

SELMAN SACİT BOZ
SELÇUK UNIVERSITY LAW FACULTY, TURKEY

SEZİN ÖZTOPRAK
SELÇUK UNIVERSITY LAW FACULTY, TURKEY

THE REGULATORY TRANSACTIONS OF THE ADMINISTRATION UNDER THE HIERARCHY OF TURKISH LAW

Abstract:

The regulatory transactions performed by the Executive Power in Turkish laws are statutory decrees, decrees, regulations and other unnamed regulatory transactions. The unnamed regulatory transactions are the title to a set of general regulatory transactions. In other words, it is a general concept to express many transactions with unlimited numbers. The reason to selection of this concept is that such transactions cannot be mentioned by the constitution which is the highest norm.

The hierarchy of norms which were introduced to the legal World by Hans Kelsen are also applicable in the operation of the regulatory transactions of the administration. However since the general regulatory transactions enacted by the administration increase rapidly day by day cause different arrangements to be brought forward in the same matters. The solution to some problems incurred by during the implementation stages cannot be achieved by Kelsen pyramid only. The administrative units at the same hierarchy stages may include contradictory provisions, then it is also possible that they may contradict with some regulatory transactions emanated under public administration.

This paper studies what kind of a hierarchy is present between the general regulatory transactions of the administration, the solution to the legal issues between the general regulatory transactions encompassing contradicting norms, how the general regulatory transactions breaching the superior norms can be abolished and how the senior management will act in case when the people of execution.

Keywords:

General Regulatory Transactions, Hierarchy of Norms, General Regulatory transactions of the Administration in Turkish Law, Abstract Transactions of Executive Power, Statutory Decrees, Decrees, Regulations, Unnamed Regulatory Transactions.

JEL Classification: K30

INTRODUCTION

In the Turkish Laws, the regulatory transactions of administration, the Executive power, are the statutory decrees, decrees, regulations, and other unnamed regulatory transactions. The unnamed regulatory transactions are the main heading of several general regulatory transactions.

The hierarchy of norms, which were introduced to the legal world by Hans Kelsen is also valid in the regulatory transactions of administration. However, the rapidly increase of general regulatory transactions, issued by administration, also brings together with it the presence of different arrangements in the same issues. The solution of some problems experienced in practice cannot be provided by only Kelsen pyramid. Just as the general regulatory transactions of the administrative units at the same hierarchical stage include some contradictory provisions with each other, sometimes, it is also possible that the regulatory transactions emanated from the same public administration may also contradict with each other

I. THE REGULATORY TRANSACTIONS OF TURKISH ADMINISTRATION

In the Turkish laws, the transactions of administration that is executive power, which are in the general and objective quality; which do not include the quality of individual transaction; which have an ability to apply for everyone; which are unilateral; and which do not run short with applying for one time, are called "general regulatory transactions"¹. The regulatory transactions of administration are divided into the four groups as the statutory decrees, decrees, regulations, and unnamed regulative transactions.

The administrative transactions, which are in the same position with the law and international treaties in the hierarchy of norms; which can be issued by only cabinet council; and which are general, abstract, and do not run short with applying for one time, are called statutory decrees².

To indicate the implementation of law or specify the tasks it orders, and on condition that they are not contrary to the Constitution and are passed through the

¹ ÖZAY, İl Han, **Günişliğinde Yönetim**, İstanbul, 1986, p. 373; TAN, Turgut, **İdare Hukuku**, Edt. 2, Ankara, 2013, p. 64; GÖZÜBÜYÜK, A. Şeref / TAN, Turgut, **İdare Hukuku Genel Esaslar**, Vol. 1, Edt. 8, Ankara, 2011, p. 105; GÖZLER, Kemal, **İdare Hukuku**, Vol. 2, Bursa, 2009, p. 1153; ATAY, Ender Ethem, **İdare Hukuku**, Edt. 3, Ankara, 2012, p. 84.

² YAVUZ, Atar, **Türk Anayasa Hukuku**, Edt. 6, Konya, 2011, p. 244; YILDIRIM, Ramazan, **Türk İdârî Rejimi Dersleri**, Vol. 2, Konya, 2014, p. 16; GÖZLER, Kemal / KAPLAN, Gürsel, **İdare Hukuku Dersleri**, Edt. 12, Bursa, 2012, p. 424.

examination by council of state, the general regulatory transactions are called decrees (Turkish Constitution, Article 115).

To provide the implementation of the laws and decrees concerning their own task areas of the prime ministry, ministries, and public legal personalities, and on condition that they are not contrary to these, the general regulatory transactions issued by them are called regulations (Turkish Constitution, Article 124).

Of the regulatory transactions of administration, only the statutory decrees, decrees, and regulations are foreseen in the Constitution. Besides these counted, there are also the general regulatory transactions, expressed as “like-regulations”³ from legal point of view, under the different names. The reason for calling this kind of transactions “unnamed regulatory transactions” is that they are not mentioned about in the Constitution⁴. In other words, the concept of “unnamed regulatory transaction” is an umbrella concept used for representing many transactions, whose number are limitless.

II. HIERARCHY BETWEEN THE REGULATORY TRANSACTIONS

A. Between The Different Kind Of Regulatory Transactions

Hierarchy, whose lexical meaning is “to stage” or “to grade”, is a concept determining the subordinate and superior position in the literature of laws, while the hierarchy between the regulatory transactions corresponds to the “hierarchy of norms” introduced by Hans Kelsen to the world of laws⁵. This structure expresses an configuration staged in a pyramidal shape⁶.

In the hierarchy of norms, there is a constitution that is on the top stage, and in which the other regulatory transactions are not possible to contrarily arrange to it. Constitution is followed by the law, statutory decrees, and international treaties on condition that they are in the same hierarchical stage.

In the hierarchy of norms, the regulatory transaction that is at the bottom position takes its quality and force from the regulatory transaction at the bottom position. Therefore, it is imposable for a bottom norm to be contrary to a top norm⁷.

³ BALTA, Tahsin Bekir, **İdare Hukukuna Giriş I**, Ankara, 1970, p. 127.

⁴ ÖZAY, p. 375; YILDIRIM, p. 21.

⁵ ÖZAY, p. 166; ATAY, E. Ethem, “*Normlar Hiyerarşisi, Erklar Hiyerarşisi İkilemi ve Düzenleyici Denetleyici Kurumlar*”, **Rekabet Hukukunda Güncel Gelişmeler Sempozyumu-VI**, Erciyes Üniversitesi Hukuk Fakültesi - Rekabet Kurumu, Kayseri, 4-5 April 2008, p. 309.

⁶ ATAY, p. 312.

⁷ ONAR, Sıddık Sami, **İdare Hukukunun Umumî Esasları**, Vol. 1, Edt. 3, İstanbul, 1966, p. 269; ATAY, p. 309-310.

According to the rule that in an area that is not arranged by the law, the decrees and regulations cannot be issued, taking decrees or regulations as a base to the Constitution is legally imposable. However, according to Turkish Supreme Court, there are also some regulatory transactions, determined that are compatible with the law but Constitution⁸. In case that there is such a contradiction and that this is carried in front of the court, it is obligatory to investigate whether or not the regulatory transaction is contrary to a superior norm upon objection or on its own motion⁹. This hierarchy that is between norms brings together with it a change from abstract to concrete, from the narrow inclusive to the large inclusive¹⁰.

What is meant with the hierarchy of norms is the superiority between the regulatory transactions. However, the acceptance of the regulatory transactions as a criterion enables us to accept the presence of a hierarchy between the positions installing these transactions¹¹.

Between the different kinds of regulatory transactions, the criterion in hierarchy is the Turkish Republic Constitution. According to this, the hierarchy between the regulatory transactions of administration is statutory decrees, decrees, regulations, and unnamed regulatory transactions, respectively. Hence, the norm at the bottom stage cannot be contrary to the regulatory transaction at the top stage. When regarding from this aspect, decrees are superior to the regulations. However, in the Turkish laws, cabinet council can issue both decrees and regulations.

According to the Constitution, while the decrees are issued "to indicate the implementation of law and specify the tasks it orders", regulations are created to provide the implementation of the laws and decrees. Regulations cannot be issued to specify the tasks the law orders. Then, are the concepts of "to indicate the implementation of the law", and "to provide the application of the laws" used in the same meaning? If what is meant with both concepts, do cabinet council have a discretionary act? If it is accepted that there is discretionary act, is there any hierarchy between "the decrees issued by cabinet council to indicate and provide the application of law" and regulations it issues on the same purpose?

While regulations are only issued to specify the tasks ordered by law, in order to indicate the application of the law, it is possible to issue the decrees

⁸ DURAN, Lûtfi, **İdare Hukuku Ders Notları**, İstanbul, 1982, p. 468.

⁹ DURAN, p. 470.

¹⁰ ONAR, p. 270.

¹¹ ATAY, p. 290.

and regulations. In the latter case, that cabinet council chooses one of the couple of decrees and regulations must be considered in discretionary act.

Although they are created by the same positions, with decrees that is in the different hierarchical stage constitutionally, the place of regulations of cabinet council in the hierarchy of norm do not change. In other words, decrees are superior to the regulations of cabinet council. In case that the decrees and regulations of cabinet council include contradiction, in eliminating the problem, the criterion of "previous-next arrangement" or "general-specific" cannot be applied. In case that such a possibility becomes fact, it is necessary to apply the provisions of decrees.

Statutory decrees and decrees are the general regulatory transactions issued by only cabinet council. The rule that the decrees cannot be contrary to the constitution taking place in Article 15 of Turkish Constitution has a quality that is applicable in the statutory decrees that is in equal position to the laws in the hierarchy of norms, From this point of view, the decrees must not also include the provisions contrary to the statutory decrees¹². That any norm cannot be arranged in contrary way to the constitution pushes it to the lower rank in the hierarchical position. Even if both of the regulatory transactions are installed by the same position, the constitutional systematic of the regulatory transactions makes the position out of service. From this aspect, the statutory decrees issued by cabinet council must be accepted more superior than both the decrees and regulations issued by cabinet council.

There is a hierarchy between the decrees and the regulations issued by the prime ministry, ministries or public legal personalities. According to Article 124 of Constitution, the fact that the regulations can be issued on condition that they provide the laws and decrees to be implemented and is not contrary to those is an evidence of that they are in the lower position¹³.

Can it be said that there is a hierarchy between regulations installed by the same institute and unnamed regulatory transactions?

There are the different views in the Turkish doctrine. According to a view, regulations are in the upper position compared to the unnamed regulatory transactions. That constitution has an arrangement regarding to regulations requires it to be considered different from the unnamed transactions. For, while unnamed regulatory transactions are the use of a general authority, regulations are the

¹² GÖZLER, p. 1268.

¹³ GÖZLER, p. 1268.

use of constitutional authority¹⁴. In similar way, it is emphasized that decrees are always superior to the unnamed regulatory transactions issued by the cabinet council. Furthermore, it is argued that an unnamed regulatory transaction issued by cabinet council on a date after issuing the decrees do not have any influence on the rule that regulations are always superior¹⁵. Another view is in the direction that it cannot be mentioned about that there is any hierarchy between these arrangements. That unnamed regulatory transactions also subject to the legal regime of regulations requires these norms to be accepted in the same hierarchy¹⁶.

B. Between The Same Kind Of Regulatory Transactions

Is there any hierarchy between the regulatory transactions of administrations that are at the same stage? In case that there are some contradictory provisions between the regulatory transactions in the same stage, how a way should be followed?

First of all, due to the fact that the position that will install the statutory decrees and decrees is the same, it is extremely difficult to eliminate the provisions that are contrary to each other. However, the persons who are in the position that will install these transactions exchange over time may lead such a problem.

In the Turkish laws, the statutory decrees are divided into two; ordinary and extraordinary. Although the procedures and fundamentals of being issued of both statutory decrees are different from each other, in the hierarchy of norms, they have no superiority to each other¹⁷. However, between the statutory decrees that do not have any superiority to each other, it is also possible that there are some provisions including confliction. In such a condition, the problem can be eliminated as follows:

In case that there is a confliction between the statutory decrees in the same or different quality, it is necessary to identify the solution according to the effective date. In other words, the new dated statutory decrees are kept superior to the previous dated statutory decrees and, in the contrary provisions, the arrangement of new dated statutory decrees is taken into consideration. If a confliction is experienced between the statutory decrees coming into force, the problem can

¹⁴ GÜNDAY, Metin, **İdare Hukuku**, Edt. 10, Ankara, 2013, p. 230.

¹⁵ ATAY, p. 98.

¹⁶ GÖZLER, p. 1269.

¹⁷ GÖZLER, p. 1269.

be overcome by preferring the specific qualified statutory decrees to the general qualified one¹⁸.

In Turkish laws, the decrees can only be issued by cabinet council. According to Constitution, it is stated that determining the decrees as single type impedes a formation of hierarchy between the decrees¹⁹. In case that the provisions that are present in the decrees being in force and not repealing each other are contrary to each other, the confusion that will emerge must be eliminated according to the effective date. If a confliction is experienced between the decrees coming into force, the problem can be overcome by preferring the specific qualified statutory decrees to the general qualified one²⁰.

In similar matters, it is possible for the same or different positions to issue the regulations. For; according to Article 124 of Turkish Constitution, the prime ministry, ministries, and public legal personalities can issue regulations to provide the implementation of the laws and decrees concerning their own task areas and on condition that they are not contrary to these. In practice, it is seen that more conflictions are experienced compared to the statutory decrees and decrees.

In eliminating the conflictions between regulations, the "previous-next" criterion alone is not enough. In other words, in case that there is a contradiction between the regulations issued by the same institute, the provisions of the new dated regulations are taken into consideration. In the regulations brought into force afterwards, any provision is not existent. It is accepted that the provisions that are present in the previous regulations and that are contrary to the new regulations are obsolete²¹.

In case that the regulations issued by the different institutes on the issue include some provisions contrary to each other, the problem faced is solved according to the position of the institute issuing the regulations in the Turkish administrative organization²².

The criterion suggested above does not find a solution for problem in each condition. How the contradictions between the regulations of the ministries at the same hierarchical stage and the prime ministry and ministries, where the discussions continue on the point of hierarchical superiority and, of even some

¹⁸ GÖZLER, p. 1269.

¹⁹ GÜNDAY, p. 113; GÖZLER, p. 1269.

²⁰ GÖZLER, p. 1269.

²¹ DURAN, p. 463; GÜNDAY, p. 229; ATAY, p. 93.

²² DURAN, p. 463-464; GÖZLER, p. 1270; GÜNDAY, p. 229.

institutes, between which there are no hierarchical and guardianship relationship, will be eliminated? In fact, eliminating these contradictions becomes via jurisdiction. However, how will the administrations, which are in the executive position, act? Mostly, each administrative agency exhibits in the approach if applying its own regulatory transaction, but in accordance with the principles of the fiscal responsibility of administration and becoming respectful the legal rules, the doctrine should bring a solution suggestion.

In this case, in terms of the place or substance, it is suggested that the rules of authority should be applied²³. In addition, it is in quality determining the power ranking of the transactions -arranging the dominance- of somebody, who is at the higher position hierarchically, on the transactions of agency that are at the lower part²⁴.

In case of confliction of the regulations issued by ministry with a regulation issued by the prime ministry, it was expressed that the regulations of prime ministry will be based on²⁵.

A contradiction that can be met between the regulatory transactions of local governments (provincial special administration, municipality, village) can be eliminated by the authoritative rules in terms of place; the inconsistencies between the regulatory transactions of the metropolitan municipalities and district municipality, by the authoritative rules, in terms of issue; and the contradictions between the regulatory transactions of each other of public institutes and the contradictions between the regulatory transactions installed by the public institutes and local governments, by the authoritative rules in terms of issue²⁶. In this case, primarily, there is not any case as in the hierarchy of norms. In other words, the regulations issued by the different persons, who do not have any administrative relation to each other cannot have any superiority to each other. Each public legal person creating the administrative transaction should apply its own transaction²⁷.

When the superiority resulted from the position of administrative post providing the regulative transaction to survive in the world of laws is not taken into consideration, one cannot mention about an hierarchy between the unnamed regulatory transactions absolutely. In other words, between the unnamed regulative

²³ DURAN, p. 464; GÜNDAY, p. 230.

²⁴ GÖZLER, p. 1270.

²⁵ GÖZLER, p. 1271.

²⁶ GÖZLER, p. 1276-277.

²⁷ ATAY, p. 93.

transactions, it cannot be said that there is a staging as in the hierarchy of norms between the unnamed regulatory transactions

The problem faced in case that the unnamed regulatory transactions issued on the same subject include the provisions contrary to each other, as in the regulations, is solved according to the position of institute installing the transaction in Turkish administrative organization²⁸.

In case that there is a contradiction between the regulatory transactions installed by the position supervised with the position having the guardianship authority, it is necessary to keep superior the regulatory transactions of position that are authorized in terms of issue²⁹. For example, the regulations issued by the ministry are accepted to be superior to the regulations on the same issue, installed by municipal positions, or to any unnamed regulatory transaction³⁰. As the reason for this, it is pointed out the central administrative positions, as the guardianship position of public legal person, are in the position of providing the public interest and integrity of administration³¹.

RESULT

The regulatory transactions of administration, according to the hierarchy of norms, are the statutory decrees, decrees, regulations. Although there is no hierarchy between these regulatory transactions, there is no hierarchy between the same kind of the regulatory transactions as well.

According to the constitution, among the regulatory transactions of administration, statutory decrees are at the top. This is followed by decrees and regulations in order. In the doctrine, although there are the various views, the unnamed regulatory transactions, whose names are not put by that making constitution, should be in a stage taking place after regulations.

In case that the same kind of regulatory transactions are installed by the same position, the confliction of norms to emerge should be solved according to the criteria of "previous-next arrangement" and "general-specific arrangement". In case that the regulations issued by the different institutes on the same matter include the provisions contrary to each other, the problem faced is solved according to the position of the institute, from where the regulations emanate, in Turkish administrative organization.

²⁸ DURAN, p. 463-464; GÖZLER, p. 1270; GÜNDAY, p. 229; ATAY, p. 98.

²⁹ GÖZLER, p. 1274.

³⁰ GÜNDAY, p. 229.

³¹ GÜNDAY, p. 229.

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