

REGULATIONS ON ACADEMIC STAFF RECRUITMENT IN TURKEY

*Türkiye’de Akademik Personel İstihdamına İlişkin Düzenlemeler**

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ABSTRACT

Receiving an academic title and appointing academic staff are different procedures. In the present study, the issue of appointing academic staff is analyzed under the related legislation and especially the decisions of the Council of State. In accordance with the provisions of the Higher Education Law No.2547 which is a special law in nature as per the Civil Servants Law No.657, the academic staff employed in a post in higher education institutions and holding the status of being a civil servant are appointed to civil service based on the status law, civil servants alike, and recruited under the Law No.2547 by requiring various conditions for the qualifications of the position. However, the provisions of Law No.2547 do not include a detailed regulation on the appointment of academic staff and it is very hard to say that it regulates the fundamental principles and rules of the matter. Therefore, procedures for the appointment of academic staff appear to be regulated by the secondary legislation including the basic principles and rules. Apart from that, procedures for the appointment of academic staff became much more diversified following the introduction of Academic Member Training Program (ÖYP) after the amendments in Article 33/a and 50/d of Law No.2547. No regulation is available on ÖYP in Law No.2547. It appears that the main legal ground for the Procedures and Principles on Academic Member Training Program which regulates appointment through ÖYP is Decree No: 78 and the related Budget Laws; however, the related main principles and rules are not included in these regulations as well. In our opinion, this constitutes a contradiction to Articles 128 and 130 of the Constitution. In this context, it is highly clear that Law No.2547 should be thoroughly revised including the provisions concerning to the matter and should be re-legislated systematically.

Keywords: Academic Staff, Appointment, Higher Education Council, Higher Education Law, Academic Title.

ÖZET

Akademik unvanların alınması ile akademik personelin atanması ayrı ayrı işlemlerdir. Çalışmada akademik personelin atanması konusu, ilgili mevzuat ve özellikle Danıştay kararları çerçevesinde incelenmektedir. 657 sayılı Devlet Memurları

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Kanunu'na göre özel kanun mahiyetindeki 2547 sayılı Yükseköğretim Kanunu hükümlerine göre, yükseköğretim kurumlarında bir kadroya bağlı şekilde istihdam edilen ve kamu görevlisi statüsünde olan akademik personel, aynı memurlar gibi, statü hukukuna tabi olarak kamu görevliliğine alınmakta ve yine 2547 sayılı Kanun çerçevesinde görevin gerektirdiği niteliklere uygun değişik koşullar istenmek suretiyle istihdam edilmektedirler. Ancak, 2547 sayılı Kanun hükümlerinin akademik personelin atanması konusunda ayrıntılı bir düzenleme içermediği gibi, konunun temel ilke ve kurallarını da gerektiği şekilde düzenlediğini söylemek oldukça zordur. Dolayısıyla akademik personeli atama usûlünün temel ilke ve kurallar da dâhil ikincil mevzuat ile düzenlendiği görülmektedir. Bunun dışında 2547 sayılı Kanun'un 33/a ve 50/d düzenlemelerinden sonra Öğretim Üyesi Yetiştirme Programı'nın (ÖYP) getirilmesiyle araştırma görevliliğine atama usûlü daha da çeşitlenmiştir. 2547 sayılı Kanun'da ÖYP'ye ilişkin bir düzenleme bulunmamaktadır. ÖYP ile atamayı düzenleyen Öğretim Üyesi Yetiştirme Programına İlişkin Usûl ve Esaslar'ın başlıca kanunî dayanağının 78 sayılı KHK ve ilgili Bütçe Kanunları olduğu ve fakat bu düzenlemelerde de konunun temel ilke ve kurallarına yer verilmediği görülmektedir. Bu durum kanaatimizce Anayasa'nın 128. ve 130.maddelerine aykırılık teşkil etmektedir. Bu bağlamda 2547 sayılı Kanun'un, konuya ilişkin hükümleri de dâhil tümüyle gözden geçirilmesi ve sistematik bir şekilde yeniden kanunlaştırılmasının gerekliliği son derece açıktır.

Anahtar Kelimeler: Akademik Personel, Atama, Yükseköğretim Kurumu, Yükseköğretim Kanunu, Akademik Unvan.



Introduction

The staff working in higher education institutions are divided into two academic staff and staff employed apart from academic staff. The civil servants employed apart from academic staff in higher education institutions are subjected to Civil Servants Law No.657 in accordance with Law No.2547¹ (Art.51) and other related legislation provisions. Apart from civil servants and academic staff, other staff is also available who is employed in the status of other civil servants in higher education institutions. Those are also subjected to the provisions of Law No.2547 and in the cases there are no provisions in the Law No.2547 or in the cases referred by this law, then to the provisions of Law No.657. Academic staff is the people who teach, do research and contribute to their fields through specific studies in universities and similar higher education institutions. It should be also noted that the academic staff working in a permanent staff in higher education institutions is public officers in terms of the administrative law specified in Article 128 of

¹ Higher Education Law No.2547, date and number of publication in the Official Gazette: 06.11.1981/17506. See. Yükseköğretim Mevzuatı, (2007), Yalın Yayıncılık, 12.Baskı, İstanbul.

the Constitution. Academic staffs employed in higher education institutions include academic members such as professors, associate professors and assistant professors, and support staff such as lecturers, instructors and research assistants, specialists, translators and planners². These are subjected to the provisions of Law No.2547 and No.2914 as a rule³. Moreover, the academic staff to be employed in higher education institutions is required to meet the requirements specified in Article 48 of Law No.657⁴. The special requirements of the appointments to an instructor post in accordance with Law No.2547 are regulated in the “Regulations on Principles and Procedures on Central Examinations or Admission Examinations to be Implemented in the Direct or External Appointments to the Lecturer Posts other than Academic Member Posts⁵. Those who apply for the announced ranks of lecturer and for

² The classification of lecturers subjected to this Law is specified in article 3 of Higher Education Staff Law No.2914. Official Gazette on 13.10.1983 No.18190. See. Yükseköğretim Mevzuatı, (2007), Yalın Yayıncılık, 12.Baskı, İstanbul.

³ The provisions of the Law No.657 also apply to academic staff on the matters not regulated by Laws No.2914 and 2547 and where the Civil Servants Law No.657 is referred to. Law No.657 is a general law in nature in the Turkish staff regime.

⁴ See. Article 6/a of the Regulations on Principles and Procedures on Central Examinations and Admission Examinations to be Implemented in Direct or External Appointments to the Ranks of Lecturer other than the Ranks of Academic Member. Official Gazette on 31.07.1983 No.26953. In addition, lecturers, instructors and support staff to be employed in higher education institutions should not have any obstacles to their employment in terms of the higher education legislation and Higher Education Council decisions.

⁵ According to Article 7 of the Regulations, the special requirements for the appointments to the lecturer post are as follows: “1.In order to apply for a research assistant post, the applicant should not be older than 35 years old.

2. The equivalence of four-point grading system to hundred-point grading system to be used in the calculation of the undergraduate grade in the pre-assessment and assessment of the applicant is determined by the decision of Higher Education Council.

3. These requirements are not stipulated in the appointment of those who succeed in the examinations of specialty and sub-specialty in medicine to the lecturer post. 4. The special requirements to be stipulated to apply for the academic membership are as follows: A) At least a Master’s Degree or 10-year experience in case of holding Bachelor’s Degree for the academic member applicants who apply for the departments providing undergraduate education (including the departments of the Rectorate), b) at least a Bachelor’s Degree and 2-year proven track experience in their fields for the academic member applicants who apply for faculty of fine arts, departments of fine arts of faculties of education, conservatories and the departments providing associate degree education. 5. The special requirements to be stipulated to apply for the instructor post are as follows: a) Except for foreign language instructors, holding at least a Master’s Degree for the instructor applicants to be appointed to the departments providing undergraduate education (including the departments of the Rectorate), b)In the applications for the ranks of foreign language instructor, at least 80 scores from Foreign Language Proficiency Examination for State Employees (KPDS) and Inter-university Foreign Language Examination (ÜDS) held by OSYM (Student Selection and Placement Center) (ÜDS was changed into YDS) or an

the related examinations should meet the general and special requirements stated in the related legislation. Including the posts of research assistants to be appointed through conventional procedures to higher education institutions, the post of academic staff is given by the Higher Education Council and the related posts are announced on the website of the Higher Education Council⁶.

It also appears that the related legislation has introduced some arrangements for some people to be able to be appointed in higher education institutions in the academic staff status on a contract basis. In accordance with Article 15 of Law No.2914, higher education institutions may employ the personnel the titles of which are specified in amended Provisional Article 19 of the Law No.657 on a contract basis with the approval of the Higher Education Institution. In Article 16 of the Law No.2914, it is stated that foreign national lecturers may work in higher education institutions on a contract basis as per Article 34 of the Law No.2547. Moreover, Article 17 of the Law No.2914 regulated that the lecturers who are above 65 years old and is retired may be employed in higher education institutions on a contract basis if deemed necessary by universities. It should be also noted that these legal regulations introduced on employing academic staff in higher education institutions on a contract basis are exceptional and they are resorted to in case of a special need. Employing the academic staff that should be employed based on the status law⁷ as per the Constitution in education activities on a contract basis also contradicts Article 128 of the Constitution in our opinion. Basic principles

equivalent score from an exam deemed equivalent by the Higher Education Institution. 6. The special requirements to be stipulated to apply for the ranks of specialist, translator and education planner are as follows; A) At least a Bachelor's Degree, b) 2-year proven track experience. Official Gazette on 31.07.1983 No.26953.

⁶ See. <https://yoksis.yok.gov.tr/ilansayfa/>, Date: 23.07.2015.

⁷ "Statute law is the determination of all the elements (of their status) working conditions (status) of civil servants and other public officials based on the regulations starting and arising from the Constitution." See. Duguit, Leon, (1954), *Kamu Hukuku Dersleri*, Translated by: Süheyp Derbil, Ankara Üniversitesi Hukuk Fakültesi Yayını, Ankara. s.123.; Public officers in status law are employed unilaterally based on the general regulations determined by laws and the administration. Therefore, mutual freedom of will is not valid in identifying the conditions of the relation between the administration and the public officer. The public officer employed unilaterally under the status law cannot be worked temporarily, he/she works on a permanent basis. The termination of employment of a public officer who is subjected to the status law happens only when the officer acts against the predetermined general regulations. The behaviors that require the termination of employment of a public officer under the status law are specified in the predetermined general regulations. The regulation that determines the behaviors to require the termination of employment has often the force of a law. This arises from the principle of legality. Aslan, Onur Ender, (2006), *Kamu Personel Rejiminin Anayasal İlkeleri, Türkiye ve Ortadoğu Amme İdaresi Yayınları*, Ankara. s.89-90, 97-98.

and rules of appointment conditions, personal rights and working conditions of all the staff to be employed in higher education institutions must be regulated in laws. In brief, these exceptional regulations have been left out from the present study. In the present study, the appointment of instructors, lecturers and support staff are discussed before proceeding with the appointment of academic member.

1. Lecturers, Instructors and Support Staff

In accordance with the Law No.2547, support staff such as lecturers, instructors and research assistants, specialists, translators and education planners are included among those who will be employed as academic staff. In addition, in accordance with the Higher Education Law (Art.50/d), the students who are engaged in graduate education can be appointed to the teaching assistant post with unilateral appointment procedures of the administration, limited to one year at a time. In a decision taken by the 8th Law Chamber of State Council, the term “the contract signed with research assistants” has been used. However, this contract has the characteristics of a contract that the administration has made unilaterally and for a certain period time, and is between support staff including lecturers and instructors and all the research assistants, and “other public officers” employed not on a contract basis but without specifying the type of employment and stated in Article 128 of the Constitution.⁸

1.1. Academic Staff and Postgraduate Education Admission Exam

In accordance with the additional Article 8 the Decree No.78 and the provisions of the Regulations on Principles and Procedures on Central Examinations and Admission Examinations to be Implemented in Direct or External Appointments to the Lecturer post other than Academic Staff Posts, lecturers, instructors and support staff to be assigned in the academic posts other than lecturer post have to take the academic proficiency exam called Academic Staff and Postgraduate Education Admission Exam (ALES) held by Student Selection and Placement Center (ÖSYM) and have the desired score. Those who are able to graduate/ have graduated from an undergraduate program, and have undergraduate education abroad on condition that they have a certificate of equivalence. In accordance with the related Regulation, the holders of a doctorate degree are exempt from the central examination, while those who apply for research assistant posts among those who are

⁸ Council of State Decision taken by the 8th Law Chamber, Decision Date: 07.02.1995, Docket: 1994/2851, Decision: 1995/365. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasiIstemciWeb/>, Access date26.07.2015.

entitled to have the education of specialty in medicine are exempt from the central examination and the admission examination of the university. In our opinion, keeping those who prove their academic proficiency by having a doctorate degree from the central examination is a sound regulation.

In order to be employed as a lecturer, instructor and support staff, one should be successful in ALES exam as a prerequisite⁹. Then, higher education institutions hold a written and/or verbal test in accordance with their legislations. The appointment of the candidates who are successful in the exams is at the sole discretion of the President in accordance with the provisions of the current legislation. In order to be appointed to the ranks of lecturer, instructor and research assistant, it is required to hold a central exam by ÖSYM instead of higher education institutions along with ALES in terms of objectivity. Then, higher education institutions can hold a verbal exam. The verbal exams can be audited by taking an audio and video recording of the exam.

1.2. Appointment to Lecturer Posts

In accordance with the Law No.2547 (Art.31), lecturers can be assigned for a certain period of time or based on course hourly wages as the people recognized for their studies and work in their own areas of expertise for the courses for which an lecturer appointed as per this Law is not available in universities and the related departments or for the education and practices of the course subjects that require special knowledge and expertise. Lecturers can be appointed to academic members, assistant academic members and lecturer by receiving the opinions of the related administrative committee upon the recommendation of the Dean in faculties and of the Chair of the discipline in the departments affiliated to the President or can be employed on the basis of a contract or course hourly wages without requiring a post.

In accordance with Law No.2547 (Art.31), lecturers can be appointed to the academic member, assistant academic members and lecturer positions for two years at the latest. It was pointed that it was concluded in a Decision by Council of State, Plenary Session of the Chambers for Administrative Cases regarding this issue that lecturers can be appointed for maximum two years and a discretionary power was given to the administration and the upper limit was determined to be two years in accordance with Article 32 of the Law No.2547 amended with Law No.2880. In this context, the administrative

⁹ Article 4/a of the Regulations on Principles and Procedures on Central Examinations and Admission Examinations to be Implemented in Direct or External Appointments to Lecturer Posts other than Academic Staff Posts. Official Gazette on 31.07.1983 No.26953.

court decision which was taken to remove the discretionary power vested in the administration on the duration of extending the term of office and revealed the requirements of extending the term of office for two years maximum concluded that nothing was found contradictory to law and the administration did not use its discretionary power against public interest and service requirements by extending the term of office of a lecturer for six months more¹⁰. As is seen in the decision, the two-year appointment period is the upper limit and determining a lower limit for the appointment period is at the discretion of the administration. Lecturers can be reappointed in the same way if there is no academic member applying for the ranks they are holding at the end of two years and if it is believed that they should continue to work for the public interest. Their term of office expires automatically at the end of the appointment period. Lecturers can be reappointed. In this case, first appointment procedures apply¹¹. Lecturers can be continuously appointed to the conservatories and vocational schools, where necessary.

1.3. Appointment to Lecturer Positions

Lecturers can be appointed for a definite or indefinite period of time by receiving the opinion of the related institutions upon the recommendation of the Dean in departments of faculties and the Chair of the department in institutes or director in colleges affiliated to the President or their term of office expires automatically at the end of the appointment period. They can be reappointed. In this case, first appointment procedures apply¹².

¹⁰ Council of State Plenary Session of the Chambers for Administrative Cases, Decision Date: 11.06.1993, Docket: 1993/65, Decision: 1995/208. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access date: : 15.07.2015.

¹¹ "Lecturers can be appointed for two years maximum in accordance with Article 31 of the Law No.2547; they can be reappointed in the same way if there is no academic member applying for the ranks they are holding at the end of two years and if it is believed that they should continue to work for the public interest. Their term of office expires automatically at the end of the appointment period. First appointment procedures apply in their reappointment. See. State Personnel Administration Procedures on Extending the Term of Office of Lecturers <http://personel.iyte.edu.tr/ogretim-elemanlari-gorev-suresi-uzatimi-islemleri/>, Access Date: 23.07.2015.

¹² "Lecturers can be appointed for two years maximum in accordance with Article 32 of the Law No.2547; they can be reappointed at the end of this period. Their term of office expires automatically at the end of the appointment period. First appointment procedures apply in their reappointment. See. State Personnel Administration Procedures on Extending the Term of Office of Lecturers <http://personel.iyte.edu.tr/ogretim-elemanlari-gorev-suresi-uzatimi-islemleri/>, Access Date: 23.07.2015.

1.4. Appointment to Support Staff Positions

Support Staff includes lecturers, specialists, translators and education planners. The conditions of being regarded as a public officer in terms of administrative law are regulated in Article 128 of the Constitution. It should be noted that the academic staff working in a post in higher education institutions, namely academic members, support staff, lecturers and instructors are in the status of “other public officers” as stated in Article 128 of the Constitution. It appears that the teaching assistants employed in the foundation universities stated to have a public entity in Article 130 of the Constitution can be accepted in this status as well¹³. Article 23 of the Regulations on Foundation Higher Education Institutions regulates the provisions concerning the academic staff working in foundation universities¹⁴. In this regulation, it appears that all the academic staff regardless of the distinction between state and foundation universities have the same status; however, the academic staff working in foundation universities are subjected to Higher Education Law for their working conditions, and to the Labor Law for salary and other personal rights¹⁵.

¹³ “The academic staff who provide higher education public service essentially and continuously should be regarded as “other public officers” stated in Article 128 of the Constitution.” See. Yıldırım, Turan-Samuray, Figen, (2010), “Vakıf Üniversitesi Öğretim Elemanlarının Statüsü”, Maltepe Üniversitesi Hukuk Fakültesi Dergisi, Sayı: 1, İstanbul. s.81-95.

¹⁴ Regulations on Foundation Higher Education Institutions, Article 23: “The selection and assessment of lecturers and assignment of the selected ones with appropriate academic titles and their promotions are carried out by the authorized academic bodies of the foundation higher education institution in accordance with the provisions of the applicable laws and regulations. In the appointment of lecturers, the requirements deemed necessary by the foundation higher education institution in terms of academic qualifications may also be stipulated as well as the required qualifications in the appointments to state higher education institutions. In the appointments of lecturers who will be assigned with especially practical courses in vocational foundation schools, they are required to have a professional experience. The working principles of the academic and administrative staff to be employed in foundation higher education institutions are subjected to the provisions of the Law No. 2547 which are foreseen for state universities. This staff is subjected to the provisions of Labor Act No.4857 in terms of the salary and other personal rights.” See. <http://www.mevzuat.gov.tr/Metin.Aspx?MevzuatKod=7.5.9768&MevzuatIliski=0&sourceXmlSearch=>, Access Date: 03.04.2015.

¹⁵ Council of State, the 8th Chamber decided on the abolishment of the term “personal rights” stated in paragraph 2 of Article 23 of the Regulations on Foundation Higher Education Institutions. Council of State Decision taken by the 8th Law Chamber, Decision Date: 29.04.2011, Docket: 2008/8235, Decision: 2011/2451. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasiIstemciWeb/>, Access date 26.07.2015.; please also see. Kalafat, Ahmet, (2013), “Bir Danıştay Kararı Üzerine Vakıf Üniversitesi Akademik Personelinin Hukukî Statüsüne İlişkin Bazı Değerlendirmeler”, İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi, Yıl: 12, Sayı: 24, İstanbul. s.160.

On the other hand, it is possible to say that the contracts made between the support staff employed in permanent tasks and the administration are accepted as administrative service contracts and therefore, the disputes that may arise between the administration and the staff are settled in the administrative jurisdiction. Council of State, Plenary Session of the Chambers for Administrative Cases decided that “higher education is a public service, an administrative service contract is signed between foundation universities and their academic staff to discuss the details of the public service and therefore the disputes arising from this contract fall into the remit of administrative jurisdiction¹⁶. It is stated in the doctrine as well that the contracts signed between the academic staff working in foundation universities and the administration is legally administrative service contracts and the disputes to arise from that should be settled in the administrative jurisdiction¹⁷. In this part of the present study, the appointment of research assistants and lecturers first and then that of other support staff are discussed.

1.4.1. Appointment of Research Assistants

Given the legislative provisions on higher education, it is seen that the appointments of research assistants to higher education institutions is carried out based on two methods: Conventional procedures and Academic Member Training Program (OYP). Nowadays, it is known that the number of research assistants appointed to higher education institutions through the conventional procedures is very low and research assistants are often appointed via a central system under Academic Member Training Program (OYP) created by Higher Education Council (YOK) in accordance with the provisions of the related legislation¹⁸. It can be said that this program has many aspects including

¹⁶ Decision of Council of State, Plenary Session of the Chambers for Administrative Cases on 12.03.2010 and Docket No.2010/5. See. <http://www.kazanci.com/kho2/ibb/files/iddgk-2010-5.htm>, Access Date: 12.12.2014.; In addition, the Decision of the Council of State, the 8th Law Chamber is also available. Council of State Decision taken by the 8th Law Chamber, Decision Date: 04.02.2003, Docket: 2002/5557, Decision: 2003/561. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasiIstemciWeb/>, Access Date: 03.07.2015.

¹⁷ Yıldırım, Turan, (2005), Türkiye'nin İdarî Teşkilâtı, Alkım Yayınevi, 4.Baskı, İstanbul. s.294.; Gözler, Kemal, (2009), İdare Hukuku, Ekin Kitabevi, Cilt: I, 2.Baskı, Bursa. s.579-580.; Giritli, İsmet-Bilgen, Pertev-Akgüner, Tayfun-Berk, Kahraman, (2013), İdare Hukuku, Der Yayınları, 6.Baskı, İstanbul. s.558.

¹⁸ Decree No.78, Additional Article 8, date and number of Official Gazette: 06.09.1983/18167.; the related Articles of Central Administration Budget Laws No.2010, 2011 and 2012, the date and number of Official Gazette, respectively: 31.12.2009/27449, 31.12.2010/27802, 29.12.2011/28157 (bis).; provisions of the Regulations on Principles and Procedures on Central Examinations and Admission Examinations to be Implemented in Direct or External Appointments to Lecturer Positions other than Academic Member Positions. Official Gazette on 31.07.1983 No.26953.

positive and adverse ones. This part of the present study aims to give brief information on the regulations on appointment of research assistants.

Given the related legislation, it is seen that staff with research assistant status is appointed based on different regulations. The fact that research assistants who do the same job are subjected to different provisions and different working conditions and therefore different work assurances are at the discretion of the law-maker and the Constitutional Court highlighted the following in the decision it took during the 1961 Constitution: "The fact that some people among those who provide the same services are subjected to public law in their relations with a university, while others are subjected to special legal provisions poses an inequality in itself. This is because no justification is available/can be shown in subjecting the people who are equal and assigned to provide educational public services to different legal provisions¹⁹." The difference that comes to forefront especially in research assistants employed in state and non-profit foundation universities is more distinct.

In the present study, first of all, the appointment of research assistants and then other research assistant appointment methods are discussed under the "Academic Member Training Program". In addition, it should be noted that in accordance with Article 35 of the Law No.2547 and the provisions of the Regulations on Research Assistants studying a Postgraduate Degree in another University on behalf of a University²⁰, there are also research assistants who are included in the university staff and studying a graduate degree in another university. In accordance with Article 4 of the related Regulations, "In order to train lecturers, research assistant positions of a university or an advanced technology institute newly established or being developed can be allocated to another university or advanced technology institute which is determined upon the application of the university that will allocate its staff to the graduate education, the opinion of the Academic Member and Researcher Training Committee and the decision of the Higher Education Council, and has a developed educational program. The allocated research assistant post may be vacant or filled. If the post is filled, the person in this post is registered in the related graduate program of the identified university or advanced technology institute without taking him/her to the admission exam again. Those people are assigned in the university or advanced technology institute they will study

¹⁹ Decision of the Constitutional Court, Decision Date: 25.05.1976, Docket No: 1976/1, Decision: 1976/28, Date and Number of Official Gazette: 16.08.1976/15679. See. <http://www.anayasa.gov.tr/Kararlar> Information Bank, Access Date: 05.06.2015.

²⁰ Official Gazette on 23.05.1997/22997.

a post-graduation degree²¹.” In accordance with Article 35 of the Law No.2547, appointment of research assistants are excluded from the present study. This is because these research assistants have the status of being staff already in another university²².

1.4.1.1. Appointment Based on Academic Member Training Program

Those who do a masters and a doctoral degree are the student who are taking graduate education. Each student who is doing a master’s and a doctoral degree is not academic staff. In order to have the academic staff title, one must be appointed to an academic post in accordance with the Law No.2547, Decree No.78, related Budget Laws and other legislation provisions.

As research assistants are getting prepared for “academic member” positions under the guidance of a supervisor, Higher Education Council puts that into practice by organizing a program in the name of “Academic Member Training”. Research assistants are the academic staff who is liable to do a master’s and a doctoral degree in general. Besides, they are also liable to improve themselves in their fields and to do research to get prepared for the academic membership.

Academic Member Training Program (OYP) is an employment process which is used to select academic members to be appointed by the Higher Education Council (YOK) and includes some peculiar rules²³. The Principles

²¹ “The implementation of Article 35 of the Law No.2547 is a program that aims to train research assistants in the universities that are newly established and underdeveloped in developed universities to return to their own universities as qualified lecturers. This practice is of great importance in ensuring universities fulfill their functions in an effective and efficient way in all aspects.” See. Özkal Sayan, İpek, (2009), “Türkiye’de Kamu Personel Sistemi: İdarî, Askerî, Akademik, Adlî Personel Ayrımı”, Ankara Üniversitesi Siyâsal Bilgiler Fakültesi Dergisi, Sayı: 64/1, Ankara. From footnote in p.232. Also see. Kahraman, Leylâ, (2007), “Türkiye’de Öğretim Üyesi Yetiştirme Politikası Bağlamında 35.Madde Uygulaması”, Mülkiye Dergisi, Sayı: 31/256, Ankara. s.187-218.

²² “The legal instrument of the assignment of training lecturers that is regulated in Article 35 of the Law No.2547 is the research assistant status regulation in Article 33 of the same law. Article 35 allows for the allocation of the filled research assistant posts of a university to another university for graduate education, and if vacant research assistant posts are allocated, the procedures of appointment to the vacant post are carried out by the university allocating the research assistants for graduate education. However, in both cases, appointment will be clearly performed to the research assistant post in accordance with Article 33 of the Law No.2547.” See. Öztürk, Burak, (2014), “Türk Yükseköğretim Düzeninde Öğretim Üyesi Yetiştirilmesinin Hukukî Çerçevesi”, İnönü Üniversitesi Hukuk Fakültesi Dergisi, Cilt: 5, Sayı: 2, Malatya. s.181.

²³ OYP page of YOK: <http://www.yok.gov.tr/web/oyp>, Access Date: 29.07.2015. OYP Program was canceled in 2016. The reason why it was canceled was explained that universities did not make any requests. Currently, it is also unclear what will happen in the future on this

and Procedures on Academic Member Training Program where the rules for such an employment process are determined have been accepted by YOK²⁴. No regulation is available on ÖYP in the Law No.2547. It appears that the main legal ground for these Procedures and Principles is Decree No.78 and the related Budget Laws; however, the related main principles and rules are not included in these regulations either. According to these Principles and Procedures, the OYP score of candidates are considered in the appointments to research assistant positions through OYP. In accordance with Article 5 of Principles and Procedures on Academic Member Training Program, which has been amended by the General Assembly of YOK, an OYP score is calculated for each OYP research assistant applying to be appointed to the Academic Member Training Program as a research assistant or to take field exams or undergraduate education in an OYP university as required by the program. 50% of the Academic Staff and Postgraduate Education Admission Exam (ALES) and if any, 15% of the foreign language exam score are taken into consideration in the calculation of OYP score²⁵. In the calculation of OYP score of the applicants of OYP research assistant positions with the field exam score, 20% of the undergraduate grade-point average, 25% of the Academic Staff and Postgraduate Education Admission Exam (ALES), 40% of the field exam score and if any, 15% of the foreign language exam score are taken into consideration²⁶. As is seen, a decision was taken in the General Assembly of YOK on 14.05.2015 that the applicants can apply for the OYP research assistant positions through “field exam score” and the effect of the field exam score on the OYP score was determined to 40%²⁷.

In accordance with Article 6 of the Principles and Procedures on Academic

matter.

²⁴ See. <http://www.yok.gov.tr/web/oyp/usul-ve-esaslar>, Access Date: 30.07.2015.

²⁵ According to the Principles and Procedures on Academic Member Training Program, “This score can be updated based on the last ALES and foreign language exam results. YOK Executive Board is authorized to increase or decrease the percentage rates up to ten point among the scores obtained in the applications for the fields of graduation and to increase the OYP score up to 10%.”

²⁶ Accordingly, it seems that a minimum language score is not available to apply for the OYP. In the applications, 15% of the language score, if any, will be considered.

²⁷ In accordance with paragraphs 2 and 3 of Article 6 of the Principles and Procedures on Academic Member Training Program, which has been amended by the YOK General Assembly, “At least four times more applicants than the number of positions announced are invited starting from those who have the highest OYP scores among the applicants of the field exam (Executive Board is authorized to invite more than four times of applicants). The applications of other applicants with the same score as the last applicant are also accepted. The field examination is held by the exam commission(s) determined by the Higher Education Council among the academic members working at the related discipline in universities.”

Member Training Program; “The applicants make their applications for the announced OYP research assistance positions by means of declaration on the website of YOK. The placements in OYP research assistant positions are performed via a central system based on the OYP score and the results are announced by YOK following the approval by the Executive Board²⁸. The appointment of the applicants to the announced positions is carried out in accordance with Article 33 of the Law No.2547²⁹. The accuracy of applicants’ declarations during the appointment is checked by the related higher education institution³⁰. The appointment is carried out for a year at the latest for those whose foreign language score is below fifty and for two years at the latest for those whose foreign language score is between fifty and sixty five (excluding sixty-five)³¹.”

²⁸ Therefore, researching minimum and maximum points for each division and department in ÖYP application is extremely important for research assistant candidates getting prepared for OYP.

²⁹ “The placement of research assistants under OYP via a central method means performing the appointment based on the placement results. In other words, it transforms the discretion power vested in the administration in Article 33 of the Law No.2547 into a non-discretionary power; and makes suggestions of the chair of discipline or art major and positive opinions of the Chair of the Department, the Dean and the directors of institutes, vocational schools or conservatories as foreseen in the Law non-functional.” See. Öztürk, agm, s.192-193.; In addition, one must have the qualifications stated in the related post announcement of the higher education institute in order to apply for OYP.

³⁰ In accordance with paragraphs 5 and 6 of Article 6 of the Principles and Procedures on Academic Member Training Program, which have been amended by the YOK General Assembly, “Those who are identified to submit false statements to have an advantage over themselves are not appointed to a research assistant post under OYP. All the penal and legal responsibility for the appointment procedures of the research assistants appointed despite their false statements belongs to the related research assistant and the officers in the higher education institution performing the appointment. In case those who do not take office although they are entitled to be appointed to a research assistant post under OYP, resign after taking office and cannot be appointed since they have submitted false statements to have an advantage over themselves apply for the research assistant positions under OYP, 20% deduction is made from their OYP scores for two years.”

³¹ It is possible to say that the language score obtained from YDS is primarily important after they are appointed as research assistants under OYP. In accordance with Article 7 of the Principles and Procedures on Academic Member Training Program, if the YDS language score of the research assistant participating in OYP is lower than sixty five, those who have sixty five and higher scores should be given priority. A research assistant appointed under OYP should have at least fifty points from YDS within a year as of the first date of appointment. The research assistants whose language scores are below fifty and whose language scores are below sixty five as of the first date of appointment as a research assistant are discharged from their positions at the end of one and two years, respectively. In accordance with paragraphs 6 of Article 9 of the Principles and Procedures on Academic Member Training Program; “If the OYP research assistants whose language score is sixty five and above on the date when they are appointed or at the end of their

In accordance with Article 10 of the Principles and Procedures on Academic Member Training Program, “study periods of OYP research assistants are the maximum periods determined in the Postgraduate Education Regulations. In case the research assistants who have been employed under OYP and take foreign language education as their foreign language scores are below sixty five, six months are added into their maximum study periods specified in the Postgraduate Education Regulations. No support is given to higher education institutions under OYP for the scientific preparatory education received during the period of time added into the maximum study periods specified in the related Regulations. The research assistants under OYP who fail to complete their studies during the period of time given to gain foreign language competency as per these ‘Procedures and Principles’ and the maximum study time specified in the Postgraduate Education Regulations, who do not want to continue OYP, do not take office in the higher education institution where he/she has the post of research assistant or takes office but do not fulfill the obligatory service are discharged and actions are taken in accordance with the letter of undertaking and the deed of surety bond³².”

In accordance with Article 9 of the Principles and Procedures on Academic Member Training Program, the higher education institutions that would like to attend the academic member training program have to state numbers, qualifications and characteristics regarding OYP specified in these principles to YOK³³. The graduate programs to be supported under OYP and their vacancies are determined via the decision of YOK Executive Board. The programs and vacancies determined are announced on the website of YOK. The minimum qualifications to be required in the applicants of the vacancies are set by the Executive Board based on the suggestions of the higher education institutions. The placements in the graduate education vacancies are carried out by the Executive Board via a central system based on the OYP score of the applicants³⁴.

foreign language education in the country do not take office in the given higher education programs determined by Higher Education Executive Board, they are discharged from their positions.”

³² In accordance with the paragraph 4 of Article 10 amended by the YOK General Assembly of the Principles and Procedures on Academic Member Training Program, “In case the research assistants who are placed in the graduate education vacancies announced by YOK are discharged from the OYP, they are also discharged from the graduate education.”

³³ In accordance with Article 9 of the Principles and Procedures on Academic Member Training Program, “The higher education institutions that would like to attend the academic member training program notify their graduate departments, the number of academic members in these departments, education and research infrastructures, the number of non-OYP graduate students and the number of research assistants that they plan to provide graduate education under OYP to YOK.”

³⁴ In accordance with the paragraph 4 of Article 10 and paragraph 5 amended by the YOK

In accordance with the paragraphs 7, 8 and 9 of Article 9 of the Principles and Procedures on Academic Member Training Program, "The vacancy requests of the higher education institutions that would like to provide graduate education in the same institution for the research assistants who have been appointed under OYP and started their graduate education in another higher education institution and/or department other than the graduate education vacancies determined by the Executive Board before the date of appointment are settled by the Executive Board. The vacancy requests of the higher education institutions that would like to provide graduate education in the same institution for the research assistants who have been appointed under OYP and started their graduate education in another higher education institution and/or department other than the graduate education vacancies determined by the Executive Board after the date of appointment are not assessed. If the higher education institution/department/division where the OYP research assistants who still continue their graduate (master's, PhD, integrated PhD) in a state higher education institution is among the higher education institutions that are announced by Higher Education Institution and can provide graduate education under OYP, the research assistants placed in this department are excluded from the graduate education vacancies allocated in this higher education institution. There is no need for the higher education institution to ask for a vacancy for the research assistants in this situation³⁵."

General Assembly of the Principles and Procedures on Academic Member Training Program, "A special talent exam is organized by the related higher education institution for the departments accepting students to graduate education through a special talent exam. The assessment and placement are carried out based on the calculation of 75% of the OYP score and 25% of the special talent exam organized by the related higher education institution. The OYP research assistants who have been appointed and whose language score is sixty five and above can be assigned in other higher education institutions under OYP after they are registered in the OYP graduate programs they are placed by YOK through the decision of YOK Executive Board in accordance with Article 35 of the Law No.2547. Upon their requests, the OYP research assistants who have been appointed and whose language score is sixty five and above can also receive their graduate and postgraduate education in the higher education they are appointed to. However, the research assistants who have been appointed to the higher education institutions that are not older than ten years old as of their date of establishment and received their postgraduate degrees in such universities as well cannot benefit from the OYP supports. The higher education institutions that have the OYP programs in related fields can provide postgraduate education for the research assistants appointed to their own positions without any YOK Executive Board decision."; "As admission to graduate programs is a part of the principles of the graduate education, passing a rule in the Procedures and Principles issued by YOK regarding a provision the regulation of which has been left to the Inter University Council by the Law No.2547 is unlawful." See, Öztürk, agm, s.194.

³⁵ In accordance with the paragraphs 10, 11 and 12 of Article 9 of the Principles and Procedures on Academic Member Training Program, "The fact that the research assistants

A budget has been prepared for each research assistant by YOK for the expenses to be made in the educational activities of research assistants under OYP³⁶. The funds in the budget are transferred to the higher education institution where the OYP research assistant has been placed and the OYP costs of the related research assistant have been covered from these funds. This regulation aims not to create an extra burden on the related higher education institution in terms of the costs of the OYP research assistants. Given the scarcity of the funds of the higher education institutions, it is possible to say that this regulation is to the point; however, in case the higher education institution where the OYP research assistant is placed has good amount of funds, this might turn into a disadvantage for OYP research assistants as they cannot use the funds of the higher education institution they are placed in; they can only use the funds in the budget allocated to them.

After stating the relevant legislative provisions, if a brief evaluation is necessary on research assistant's employment via OYP; it is possible to say that OYP used to be an objective system in the placement of research assistants in higher education institutions before the regulation introduced in the field exam score. This is because the scores that the applicants have in the central exams organized by OSYM such as ALES and YDS also play a role in the calculation of OYP score as well as the undergraduate grade-point average. In addition to keeping this regulation, as stated above, a decision was taken in the General Assembly of YOK on 14.05.2015 that the applicants can apply for the OYP research assistant positions through "field exam score" and the effect

who complete their graduate education under OYP continue their postgraduate education in another institution is decided by the Executive Board upon the request of the higher education institution. It is essential that OYP research assistants receive graduate education in the department they are appointed to. As long as it is the same department, providing a graduate education in another division than the one they are appointed to is at the discretion of the higher education institution. However, department can be changed upon the request of the higher education institution and the decision of the Executive Board. The Executive Board takes the necessary measures in the provision of new graduate programs by higher education institutions in the areas where challenges are encountered in having lecturers in order to train academic members."

³⁶ In accordance with Article 13 of the Procedures and Principles on Academic Member Training Program that regulates the OYP Expenses and has been amended by YOK General Assembly; "The funds transferred to the higher education institution for each OYP research assistant and to be used during their educations are used for project expenses under OYP, foreign language education in the country or abroad, the expenses of research to be performed as part of the assertion in a county abroad, necessary procurement for education, basic office equipment, commodities, machinery-equipment supply, maintenance, repair and support costs, participation of OYP research assistants in scientific meetings in the country and abroad not longer than 15 days in a year in total (including the payments made in accordance with the Travel Expenses Law No.6245)."

of the field exam score on the OYP score was determined to 40%³⁷. Especially, given the high number of claims of favoritism in the written and/or verbal exams in hiring research assistants in higher education institutions through conventional procedures, OYP can be claimed to be a sound application in fulfilling the principle of merit in staff employment, except for the application of a field exam score. However, as mentioned above, the verbal exam that is inarguably open to subjective assessments in our country seems to be applied in OYP as well with the regulation of the application of a field exam score and that the organization of field exams by the exam commissions determined by the Higher Education Council among the academic members working at the related disciplines in universities. Given especially the influence of the field exam to the OYP score by 40%, it seems that OYP will partially lose its objectivity in employing research assistants. This is because the major problem in verbal exams is the audit of exams and in case of a contradiction to law, it is about whether it can be proven or not³⁸. The fact that the regulations stipulating the organization of verbal exams should be stated in a manner that does not allow for subjective evaluations and in detail, the audio and video records of verbal exams should be taken³⁹ and these records should be maintained at least until the term of litigation is expired and the rules on preparing the verbal exam questions and asking them to applicants by lot are regulated by legislation would eliminate the problem of proof in verbal exams and set the limits of the legality audit and ensure the principle of legal stability and confidence. The fact that the verbal exam is recorded and kept as an exam document is regulated by legislation would set the legal grounds for cancellation in case the verbal exam is not recorded or kept. Ensuring the establishment of an infrastructure that would facilitate the legal audit of deeming the applicant

³⁷ In the applications for research assistant positions under OYP using the field exam scores, through the regulation on the fact that the effect of field exam score on the OYP score will be 40%, the undergraduate grade-point average has been reduced to 20% and ALES score to 25% in the calculation of OYP score.

³⁸ Avcı, Mustafa, (2012), "Adli, İdarî ve Askerî Hâkimliğe ve Savcılığa Alınmaya İlişkin Bazı Değerlendirmeler", Ankara Üniversitesi Hukuk Fakültesi Dergisi, Cilt: 61, Sayı: 3, Ankara Üniversitesi Basımevi, Ankara. s.897-898.

³⁹ "Ensuring that the answers given in verbal exams are recorded using technological opportunities and examined and controlled objectively is considered to be an important and sound implementation in putting the principle of rule of law into operation." See. Council of State Decision taken by the 5th Law Chamber, Decision Date: 21.05.2008, Docket: 2007/1771, Decision: 2008/3008. Danıştay Dergisi, (2008), Yıl: 38, Sayı: 119, Ankara. s.191-194.; "Although there is no provision in the regulation where the benchmarks on verbal exams are stipulated; it is considered that a detailed exam report should be issued in a way to allow for a legal audit as required by the nature of a verbal exam." See. Council of State Decision taken by the 8th Law Chamber, Decision Date: 09.06.2008, Docket: 2008/535, Decision: 2008/3422. Danıştay Dergisi, (2008), Yıl: 38, Sayı: 119, Ankara. s.407-408.

unsuccessful in the verbal exam is the duty of the legal administration⁴⁰. The principle of the Rule of Law does not allow for the regulations that would preclude or hamper the judicial review of administrative actions⁴¹.

In addition, in paragraph 9 of Article 130 of the Constitution, it is stipulated that “the duties, titles, the conditions of appointment, promotion and retirement of academic members and training academic members” will be regulated by law. In this scope, the issues on the announcement of OYP research assistant positions, applications to and placement in these positions should be regulated by law⁴². No regulation is available on ÖYP in the Law No.2547. It appears that the main legal ground for the Procedures and Principles on Academic Member Training Program which regulates appointment through ÖYP is Decree No: 78 and the related Budget Laws; however, the related main principles and rules are not included in these regulations either. The Supreme Court stated in its decisions what must be understood from “regulation by law” included in various articles of the Constitution in its decisions. Accordingly, giving a general, unlimited power to regulate the principles and the framework of which are uncertain to the executive branch on the issues that should be regulated by law would be contrary to Article 7 of the Constitution⁴³. However, leaving the regulation of the expertise and technical details to execution would be unconstitutional provided that the basic principles and framework are determined in law⁴⁴. As stated by the

⁴⁰ Council of State Decision taken by the 8th Law Chamber, Decision Date: 09.06.2008, Docket: 2008/535, Decision: 2008/3422. *Danıştay Dergisi*, (2008), Yıl: 38, Sayı: 119, Ankara. s.408.

⁴¹ Avcı, “Doçentlik Sınavı ve Doçentlik Kadrosuna Atanma”, s.26-27.

⁴² Öztürk, agm, s.183, 190.; “It is clearly not possible to put a system based on a central placement like OYP into operation without making any changes in legal regulations. However, it should be noted that the possible legal regulations to ensure that must comply with the principle of university autonomy stated in Article 130 of the Constitution.” See. Öztürk, agm, s.194.

⁴³ The Supreme Court stated that, “on the issues that should be regulated by law according to the Constitution, the executive branch should not be given a general, unlimited power to regulate the principles and the framework of which are uncertain”. Decision of the Supreme Court, Decision Date: 02.10.1996, Docket: 1996/61, Decision: 1996/35, Date and Number of Official Gazette: 27.12.1996/22860. See. <http://www.anayasa.gov.tr/Kararlar Databank>, Access Date: 01.08.2015.

⁴⁴ Decision of the Supreme Court, Decision Date: 11.06.2003, Docket: 2003/63, Decision: 1996/63, Date and Number of Official Gazette: 08.11.2003/25283. Decision of the Supreme Court, Decision Date: 27.11.1997, Docket: 1997/37, Decision: 1997/69, Date and Number of Official Gazette: 15.01.1999/23584. Decision of the Supreme Court, Decision Date: 07.05.2002, Docket: 2000/17, Decision: 2002/46, Date and Number of Official Gazette: 26.03.2003/25060. See. <http://www.anayasa.gov.tr/Kararlar Databank>, Access Date: 01.08.2015.

Supreme Court, the overall regulatory process of the administration should not be contrary to law, and must be based on law⁴⁵. The power to regulate of the execution is a limited, complementary and dependent power. Execution might make regulations to show the implementation of the issues the basic principles, framework and limits of which have been established by law⁴⁶. In this case, administration may regulate the issues requiring know-how and expertise through the overall regulatory process in order to demonstrate the application of laws⁴⁷.

1.4.1.2. Appointment by Article 33/a of Law No. 2547

Article 33 of the Law No. 2547 33 is the basic regulations on the appointment of research assistants. This is because appointments are made for OYP research assistants in accordance with Article 33 of the Law No. 2547, 50/d Article of the Law No.2547 as well as those as per directly Article 33.

Article 33 of the Law No. 2547 that regulates research assistants does not contain any connection between graduate education and being a research assistant. Therefore, those who have completed a graduate degree or has not taken such a study can also be appointed as research assistants in accordance with the regulations of Article 33/a⁴⁸. According to Article 33/a of the Law No.2547, research assistants are the support staff who are assisting the research, examination and tests performed in higher education institutions and perform other tasks assigned by competent bodies. They shall be appointed in research assistant positions for up to 3 years upon the suggestion of the Chair of the relevant disciplines or majors, upon the positive opinion of the Chair of the Department, the Dean, the director of the institute, college or conservatory and with the approval of the President and their term of office expires automatically at the end of the appointment period. In a decision taken by 5th Chamber of Council of State concerning an opinion to be received on the appointment to a research assistant post, "The fact that the rejection of an application of an individual for being appointed to the research assistant without receiving the opinion of the Chair of the Division in defiance of Article 33/a is formally against the law"⁴⁹. As stated in the said decision, not receiving

⁴⁵ Decision of the Supreme Court, Decision Date: 22.12.1988, Docket: 1988/5, Decision: 1988/55, Date and Number of Official Gazette: 25.07.1989/20232. See. <http://www.anayasa.gov.tr/Kararlar/Databank>, Access Date: 01.08.2015.

⁴⁶ Teziç, Erdoğan, (1972), "Yasama Yetkisi ve Kanun Hükmünde Kararnameler", Amme İdaresi Dergisi, Cilt: 5, Sayı: 1, Ankara. s.9.

⁴⁷ Avcı, Mustafa, (2009), Devlet Memurları Kanunu Kapsamında Kamu Görevliliğine Giriş, Yetkin Yayınları, Ankara. s.86.

⁴⁸ Öztürk, agm, s.176.

⁴⁹ Council of State Decision taken by the 5th Law Chamber, Decision Date: 22.11.1988,

the opinion to be taken from the relevant authorities on the appointment to a research assistant post will formally injure the appointment process, which is an administrative process.

The appointment of students of specialty in medicine and graduate, qualification in art and doctoral students to support staff positions is carried out in accordance with the procedures specified in Article 33 of the Law No. 2547⁵⁰. Research assistant assignments in public care institutions are performed based on the medical specialty exam (MSE)⁵¹. The appointments of graduate, qualification in art, doctoral and specialty in medicine students who meet all the requirements of appointment to the support staff positions are carried out for a maximum of one year at each time⁵². In addition, the 5th Chamber of the Council of State stated that those who are having medical specialty training are subjected to the same principles and procedures that apply to assistants, and the purpose of the medical specialty training is different from research assistant positions, which are the beginning of an academic career. According to the decision in question, "According to Article 30/1 of the Medical Specialty Regulation, the main objective of the specialty in medicine is to provide doctors with the freedom to open up businesses and to engage in medical activities related their expertise in the related workplaces in the private or public sector and to perform their profession freely. It seems that

Docket: 1988/2845, Decision: 1988/2749. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 22.07.2015.

⁵⁰ Article 3 of the Regulation on Rights and Responsibilities of among Those who are graduate students and are to be Appointed to the Ranks of Support Staff and on the Admission Examination of Medical Specialty Students. Official Gazette on 13.10.1984/18544.

⁵¹ Özkal Sayan, agm, s.226.

⁵² "Tenure track research assistants (in accordance with Article 33/a of the Law No. 2547) and those who have a limited term of office and education period (Article 50/d of the Law No. 2547) are employed in two different status. Research assistants who work in both status are subject to the procedures specified in the Article 33/a of the Law No. 2547 for the extension of their term of office and appointment periods again. However, the term of office of those who have a tenure track here can be extended for three years at a time, the term of office of the research assistants who are employed as per Article 50/d can be extended only for a year at a time in accordance with Article 5 of the 'Regulation on Rights and Responsibilities of among Those who are graduate students and are to be Appointed to the Support Staff Posts and on the Admission Examination of Medical Specialty Students and the graduate students are discharged from this post at the end of the 6th term and the 12th term for doctoral students even if their status as a student continues. Research assistants whose term of office is almost over applies to his/her department with a petition and an activity report before the term of office is over. The tenures are extended again in accordance with the procedures specified in Article 33/a of the Law No. 2547." See. State Personnel Administration Procedures on Extending the Term of Office of Lecturers <http://personel.iyte.edu.tr/ogretim-elemanlari-gorev-suresi-uzatimi-islemleri/>, Access Date: 11.07.2015.

an absolute requirement of post is not stipulated for the medical specialty training while making an allocation of the research assistant post in higher education institutions. As can be understood from Article 3 of the Medical Specialty Regulation, the medical specialty training is not necessary taken in higher education institutions. In this case, those who are taking medical specialty training must complete their education as other graduate students regardless of a post⁵³.”

1.4.1.3. Appointment by Article 50/d of Law No. 2547

Through the regulation specified in paragraph ‘d’ of Article 50 of the Higher Education Law No.2547, it is intended to support the students taking graduate education in the related institutes financially by employing them as a research assistant in these institutes as if they were granted a graduate education scholarship, unlikely the purposes of the regulation specified in Article 33 of the Law No.2547. It should be noted that the paragraph ‘d’ of Article 50 has been more consulted by administrations compared to the implementation of Article 33 due to the status given to research assistants. The 8th Chamber of the Council of State stated that the purpose of appointments made according to Articles 33 and 50/d of the Law No. 2547 is different and the research assistant appointments made in accordance with the Article 33 must be extended unless there is a justification: “In two articles of the Law No.2547, the appointment periods are determined different for the research assistant post. On the other hand, appointments made in accordance with paragraph ‘d’ of Article 50 of the Law No.2547 are intended to support graduate students financially during their studies, but there is no rule that allows for this comment in Article 33 of the same Law. The appointment of a person to a research assistant post in accordance with Article 33 of the Law No.2547 requires not dismissing him/her from her duty after completing the postgraduate education and extending the term of office again unless there is a justified reason according to the same Article⁵⁴.”

In the Regulation on Rights and Responsibilities of among Those who are graduate students and are to be Appointed to the Ranks of Support Staff and on the Admission Examination of Medical Specialty Students, it is clearly stated that those who are appointed in accordance with the paragraph ‘d’ of

⁵³ Council of State Decision taken by the 5th Law Chamber, Decision Date: 28.10.1992, Docket: 1989/2664, Decision: 1992/2806. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 10.07.2015.

⁵⁴ Council of State Decision taken by the 8th Law Chamber, Decision Date: 07.02.1995, Docket: 1994/2851, Decision: 1995/365. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 08.07.2015.

Article 50 of the Law No.2547 will be appointed to the ranks of support staff temporarily. Further, as stated in Article 10 of the related Regulation, those who are temporarily appointed to the ranks of support staff and are granted their graduate, postgraduate or qualification in art diplomas or medical specialty certificates having successfully completed their graduate, postgraduate, qualification in art or medical specialty education are discharged from their ranks automatically in accordance with Article 50 of the Law No. 2547. When the term of office of the research assistants employed in accordance with Article 33 of the Law No.2547 is expired, they are discharged from the post automatically; however, the fact that they will be appointed 'temporarily' is not specified in Article 33, and the reason why Article 33/a and 50/d have been regulated is different and according to the paragraph 2 of Article 10 of the related Regulation ⁵⁵, among those who are employed as per the paragraph 'd' of Article 50 of the Law No. 2547, the ones whose services are needed are stated to be employed by being appointed again as support staff. Therefore, it is understood from these regulations that the ranks mentioned in the paragraph 'd' of Article 50 of the Law No.2547 cannot be held continuously and they are temporary, the term of office of graduate students is over when they complete their studies; on the other hand, it is possible to appoint to the ranks of support staff stated in Article 33 when needed. The 8th Chamber of the Council of State stated that the implementation of the paragraph 'd' of Article 50 of the Law No.2547 is different from that of Article 33 in its decision as follows: "In this case, the person who become a research assistant in accordance not Article 33 but Article 50 of the Law No.2547 has completed his/her specialized training in medicine and become a specialist. The term of office was extended obligatorily due to the compulsory military service and military service time was added to this time. In the proceeding in dispute where the administration exercised its discretion not to extend his term of office after compulsory extensions, there is no illegality⁵⁶." In its decision where it highlighted that the discretionary power about the reappointments of support staff is not unlimited and the proceeding of not appointing should be based on a justified reason, the 5th Chamber of the Council of State stated that "the administration has been granted a discretionary power to appoint the research assistants whose term of office has been expired; however, this power is limited to the public interest and service requirements; in addition,

⁵⁵ Article 10 of the Regulation on Rights and Responsibilities of among Those who are graduate students and are to be Appointed to the Ranks of Support Staff and on the Admission Examination of Medical Specialty Students. Official Gazette on 13.10.1984/18544.

⁵⁶ Council of State Decision taken by the 8th Law Chamber, Decision Date: 09.03.1995, Docket: 1994/2879, Decision: 1995/697. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 19.07.2015.

the determination whether the person to be appointed again has the qualifications required by the position should be performed in line with the purposes and requirements of public services". In the event mentioned in this decision, the term of office of the person was not extended claiming that he presented negative behaviors during the general and Open University exams. The 5th Chamber of Council of State decided that "the fact that the term of office of the person was not extended based on the non-concrete claims was not against the legislation in terms of service requirements and public interest since the administration did not send any information or documents in reply to the interim decision of the administration court on sending all kinds of information and documents on this issue⁵⁷. Therefore, the positions of the research assistants and other support staff including lecturers and instructors (those who fail in the graduate education among the research assistants subjected to the implementation of Article 50/d ⁵⁸ or who complete their graduate education) should not be dismissed except for a justified reason such a disciplinary punishment.

It should be also noted that in accordance with the (Art.6) Regulation on Rights and Responsibilities of among those who are graduate students and are to be Appointed to the Ranks of Support Staff and on the Admission Examination of Medical Specialty Students, a decision on the re-appointment of the graduate students appointed temporarily to the ranks of lecturer through the same procedures is to be taken by the President considering other applicants who would like to be appointed to these ranks as well. In addition, other regulations that would not be contradictory to Articles 33 and 50 of the Law No.2547 and be in parallel to these regulations can also be made on the employment and appointment of research assistants by the executive boards of universities. In this regard, the 8th Chamber of Council of State did not see any illegality in the decision of the university administrative board on the way of appointment that includes parallel arrangements to laws and regulations and does not hinder the execution of the stated service since

⁵⁷ Council of State Decision taken by the 5th Law Chamber, Decision Date: 29.01.1992, Docket: 1991/525, Decision: 1992/117. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access date: : 15.07.2015.

⁵⁸ In our opinion, the student status that emerged as a result of the amendment in Article 44 of Law No.2547 cannot be said to affect the implementation of the Article 50/d of the same law. This is because the fact that the research assistants who have been appointed in accordance with the implementation of Article 50/d and who fail in their graduate education are dismissed from their positions, which would not be against laws in terms of public interest and service requirements. In our opinion, the fact that those who fail in their graduate education among the research assistants appointed as per Article 33/a of the Law No. 2547 and through OYP are dismissed can be said to be lawful on the same grounds.

the research assistants appointed in accordance with either 33/a Article or 50/d Article of the Law No.2547 are the support staff who assist the research, examination and tests performed in higher education institutions and the way of appointment does not change their qualifications for being a research assistant⁵⁹.

It seems that the research assistants employed in accordance with paragraph 'd' of Article 50 of Law No. 2547 do not have any employment assurance and they are automatically dismissed from their post when they finish their graduate education. However, the academic staff that successfully complete their graduate education and prove their academic qualifications should not be dismissed from their post, which is required for employment security. Indeed, the research assistants employed in accordance with Article 33 of the Law No.2547 continue their duties if they are successful in their graduate education and if needs arise. In addition, even if the research assistants employed in accordance with Article 33 of the Law No.2547 fail in their graduate education, they could continue working in their jobs when required, while the research assistants employed in accordance with the paragraph 'd' of Article 50 of the Law No.2547 are dismissed from their ranks even if they are successful in their graduate education, which does not comply with the principles of equality and merit in the public personnel law and is not fair either. Therefore, it seems that this regulation is against the Articles 10 and 70 of the Constitution. It should be also noted that the law maker is expected to make the legal regulations to provide at least employment security to the research assistants employed in accordance with the paragraph 'd' of Article 50 of the Law No.2547. With the legal regulations to provide employment security to the research assistants employed in accordance with the paragraph 'd' of Article 50 of the Law No.2547, the job losses of the research assistants who successfully complete their graduate education and dismissed automatically from their ranks would be prevented.

1.4.2. Appointment of Experts, Translators and Education Planners

According to Law No. 2547 (Art.33 /b), experts are support staff who are directly or indirectly related to education, and assigned in laboratories, libraries, workshops and other areas of application with a job that requires special knowledge or expertise. There are no provisions in laws and regulations as to whether experts have received higher education or not and the 5th and 8th Chambers of Council of State also seem to give different decisions in this regard.

⁵⁹ Council of State Decision taken by the 8th Law Chamber, Decision Date: 28.03.2001, Docket: 2000/1501, Decision: 1995/1263. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 16.07.2015.

In a decision taken by the 5th Chamber of Council of State stated that there is no provision that requires having a higher education for working as a specialist in accordance with the Law No.2547 and Higher Education Personnel Law No. 2914 and that experts are defined as support staff who are directly or indirectly related to education, and assigned in laboratories, libraries, workshops and other areas of application with a job that requires 'special knowledge or expertise'. Given this fact, as it is understood that the services of the person who is a specialist in the assigned area are needed; therefore, his/her term of office has been extended for three times before and nobody who has received an education in this field could be employed, the Council of State decided the fact that the term of office of the person who did not have any problems in terms of post was not extended just because he/she did not have a higher education was against the legislation and stated that the requirement of having a higher education is not stipulated to work as a specialist⁶⁰. The 8th Chamber of Council of State made a different assessment in this regard. In the decision taken by the 8th Chamber of the Council of State, it is stated that "although the education level is not clearly specified in the Law No.2547 so as to be appointed as a specialist, it seems that an associate's degree is not enough for the experts who are lecturers in universities and perform education-related duties as support staff. In this case, in the proceeding in dispute regarding the person appointed from the specialist post to the technician post justifying that he/she is a holder of associate's degree, there is no illegality in terms of the requirements of public service and public interest⁶¹." It can be stated that the experts employed in universities as support staff should have a higher education degree in terms of the service requirements.

According to Law No. 2547, translators are support staff who are employed in oral or written translation tasks (Art.33/c). Education planners are the support staff assigned in planning education and training in higher education institutions. According to Law No.2547 (Art.33/e), the appointment of specialists, translators and education planners or their assignment by a contract are performed by receiving the opinions of the related executive boards upon the suggestion of deans in faculties and departments affiliated to faculties, the directors in the institutes or colleges affiliated to the President, the Chair of the disciplines in the departments affiliated to the President

⁶⁰ Council of State Decision taken by the 5th Law Chamber, Decision Date: 17.11.1992, Docket: 1991/3369, Decision: 1992/3091. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasistemciWeb/>, Access Date: 17.07.2015.

⁶¹ Council of State Decision taken by the 8th Law Chamber, Decision Date: 22.11.1999, Docket: 1998/374, Decision: 1995/6527. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasistemciWeb/>, Access Date: 18.07.2015.; please also see. Nuhoğlu, Ayşe-Karan, Nur-Özdemir, Eyüp, (2007), İçtihatlı Yükseköğretim Mevzuatı, Yetkin Yayınları, Ankara. s.61 vd.

and upon the approval of the President for maximum two years. Their term of office expires automatically at the end of the appointment period. They can be reappointed. In this case, first appointment procedures apply⁶². In addition, they might also be appointed to these statuses permanently after being appointed for three times.

2. Academic Membership

According to the Law No.2547, academic members are assistant professors, associate professors and professors working in higher education institutions. Appointment to the academic membership is an administrative process that starts with the announcement of the position and ends with the appointment by the President⁶³. In this part of the study, the regulations on the appointment of academic members are highlighted after making general statement on the subject.

2.1. Prerequisite for Appointment to Academic Membership

In accordance with the Regulation No.2547 on the Promotion and Appointment to Academic Membership (Art.2/1), having the qualifications specified in Article 48 of the Law No.657 is a prerequisite to be appointed to the assistant professorship, associate professor and professor⁶⁴. Those who

⁶² “Specialists, translators and education planners can be appointed for two years maximum in accordance with Article 33/e of the Law No.2547; they can be reappointed at the end of this period through same procedures. Their term of office expires automatically at the end of the appointment period. First appointment procedures apply in their reappointment. See. State Personnel Administration Procedures on Extending the Term of Office of Lecturers <http://personel.iyte.edu.tr/ogretim-elemanlari-gorev-suresi-uzatimi-islemleri/>, Access Date: 23.07.2015.

⁶³ Tekinsoy, M. Ayhan-Mısır, Mustafa Bayram, (2012), “Öğretim Üyeliğine Atanma Sürecinin Başlangıcı, Ek Koşullar ve Jüri Raporları”, Ankara Üniversitesi Hukuk Fakültesi Dergisi, Sayı: 61/1, Ankara. s.351.

⁶⁴ The following general and special conditions are stipulated for those who are to be employed as a public officer.

A) General conditions:

1. Citizenship of the Republic of Turkey,
2. Meeting the age conditions specified in Article 40 of this Law,
3. Meeting the educational conditions specified in Article 41 of this Law,
4. Not being deprived of public rights,
5. Even if the times stated in Article 53 of the Turkish Penal Code are expired, not being sentenced to imprisonment for a year or more due to a crime committed deliberately or even if pardoned, not being sentenced due to the crimes committed against the state security, Constitutional order and the functioning of this order, embezzlement, extortion, bribery, theft, fraud, forgery, breach of trust, fraudulent bankruptcy, bid rigging, rigging in the performance of the deed, laundering of the assets obtained from an offense or smuggling,

have these prerequisites can become a candidate to be appointed to the ranks of academic member as long as they meet other requirements in the related legislation. It would be helpful to briefly talk about the additional conditions introduced by higher education institutions in appointment to academic membership and getting academic titles before moving to the appointment to academic membership.

2.2. Additional Conditions for Appointment to Academic Membership in Higher Education Institutions

The conditions for appointment to academic membership are stated in the Regulation No.2547 on the Promotion and Appointment to Academic Membership. However, in the appointments to academic membership in higher education institutions, additional conditions seem to be required other than the specified minimum conditions⁶⁵. With the paragraph 2 added into Article 2 of the Regulation on the Promotion and Appointment to Academic Membership, it was accepted that additional conditions might be introduced by higher education institutions as well as laws and regulations. However, the execution of the decision was suspended by the 8th Chamber of the Council of State on the grounds that higher education institutions do not have an authority to make such a regulation⁶⁶. The reason for the

6. For the compulsory military service;

a) Not being related to the military service,

b) Not being at the age of military service,

c) If at the age of military service, having served as a regular or delayed the military service or being transferred to the reserve class,

7. Save for the provisions of Article 53, not having a mental disease to prevent him/her from performing his/her duty continuously.

B) Special conditions:

1. Having a diploma from one of the educational institutions specified in Articles 36 and 41 for the work class,

2. Having the qualifications stipulated in special laws and other legislations of institutions.; Please see for detailed information on admission to civil service, and public service in general. Avcı, Devlet Memurları Kanunu Kapsamında Kamu Görevliliğine Giriş, s.101 vd.

⁶⁵ In the decisions taken by the related chambers of the Council of State on different dates, it was stated that additional conditions may be introduced by higher education institutions to improve the academic members and therefore the quality of education. These decisions are included in the sections on matters in dispute.

⁶⁶ In accordance with the Regulation amendment on which a lawsuit has been initiated and the paragraph added into Article 2 of the stated Regulations; "Besides the conditions stipulated by the provisions of the related law and regulation; it is required to meet the minimum standards determined by higher education institutions and deemed appropriate by the Higher Education Council in order to apply for a post announced in the appointments to assistant professorship, associate professorship and professorship. In addition, the provision "assistant professor candidates have to get a foreign language score set by senates

decision on the suspension of execution taken by the 8th Chamber of the Council of State was explained as follows: “It was concluded from the assessment of the provisions of the Regulation No: 2547 on the Promotion and Appointment to Academic Membership that the conditions of obtaining and appointing to academic membership are determined in detailed, and among these conditions, giving the authority to determine the criterion of appointment to university and university senates is against the fact that the regulatory proceedings are contradictory to the principle of not including contradictory provisions to the Constitution, laws, regulations and the general principles of law. In this case, there is no legality in the amendment made in the Regulation on the Promotion and Appointment to Academic Membership that introduced an illegal arrangement as it has given the authority to make an arrangement in the Law No.2547 by a regulation to the Higher Education Council within a given framework, yet it has not given the authority to transfer this authority to other bodies⁶⁷.” It does not seem possible to agree with the decision taken by the 8th Chamber of the Council of State for different reasons⁶⁸. It can be said that higher education institutions have different quality of education and therefore, there is no illegality in introducing different criteria for academic members by higher education institutions in terms of public interest and service requirements. In the decision on the suspension of execution taken by the 8th Chamber of the Council of State, it is stated that the Higher Education Council has the authority to issue and implement a regulation in this regard, while the

not less than the base score set for lecturers” stated in the Regulations on Principles and Procedures on Central Examinations and Admission Examinations to be Implemented in Direct or External Appointments to the Lecturer Posts other than Academic Staff Posts” and the interim provision added into the same Regulations which states that “Within three months as of the publication of these Regulations, higher education institutions have to determine the minimum criteria to be required in the appointments to the academic staff posts and to implement them receiving the approval of the Higher Education Council and the criteria approved by the Higher Education Council before continue to be implemented until the new criteria are put into practice” have been introduced.

⁶⁷ The decision taken by the 8th Chamber of the Council of State on the Suspension of Execution Docket No.2007/3688. See: http://www.egitimsen.org.tr/ekler/cea9126436202bd_ek.doc?tipi=72, Access Date: 03.04.2014.

⁶⁸ The Council of State stated the following in its counter vote justification against the decisions on the suspension of execution taken by its 8th Chamber Docket No. 2006/6252 and 2007/3688: “The regulation in dispute complies with Articles 7, 12 and 14 of the Law No.2547 on the duties of higher education institutions and the purposes and principles of the higher education is to provide the universities and advanced technology institutes with the obligation to improve themselves, to increase their efficiency, to raise lecturers and to carry out high level of scientific studies and research. All these duties and responsibilities give the Higher Education Council and the higher education institutions the authority to make regulations on the issues requested to be canceled.

university executive boards and senates do not have such an authority. This decision of the 8th Chamber of the Council of State is right in ensuring unity in the implementations of higher education institutions, while subjecting all the higher education institutions to the same rules would bring some challenges with it as the opportunities provided by higher education institutions and their level and quality of education are different. Due to the fact that the academic members who are working in different higher education institutions and do not have the same opportunities are subjected to the same criteria, this would lead to inequality although it seems like absolute equality. Therefore, in our opinion, the fact that higher education institutions introduce different criteria in the Promotion and appointment to academic membership considering their own positions and opportunities would be right. Indeed, the related provisions of the Law No.2547 was amended by the Law No.5772 and the higher education institutions were given the authority to determine additional conditions for the appointment of academic staff: "Universities, ...may determine additional conditions which are objective and controllable as well as the minimum conditions for the appointment by receiving the approval of the Higher Education Council in order to improve scientific quality exclusively considering the differences between scientific disciplines". And then higher education institutions have determined additional conditions that would be called for in the appointments of academic members. It should be also noted that these arrangements to be made by the higher education institutions are subjected to the approval of the Higher Education Council, which is the administrative guardianship authority. Also, the additional conditions imposed by higher education institutions should not be contrary to the higher legal norms, and comply with the public interest and service requirements as they are the general regulatory processes of the administration⁶⁹. In addition, the additional conditions introduced as well as the minimum conditions determined in the Law No.2547 should be established in a way not to hinder the objectivity and controllability of the appointment process⁷⁰.

2.3. Getting Academic Titles

Receiving an academic title and appointing academic staff are different procedures. Therefore, the fact that the duties of the juries created for these proceedings are different is arising from the nature of this work⁷¹. While the

⁶⁹ Tekinsoy-Mısır, agm, s.363.

⁷⁰ Tekinsoy-Mısır, agm, s.380.

⁷¹ Council of State Decision taken by the 5th Law Chamber, Decision Date: 17.03.1987, Docket: 1986/1685, Decision: 1987/405. See. <http://emsal.danistay.uyap.gov.tr/>

duty of the juries created to get academic titles is to determine whether the candidate has the scientific qualification on that subject or not, the duty of the juries created to appoint academic staff is to try to determine the staff to best perform educational and other academic duties in higher education institutions. It has been also claimed that recognition of assistant professor as a title in the Law No.2547 leads to not understanding the difference between getting academic titles and appointment to a post⁷². It might be also noted that getting an academic title is a precondition to be appointed the academic ranks of the related titles in universities; however, having received the title has nothing to do with the administration's authority in this regard so as to be appointed to stated ranks and does not give any right to be appointed with priority to people. In this regard, a related decision of the 5th Chamber of the Council of State is as follows: "The provisions of the Law No.2547 do not give any right to be appointed with priority to the assistant professorship to the person who holds the associate professor title, which is a superior title than the post to be appointed⁷³."

2.4. Appointment to Assistant Professorship

The first step of academic membership is assistant professorship. In accordance with the related articles of the Regulations on the Promotion and Appointment to Academic Membership and the Law No.2547, academic staff posts including those of assistant professor are announced by the President. It is accepted that the President should assess his/her discretion in this regard within the framework of public interest and service requirements. It is stated that the requests of the academic units especially in higher education institutions should be taken as basis in terms of service requirements⁷⁴. In a part of the study, the issues such as the conditions for applying and appointing to assistant professorship, which is the first step of being an academic staff, and the procedures of appointing to assistant professorship and the competent authority are discussed based on the Council of State decisions.

VeriBankasiIstemciWeb/, Access Date: 10.07.2015.

⁷² "In accordance with the legislation, assistant professor is an academic title and if remained in the same post for two years, it is beyond question that the academic staff who has received this title can use it in his/her studies out of higher education institutions. Similar criticism can be brought for the "professor title" where they are promoted through appointment to the post." See. Tekinsoy-Mısır, agm, s.353-354.

⁷³ Council of State Decision taken by the 5th Law Chamber, Decision Date: 24.03.1992, Docket: 1991/4101, Decision: 1992/712. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasiIstemciWeb/>, Access Date: 12.07.2015.

⁷⁴ Tekinsoy-Mısır, agm, s.356.

2.4.1. Application and Appointment to Assistant Professorship

In accordance with Higher Education Law No.2547 (Art.23) and the Regulations on Promotion and Appointment to Academic Membership (Art.3-9), the people who fulfill the conditions to be required in the appointment to assistant professorship vacancies may apply for the assistant professorship to be announced by the related higher education institution. The conditions to be required in the appointment to assistant professorship will be highlighted in the following.

2.4.1.1. Having Qualified in PhD or Medical Specialty or One of the Branches of Art to be Determined by the Higher Education Institute upon the Recommendation of the Inter University Council

In accordance with Law No.2547, one should have done his/her PhD, received his/her title in medical specialty or be qualified in one of the art branches to be determined by the Higher Education Institute upon the recommendation of the Inter University Council in order to apply for assistant professorship. In addition, as stated above, the related provisions of the Law No.2547 were amended by the Law No.5772 and the higher education institutions were given the authority to determine additional conditions for the appointment of academic staff: In this scope, the academic staff candidates should have the additional conditions regulated by the higher education institutions where they apply for a post. The additional conditions determined by higher education institutions should not be against supreme law norms and comply with public interests and service requirements. As stated before, the 8th Chamber of the Council of State decided that “universities might introduce additional conditions in appointing to the ranks of academic staff as well as the conditions determined in laws and regulations and therefore, they introduce the condition of having worked in the related discipline after they become associate professors or specialists in medicine or having been qualified in one of the specific art branches and having written the doctoral dissertation or at least one essay written based on these dissertations in the journals published in this scope”. The 8th Chamber of the Council of State decided that “In Article 1 of the principles of appointment to the assistant professorship and associate professorship in their universities and promotion and appointment to the professorship; it is stated that conditions have been introduced on additional times and studies after becoming a doctor or a specialist in medicine or having been qualified in one of the specific art branches in order to apply for the announced assistant professor post, and there is no illegality in the proceeding in dispute on having publications in specific journals to ensure that the scientific publications and work of the

academic staff who complete their PhD in university and will work under the title of assistant professor are in a certain level of competency and in keeping them waited for a reasonable period of time before appointing them to assistant professorship as improving the quality of education and ensuring the assessments to be performed based on objective criteria are intended⁷⁵. The Council of State has a great responsibility in controlling the compliance of the additional conditions determined by higher education institutions with public interests and service requirements.

2.4.1.2. Being Successful in the Foreign Language Exam

Law No.2547 stipulates that the candidates become successful in a foreign language exam to be held by a jury including three people to be selected by the executive boards of faculties, institutes or colleges and to include translation from Turkish to a foreign language and from the foreign language to Turkish by getting at least seventy scores in order to be appointed to assistant professorship. Giving the authority to determine additional conditions for the appointment of academic staff to higher education institutions by amending the related provisions of the Law No.2547 by the Law No.5772, the implementation of the foreign language exam condition in the appointment to assistant professorship continues to be carried out by universities again; however, it seems that universities may also require YDS (formerly ÜDS or KPDS) scores as an additional condition through regulations they make. The 8th Chamber of the Council of State decided that, “universities may introduce additional conditions which comply with the legislation in order to ensure a certain level of standard and therefore, introducing the condition of getting a score of sixty from the Inter University Council foreign language exam (recently named as YDS) or public personnel foreign language exam (KPDS) so as to be appointed to assistant professorship would comply with the public interest and service requirements so that they could follow publications in the foreign language and contribute to scientific development and reflect that in their educational activities”⁷⁶. However, the 8th Chamber of the Council of State also decided that the additional conditions to be required as well as the ones stated in the laws and regulations cannot be requested contradictory to the conditions mentioned. The 8th Chamber of the Council of State decided

⁷⁵ Council of State Decision taken by the 8th Law Chamber, Decision Date: 27.01.2004, Docket: 2003/3606, Decision: 2004/366. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 22.07.2015.

⁷⁶ Council of State Decision taken by the 8th Law Chamber, Decision Date: 24.12.2004, Docket: 2004/1581, Decision: 2004/5072. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 23.07.2015.

that “besides the resolutions taken by the administrative board of a university on the appointments and promotions to various ranks of lecturer, instructor and academic staff, in accordance with the decision taken on the assessment of the English language knowledge of a candidate, the decision taken on the cancellation of the claim on the grounds that the candidate was interviewed in English and he/she was found ineligible in oral communication in English as a result of the interview did not comply with laws”⁷⁷. In this decision, the 8th Chamber of the Council of State stated that there is an explicit arrangement as to how the foreign language exam will be held in the Regulations on the Promotion and Appointment to Academic Membership and the Law No.2547, and there is no provision on having an interview in this arrangement, and therefore, decided that an interview cannot be held.

It is seen that the executive boards and senate of universities can make regulations on academic staff in a way that is not contradictory to the Constitution, laws and regulations and supreme legal norms using their powers specified in the relevant articles⁷⁸ of Law No.2547. It is clear that administrative boards and authorities’ proceedings that are not within the powers vested in them by the legislation would be contrary to the law. The 8th Chamber of the Council of State indicates that the proceedings performed by unauthorized administrative authorities are not in compliance with law intrinsically. In accordance with the stated decision, “the application of the plaintiff to assistant professorship was declined on the grounds that he/she was found to be unsuccessful in the English seminar assessment foreseen among the principles of administrative board of theUniversity regarding academic Promotion and appointment criteria. In accordance with Article 14 of Law No. 2547, the authority to take decisions on education, scientific research and publication activities of the university belongs to the Senate. The administrative board does not have any authority to decide on this matter. Therefore, there is no illegality in canceling the proceeding in dispute⁷⁹.” The Senate’s carrying out a process which is normally under the authority of the administrative board of the university or the board’s carrying out a process

⁷⁷ Council of State Decision taken by the 8th Law Chamber, Decision Date: 06.04.2004, Docket: 2003/3350, Decision: 2004/1608. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 24.07.2015.

⁷⁸ The duties of the Senate are specified in Article 14 of Law No. 2547, while those of the university administrative board are specified in Article 15 of the same law. The Senate is the academic body of a university. The administrative board is a body which assists the President in administrative activities.

⁷⁹ State of Council Decision taken by the 8th Law Chamber, Decision Date: 02.03.2005, Docket: 2004/3422, Decision: 2005/969. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 25.07.2015.

which is usually under the Senate's authority undermines the administrative proceeding in terms of the authority concerned.

2.4.2. Procedures on the Appointment to Assistant Professorship and Competent Authority

According to Law No. 2547 (Art.23), a written opinion on the assistant professor candidate is requested from three professors or associate professors; the Dean in faculties or the director in institutes and colleges and the Chair of the department where the vacancy of associate professor is, or somebody out of the university where the appointment will be made⁸⁰. The 5th Chamber of the Council of State decided that taking the opinions and suggestions of competent persons and boards on the appointment of academic staff cripples the administrative proceeding formally⁸¹. The Dean and the related Chair reports the candidate to the university's President after receiving the opinion of their own executive boards and the appointment process is done by the President⁸². The 5th Chamber of the Council of State

⁸⁰ In our opinion, the written opinions requested on the candidates to be appointed to associate professorship cannot be subjected to a lawsuit. This is because these written opinions are a part of a preparation process for the decision to appoint or not to appoint which will be taken by the President and therefore they are not an actionable administrative process. The decision taken by the President to appoint or not to appoint is an administrative process which is final, operational and executable; in other words, since it is an actionable administrative process, it can be brought to a court within sixty days starting from the written notification. The written opinions received for the appointment to associate professorship should be accepted as "evidence" in the lawsuits to be initiated against the decision taken by the President to appoint or not to appoint to associate professorship. This is because the legal grounds of the decision taken by the President to appoint or not to appoint to associate professorship are these written opinions, except the issues such as security investigation. Please see for the preparatory proceedings of the administration and the characteristics of the actionable administrative proceedings. Gözübüyük, A. Şeref-Tan, Turgut, (2011), *İdare Hukuku*, Cilt: I, Genel Esaslar, 8.Baskı, Turhan Kitabevi, Ankara. s.375-378.; Kalabalık, Halil, (2004), *İdare Hukuku Dersleri*, Değişim Yayınları, İstanbul. s.99 vd.; Akyılmaz, Bahtiyar, (2004), *İdare Hukuku*, Sayram Yayınları, Konya. s.271.

⁸¹ Council of State Decision taken by the 5th Law Chamber, Decision Date: 22.11.1988, Docket: 1988/2845, Decision: 1988/2746. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasiIstemciWeb/>, Access date 26.07.2015.

⁸² The legal action taken by the President on the appointment to associate professorship is an appointment action made unilaterally and for a certain period of time. They are employed as public officers in accordance with the Special Law without specifying the type of employment. In the Regulations on Promotion and Appointment to Academic Membership, the term "contracted staff" is not used for associate professors and in the Civil Servants Law, an employment type is stated to be established other than four employment types specified in Civil Servants Law in the special laws of public institutions and organizations, except for the public institutions and organizations subjected to the Civil Servants Law.

stated that the authority to make the final decision on the appointment to assistant professorship belongs to the President as follows: "According to Article 23 of the Higher Education Law No.2547, the authority of the faculty deans and the heads of institutes or colleges is simply to establish a jury of three people and to take their written opinions about the candidates and then their own executive boards and to submit them to the President by adding their own suggestions; they do not have an authority to accept or refuse the applications for appointment to assistant professorship and the authority to assess the views and suggestions on this issue and make a final decision about them belongs to the President⁸³."

It should also be noted that the President may exercise his discretion in appointing assistant professors; however the use of authority is not unlimited, as is known. The 8th Chamber of Council of State suggests that the President's discretion is not unlimited and the proceedings of not appointing to the assistant professorship should be reasoned and comply with the legislation. In accordance with the related decision; "As a precondition of making a reappointment to the same post although it is not included in Law No.2547 ...administrative court decided that the proceeding on the cancellation of the reappointment request of the plaintiff assistant professor who meets the condition "fundamental work" stated in Article 9 of the academic Promotion and appointment criteria adopted in the university of, about whom the Chair of the division has positive opinion, who carries research and studies in the country and abroad about his/her field, yet the decision of not appointing him/her to the post again has been taken by the majority of votes is not objective and complies with the legislation and law, which is a lawful decision⁸⁴." A related decision of the 8th Chamber of the Council of State is as follows: "...it is understood that the plaintiff assistant professor has not been appointed upon delivering an opinion to the President stating that there are still three assistant professors working at the department, there is no need for the appointment of the fourth assistant professor to the department. Although the administration has the discretionary power on appointing or not appointing the plaintiff, the stated power is not absolute and unlimited and restricted to public interest and service requirements and the use of this power should be based on legally valid reasons. ...it is not possible to

⁸³ Council of State Decision taken by the 5th Law Chamber, Decision Date: 08.12.1988, Docket: 1988/2013, Decision: 1988/2957. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilmecisiWeb/>, Access Date: 27.07.2015.

⁸⁴ Council of State Decision taken by the 8th Law Chamber, Decision Date: 22.10.2002, Docket: 2002/1693, Decision: 2002/4893. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilmecisiWeb/>, Access Date: 28.07.2015.

associate the non-appointment of the plaintiff who applied for the announced post for the division and for whom all the jury members expressed positive opinions claiming that there is no need for his/her appointment while he/she was waiting for the last phase of the appointment procedures with the principle of administrative stability. In this case, since continuity is essential in administration and there are no documents and information presented that would hinder the appointment of the plaintiff, the appointment has not been carried out expressing that there is no need for the appointment only after the management of the faculty has been changed, which does not comply with laws⁸⁵.” As it is seen in the decisions of the 8th Chamber of the Council of State that the non-appointment to the assistant professorship by the President should be based on a justification the grounds of which should be revealed by documents and the information.

According to Law No. 2547 (Art.23), assistant professors can be appointed for two or three years in each case at a university⁸⁶. The regulation of paragraph 2 of Article 23 of the Law No.2547 stating that assistant professors can be appointed for up to twelve years has been annulled by Article 2 of the Law No.4584 in accordance with the interim Article 47 of the Law No. 2547⁸⁷. The 8th Chamber of the Council of State has stated the following in a decision in this regard: “Regulations have been made in interim Article 47 of Law No.4584 for several groups and the preconditions of benefiting from these regulations have been specified. In the paragraph 2 of the above-mentioned article, the limitation on working time of academic staff serving in assistant professorship has been removed; however it is not bound to any condition. It is understood from the regulation introduced that associate

⁸⁵ Council of State Decision taken by the 8th Law Chamber, Decision Date: 19.12.2000, Docket: 1999/2720, Decision: 2000/8365. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasiIstemciWeb/>, Access Date: 29.07.2015.

⁸⁶ “The working times of assistant professors can be extended for two or three years each time as per Article 23 of on Law No.2547 and the related provisions of Regulations on Promotion and Appointment to Academic Membership. Each appointment is automatically terminated at the end of its period. The procedures and principles in the first appointment apply for the extension of the term of office.” See. State Personnel Administration Procedures on Extending the Term of Office of Lecturers <http://personel.iyte.edu.tr/ogretim-elemanlari-gorev-suresi-uzatimi-islemleri/>, Access Date: 23.07.2015.

⁸⁷ “The academic staff who are still working in universities as assistant professors and who complete their twelve-year period as of the publication of Law No.4584 and apply in accordance with this Law can be appointed to the assistant professorship for two or three years in line with the procedures and principles stated in Article 23 of the Law No.4584.” Council of State Decision taken by the 1st Law Chamber, Decision Date: 09.02.2001, Docket: 2000/202, Decision: 2001/16. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasiIstemciWeb/>, Access Date: 30.07.2015.

professors will be appointed for two or three years and the twelve-year limitation determined as the total working time is canceled, which is stated in Article 23 of Law No.2547⁸⁸.” The 8th Chamber of the Council of State, did not deem the proceeding of not appointing just because of the expiry of twelve-year working time lawful: In accordance with the legal provisions serving as an amnesty No.4584, since the condition of being appointed up to twelve years which is the working time limit for assistant professors has been abolished, the fact that the appointment requests of the plaintiff to the assistant professorship has been rejected on the grounds that twelve-year period has been expired is not lawful⁸⁹.”

The fact that a regulation that still exists in the paragraph 2 of Article 23 of Law No.2547 has been removed by the interim article introduced in Law No.2547 is extremely poor in terms of law technique. It would be more appropriate to abolish the related provision by introducing an interim article to Law No.2547 by Law No.4584 and by regulating the paragraph 2 of Article 23 of Law No.2547 directly in this interim Article instead of abolishing the regulation of paragraph 2 of Article 23 of Law No.2547. In addition, given the regulation of interim Article 47 of Law No.4584, it is seen that the change on assistant professors is foisted into the Article and it does not have any connection with the original subject of the regulation.

2.5. Appointment to Associate Professorship

The second step of academic membership is associate professorship. Associate professorship is different from assistant professorship. As mentioned above, assistant professors can be appointed for two or three years each time at a university, associate professors are appointed permanently and continue to work in the related higher education institution unless they are given a discipline penalty such as dismissal from the university teaching occupation or public service regulated in Article 4 of the Disciplinary Regulation for Administrators, Lecturers and Civil Servants in Higher Education Institutions.

⁸⁸ Council of State Decision taken by the 8th Law Chamber, Decision Date: 28.02.2002, Docket: 2001/3007, Decision: 2002/1239. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 31.07.2015.

⁸⁹ Council of State Decision taken by the 8th Law Chamber, Decision Date: 18.02.2002, Docket: 2002/3302, Decision: 2002/6029. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 01.08.2015.; There are other decisions taken by the 8th Chamber of the Council of State in this direction: “There is no illegality in the rejection of the plaintiff’s request for being appointed to the assistant professorship on the grounds that the twelve-year period is terminated.” Council of State Decision taken by the 8th Law Chamber, Decision Date: 03.06.2003, Docket: 2002/4395, Decision: 2003/2610. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 02.08.2015.

In this part of the study, the conditions and procedures of appointment to the associate professorship and competent authority issues are discussed in the light of the Council of State decisions.

2.5.1. Conditions of the Appointment to Associate Professorship

In accordance with Law No.2547 (Art.25), it is stipulated in the appointment to associate professorship that they have received their title of associate professor or are deemed to be at the same level as those who succeed in the associate professorship exam by the Inter University Council in accordance with the amended Article 27 of Law No.2880. According to Associate Professorship Regulations, associate professorship exam is held by Inter University Council (IUC). Those who have achieved associate professorship exam can receive the title of associate professor. The basic requirement for the appointment to the associate professorship is to have received the title of associate professor⁹⁰. However, having taken the title of associate professors does not necessarily mean that the appointment to associate professorship will be made. Based on the result of the appointment procedures stated in the Higher Education Law (Art.25) and Regulations on Promotion and Appointment of Academic Membership (Art.10-16), the proceeding of appointment or non-appointment to associate professorship will be carried out.

2.5.2. Procedures on the Appointment to Associate Professorship and Competent Authority

In accordance with the Higher Education Law (Art.25) and Regulations on Promotion and Appointment of Academic Membership (Art.10-16); "The vacancy of associate professorship at a university shall be announced to the candidates to apply by the President. In order to evaluate the status of the candidates, at least three professors are determined including a Chair of the relevant unit, if any, one professor out of the university. These professors submit their written reports on these candidates separately to the President. President makes the appointment after obtaining the opinion of the administrative board of the university based on these reports." If there is more than one candidate in the appointments to the associate professorship, the reports from professors and the opinion of the administrative board of the university will be considered, and the candidate who is expressed more

⁹⁰ For detailed information for associate professor examination, please see. Avcı, Mustafa, (2009), "Doçentlik Sınavı ve Doçentlik Kadrosuna Atanma", Selçuk Üniversitesi Hukuk Fakültesi Dergisi, Cilt: 17, Sayı: 1, Konya. s.11-41.; Demircioğlu, M. Yaşar, (2013), "Doçentlik Sınavında İdarî Süreç", Türkiye Barolar Birliği Dergisi, Sayı: 109, Ankara. s.141-174. Associate professorship criteria have been changed by IUC to be effective from October 2016.

positively in the reports will be appointed to the post. However, the reports from professors and the opinion of the administrative board of the university are not binding for the President's authority to appoint in the appointments that will be made to associate professorship, yet they are only guiding⁹¹. Even the decisions taken by the President on the appointment or non-appointment based on these reports and opinions may not be found lawful by the Council of State. Indeed, the 8th Chamber of the Council of State stated that the appointment of the person who has proven his/her scientific competence by receiving the title of associate professor as the only candidate should be made and decided that the President's decision that has not appointed the related person to the post based on the adverse opinion given by two of the three professors and negative opinion of the university's administrative board is unlawful: "The person who applied as the only candidate to be appointed to the vacancy of associate professor announced for one person was not appointed by the President as a result of the decision taken by the majority of votes on not appointing him/her to associate professorship based on one positive and two adverse opinions that came out of the evaluation by three professors determined by the Presidency in accordance with the related law and regulation on the background, scientific studies and publications of that person upon taking the jury reports into consideration by the administrative board of the university. It is no doubt that it is required by the law and regulations that candidates are evaluated in terms of their publications and academic studies before appointment to associate professorship. In case of more than one application, such an evaluation to be taken as basis in the comparison between candidates in terms of their scientific and academic qualifications is a must. However, since the scientific and academic

⁹¹ The reports issued by the jury created for the appointments to the associate professorship based on the evaluation of the work and academic studies of the candidate cannot be brought to court. This is because the reports of the jury members are a part of a preparation process for the decision to appoint or not to appoint which will be taken by the President and therefore they are not an actionable administrative process. The decision taken by the President to appoint or not to appoint is an administrative process which is final, operational and executable; in other words, since it is an actionable administrative process, it can be brought to a court within sixty days starting from the written notification. The reports issued by the jury members for the appointment to associate professorship should be accepted as "evidence" in the lawsuits to be initiated against the decision taken by the President to appoint or not to appoint to associate professorship. This is because the legal grounds of the decision taken by the President to appoint or not to appoint to associate professorship are the reports of the jury members and the opinions of the administrative board of the university based on these reports, except the issues such as security investigation. Please see for the preparatory proceedings of the administration and the characteristics of the actionable administrative proceedings. Gözübüyük-Tan, age, s.375-378.; Kalabalık, age, s.99 vd.; Akyılmaz, age, s.271.

qualifications of the candidate who have received the title of associate professor due to the fact that he/she has been found scientifically qualified going through all the academic processes foreseen in legal regulations to be promoted to associate professorship and upon the opinion of the related scientific jury and the decision of the Inter University Council and who has applied for the vacancy as the only candidate and no special requirements are available in the announcement are subjected to a reevaluation is not fair, there is no compliance with the related law and legislation in the proceeding on not appointing the candidate based on the adverse opinions of the professors and the administrative board of the university⁹².” In accordance with this decision of the 8th Chamber of the Council of State, it is concluded that the reports taken from professors and the opinions of the administrative board of the university should not be evaluated in the appointments to the associate professorship applied as the only candidate. However, in our opinion, it is not possible to agree with this decision of the 8th Chamber of the Council of State. This is because, as previously stated, the process of granting academic titles and the process appointing academic staff are separate proceedings. Therefore, the fact that the reports received from the juries created for these proceedings are different is arising from the nature of this work.⁹³ While the duty of the juries created to get academic titles is to determine whether the candidate has the scientific qualification on that subject or not, the duty of the juries created to appoint academic staff is to try to determine the staff to best perform educational and other academic duties in higher education institutions. Therefore, the reports received from the professors in the appointment to associate professorship and the opinions expressed by the administrative board of the university should be considered in the appointments to the associate professorship applied as the only candidate and actions should be taken accordingly.

The 8th Chamber of the Council of State stated that the additional conditions that may be introduced by universities in the appointments to associate professorship can be reason for preference in the cases where multiple candidates are available, while the lack of additional conditions in the cases where there is only one candidate cannot constitute a justification for the non-appointment. “Although introducing a scoring system in order

⁹² Council of State Decision taken by the 8th Law Chamber, Decision Date: 13.10.2003, Docket: 2003/2062, Decision: 2003/4001. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 22.06.2015.

⁹³ In addition, please see the decision taken by the 5th Chamber of the Council of State in this regard. Council of State Decision taken by the 5th Law Chamber, Decision Date: 17.03.1987, Docket: 1986/1685, Decision: 1987/405. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 23.06.2015.

to ensure the scientific publications and work of academic members with professor and associate professor titles who will work at universities, to improve the quality of education and to allow for the order of preference of jury members to be performed based on objective criteria, there is no compliance with law in stipulating that the candidate has international publications in the appointments to the associate professorship, which is against the related laws and regulations. However, in the cases where the scientific and original publications of the candidates of associate professorship are equal or almost equal, the fact that the candidate has international publications might be a reason for preference. Having international publications would not clearly provide absolute superiority by itself. In this case, there is no compliance with the legislation in the proceeding of not appointing the only candidate who applies the vacancy in associate professorship despite the positive jury reports on the grounds that he/she did not have any scores from the activities stated in the senate's decision in dispute⁹⁴." As stated earlier, higher education institutions can introduce additional conditions *which are not contrary to the provisions of law and legislation* in the appointments to academic ranks in order to improve the quality of education. In addition, assessment of these additional conditions in the appointments to the academic memberships applied to as the only candidate is important to provide an opportunity to appoint the staff who will perform the educational and other academic missions in higher education institutions.

The competent authority in appointment to associate professorship is the President. The President should exercise his/her discretionary power to appoint legally and by presenting a justification. The 5th Chamber of the Council of State decided that "As the necessary proceedings have been started after the application the related person for the appointment to associate professorship and the jury members presented their positive opinions and the administrative board of the university has a positive decision, the cancellation of the non-appointment proceeding based on no legal grounds complies with procedures and the law."⁹⁵ The 8th Chamber of the Council of State decided that not appointing the plaintiff who has promoted to the associate professor after going through all the academic processes foreseen in legal regulations to be promoted to associate professorship and who has been found scientifically

⁹⁴ State of Council Decision taken by the 8th Law Chamber, Decision Date: 09.11.1998, Docket: 1998/4075, Decision: 1998/3593. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasiIstemciWeb/>, Access Date: 23.06.2015.

⁹⁵ Council of State Decision taken by the 5th Law Chamber, Decision Date: 27.06.1988, Docket: 1988/777, Decision: 1988/1960. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasiIstemciWeb/>, Access Date: 24.06.2015.

successful and competent upon the opinion of the related scientific jury and the decision of the Inter University Council to associate professorship without any reason and despite the positive opinions of three academic members is unlawful and the President should give a fair justification in his/her non-appointment decision⁹⁶. In case the President predicates his/her discretionary power to appoint to a fair justification, the appointment proceeding may not be carried out. Indeed, the 5th Chamber of the Council of State decided that the appointment proceeding that has not been performed is lawful according to the results of security investigation: "It is understood that the plaintiff has respectively carried out the proceedings foreseen by the laws and regulations in order to be appointed to the vacant post of associate professor in ... university in ... department; however, the President did not carry out the appointment and the security investigation on the plaintiff became effective in this regard. The university has the discretionary power to appoint to the vacancy and since it is not possible to force them legally on the issues where the administrations have the discretionary power, there is no contradiction with the legislation in the proceeding in dispute⁹⁷." The administration may subject academic member candidates to be employed as public officers in a post in higher education institutions to an investigation called security and archive investigation and may appoint or not appoint them as a result of the information and reports obtained in this investigation. It should be noted that the security investigation⁹⁸ should be performed limited to the public officers to be employed in the positions that are confidential or accepted to be critical in terms of state security⁹⁹. However, it is seen that security investigations and archive investigations are performed for many public officers who are out of certain criteria in practice¹⁰⁰. Moreover, being very rigorous in the

⁹⁶ Council of State Decision taken by the 8th Law Chamber, Decision Date: 18.01.1996, Docket: 1994/5583, Decision: 1996/101. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 25.06.2015.

⁹⁷ Council of State Decision taken by the 5th Law Chamber, Decision Date: 28.03.1985, Docket: 1984/1023, Decision: 1985/822. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 26.06.2015.

⁹⁸ The security investigation and archive research is carried out in accordance with the Regulation on Security Investigation and Archive Research that was enacted to show the implementation of Law No.4045. The purpose of these regulations is to evaluate the public officers to provide public service in terms of security. See. Law No.4045 on Security Investigation , Returning the Rights of Public Personnel Discharged their Duties for Some Reasons and Not Appointed to the Public Service and Amending the Martial Law No.1402, Official Gazette Date and No: 03.11.1994/22100.

⁹⁹ Aker, Önder, (1992), "İLO Ayrımcılık Sözleşmesi Açısından Kamu Hizmetine Girme ve Hizmette Kalma Hakkı", İnsan Hakları ve Kamu Görevlileri, Yayına Hazırlayan: Mesut Gülmez, TODAİE Yayınları, No: 243, Ankara. s.207.

¹⁰⁰ "In the examination of the case file, it is understood that the case was brought claiming

evaluations to be performed by the administration is of great importance for the protection of individual rights and freedoms¹⁰¹. The 5th Chamber of the Council of State examines, “the compliance with the reasons stated in the security investigation in the judicial control of the actions taken by the administration depending on the results of the security investigation”¹⁰². While there is an objective institution for the “criminal and archive records” in employing people in public service, the assessment of the each person as “positive” or “negative” with the security investigation reports that are issued by officers in other levels and lack of equal and objective criteria is often against law and service requirements¹⁰³.

An application should be made to associate professorship which is vacant in the discipline where the title of associate professor has been received. Indeed, the 8th Chamber of the Council of State stated this situation in a decision it has taken as follows: “There is no non-compliance with the law, legislation and the service requirements in the proceeding stating that the plaintiff who graduated from the faculty of pharmaceuticals and received the title of microbiology associate professor cannot be appointed to associate

that the plaintiff who was a classroom teacher in Adıyaman passed the written and verbal examination of *tobacco expertise* held by the defendant administration and the place of duty was determined in the lots drawn on the date of ...and he started to take office in Diyarbakır Leaf Tobacco Enterprise, as a result of the archive research carried out by the evaluation commission for the plaintiff with the decision dated...and No ..., it was found in the letter of Adıyaman Governorate on ...and No... that the stated person was caught by İstanbul Police Headquarters for holding an unpermitted demonstration and hanging illegal banners and he/she has a voucher record; although he was caught distributing illegal leaflets in order to protest the operations to the terrorist organization in the southeast in İstanbul University Çapa Faculty of Medicine on ..., he was not deemed suitable to be employed in the institution as he made a false statement in the Security Investigation and Archive Research Form for Personnel since he did not mention that in the form and on the grounds that he was a follower of the illegal organization”. Council of State Decision taken by the 5th Law Chamber, Decision Date: 03.11.1999, Docket: 1999/3652, Decision: 1999/3292. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasiIstemciWeb/>, Access Date: 25.06.2015.; As is seen, the security investigation has been performed by the administration for tobacco expertise.

¹⁰¹ Avcı, Devlet Memurları Kanunu Kapsamında Kamu Görevliliğine Giriş, s.173-174.

¹⁰² The 5th Chamber of the Council of State decided that “The issues shown to hinder the plaintiff’s duty as a security officer are not such as to dismiss him from his duty and to be accepted legally valid, given the nature of his future duty. Council of State Decision taken by the 5th Law Chamber, Decision Date: 19.03.1987, Docket: 1987/193, Decision: 1987/933. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasiIstemciWeb/>, Access Date: 25.06.2015.

¹⁰³ Aksoy, Muammer, (1988), “GÜVENLİK SORUŞTURMASI Denilen Hukuksal Sapıklığın, MİT Raporlarındaki Korkunç Yanlış ve Yalanlar Işığında Değerlendirilmesi”, Bahri Savcı’ya Armağan, Mülkiyeliler Birliği Vakfı Yayınları: 7, Ankara. s.70.

professorship in the internal diseases department which has a main medical discipline and where direct clinical applications are performed based on the chart annexed in the Regulations of the Medical Specialty and the proceeding carried out in line with the resolutions taken by the medical council¹⁰⁴.” In our opinion, this decision taken by the 8th Chamber of the Council of State is highly right. This is because in case the application made for associate professorship from another discipline other than the one from which the title of associate professor has been received is accepted, the fact that the title of associate professor has been received from the related discipline would not have any legal consequences and would not comply with the service requirements in terms of scientific competency and specialization.

A distinction should be also made between the appointment of a candidate who works as an academic staff at a higher education institution and the appointment of a candidate who has not worked as an academic staff in an higher education institution before in the appointment to associate professorship; legal regulations should be made that would enable the candidate who work as an academic staff in especially higher education institutions to be appointed to the associate professor primarily. This is because lecturing and performing practical studies in a higher education institution is a separate experience and requires working at a university¹⁰⁵.

2.6. Appointment to Professorship

The last step of academic membership is professorship. Given the related legislation, it is seen that the title and post of professor can be received in tandem with each other. As is known, it is not necessary to be actually working in a higher education institution in order to be able to receive the title of associate professor. In professorship, the situation is different. The title of professorship is a title that can be received by appointment to a post of Professor in a higher education institution, which means it is related to a post. In this part of the study, the issues such as the conditions and procedures of appointment to professorship and the competent authority and the title of professor received in another country are discussed in scope of the Council of State decisions.

2.6.1. Conditions of the Appointment to Professorship

The conditions of appointment to professorship are regulated in the

¹⁰⁴ Council of State Decision taken by the 8th Law Chamber, Decision Date: 03.11.1999, Docket: 1998/2338, Decision: 1999/5757. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasiIstemciWeb/>, Access Date: 27.06.2015.

¹⁰⁵ Avci, agm, s.14.

Higher Education Law (Art.26) and Regulation on Promotion and Promotion in Academic Membership (Art.17-19)¹⁰⁶. Accordingly, the conditions of appointment to professorship are as follows: 1. Having worked at the related discipline related to the professorship vacancy for at least five years after receiving the title of associate professor, 2. Having practical studies in the related discipline and having international original publications, 3. Having been appointed to a professor post. As is seen, the title of professor is received by the appointment to professorship. Therefore, it is not possible to have the title of professor without being employed in a higher education institution first, unlike receiving the title of associate professor. In addition, the title of associate professor is received by achieving the associate professorship exam held in two stages, first the analysis of work and a verbal examination, while the title of professor is received as a result of the appointment to professorship by higher education institutions in accordance with the related legislation upon the appointment decision of the President to the professorship. The conditions of appointment to professorship are evaluated here together with the decisions of the Council of State in line with the order stated above.

2.6.1.1. Having Worked at the Related Discipline Related to the Professorship Vacancy for at least Five Years After Receiving the Title of Associate Professor

One should work at the related discipline related to the professorship vacancy for at least five years after receiving the title of associate professor. The 5th Chamber of the Council of State decided that there was no non-compliance with the legislation in rejecting the candidate's appointment request on the grounds that the candidate has not completed five-year period in the related discipline of the professorship vacancy¹⁰⁷. The 5th Chamber of

¹⁰⁶ In accordance with Article 17 of the Regulation on Promotion and Promotion in Academic Membership; "The President announces the professorship vacancies in one of the five with high circulation in Turkey and in the Official Gazette stating the vacant ranks, scientific disciplines and the desired qualifications when the posts in the university or advanced technology institute become vacant. The application time and deadline are stated in the announcement not less than fifteen days. In addition, this is announced to all the universities and advanced technology institutes by the President. The candidates deliver their petitions together with a file that includes and documents their scientific studies, congress and conference bulletins and the references made to them, work of art, performances and the related documents, educational activities, ongoing and completed PhD, competence in art or graduate studies, their contributions to universities or advanced technology institutes to the President's Office in the related university or advanced technology institute in the number shown in the announcement in at least five copies. The candidates show one of their publications as their main work of art in their applications. See. Nuhoglu-Karan-Özdemir, age, s.594.

¹⁰⁷ Council of State Decision taken by the 5th Law Chamber, Decision Date: 18.11.1992,

Council of State concluded in another decision that it is not possible to say that the person who has not actually worked for at least five years as an associate professor in the related discipline has the conditions stipulated in Article 26 of Law No.2547 so as to be able to be appointed to the professorship¹⁰⁸. It is also seen that a Council of State decision is available on the fact that the study that should be at least five years in the discipline related to the professorship vacancy to be applied after receiving the title of associate professor in accordance with the related legislation is not necessarily be carried out actually in a higher education institution by the related person. The 8th Chamber of the Council of State decided that the candidate can meet this condition through the academic activities he/she executes out of the university: "It is understood that the person who receives the title of associate professor is assigned in the Higher Education Council, his term of office is extended each year and meanwhile, he lectures at the university; in addition, he is elected to the membership of Science Committee of Atatürk Research Center and he carries out academic activities such as participating in the seminars and meetings held at various times, and upon his application to the professorship vacancy announced in ... University, his works have been examined by five-person jury and it has been stated unanimously that he is qualified to be appointed to professorship; however, the request for the appointment to professorship has been declined by the administration on the grounds that he has not met the condition of having worked for five years stipulated in the Law. The action of working at the related discipline which is stated as the precondition of appointment to professorship does not include the necessity to carry out studies in only a higher education institution. In this case, as it is understood that the related person has fulfilled the condition of working five years in his own discipline after receiving the title of associate professor given the fact that he has been temporarily assigned in the Higher Education Council, he has lectured for three years in his faculty and he is a member of Science Committee of Atatürk Research Center and he carries out academic activities, it is concluded that the administrative proceeding on the non-appointment to professorship and the decision of the administrative court are unlawful¹⁰⁹." As the 8th Chamber of the Council of State stated in this decision, the action of working at the related discipline which is stated as the

Docket: 1989/1774, Decision: 1992/3109. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 27.06.2015.

¹⁰⁸ Council of State Decision taken by the 5th Law Chamber, Decision Date: 13.02.1991, Docket: 1990/990, Decision: 1992/181. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 26.06.2015.

¹⁰⁹ Council of State Decision taken by the 8th Law Chamber, Decision Date: 31.10.2000, Docket: 1999/684, Decision: 2000/7021. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 29.06.2015.

precondition of appointment to professorship does not include the necessity to carry out studies in only a higher education institution. In our opinion, the condition of “having actually worked in higher education institutions” should be required in terms of the service requirements in people to be appointed to professorship or associate professorship in higher education institutions. The condition of having worked at the related discipline should not be considered as having only academic and scientific publications or carried out scientific activities. Lecturing in higher education institutions and carrying out practical and research studies are separate experiences; therefore the consideration of the related condition in this framework would be more right in terms of fulfilling the principle of merits which is dominant in the public personnel regime.

2.6.1.2. Having Practical Studies in the Related Discipline and Having International Original Publications

Another condition introduced in the appointment to the professorship is to have practical studies and original published work at an international level in the relevant discipline. The 8th Chamber of the Council of State concluded on what should be understood from the “discipline” specified in the above-mentioned condition in its decision that the discipline is used in the same sense as department or art major: “Article 4 titled the distribution of posts, the Decree No.78 on the Posts of Lecturers in Higher Education Institutions foresees the distribution of posts based on departments. On the other hand, “discipline” is said to be accepted as equal to “department or art major” by the YOK decision in the associate professorship departments brochure issued by the Inter University Council. When the above-mentioned rules are considered together, the concept of “discipline” stated in the Law is seen to be used in the same sense as the concept of ‘department or art major’¹¹⁰.” In addition, a decision taken by the 5th Chamber of Council of State on the appointment to the professorship explained the ‘appointment principles’ briefly as follows: “One should have comprehensive knowledge and experience, be capable of solving problems by scientific methods, have made original and scientific studies, and have references to his/her works¹¹¹.” We believe that the decision taken by the 5th Chamber of the Council of State may be partly guiding in determining what the content of this condition is in

¹¹⁰ Council of State Decision taken by the 8th Law Chamber, Decision Date: 18.01.1996, Docket: 1995/3652, Decision: 1996/103. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 12.06.2015.

¹¹¹ Council of State Decision taken by the 5th Law Chamber, Decision Date: 29.05.1991, Docket: 1990/442, Decision: 1991/1204. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 13.06.2015.

the appointment to professorship. It should be also noted that the criteria in this decision of the 5th Chamber of the Council of State in which the principles of appointing to professorship are stated are open to subjective interpretation. As a requirement of the principle of merits which is dominant in the public personnel regime, the qualifications for the task must be determined not by subjective evaluation but objective rules. Thus it is seen that there is a need for clearer and more detailed regulation in the previously mentioned conditions. For instance, the related condition can be edited as 'having made a certain number of international publications'. The criterion "having given a lecture about the division of the professorship vacancy" can also be added into this condition. In short, it is possible to say that ambiguous expressions that are open to subjective interpretation should not be included in legal texts and such regulations are incompatible with the rule of law.

2.6.1.3. Having Been Appointed to a Professorship Post

The associate professors who have the conditions stated in Law No.2547 (Art.26/b.1) and explained above and the professors who have worked in other higher education institutions for at least two years can be appointed to professorship vacancies. It should be also accepted that the professors who have left the same higher education institution and have served for at least two years can be appointed in this way. As mentioned above, the title of professor is vested when the appointment to the post of professor is made. Therefore, appointment to professorship and obtaining the title of professor take place simultaneously.

2.6.2. Procedures on the Appointment to Professorship and Competent Authority

In accordance with the Regulation No.2547 (Art.26) on the Promotion and Appointment to Academic Membership (Art.20), the President makes an announcement for the professorship vacancies in the university together with the additional conditions required for these vacancies. The 8th Chamber of the Council of State decided that introducing additional special conditions to the post in line with the service requirements is natural in determining the qualifications to be required in professorship vacancies to be announced by the President and no regulation to hinder that is available: "In an announced one-person professorship vacancy, it is noted that the conditions of "working in the field of dam and tunnel geology" will be required in the academic member to be assigned in this position, and upon the application of an associate professor, it has been decided not to take any action on the file based on the decision of the administrative board of the university on the

grounds that the associate professor could not fulfill the stated condition. The administrative proceeding has been canceled by the administrative court claiming that introducing regulatory rules by the administration in a manner to limit the applications of the applicants who meet the legal conditions by introducing additional conditions other than the main conditions specified in the related law and regulation so as to apply for the academic membership does not comply with the Constitution and the Law No.2547. In accordance with Article 26 of Law No.2547, introducing additional special conditions to the post in line with the service requirements is natural in determining the qualifications to be required in professorship vacancies to be announced by the Presidents and no regulation to hinder that is available¹¹².” However, as stated above, it is clear that the additional conditions to be introduced should not be contrary to the related law and regulations and in compliance with the service requirements as a requirement of the principle of merits.

2.6.2.1. Creating the Jury by the University Administrative Committee

In accordance with the Regulation No.2547 (Art.26) on the Promotion and Appointment to Academic Membership (Art.20), a jury consisting of five professors is created by the university administrative committee in order to evaluate the candidates applying to the professorship vacancies announced. These jury members should be from the same discipline as the professorship vacancy and at least three of them must be outside of the university concerned. The Council of State Administrative Judicial Chambers Committee decided that “there is no compliance with the legislation in the proceeding taken based on the adverse report of the jury as it has been understood that the jury has not been duly created since the professor assigned in the jury which issues a report on the plaintiff in the appointment to professorship is not coming from the same department as the plaintiff and in this case it is not possible to say that the scientific competence of the plaintiff has been determined in accordance with the related law and regulations”¹¹³. Therefore, it is clear that the jury members should be from the same department where the professorship vacancy is. This is also a requirement for assessing the candidate’s work and academic studies scientifically.

In case the absence of a sufficient number of professors in the department

¹¹² Council of State Decision taken by the 8th Law Chamber, Decision Date: 08.02.2005, Docket: 2004/3743, Decision: 2005/528. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 14.06.2015.

¹¹³ Council of State Plenary Session of the Chambers for Administrative Cases, Decision Date: 14.02.1992, Docket: 1992/453, Decision: 1992/38. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 15.06.2015.

where the candidate applies to the professorial staff, it is stated that the professors at the closest discipline will be appointed. The 5th Chamber of the Council of State decided that the professors at the closest discipline can be appointed in the jury to be created for the appointments to the professorship vacancy announced in case of the absence of the professors in the department where the candidate also comes from: "The meaning of the "closest discipline" should be explained as it is important for the issue. In paragraph 'k' of Article 3 of Law No.2547, it is stated that "departments" are the scientific research and application units which constitute a whole in terms of purpose, scope and quality, which complement each other or consist of close divisions or art majors, and it is clear that the divisions or art majors in the departments where the close and complementing divisions are found within the academic organization are the "closest disciplines". Accordingly, as no professor is available in the division of pharmaceutical toxicology of the vocational sciences department where the professorship vacancy is, there is no illegality in appointing the professor of pharmacology which is the closest discipline to such division and is affiliated to the same department in the scientific jury created by the President as per the related law and regulation; in addition, the way of creation of the scientific jury is not found to require the cancellation of the proceeding due to the fact that the professor who is from a different division assigned in the jury has been giving lectures of toxicology for fifteen years and having a professor from a different division of fundamental sciences would not affect the conclusion against the assessment of the other two jury members about the candidate ¹¹⁴."

In accordance with the Regulation on the Promotion and Appointment to Academic Membership (Art.20), the professors consisting of the jury issue a separate report for each candidate and if there are multiple candidate who apply for the appointment to the post, they report their preferences. Following this stage, namely after the reports are delivered to the President's Office, no change should be made in the related jury. The 5th Chamber of the Council of State decided that "the rejection of the request for promoting to professorship based on the adverse report received again would be unlawful if the previous reports issued in accordance with the provisions of the related law and regulations are ruled out without a good cause"¹¹⁵. In case of multiple

¹¹⁴ Council of State Decision taken by the 5th Law Chamber, Decision Date: 17.04.1990, Docket: 1988/3317, Decision: 1990/858. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 16.06.2015.

¹¹⁵ Council of State Decision taken by the 5th Law Chamber, Decision Date: 29.05.1991, Docket: 1990/442, Decision: 1991/1024. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 17.06.2015.

candidates for the professorship vacancy, it is clear that a selection should be among the candidates in the reports to be issued by the members of the jury. Indeed, the 8th Chamber of the Council of State decided that it is clear that the obligation to make a selection in the reports to be issued by the professors selected to determine the status and scientific qualifications of the candidates applying to the professorship vacancy separately for each candidate has been introduced; therefore, they should express their opinions on which one should be appointed primarily as well as determining their qualifications. In accordance with the decision taken; "It is understood that one of the professors in the jury has delivered an adverse opinion, while two of them have delivered positive opinions; one of them made a positive selection in the second post, while one of them has not delivered any opinions and the university administration has taken an action based on these reports. In this case, as it is not possible to understand which candidate is selected in which post since one of the jury members has not delivered any opinion, while three of them have not given any preferences, there is no legality in the vote and action taken by the university administration board based on these reports¹¹⁶."

If the related jury member has not issued a report yet after the establishment of the jury, a change can be made in the related jury member in the case of the presence of Force Majeure or reasonable grounds. Indeed, the 8th Chamber of the Council of State decided that the jury should be gathered with the people identified before and it would be unlawful to create a second jury and take actions accordingly without reasonable grounds¹¹⁷. The 5th Chamber of the Council of State concluded in its decision that an additional report may be asked from the jury created for a single candidate; however, creating a new jury and making a new decision would be unlawful¹¹⁸. It is clear that the application of the professor candidate will not be rejected and a change can be made in the related jury and even a new jury could be created, in case the jury members give incomplete, unclear or inadequate reports. Indeed, the 8th Chamber of the Council of State concluded that an additional report may be asked from the jury or the application can be finalized by a new scientific jury in case the reports submitted by the jury members are not satisfactory.

¹¹⁶ Council of State Decision taken by the 8th Law Chamber, Decision Date: 10.02.2002, Docket: 2002/2570, Decision: 2002/4678. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 18.06.2015.

¹¹⁷ Council of State Decision taken by the 8th Law Chamber, Decision Date: 27.06.1986, Docket: 1985/270, Decision: 1986/349. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 19.06.2015.

¹¹⁸ Council of State Decision taken by the 5th Law Chamber, Decision Date: 29.05.1991, Docket: 1990/442, Decision: 1991/1024. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 20.06.2015.

According to the decision; “four out of five members of the scientific jury selected by lot have delivered positive opinions about the candidate, while one of them delivered an adverse opinion; the reports of the three academic members delivering positive opinions are the same except the section titled general assessment and the assessments in the reports have been made in accordance with the Senate principles of the.....university. In this case, while the administration should have asked complementary information or explanation from the stated members since the reports of these three academic members are the same, and if it is not possible, it should have created a new scientific jury in accordance with Article 26 of Law No.2547 and made a decision based on the new reports to be issued, there is no legality in the proceeding in not finalizing the candidate’s application upon the rejection of all the academic members’ opinions¹¹⁹.”

In accordance with the Regulation on the Promotion and Appointment to Academic Membership (Art.20), in the reports issued by the members of the jury, the scientific and artistic qualities of the candidates and their work are evaluated; their management, construction and development characteristics and efforts in raising scientists and artists are specified in detail. The 8th Chamber of the Council of State decided that; “There is no illegality in the action of non-appointment taken by the administration for the candidate who could not be identified to have the most fundamental conditions stipulated in the related legal regulations such as performing practical studies in the related discipline and having original publications at the international level as it is understood in the examination carried out by the jury created after the application of the associate professor to the appointment to the professorship vacancy announced that all the three papers the candidate presented as professorship studies have not been published, no reference to his work could be identified, he has not consulted any thesis dissertations, does not have any research project, has not given any radio and TV speeches, any articles published in the media; on the other hand, he has been given many discipline penalties due to his improper attitudes and behaviors, and finally he has been appointed to another university after YOK changed his place of work¹²⁰. The 8th Chamber of Council of State serves as a guide on the actions to be taken by the candidates of any professorship vacancies by making a reference to the content of the jury

¹¹⁹ Council of State Decision taken by the 8th Law Chamber, Decision Date: 12.02.2001, Docket: 1999/2034, Decision: 2001/463. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 21.06.2015.

¹²⁰ Council of State Decision taken by the 8th Law Chamber, Decision Date: 10.11.1998, Docket: 1998/4665, Decision: 1998/3634. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 22.06.2015.

reports that assess in which activities the scientific and artistic studies and the qualities of construction and development could be revealed.

As in the appointment to the associate professorship, the reports issued by the jury created for the appointments to the associate professorship based on the evaluation of the work and academic studies of the candidate cannot be brought to court, in our opinion. This is because the reports of the jury members are a part of a preparation process for the decision to appoint or not to appoint which will be taken by the President and the university administration committee and therefore they are not an actionable administrative process.¹²¹ The decision taken by the President and the university administration committee to appoint or not to appoint is an administrative process which is final, operational and executable; in other words, since it is an actionable administrative process, it can be brought to a court within sixty days starting from the written notification.¹²² The reports issued by the jury members for the appointment to professorship should be accepted as "evidence" in the lawsuits to be initiated against the decision taken by the President to appoint or not to appoint to associate professorship. This is because the legal grounds of the decisions taken by the President and the university administrative committee to appoint or not to appoint to the professorship are the reports of the jury members, except the issues such as security investigation.

The jury members should make an independent assessment regardless of relevant authorities and committees. Otherwise, it is clear that the administrative action taken would be contrary to law. Indeed, the 5th Chamber of the Council of State decided that these juries should decide independently of other organs and the appointment authority should not act in a way that will affect such decisions¹²³.

2.6.2.2. Taking the Decision of Appointment to Professorship by the University Administrative Committee

In accordance with the Regulation No.2547 (Art.26) on the Promotion and Appointment to Academic Membership (Art.20), the university administrative

¹²¹ Please see for the preparatory proceedings of the administration and the characteristics of the actionable administrative proceedings. Gözübüyük-Tan, age, s.375-378.; Kalabalık, age, s.99 vd.; Akyılmaz, age, s.271.

¹²² For detailed information for the administrative proceedings, please see. Gözübüyük-Tan, age, s.369 vd.; Giritli-Bilgen-Akgüner-Berk, age, s.1068 vd.

¹²³ Council of State Decision taken by the 5th Law Chamber, Decision Date: 16.04.1987, Docket: 1986/255, Decision: 1987/628. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 23.06.2015.

committee decides on the appointment of the associate professor or professor to professorship considering the reports issued by the jury members. Upon the decision taken by the university administrative committee, the appointment proceeding is carried out by the President. The decision of appointment to the professorship is taken by the university administrative committee. It is clearly seen that the power of the President as the Chair of the university administrative committee to appoint to professorship in accordance with the regulation in Article 26 of Law No.2547 is dependent and it consists of implementing the appointment decision taken by the university administrative committee. However, unlike the appointment to professorship, it seems that the President has the discretionary power in the appointment of other lecturers¹²⁴; however, it should be noted once again that the discretionary power of the President is not unlimited and restricted to public interests and service requirements as in the discretionary power of the administration in general¹²⁵.

¹²⁴ “The administration has the discretionary power in the appointment of public officers. Each person who meets the conditions specified in Law No.657 and the special legislations of institutions cannot appeal to the administration and ask him/her to be appointed as a public officer. In the decisions of the Council of State, it is stated that the administration can be forced by a court decision to appoint a person as a public official, and the administration has discretion in this regard. “See. Gözler, Kemal, (2003), *İdare Hukuku*, Ekin Kitabevi, Cilt: II, 1.Baskı, Bursa. s.620.

¹²⁵ It has been stated in many decisions of the Council of State and the administrative court that the discretionary power of the administration should be used in line with public interests and service requirements. A related decision of the 5th Chamber of the Council of State is as follows: “It is clear that a discretionary power is vested in the administration regarding appointments and in case it is determined that this power has been exercised neglecting the public interests and service requirements is proven by the administrative judicial authority, the fact that this will require the abolishment of the administrative proceeding in dispute due to its illegality in terms of its reason and subject has been accepted by established judicial decisions.” Council of State Decision taken by the 5th Law Chamber, Decision Date: 18.09.1997, Docket: 1995/2103, Decision: 1997/1785.; “The discretionary power vested in the administration is not absolute and limited to public interests and service requirements.” Council of State Decision taken by the 5th Law Chamber, Decision Date: 05.11.1997, Docket: 1996/1812, Decision: 1997/2443.; Please see for other decisions in this regard. Council of State Decision taken by the 5th Law Chamber, Decision Date: 29.04.1998, Docket: 1997/2508, Decision: 1998/1224. Council of State Decision taken by the 5th Law Chamber, Decision Date: 23.02.1994, Docket: 1993/5842, Decision: 1994/1150. Council of State Decision taken by the 5th Law Chamber, Decision Date: 11.06.1991, Docket: 1989/2823, Decision: 1991/1243. Council of State Decision taken by the 5th Law Chamber, Decision Date: 11.06.1991, Docket: 1989/2823, Decision: 1991/1243. Council of State Decision taken by the 5th Law Chamber, Decision Date: 05.11.1997, Docket: 1996/1812, Decision: 1997/2443. Council of State Decision taken by the 5th Law Chamber, Decision Date: 29.04.1998, Docket: 1997/2508, Decision: 1998/1224. Council of State Decision taken by the 5th Law Chamber, Decision

The decisions of the university administrative board on appointment should be necessarily justified. Especially when a decision will be taken in the opposite direction to the jury assessments, legal grounds should be absolutely stated; otherwise the administrative procedure would be contrary to law. Indeed, the 5th Chamber of the Council of State decided that taking an action based on the unjustified adverse opinion of the university administrative committee despite the positive jury assessment would be unlawful¹²⁶.

2.6.3. Title of Professorship Received Abroad

In accordance with the Higher Education Law (Art.28), the Inter University Council should take a decision in this regard so that the title of professor received abroad can be valid in Turkey¹²⁷: It should be determined by the Inter University Council that the candidate who is applying for the equivalence of the title professor received abroad in Turkey has been working abroad in the title of professor in the education and research institutions for at least two years after he/she receives the title of doctor or specialist in medicine or has worked in branches for a certain period of time and the higher education institution in the country where he/she has worked is at the same level as the Turkish higher education institution. The 8th Chamber of the Council of State has stated the following in a decision in this regard: “Those who are vested the title or authority of professor abroad after working for a certain period of time in the art branches or having received the title of doctor or specialist in medicine are mentioned in Article 28 of Law No.2547 and it is not possible to accept that the person meets the condition of working abroad which is stipulated in the Law by being employed directly in the title of professor without working abroad” “There is non-compliance with the related law and regulation in the proceeding on the rejection of the application of the concerned person to the Inter University Council requesting that his/her title of professor vested in a country where the person worked for two years as an associate professor as of 1985 be recognized in accordance with Article 28 of

Date: 16.11.1998, Docket: 4998/2858, Decision: 1998/2690. Council of State Decision taken by the 5th Law Chamber, Decision Date: 21.05.1999, Docket: 1996/976, Decision: 1999/1655. Council of State Decision taken by the 5th Law Chamber, Decision Date: 07.04.1999, Docket: 1998/2342, Decision: 1999/853. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 24.06.2015.

¹²⁶ Council of State Decision taken by the 5th Law Chamber, Decision Date: 23.11.1987, Docket: 1987/2389, Decision: 1987/1620. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilstemciWeb/>, Access Date: 24.06.2015.

¹²⁷ According to Article 27 of Law No. 2547, the procedure to be carried out for the title of associate professor received in a foreign country to be valid in Turkey is the same as the procedures for the title of professorship received in a foreign country. Namely, the title taken must be approved by a decision taken by the Inter University Council.

Law No.2547 on the grounds that the title of professor is not permanent and limited to two-year contract period ¹²⁸.”

3. Judicial Review of the Proceedings on the Issuance of Academic Titles

Some authors argue that the proceedings on vesting the academic titles undermine the scientific autonomy, scientific autonomy requires no intervention by any authority in the decisions on vesting the academic titles other than higher education institution and therefore the academic decisions of the higher education institutions should be taken out of the judicial and non-judicial control by making amendments in the Constitution and laws¹²⁹. We believe that is not possible to agree with this opinion. This is because autonomy does not mean independence and unlimited freedom of action. In addition to the main feature of the rule of law is that the administration is subject to judicial review of its any and all transactions and actions as specified in Article 125 of the Constitution. Taking some administrative decisions out of judicial control does not comply with the rule of law primarily. As stated in the decision of the Supreme Court, autonomy refers to the freedom of action within the limits drawn by the Constitution and laws¹³⁰. Judicial control is a guarantee of the protection of individual rights and freedoms. Therefore it is unimaginable not to be able to control the lawfulness of the appointment procedures to the academic positions by the judiciary. The jury reports and the relevant committee and President decisions are of great importance in the appointments to academic posts. Jury assessments and the related committee and the President decisions may be erroneous or deliberate and may not reflect the truth. Indeed, the 5th Chamber of the Council of State annulled the proceedings which do not comply with laws and regulations or are unjustified or have in appropriate grounds by examining the jury assessments¹³¹.

¹²⁸ Council of State Decision taken by the 8th Law Chamber, Decision Date: 20.09.1995, Docket: 1994/2885, Decision: 1995/2600. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasiIstemciWeb/>, Access Date: 25.06.2015.

¹²⁹ Cin, Halil, (1992), “Çağdaş Eğitim, Çağdaş Üniversite”, Rektörlerin Başbakan Süleyman Demirel’e verdiği brifing, Başbakanlık Yayını, Ankara. s.287.

¹³⁰ Decision of the Supreme Court, Decision Date: 30.05.1990, Docket: 1990/2, Decision: 1990/10, Date and Number of Official Gazette: 09.02.1991/20781. See. <http://www.anayasa.gov.tr/Decisions Database>, Access Date: 01.08.2015.

¹³¹ In this regard, the 5th Chamber of the Council of State made the following decision: “It is clear that the candidate who applies for the appointment to professorship has been assessed adversely by the jury, whereas the jury assessments must include the issues stated in laws and regulations and an issue not included in the laws and regulations is unlawful since it cannot be the basis of an adverse assessment.” Council of State Decision taken by the 5th Law Chamber, Decision Date: 06.10.1989, Docket: 1988/3148, Decision: 1989/1718. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasiIstemciWeb/>, Access

Conclusion

In accordance with the provisions of the Higher Education Law No.2547 which is a special law in nature as per the Civil Servants Law No.657, the academic staff employed in a post in higher education institutions and holding the status of being a civil servant are appointed to civil service based on the status law, civil servants alike, and recruited under the Law No.2547 by requiring various conditions for the qualifications of the position. Therefore, it is possible to say that these legal regulations introduced on employing academic staff in higher education institutions on a contract basis are exceptional and they are resorted to in case of a special need. In our opinion, employing the academic staff that should be employed based on the status law as per the Constitution in education activities on a contract basis also contradicts Article 128 of the Constitution. Basic principles and rules of appointment conditions, personal rights and working conditions of all the staff to be employed in higher education institutions must be regulated in laws.

Another issue that should be noted is the appointment of academic staff working as research assistants in higher education institutions based on different regulations. Subjecting the research assistants who do the same job to different provisions and different working conditions and therefore different work assurances is at the discretion of the law-maker, and it would not be wrong to say this leads to inequality. This is because there is no reasonable justification in subjecting the people who are equal and have been assigned to provide educational public services to different legal provisions. The difference that comes to forefront especially in research assistances employed in state and non-profit foundation universities is more distinct. We believe that appointment of academic staff working as research assistants in higher education institutions based on different regulations constitutes a contradiction to Article 10 of the Constitution.

To make a brief assessment on the employment of research assistants by OYP, it is known that the number of research assistants appointed to higher education institutions through the conventional procedures is very low and research assistants are often appointed via a central system under Academic

date : 15.07.2015.; The 8th Chamber of Council of State concluded in its decision that: The candidate who applies to be promoted to the professorship and has been rejected based on the adverse opinion of the jury on the grounds that he should have published original work at an international level should be promoted to professorship as it has been identified that he meets this condition in the expert review." Council of State Decision taken by the 8th Law Chamber, Decision Date: 09.11.1992, Docket: 1991/736, Decision: 1992/2678. See. <http://emsal.danistay.uyap.gov.tr/VeriBankasilmstemciWeb/>, Access Date: 16.06.2015.

Member Training Program (OYP) created by Higher Education Council (YOK) in accordance with the provisions of the related legislation. OYP is an employment process which is used to select academic members to be appointed by the Higher Education Council (YOK) and includes some peculiar rules. The Principles and Procedures on Academic Member Training Program where the rules for such an employment process are determined have been accepted by YOK. In paragraph 9 of Article 130 of the Constitution, it is stipulated that “the duties, titles, the conditions of appointment, Promotion and retirement of academic members and training academic members” will be regulated by law. In this scope, the issues on the announcement of OYP research assistant positions, applications to and placement in these positions should be regulated by law. No regulation is available on OYP in the Law No.2547. It appears that the main legal ground for the Procedures and Principles on Academic Member Training Program which regulates appointment through ÖYP is Decree No: 78 and the related Budget Laws; however, the related main principles and rules are not included in these regulations either. The Supreme Court stated in its decisions what must be understood from “regulation by law” included in various articles of the Constitution in its decisions. Accordingly, giving a general, unlimited power to regulate the principles and the framework of which are uncertain to the executive branch on the issues that should be regulated by law would be contrary to Article 7 of the Constitution. However, leaving the regulation of the expertise and technical details to execution would be unconstitutional provided that the basic principles and framework are determined in law. As stated in the decisions of the Supreme Court, the overall regulatory process of the administration should not be contrary to law, and must be based on law. The power to regulate of the execution is a limited, complementary and dependent power. Execution might make regulations to show the implementation of the issues the basic principles, framework and limits of which have been established by law. In this case, administration may regulate the issues requiring know-how and expertise through the overall regulatory process in order to demonstrate the application of laws.

It should be also noted that a budget has been prepared for each research assistant by YOK for the expenses to be made in the educational activities of research assistants under OYP. The funds in the budget are transferred to the higher education institution where the OYP research assistant has been placed and the OYP costs of the related research assistant have been covered from these funds. This regulation aims not to create an extra burden on the related higher education institution in terms of the costs of the OYP research assistants. Given the scarcity of the funds of the higher education institutions, it is possible to say that this regulation is to the point; however, in case the

higher education institution where the OYP research assistant is placed has good amount of funds, this might turn into a disadvantage for OYP research assistants as they cannot use the funds of the higher education institution they are placed in; they can only use the funds in the budget allocated to them.

In addition, it is possible to say that OYP constituted a very objective system in the placement of research assistants in higher education institutions before the regulation made in the field exam score. This is because the scores that the applicants have in the central exams organized by OSYM such as ALES and YDS also play a role in the calculation of OYP score as well as the undergraduate grade-point average. In addition to keeping this regulation, as stated above, a decision was taken in the General Assembly of YOK on 14.05.2015 that the applicants can apply for the OYP research assistant positions through "field exam score" and the effect of the field exam score on the OYP score was determined to 40%. Especially, given the high number of claims of favoritism in the written and/or verbal exams in hiring research assistants in higher education institutions through conventional procedures, OYP can be claimed to be a sound application in fulfilling the principle of merit in staff employment, except for the application of a field exam score. However, as mentioned above, the verbal exam that is inarguably open to subjective assessments in our country seems to be applied in OYP as well with the regulation of the application of a field exam score and that the organization of field exams by the exam commissions determined by the Higher Education Council among the academic members working at the related disciplines in universities. Given especially the influence of the field exam to the OYP score by 40%, it seems that OYP will partially lose its objectivity in employing research assistants. This is because the major problem in verbal exams is the audit of exams and in case of a contradiction to law, it is about whether it can be proven or not. The fact that the regulations stipulating the organization of verbal exams should be stated in a manner that does not allow for subjective evaluations and in detail, the audio and video records of verbal exams should be taken and these records should be maintained at least until the term of litigation is expired and the rules on preparing the verbal exam questions and asking them to applicants by lot are regulated by legislation would eliminate the problem of proof in verbal exams and set the limits of the legality audit and ensure the principle of legal stability and confidence. The principle of the Rule of Law does not allow for the regulations that would preclude or hamper the judicial review of administrative actions.

It should be noted here that Article 33 of Law No.2547 is the basic regulation in the appointment of research assistants when the higher education

legislation is examined. This is because appointments are made for OYP research assistants in accordance with Article 33 of the Law No. 2547, 50/d Article of the Law No.2547 as well as those as per directly Article 33. Through the regulation specified in paragraph 'd' of Article 50 of the Higher Education Law No.2547, it is intended to support the students taking graduate education in the related institutes financially by employing them as a research assistant in these institutes as if they were granted a graduate education scholarship, unlikely the purposes of the regulation specified in Article 33 of the Law No.2547. It seems that the research assistants employed in accordance with paragraph 'd' of Article 50 of Law No. 2547 50 do not have any employment assurance and they are automatically dismissed from their post when they finish their graduate education. However, the academic staff that successfully complete their graduate education and prove their academic qualifications should not be dismissed from their post, which is required for employment security. Indeed, the research assistants employed in accordance with Article 33 of the Law No.2547 continue their duties if they are successful in their graduate education and if a need arises. In addition, even if the research assistants employed in accordance with Article 33 of the Law No.2547 fail in their graduate education, they could continue working in their jobs when required, while the research assistants employed in accordance with the paragraph 'd' of Article 50 of the Law No.2547 are dismissed from their ranks even if they are successful in their graduate education, which does not comply with the principles of equality and merit in the public personnel law and is not fair either. Therefore, it seems that this regulation is against the Articles 10 and 70 of the Constitution.

Here, it should be briefly stated that the related provisions of the Law No.2547 was amended by the Law No.5772 and the higher education institutions were given the authority to determine additional conditions for the appointment of academic staff: Accordingly, universities may determine additional conditions which are objective and controllable as well as the minimum conditions for the appointment by receiving the approval of the Higher Education Council in order to improve scientific quality exclusively considering the differences between scientific disciplines. And then higher education institutions have determined additional conditions that would be called for in the appointments of academic members. It should be also noted that these arrangements to be made by the higher education institutions are subjected to the approval of the Higher Education Council, which is the administrative guardianship authority. Also, the additional conditions imposed by higher education institutions should not be contrary to the higher legal norms, and comply with the public interest and service requirements as

they are the general regulatory processes of the administration. In addition, the additional conditions introduced as well as the minimum conditions determined in the Law No.2547 should be established in a way not to hinder the objectivity and controllability of the appointment process.

Another issue that should be noted here is that getting academic titles and appointing academic staff are different procedures. Therefore, the fact that the duties of the juries created for these proceedings are different is arising from the nature of this work. While the duty of the juries created to get academic titles is to determine whether the candidate has the scientific qualification on that subject or not, the duty of the juries created to appoint academic staff is to try to determine the staff to best perform educational and other academic duties in higher education institutions. It has been also claimed that recognition of assistant associate professor as a title in the Law No.2547 leads to not understanding the difference between getting academic titles and appointment to a post. It might be also noted that getting an academic title is a precondition to be appointed the academic ranks of the related titles in universities; however, having received the title has nothing to do with the administration's authority in this regard so as to be appointed to stated ranks and does not give any right to be appointed with priority to people. In addition, a distinction should be also made between the appointment of a candidate who works as an academic staff at a higher education institution and the appointment of a candidate who has not worked as an academic staff in an higher education institution before in the appointment to associate professorship; legal regulations should be made that would enable the candidate who work as an academic staff in especially higher education institutions to be appointed to the associate professor primarily. In our opinion, the condition of "having actually worked in higher education institutions" should be required in terms of the service requirements in people to be appointed to professorship or associate professorship in higher education institutions. The condition of having worked at the related discipline should not be considered as having only academic and scientific publications or carried out scientific activities. Lecturing in higher education institutions and carrying out practical and research studies are separate experiences; therefore the consideration of the related condition in this framework would be more right in terms of fulfilling the principle of merits which is dominant in the public personnel regime.

In our opinion, it should be also noted that the reports issued as a result of the written opinions received and the examination of the work and academic studies of the candidates by a jury cannot be brought to court. This is because the reports of the jury members and the written opinions

are a part of a preparation process for the decision to appoint or not to appoint which will be taken by the President in appointments to assistant professor and associate professorship and by the university administrative committee and the President in the appointments to professorship and therefore this is not an actionable administrative process. The decisions taken by the President to appoint or not to appoint to assistant professorship and associate professorship and by the university administrative committee and the President for the appointment professorship are administrative processes which are final, operational and executable; in other words, since they are an actionable administrative processes, they can be brought to a court within sixty days starting from the written notification. The written opinions taken on the appointment to assistant professorship and the reports issued by the jury members on the appointment to associate professorship and professorship should be accepted as "evidence" in the lawsuits to be initiated. This is because the legal grounds of the decisions taken by the President to appoint or not to appoint to the assistant professorship and associate professorship and by the President and the university administrative committee for the appointments to professorship are the written opinions and the reports of the jury members, except the issues such as security investigation.

Finally, it should be noted that the administration may subject academic member candidates to be employed as public officers in a post in higher education institutions to an investigation called security and archive investigation and may appoint or not appoint them as a result of the information and reports obtained in this investigation. It should be noted that the security investigation should be performed limited to the public officers to be employed in the positions that are confidential or accepted to be critical in terms of state security. However, it is seen that security investigations and archive investigations are performed for many public officers who are out of certain criteria in practice. Moreover, being very rigorous in the evaluations to be performed by the administration is of great importance for the protection of individual rights and freedoms.

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