applicable either wholly or partly" as referred to in the following years or "other provisions related to revenues or expenditures" as referred to in the last few years constitute the **second group provisions**. These are the articles that are subject to claims of unconstitutionality the most, since they are the provisions of "ordinary laws" which are stated to be not applicable, not applicable either wholly or partly, or applicable in different manner. Provisions included in this group are those with the highest probability of annulment.

The articles which are not included in the two groups above and which regulate different subjects constitute **third group of provisions** (other articles). In court decisions, dissenting vote letters are written the most when finalizing the requests for annulment of such kind of articles. This proves the fact that the members of the Court often hesitate about the constitutionality of the provision subject of the annulment request and that they cannot reach a decision easily (Yüksel 2007, p. 139).

Why the unconstitutional provisions are still inserted in the budget laws, despite the case-law of the Constitutional Court and even its stabilized case-law (Soysal 1986)?

- As the unconstitutionality of the provisions concerned cannot be understood, some provisions that are in violation of the constitution may have been inserted in the budget draft law/budget proposal text. Even members of the Court cannot agree on certain provisions.
- Due to blockages in ordinary law-making processes, the provisions which will probably be subject of an annulment request are included in the budget laws. Because, this way relevant provision is guaranteed to be enacted without causing any dispute between the articles of budget law (through concealing to some extent) and before the fiscal year begins. In the 1990s, when the coalition governments were in the scene, it was sometimes so difficult to enact ordinary law that the governments preferred to put into the budget laws the issues which included any measure that they intended to put into practice together with the fiscal year and that they attached importance. Without prejudice to the legislative process, it is necessary to review the Rules of Procedure of the GNAT and to ensure the efficient functioning of the GNAT in order to eliminate the blockages in the ordinary law-making process.
- The fact that the provisions annulled in previous years are inserted into the budget laws in the following year or years, despite clear and explicit stance of the Supreme Court on that matter is an evidence of the low degree of diligence shown in taking

into account the decisions of constitutional jurisdiction or stubborn approach taken from time to time.

As is known, the budget laws only apply to the fiscal year which they relate to. After the end of the fiscal year, the annulments and/or annulment decisions made regarding the budget laws will not function. For this reason, and in order to make the constitutionality audit of budget laws more efficient, the Constitutional Court should promptly finalise the requests related to the budget law and efficiently make use of stay of execution.

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