

WHO SHOULD REGULATE THE REGULATORS?

Yonca Fatma YÜCEL*

* Lawyer, Member of Ankara Bar, Banking Regulation and Supervision Agency, Senior specialist in law.

ABSTRACT

This study inquires the answers of the questions of “what should be the main purposes of regulators?” or “who should regulate the regulators?” or better way of posing the question is “who should supervise the regulators?”.

Keywords: *Regulate, regulators, supervisor, due diligence, corporate governance.*

What does it mean to say that a proposition of law is true? For positivists, a proposition of law is true if it accords with certain institutional facts- rules of recognition as was the case with H.Hart or grand norm was with H.Kelsen. Some natural lawyers argue that a proposition of law is true if it accords with certain institutional cases. The other natural lawyers argue that a proposition of law is true if it is consistent with principles of universal justice that put the law in its best light. Still the others point out that truth names a convergence in interpretive assumptions about law.^[1] Whereas the realists looks into how the institutions work in reality.^[2]

Regulators regulate law according to the theoretical assumptions taken by the National Assembly. Regulators are obliged to take into account national laws in force as well as conventions and international standards adopted by supra national bodies. Regulators should pay attention into the principles of inner morality regarding the pending draft legislation. These principles are as follows:^[3]

Rules must be general and clear and also be understandable by the public,
Rules must not be applied to the past cases-prohibition of *ex post facto laws*,

1. Rules must not be temporary in time,
2. Rules must not be in contradiction with other rule,
3. Rules must not demand to execute the impossible things (principle of ultra posse).

As a matter of fact, they are the crucial points for satisfying the feeling of justice. The same feeling should also be satisfied in the process of administrating justice. This requires the fair trial for plaintiff as well as defendant.^[4] This is another way of saying that the equality of arms be provided to agents in the cases. Trial is a collective process and every body should take a role in bringing about the facts of case to the forefront. While continuing the circulation on triangle of among prosecutor, judge and lawyer for distributing fair justice in the criminal trials, regulators have to pay attention to not only the binding rule but also de-facto applications of these rules. Another words, reliance on a strictly conceptual analysis is not good enough, we should also look into the effects of those concepts. Here comes the big question of “*what should be the main purposes of regulators?*” or “*who should regulate the regulators?*” or better way of posing the question is “*who should supervise the regulators?*”

Main purposes that are required to have for regulators are to provide equal and fair treatment for every citizen, and the protection of fundamental rights and

[1] Leiter B, “*Objectivity and the Problems of Jurisprudence*”, 72 Texas Law Review 187, 1993, p.8.

[2] Uygur N. “*Kuram-Eylem Bağlamı*”, YKY, 1966, s.73-86, Lewellyn K.L, “*Jurisprudence Realism in Theory and Practice*”, Chicago Press, 1962, p.401.

[3] Fuller L. L, “*The Morality of Law*”, 1969, pp. 39,53.

[4] Schroeder, Yenisey ve Peukert, Ceza Muhakemesinde “*Fair Trial*” İlkesi, İstanbul Bar,1999.

freedoms and habeas corpus for individual claims, thus enable human beings in the community have feelings of safety and security.^[5]

Let me come to the starting point of reference, regulators should enjoy the common minimum belief system which enable them a common approach and thus do away mistrust among themselves. In addition, they should review both of national and international acts, regulations, directives etc. and also the social rules for preparing or amending normative system of rules. Secondly, they should determine both social and legal needs for all concerned. At this point, a greater concern be given to the object of the regulation, i.e., whether making a new rule is suitable/effective or not for the issue at hand for the good of public or the one interested persons/institutions. After having dealt with evaluation and cross-checks, enough care and protection be given to individual rights and ownerships. It is required that the regulators prevent any abuse of fundamental rights of all citizens. Although the law making is process taking a long time, involving many people of different motivations, their attitudes must be taken with caution and suspicion in the every step of preparation for draft regulations. Game theory should be taken a point of reference for finding a just solution and manageable cost to the public. It is well known that justice to all cost is not a justice at all. In this situation, they should adopt the rule of “*know your citizen*” and do the test of analyzing the “*profit and cost*”. Another words, the economic aspect of the regulation is not to be disregarded at all. Thirdly, attention should be given to the ethical rules of community; and if possible mobilize the moral support lies within them. From this angle, public conscience is to become a real reference for those regulation considered to be suitable or not to begin during the above mentioned assessment period. At the end, the product, rules and regulation may enjoy the public understanding and support; thus eventual acceptance of those concerning the regulation. Otherwise, the regulation is to remain a de jure existence.^[6]

From the constitutional perspective, regulations which govern the different authorities are so crucial for the sake of independency of aforementioned authorities. During the law-making process, regulators, firstly, have to take into account whether this legislation is fair or not for all concerned. Secondly, they shall consider above mentioned whether the institutional requirements are met or not. Thirdly, they oblige to know this legislation whether brings efficient solutions regarding legal conflicts/discrepancies or not. They have to control and provide whether legislative authority is solely independent or not. From this point of view, regulators should analyze the whole process in details and do cross-check all of the paradigms up to both environmental and other conditions. At this reaching point, regulators should assess the whole part, including of all data. In this situation, that test will be measurable above this matter. The other fact is that regulators should review

[5] Magna Carta, Chapter 40.

[6] Holmes O.W, “*The Path of the Law*”, Harvard Law Review, Vol.10, 1897, p.457.

and take into account the other legislative regulations. Moreover, regulators have to consider whether this legislation is suitable according to general legal ethic and jurisprudence or not. They have to go into the draft legislation whether it meets public conscience or not. According to public law, managers have to pay attention to regulations which governs their own business.

Let me tell the fact that mentioned transition shows us there is the same point of view between public and management laws. Managerially speaking, what management means is as thin line between employers and employees. Employer has to behave as a regulator. He should determine all requirements both of structure and employee. Management is required that decisions which has taken be consistent regarding institutional subject. The success of a decision that was taken shows institutional performance. The other point is manager as a legislator should think legal entity. From time to time, he should take decisions considering the institutional perspective according the conflicts. Public management is required that be more productive and keep the topic of legal entity. In this situation, the basic point is to define the purpose. Managers have to determine whether this purpose is suitable regarding official perspective or not. The best target will be reasoned with the best practise. The best practise will be also realized by means of best regulations. For this reason, manager should share information related to management by using both of formal and ethic rule. To ensure consistency and limit discretion seems obligatory at this point. In this situation, the manager have to analyze detailed over cycle and know how to share information among the participants. This means, among other things, that it should be neither irrelevant nor excessive for their purposes, and must only be disclosed it to others where those other agencies also need to know the particular information shared. In addition, some fields are subject to specific laws or regulations. Decisions to share information between agencies about an individual are usually based on some judgments about the risk that might be found later when information has been shared and further investigations done that an individual faces, or that the individual presents. At the point where a decision on whether or not to share the information is being made, the professional's confidence in their judgment of risk is unavoidably rather low, for neither the sending, nor the receiving organisation possesses a full picture. If the decision to share is not appropriate, then presumably the initial suspicious of risk was a false positive judgment error. The converse error, an appropriate decision not to share information arises where the initial lack of suspicion of risk is a case of a "*false negative*" judgment error. If having shared the information and conducted further information, the initial judgment error is not corrected for any reason, then inappropriate intervention may follow –wrongly taking a child into care or unnecessary compelling a putatively mentally ill person to be treated in a psychiatric unit or falling to do so when it would have been warranted. The problem facing many professionals and street-level problem solving agents is precisely that any decision rule or norm, whether formal or informal in character, applied

under such conditions of limited and opaque information will inevitably sooner or later run the risk either of “*false negative*” or else of “*false positive*” judgment errors. This approach must be compliant with “*management theory*.”^[7]

Apart from the analytical consistency of legislation, there is the other point is the moral content of the legislative process.^[8] At this point, regulators should determine any moral hazard which will arise. Moral hazard may come into forefront in matters of compensation. It is also so important for regulators. They should make a public opinions’ survey. When we return the first question, the answer to the question is hidden in the answer to be given to the second question. For this reason, supervision itself assumes the requirement that supervisors as well as regulators must play equal roles. The functions of supervising and regulating are complimentary elements of a structure. The supervisors must have the rationale of the regulation. They must also bring about all the necessary measures taken to have full application of the regulation. Impartiality on the part of supervisors is a very important. This is psychological feeling on the part of consumers. This quality comes after a long processing of different cases dealt by the supervisors. Supervisors also serve as watchdogs against any discretionary abuses. From this angle, they provide equal treatment of those come under aegis of supervisors-fair justice. As the constitutional law dictates that the regulation itself provides for the functioning of regulators. Supervisors also provide feedbacks for the realisation of intended purpose with the regulation. This is another way of saying that all the regulations are open to supervision. This is an approach adopted by the pragmatists.^[9] The other point of supervision is up to the monitoring. The best governance requires that monitoring as a policy of productivity is to be adopted by the manager/governor in an effective way. So the best manager should determine whether the facts that discovered are fair and measurable or not. He has to have the whole economic and administrative theories and know how to apply them. Investigation is required that diligent inquiries carried out. At that point supervisor is obliged to help monitors. Both of them should prepare regulation for monitoring process. It goes without saying that supervising and monitoring should be equal importance for regulators. Monitors should have to share information with supervisors. So it should be the case with the supervisors. It is of no doubt that both supervisors and monitors must be open-minded persons. Having seen that necessity does not mean that to reach the reality. For this reason, regulators have to consider integral part of totally. So they will bring solutions with getting easily.

From the angle of governing perspective, manager should consider the rule of “*due diligence*”.^[10] For reaching success, efficient due diligence is required

[7] www.business.com/directory/management/management_theory, Bono de Edward-Heller Robert, “*Management Theory*”, Thinking Managers, 2006.

[8] Kuçuradi İ., “*Code of Etik and Law*”, HFSA:8 (1st. Bar), 2003, s.9,11.

[9] James W, Pragmatism and Other Essays Washington Square Press, New York, 1963, p.27.

[10] Lawrence Gary M., “*Due Diligence in Business Transactions*”, Business and Economics, 1994.

regarding legal entity. In this situation, a best manager should presume and calculate whole possibilities and conditions. More creative activities is required more detailed analysis. By the means of mentioned, regulator/manager will reach best solution according to incident/conflict. Everything depends on the necessity of due diligence. If the manager want to be a successive, he should consider the results of due diligence-feedback. As a best regulator, manager obliged to entertain due diligence. If the manager wish to regulate for all concerned, he should give importance regarding due diligence. There is also the other crucial point which is public measures. Managers have to also consider the safeguard the general/public interest. He should consider whole possibilities. He should determine the specific economic policy objective clearly defined. He should prevent discrimination. He must have a conscious of both the capacity of institution and employees. It is also expected that he must behave in accordance with the demands of shareholders. At this point, he should focus on the rule of corporate governance. The rule of corporate governance will be basic way for reaching good governance. In the process as such regulators should consider supra-national aspect of the rule of “*corporate governance*”.^[11]

Moreover, from the angle of present applications, regulation of corporate activity in certain sectors is the most widely used instrument to safeguard the general interest and the public policy objectives. Regulation has the merit of spelling out clearly the public policy obligations of the company or a service provider. Examples include outright national regulation of supply conditions in sectors characterised by natural monopolies, either through legislation or through monitoring by regulators, as in the certain sector. Regulation can also be exercised within a concession system, where production conditions are laid down in the relevant legislation, as well as in the tendering conditions and the concession contracts, with the airline and broadcasting sectors as examples. Regulator should determine both national and international legal framework.

As a result, regulations are binding whole legislative process under the theoretical, moral and the other approaches. For this reason, all regulators should take decisions with independently and informed conscience. They should pay attention to rules of accountability and transparency. As a result of accountability, they could be held responsible in those cases they causes harm due to personnel fault. At this point, no organs, authority or person shall not give any instructions, due to influence on the decisions which the regulator has given.

In summary, regulation consists of both enforcement and management. It is important that the stability of organisational structure be protected. From this angle, regulators are obliged to be responsible to carry on burdens of system for providing stability with the intended purpose in the forefront. Having filled with

[11] Marks Robert A.G.– Minow Nell, *Corporate Governance*, Blackwell Publishing, Third Edition, 2003. Pulaşlı Hasan, *Corporate Governance- Anonim Şirket Yönetiminde Yeni Model*, Ankara Law Faculty, Ankara 2003.

responsible functions, supervisors as well as regulators need special protection for both the tenure and remuneration. By using this instrument, we can reach this answer of the question of “*who should regulate the regulators on behalf of reaching the truth of law.*”

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