

Lack Of Transparency In Turkish Agency Rulemaking

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I. Introduction

In most countries, laws are enacted through national assemblies pursuant to the rules prescribed by constitutions or standing orders. Nevertheless, it is almost inevitable that parliaments have to delegate their legislative power to administration, simply because of the fact that parliaments may not regulate every aspect of daily life in a detailed way. They only tend to lay out the basic principles in many areas and specify the rules that government agencies should follow when they are regulating their own specific area. Thus, secondary legislations (regulations, by-laws, executive orders) are the most

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¹ The rulemaking applications may differ for every country, because every government has its own way of rulemaking that was established by its tradition and legal system. One country might use public consultation widely; another might use consultation in a limited manner.

important tools to shape a society and lead them into a specific way of acting.¹

The USA has a strong tradition in rulemaking,² which gives a comprehensive guidance how to conduct rulemaking proceedings transparently, participatory, accountable and fair. The rulemaking system of the USA provides a good example of how laws can be done through extensive participation of public and with strong reasoning of the rules. Therefore, I try to analyze the US rulemaking system in order to grasp its good practices and propose them to the Turkish rulemaking system.

My suggestions about Turkish rulemaking system are not related to substantive law, but about the procedural part of the rulemaking system. The improvements in procedural part of the rulemaking system will increase the quality of regulations. The Turkish rulemaking system has some similarities to the US system, such as having a centralized oversight body³ and possibility to challenge the regulations in judiciary. However, the Turkish rulemaking system lacks some of the basic principles of the US rulemaking system, like using consultation very widely by ensuring that every relevant party or interest group has the ability to express its view on a proposed rule. Consultation is used in a very narrow manner in the Turkish rulemaking system. Agencies are supposed to consult only with certain administrative agencies if the regulations are related to some particular issues, otherwise they are free to conduct further consultation. Thus, it is within agency's discretion to consult with other agencies or public. Therefore, I suggest mandatory consultation to the Turkish rulemaking, which has a very strong

One might coerce the agencies to prepare a detailed analysis of proposed rule, another might only ask for a reasoned explanation of the proposed rule. This might change depending on the legal and political tradition of the country.

² "Rulemaking" suggest the procedures that administrative agencies use in promulgation of regulations or other kind of regulatory means.

³ Even though Turkey has a centralized oversight body Prime Ministry Directorate General of Laws and Decrees (GDLD) in agency rulemaking, its functions are not totally similar to U.S. centralized oversight body (OIRA).

affect on administration to ensure that agencies act responsible, accountable and transparent.

I also suggest adopting a regulatory agenda that will show the planned regulations of administrative agencies for the following year. This will inform public about future government actions and lead agencies to act in accordance with this agenda and prevent arbitrary conducts of agencies.

Another point about the Turkish rulemaking system is Turkey's relation to the European Union (EU). Turkey has strong ties with Europe historically. Turkey has been following the European system as an example and adopted its institutions in many areas. Within this context, Turkey has been following the EU approach in rulemaking to a large extent in the process of membership to the EU. Therefore, Turkey adopted some of the EU rulemaking tools to "improve and the transparency and accountability in public administration"⁴ to its system. To give a better understanding of the Turkish rulemaking system, I need to talk about the basic elements of the EU rulemaking system in this paper.

In this paper, I evaluate the rulemaking systems of Turkey and the USA. I try to answer the question of "What can Turkey benefit from the US experience in rulemaking?" and I propose some amendments to the Turkish rulemaking system. First of all, I will describe the basic aspects of the Turkish rulemaking system and "better regulation" efforts in Turkey. In this context, I will talk about better regulation principles of the EU for its potential and practical impacts on the Turkish rulemaking system. In the second part, I describe the US rulemaking system. Finally, I will suggest what Turkey may take from the US rulemaking system and I endeavor to suggest some amendments to the Turkish rulemaking system.

⁴ Bickici, Mehmet, Law Drafting in Turkey, <http://www.oecd.org/dataoecd/46/41/41727786.pdf>.

II. “Better Regulation”

Approach And Turkey’s Position In Rulemaking

Turkey mainly follows the European Union (EU) system in legal issues as a result of her historical ties with Europe, her geographical proximity and accession to the EU. Rulemaking is one of those issues that Turkey takes the EU as a role model. To clarify the Turkey’s position in rulemaking, I want to talk about the “better regulation” initiative that the EU implements.

“*Better regulation*” is used by the EU to imply a systematic approach to the rulemaking process. “*The term “better regulation” covers a large set of policy instruments and programs to enhance the capacity of institutions to provide high-quality regulation.*”⁵ The purpose of “*better regulation*” is to produce smarter regulations by ensuring that regulations are well thought, analyzed and consulted with all interested parties. Better regulation does not aim to produce a better regulation in a specific sector or an area, like better environmental law or consumer protection law. It aims governments to adopt a specific approach to produce better rules. “... *its emphasis on standards and rules which, instead of governing specific sectors or economic actors, steer the process of rule formulation, adoption, enforcement, and evaluation.*”⁶ “*Better regulation*” efforts have a lot of advantages for the administration and the public such as increasing public participation in rulemaking, making smarter regulations by assessing the possible effects of regulations, reducing paper work and improving legitimacy and accountability of administration. It makes rulemaking more transparent. Regulations are more proportionate and consistent with the needs of the society that “*will lead to higher compliance levels.*”⁷

⁵ (Claudio M. Radaelli (2007): Whither “better regulation” for the Lisbon agenda?, Journal of European Public Policy, 14:2, 190-207)

⁶ Claudio M. Radaelli (2007): Whither “better regulation” for the Lisbon agenda?, Journal of European Public Policy, 14:2, 190-207.

⁷ Breyer, Stewart, Sunstein, Vermeule, Herz, Administrative Law and Regulatory Policy,

Nevertheless, along with producing better results in rulemaking, better regulation tools have some disadvantages for administration and public. Due to the fact that consultation mechanism may take a long period of time, it naturally increases bureaucracy. It is surely a time consuming process to promulgate a rule.

I. “Better Regulation”

Better regulation goals are achieved by better regulation tools. The most important ones are impact assessment, consultation and simplification.

1. Regulatory impact assessment (RIA): Regulatory impact assessment is prepared by administrative agency before a new regulation is promulgated. It provides a detailed and systematic analysis of the potential effects (social, economic, environmental) of the proposed rule in order to assess whether the proposed regulation is capable of achieving desired objectives and “ *it provides an opportunity for decision makers to make the regulations based on data.*”⁸ It suggests alternative solutions to the problem. The solution is not always regulation; sometimes it is not to regulate.

RIA aims to compare the likely costs and benefits of the regulation. It provides a meaningful chance for decision makers to base their decisions on a detailed analysis of likely impact of the proposed regulation. Even though preparing RIA for “*major policy proposals*” is mandatory in the EU and in many other countries, its influence on decision makers is variable, since it is only a guiding document, not mandatory to follow.

2. Consultation: The second tool is consultation which is a key element in

Problems, Text, and Cases, Seventh Edition, Wolters & Kluwer, p. 609.

⁸ Yamac, Necati, İngiltere, Hollanda ve ABD’de Daha İyi Düzenleme Çalışmaları ve Bu Çalışmalardan Türkiye İçin Çıkarılabilecek Sonuçlar, Yasama Dergisi, v.9, p. 35, 2011, Ankara.

rulemaking. The purpose of consultation is to learn the opinion of the public on a particular issue and to use submitted comments to shape the regulation. Administrative agencies seek to improve efficiency, transparency and public involvement in rulemaking through public consultation. “*By seeking views from a broad spectrum of society, it is possible to test whether policies are workable in practice.*”⁹ Consultation takes different forms in different countries. While it is mandatory to publish proposed rules for public participation in the USA and in the EU, consultation is done in a limited manner in Turkey.

Even though consultation is accepted as one of the most valuable regulatory tools in many countries, it is criticized by some scholars:

“Participation improves the quality of rules and makes regulatory rulemaking more legitimate and accountable.....Yet, despite the right, the reality of participation as currently practiced is largely indirect, mediated by interest groups and hopelessly time consuming for agency officials.”¹⁰

Despite all criticism, politicians, scholars and technicians acknowledge the importance of consultation in rulemaking. They cannot deny the input that consultation produces in the rulemaking process.

3. Simplification: The third tool of better regulation is simplification. Simplification is done through existing legislations.

⁹ European Commission, Better Regulation — simply explained, Luxembourg: Office for Official Publications of the European Communities.

¹⁰ “Beth Simone Noveck, The Electronic Revolution in Rulemaking, 53 Emory L. J. 433, 434-438 (2004) taken from Breyer, Stewart, Sunstein, Vermeule, Herz, Administrative Law and Regulatory Policy, Problems, Text, and Cases, Seventh Edition, Wolters & Kluwer, p. 572.

“Some regulation can be overly prescriptive, unjustifiably expensive or counterproductive. Layers of overlapping regulation can develop over time, affecting businesses, the voluntary sector, public authorities and the public. Regulation can also become quickly outdated. Rapid technological developments, open and expanding global markets and ever-increasing access to information mean that regulation has to be kept under constant review and adapted to keep pace with the fast moving world.”¹¹

Agencies review existing regulations to ascertain outdated or overlapping provisions and to ensure that regulations are clear and unburdensome for operators and citizens as much as possible. The purpose of simplification is to reduce administrative burdens stemming from regulatory requirements. Agencies aim to adopt more flexible regulatory approaches through simplification.

In addition to the tools mentioned above, codification, choice of regulatory instruments and evaluation are used to achieve better regulation goals.¹²

II. The Rulemaking System of Turkey

Turkey follows the EU model in regulatory issues and tries to apply “*better regulation*” tools into its system. There have been some efforts in better regulation issues and some improvements have been made in rulemaking such as regulatory impact assessment. A project was finished to reduce the administrative burdens.¹³ But these efforts are not enough to make

¹¹ European Commission, Better Regulation — simply explained, Luxembourg: Office for Official Publications of the European Communities.

¹² These tolls are a part of better regulation initiative of the EU, but we do not need to talk about them for the purposes of this paper.

¹³ In the project of “Reducing the Bureaucracy and Administrative Burdens” that was completed in 2009, 170 by-laws were simplified and 421 requirements were abolished. In the second project in 2012, 121 by-laws were simplified and 460 requirements were abolished.

rulemaking process better, because better regulation efforts lack the political support.

Rulemaking by government agencies is done according to a by-law¹⁴ promulgated by the Council of Ministers in 2006. All agencies have to follow the procedures set out in this by-law. The agencies have to consult with certain agencies if the legislation deals with some specified area of law. However, consultation with NGOs, private sector, universities and citizens is discretionary. Since it is not mandatory to consult with the public, the agencies do not have to publish a notice about their draft laws. Rulemaking almost totally takes place within the agency¹⁵ structure. The technical and legal experts of the agency prepare a draft and consult with mandatory government agencies, and sometimes with other private stakeholders. The agency answers the comments made by other government agencies and important private stakeholders in a report and sends the report to the Prime Ministry with the final draft and general statement. This report does not need to be sent to the commenting agencies.

Impact assessment is only used for statutes whose potential effect is more than 10 million Turkish Liras when put into effect. There is no provision to force an agency to make an impact assessment for secondary regulations even if their likely impacts are more than 10 million Turkish Liras.

All agencies have to submit the draft regulations to the General Directorate of Laws and Decrees (GDL) of the Prime Ministry for the approval of the cabinet. The GDL functions as an oversight body on rulemaking issues similar to the OIRA (Office of Information and Regulatory Affairs in the USA). It examines the draft laws to see if they are prepared

¹⁴ This by-law is called as “By-Law on Principles and Procedures of Preparing Legislation”, which is promulgated in February 17th, 2006 and the purpose of this by-law is to set out the principles and procedures to be followed by the Prime Ministry, ministries, related administrations to them and other government agencies when they prepare a draft of a statute, regulation, by-law and cabinet decisions.

¹⁵ Agencies, within the meaning of rulemaking, include the Prime Ministry, ministries and their affiliated, related and associated public institutions and other government agencies.

pursuant to the Constitution, statutes, government plans and programs. The GDLD has the authority to send the draft laws back to the agency if the set criteria are not met. If there is a strong political support behind the draft law, this power cannot be easily used in practice.

III. The Us Rulemaking System

It is necessary to talk about the US rulemaking system to be able to show how some features of it can be applied to the Turkish rulemaking system. In the USA, the rulemaking process is defined as “*the procedures that federal agencies are required to follow in writing regulations*”.¹⁶ Legislative authority belongs to the Congress, but Congress delegates this power to administrative agencies through laws. A regulation can be based on two kinds of legislative delegation; broad delegation and specific delegation. In broad delegation, Congressional act defines the general intent of the legislation and grants a great deal of discretion to agencies how to implement that act.¹⁷

Besides the Congressional acts delegating legislative power to the administrative agencies, the Federal Administrative Procedural Act (APA)¹⁸ also sets out the general rules applicable to all kinds of rulemaking. The rulemaking procedures are explained in the APA in a very detailed manner. The APA divides rulemaking in to two categories: informal and formal rulemaking.

In addition to the APA, federal courts require agencies to include some

¹⁶ Curtis W. Copeland, CRS Report For Congress, The Federal Rulemaking Process: An Overview, August 28, 2008, p.3.

¹⁷ Second form of it is also a Congressional act that provides very detailed procedures how administrative agencies should act when they are promulgating a rule. Congress can also impact the regulatory process by using its oversight and appropriations responsibilities.

¹⁸ Administrative Procedural Act of 1946 is a federal statute that governs the procedure in which administrative agencies of the federal government of the USA may propose and establish regulations.

extra procedures in informal rulemaking, which were called hybrid procedures.¹⁹ Courts can impose hybrid procedures on agencies, when organic statute²⁰ has a big impact on small number of interested parties or the rulemaking involves particularly important or complex issues.

1. The informal rulemaking: The Informal rulemaking is also called “*notice and comment*” rulemaking. The informal rulemaking consists of publishing proposed rules, giving opportunity for public comment and publishing the final rule. A concise general statement accompanies the final rule, which explains the basis and purpose of the rule.

The purpose of notice and comment process is conducting an effective consultation. This process is perceived as a fundamental element of rulemaking. Any in compliance with the requirements of notice and comment process will be reviewed by courts and the regulation will be nullified.

a. Notice Requirement: The notice requirement is established to give a meaningful opportunity to affected parties to participate in rulemaking by expressing their views through comment channel. Thus, notice should include adequate information to interested parties. There are some requirements for a notice to be considered as adequate. “Notice is adequate if it apprises interested parties of the issues to be addressed in the rule-making proceeding with sufficient clarity and specificity to allow them to participate in the rulemaking in a meaningful and informed manner.”²¹

However, the APA provides exceptions to notice and comment procedures. Agencies may not follow notice and comment procedures

¹⁹ Since the USA is a common law country, courts have a big amount of power to interpret law (statutes and precedents) and impose new requirements on parties, when they support their decision with precedents and a strong reasoning.

²⁰ An organic statute is a statute enacted by Congress that creates an administrative agency and defines its authorities and responsibilities.

²¹ American Medical Association v. United States, 887 F.2d 760, 767 (7 th Cir. 1989),

when they find “good cause”, showing that notice and comment procedure is “*impracticable, unnecessary, or contrary to the public interest.*” They should provide a rationale to support their finding. “*The APA also provides explicit exceptions to the NPRM (notice and proposed rulemaking) requirement for certain categories of regulatory actions, such as rules dealing with military or foreign affairs; agency management or personnel; or public property, loans, grants, benefits, or contracts.*”²² Moreover, Congress can exemplify some regulations of agencies from notice and comment procedures.

b. Comment Period: When the rule is published in the Federal Register to inform the public, a public comment period begins. “*...the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.*”²³ Any interested party can submit his/her written comment to the agency. Comments are mostly submitted through a central website,²⁴ where people can view the proposed rules and submit their comments.

Comment period should last at least 30 days. There is no upper limitation in timing, but in practice it is not more than 180 days. In principle, agencies are required to respond all comments. In practice, they respond all substantial comments and publish them through the same website. Interested parties should also have the chance to respond to opposing comments. As long as the comment period is open, public may submit new comments to the proposed rule.

²² Curtis W. Copeland, CRS Report For Congress, The Federal Rulemaking Process: An Overview, February 22, 2011, p.6.

²³ Administrative Procedural Act of 1946, 5 USC §553 (c).

²⁴ All agencies have to publish their proposed regulations in www.regulations.gov and open it for public comment through this website.

c. Ex parte contacts: Another issue in rulemaking is ex parte contacts. “Ex parte contact is a communication by an interested party to an administrator made outside the normal comment process.”²⁵ Ex parte comments are mostly done by private interest groups or by the members of the Congress. The APA does not prohibit ex parte contact in informal rulemaking before the agency publishes the proposed rule, yet ex parte contacts are not allowed in formal rulemaking in many situations.

The problem with ex parte contacts is that they are done out of the notice and comment period, therefore the contents of communications are not publicized. Other interested parties in rulemaking do not have the chance to comment on the content of the ex parte contact. Ex parte contacts are allowed before starting the notice and comment period, but courts require agencies to include summaries of all important ex parte communications on the record of rulemaking to ensure that all interested parties are informed about them and courts could consider them in judicial review.²⁶

Ex parte communications by the President and the executive branch officials, and also by the members of the Congress are allowed, because the President as the chief executive is considered to have a right to ask for information about pending rulemaking as well as to contribute to the rulemaking. But if the presidential contact violates the due process,²⁷ it is not acceptable. If the rule is supported by public

²⁵ Beerman, Jack. M., Emanuel Law Outlines, Administrative Law., Wolters & Kluwer, 2010, P. 97.

²⁶ Even though the APA does not require (expressly) agencies to include ex-parte contacts in the record before starting the notice and comment period, courts interpret the APA as agencies should include summaries of all important ex parte communications.

²⁷ Due process: An established course for judicial proceedings or other governmental activities designed to safeguard the legal rights of the individual. (<http://www.thefreedictionary.com>) Under 14 th Amendment of the US Constitution, due process protection extends to all government proceedings that can result in a deprivation of a right of an individual, to ensure fundamental fairness.

record, presidential involvement in informal rulemaking is accepted as a reason to overturn a regulation by courts. Congress is free to demand that agencies place the contents of contacts with the President. Including communication with the President on the public record is a very important indicator of transparency of rulemaking in the US. Even though ex parte contacts with the President and the members of the Congress are allowed in informal rulemaking, they are not allowed to try to influence the outcome of adjudication.

d. Unalterably closed mind standard: Decision makers in rulemaking should not be unalterably close minded. They should be open to persuasion by interested parties. They cannot participate in rulemaking if they have an unalterably closed mind and they can be disqualified on this ground when this can be proved with clear and convincing evidence.²⁸

e. Concise general statement: The agency should add a concise general statement to the proposed rule that provides a reasoned explanation of the agency's decision. The agency should address substantial issues stated in the comments and should inform the public of its position about the major issues related to the rulemaking.

f. Publication of the final rules and the effective date: For a rule to be effective, it must be published in the Federal Register. Agencies usually spell the effective date of a rule. As a general application, the effective date is no less than 30 days after publication of the final rule, but if it is a major rule, it cannot be effective before 60 days. This rule is required by the Congressional Review Act to allow the Congress time to invalidate the legislation.

²⁸ Prejudgment in rulemaking is accepted as a ground to be disqualified for an administrator, because decision makers in rulemaking should be open to persuasion. This standard is not coming from the Administrative Procedural Act, it is judge made.

2. The formal rulemaking: The APA requires formal rulemaking in very rare instances. Formal rulemaking is done through an adjudicatory process.²⁹ When the organic statute of an agency says that rules should be made on the record, trial-type procedures should be followed. This process is very similar to adjudication. In the formal rulemaking, there should be a hearing presided by agency heads or administrative law judges (ALJ). The parties can present evidence, and the record produced at the hearing is considered by the courts as the exclusive record for the rulemaking. Ex parte communications are prohibited because of their likelihood of affecting the process. As in the informal rulemaking, the final rule must include a general statement of the rule's basis and purpose.

3. Negotiated rulemaking³⁰: The Negotiated Rulemaking Act was promulgated in 1990 by Congress. Negotiated rulemaking *“allows agencies to conduct formal negotiations among interested parties to formulate rule-making proposals that have the support of the interested parties.”*³¹ If it seems that interested parties in rulemaking can reach an agreement through negotiations, the agency forms a committee with representatives of all interested parties. When the committee reaches an agreement, it forms the basis for a proposed rule. The agency starts a notice and comment procedure by publishing the text produced in the committee. *“Negotiated rulemaking would seem to work best when each party involved has the power to influence the outcome, when the number of parties is fairly small, ..., when parties are under pressure to decide, when each party has something to gain from*

²⁹ Adjudicatory process is a legal process that administrative law judge hears the parties and reviews evidences and argumentation of both parties and determines the legal issue.

³⁰ Direct and Interim Final Rulemaking and Negotiated Rulemaking are not created by the APA. They are created by agencies, but has not been invalidated by courts. They allow agencies to accelerate the rulemaking process.

³¹ Beerman, Jack. M., Emanuel Law Outlines, Administrative Law., Wolters & Kluwer, 2010, P. 106.

*negotiation, when tradeoffs are possible....*³² Negotiated rulemaking enables agencies to produce better proposed rules, since they already learned the major stakeholder's view in that particular area.

4. Direct final rulemaking: This is an accelerated way of rulemaking that agencies have started to use in recent years. In direct rulemaking, an agency publishes a final rule without going through notice and comment procedure. But the agency specifies the effective date of the final rule if the agency does not receive adverse comments about the rule. If the agency receives adverse comments, the final rule is canceled and the agency starts a notice and comment process. Since this is a recent procedure in rulemaking, it has not been tested in courts yet.

5. Regulatory oversight: In the US, there is a centralized regulatory oversight and it is carried out by the Office of Information and Regulatory Affairs (OIRA) as a branch of Office of Management and Budget within the White House. The OIRA reviews and coordinates regulatory initiatives of agencies. Agencies should submit their proposed and final regulations to the OIRA with a cost benefit analysis. "*OIRA can play a significant role in the rulemaking process. ... OIRA reviews the substance of about 600-700 significant proposed and final rules each year before agencies publish them in the Federal Register and can clear the rules with or without change, return them to the agencies for "reconsideration," or encourage the agencies to withdraw the rules.*"³³ The centralized review carried out by the OIRA is very important, because it makes the regulatory process "more accessible and open to the public".

Even though the OIRA was established by the Paperwork Reduction Act

³² Breyer, Stewart, Sunstein, Vermeule, Herz, Administrative Law and Regulatory Policy, Problems, Text, and Cases, Seventh Edition, Wolters & Kluwer, p. 609.

³³ Copeland W. Curtis., The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking, \server05\productn\F\FUJ\33-4\FUJ410.txt, Seq: 1, 1-JUN-06, p.1.

(PRA) of 1980³⁴, it mostly uses executive orders³⁵ of the President to perform its regulatory review function. The content of the centralized review is regulated through executive orders of presidents. The basic principles of regulation were laid out in an executive order by President Clinton. The agencies should follow these principles in preparing their regulations.

These are some of the principles:

- “ – identify the problem and assess the significance of the problem,
- examine whether existing regulations have contributed to the problem that new regulation is intended to correct,
- identify and assess available alternatives to direct regulation,
- set regulatory priorities,
- if it is determined that a regulation is the best available method of achieving the regulatory objective, design the regulation in the most cost-effective manner,
- assess the costs and benefits of the intended regulation,
- base its decisions on the best reasonably obtainable, scientific, technical, economic and other information,
- identify and assess the alternative forms of the regulation,
- avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations, or those of other Federal agencies,”³⁶

³⁴ Paperwork Reduction Act (PRA) of 1980, 44 U.S.C. § 3503(a) (1980) (amended 1995).

³⁵ The President, as a result of executive authority, orders administrative agencies, to follow certain principles in rulemaking, like preparing cost-benefit analysis, impact analysis and considering alternatives to regulation.

³⁶ Executive Order 12,866 : Regulatory Planning and Review. 58 Fed. Reg. 51735 (1993).

President Obama issued the Executive Order 13,563³⁷ adopting the same principles of Executive Order 12,866 and enhanced its applicability. In the Executive Order 13,563, the importance of public participation was highlighted. It also emphasized the importance of adopting flexible approaches and conducting retrospective analyses of existing rules.

Another important aspect of the Executive Order 13,563 is that it required all agencies to prepare an agenda of all regulations under development or review. All these agendas are collected in a semiannual Unified Agenda of Federal Regulatory and Deregulatory Actions and this was made available to public online. The purpose was to create a single place for the public to learn what the federal government is considering for regulatory purposes.³⁸

6. Other Statutes and rules regulating the administrative rulemaking

There are some statutes bringing changes to the rulemaking system in the US, which are in effect along with the APA.

a. The 1995 Unfunded Mandates Reform Act (UMRA): This act was promulgated as a response to the federal programs imposing regulatory and social assistance obligations on state and local governments without providing financial sources to carry out those obligations. The UMRA included a lot of new provisions to be followed by agencies when promulgating rules under notice and comment procedures.³⁹ One of the most important changes the UMRA requires is that agencies prepare a statement

³⁷ Executive Order 13,563 : Improving Regulation and Regulatory Review. 76 Fed. Reg. 3821 (Jan. 21, 2011)

³⁸ Breyer, Stewart, Sunstein, Vermeule, Herz, *Administrative Law and Regulatory Policy, Problems, Text, and Cases*, Seventh Edition, Wolters & Kluwer, p. 154.

³⁹ Breyer, Stewart, Sunstein, Vermeule, Herz, *Administrative Law and Regulatory Policy, Problems, Text, and Cases*, Seventh Edition, Wolters & Kluwer, p.

about the proposed regulations, which may cause state or local governments or private sector spend more than \$ 100 million annually.

This statement should include;

- (1) the federal rule under which this regulation is being promulgated;
- (2) a qualitative and quantitative assessment of estimated costs and benefits of the Federal mandate to the subjects of the regulation;
- (3) an assessment of any disproportionate budgetary effects of the Federal mandate upon any particular region of the nation or particular State or local governments, or particular segment of the private sector;
- (4) an estimation of mandate's effect on the national economy, such as the effect on productivity, economic growth, full employment, creation of productive jobs;
- (5) a description of the results of consultation held with elected local officials.

b. The Regulatory Flexibility Act (RFA): Under this Act, the federal agencies are required to analyze the impact of their proposed regulations on small entities (businesses, NGOs.) and evaluate the alternatives to the regulation. Under the RFA, agencies do not need to minimize a rule's impact on small entities if they can provide significant legal, factual or other reasons to rationalize the rule. If any agency cannot certify that its rule will not have a significant effect, the agency has to prepare an initial regulatory flexibility analysis and this must be available for public comment.⁴⁰ If the anticipated regulatory impact is significant and affecting a substantial number of small entities, the agency should prepare a full analysis and provide less

⁴⁰ <http://www.eeoc.gov/eeoc/plan/regflexibilityact.cfm>, available at 04/16/2012.

burden some alternatives to the proposed regulation. The RFA required government agencies to submit semi-annual regulatory agendas, which included all planned federal regulations. These semi-annual regulatory agendas are helpful in terms of planning the regulatory scheme and informing public about planned regulations. The application of regulatory flexibility analysis and semi-annual agendas helped to improve predictability and transparency in the federal regulatory process.

c. The Federal Register Act: This act established a uniform system for handling agency regulations. It required federal agencies to file and publish the documents with the Office of the Federal Register and codify them in the Code of Federal Regulations. When a rule is published in the Federal Register, it notifies the public about its existence and contents. Beside rules, presidential proclamations and executive orders, notices are published in the Federal Register. The Congress or the President can also decide any other document to be published in the Federal Register. Publication of documents in the Federal Register is done by the Office of the Federal Register. The Federal Register is published each business day and it has an electronic version. A guide and a drafting handbook are available for agencies to follow when preparing documents for the Federal Register.⁴¹

IV. What Can Turkey Benefit from the US experience in rulemaking?

The USA is a common law country. Law is developed through court decisions. Higher court decisions have precedential power on lower courts, which means that lower courts should follow the precedents of higher courts in later cases. Minor facts in adjudication can make a big difference in the rule and distinguish the case from the rest of the cases. Even a statute or a

⁴¹ Curtis W. Copeland, CRS Report For Congress, The Federal Rulemaking Process: An Overview p 9-10

regulation, when interpreted by courts, become a part of common law. Courts play an important role in rulemaking when the rules are challenged in adjudication. Courts interpret the APA and/or other related statutes and uphold or set aside the challenged regulations.

The major distinction between the US and Turkish rulemaking procedures arises from common law-civil law. As a civil law country, regular court decisions do not have a binding effect on lower court's decisions in Turkey. Therefore, the court's role in Turkey is quite different than the courts in the US within the context of rulemaking. Neither the delegated power of agencies to make regulations nor the procedure followed by agencies in rulemaking is often challenged by the parties in Turkey. The most common reason for a regulation to be challenged is that the regulation goes beyond the delegated power of the statute, or it is contrary to the Constitution or the general principles of basic statutes.

Despite the fact that Turkey performs a good working system of rulemaking, it also has some weak parts. The US system can set a good example to eliminate those weaknesses of the Turkish system. I believe that Turkey should regulate its agency rulemaking with a statute to strengthen its implementing force.

Although there are big differences in two legal systems, rulemaking power is used by administrative agencies following specified procedures. The USA has a long and settled tradition in rulemaking, which makes it a very good example for Turkey (and for many other countries). Wide use of consultation process is a unique feature of the US rulemaking.

Turkey also applies consultation process, but it is not mandatory to consult with public in general. According to the by-law regulating rulemaking practices, the agencies should consult with the related agencies. But it is discretionary to consult with citizens. Sometimes agencies publish notices of their proposed rules in their own websites and accept comments; but there is no rule regulating this comment process. The agency is not required to answer those comments. Even though the agency responds to the comments, almost every time the responds are not published.

Adopting the US consultation approach to the Turkish rulemaking system will help Turkey to enhance its democracy by integrating people in the agency rulemaking. Notice and comment procedure will enhance the participatory culture and help to improve transparency in decision making. People will be aware of what proposals are being considered, what other interested parties think on that issue and what is the rationale behind the proposed rule. This open process will help people to understand the reasoning of rules, because it prevents decision makers acting arbitrary and capricious.

Another important element of the US rulemaking is impact analysis. Regulatory impact analysis has a different application in the USA. *“The USA, for example, has long experience in looking at the impacts of regulations proposed by federal agencies.....Federal agencies are required to do analysis on all economically significant regulatory actions. The American approach differs in scope from the European one as the emphasis is on executive acts rather than basic laws and it focuses on cost benefit analysis, rather than a broader analysis of policy options.”*⁴² RIA is done only for major regulations and it has some different forms in the US. It is not named as RIA; the Congress used variable names when it required different form of analysis. Regulatory flexibility analysis constitutes a good example of specified type of regulatory impact analysis. The purpose of regulatory flexibility analysis is to minimize the likely impacts of a regulation on small businesses and small entities.

Turkey adopted the regulatory impact analysis from the EU system. Nevertheless, it has almost the same function with impact assessment in the USA, in describing the problem, searching for alternatives and assessing the likely impacts of the regulation on certain areas and providing options for decision makers to take a reasoned decision. Even though the RIA is mandatory in Turkey for statutes whose potential effect is more than 10

⁴² European Commission, Better Regulation — simply explained, Luxembourg: Office for Official Publications of the European Communities.

million Turkish Liras, in practice it is not always enforced. Since it is a new concept, it has not been a practical part of the Turkish rulemaking yet. Besides, preparing RIA is mandatory only for statutes, there is no regulation requiring agencies to prepare RIA for agency regulations even if their potential effect is more than 10 million Turkish Liras. The agencies should be required to prepare RIA, when the proposed regulation has significant impact on economy, society or environment.

The US approach in handling the ex parte contacts also offers good examples to Turkey to enhance its democratic culture. Ex parte contacts are limited or prohibited in agency rulemaking in the USA. The requirement of disclosing the records of ex parte contacts in the rulemaking record avoids unwanted external impact on rulemaking. This approach can be very helpful in the Turkish rulemaking to hamper political or private efforts to affect the rulemaking process.

For Turkey, I suggest these amendments to the existing system;

1. Mandatory public consultation: The proposed laws should be published by the agencies through a central website and a specific time period should be determined to make comments. Transparency in this process is very important. All comments should be accessible by public and people should be able to comment on prior comments. Within the designated time, people should be free to comment as many times as they want and rebut other comments. After comment process is ended, agency should examine them very carefully and answer to major, substantial comments. These answers should also be accessible through the same central website. This can enhance the transparency and accountability, because it will enable public to get information about the rulemaking process efficiently. This comment procedure should be mandatory to prevent discretionary noncompliance of government agencies. It is also important that when the comment period ends, nobody should be allowed to submit comments to the agency any more, because other people will not be able to view these comments and express their views on them.

2. Regulatory agenda: Agencies should prepare a regulatory agenda every year. Agencies should review their regulatory needs at the beginning of the year and give a list of regulations they plan to promulgate that year. This agenda should be approved by the responsible minister for the agency or by the cabinet for all agencies. It should be published, so that the public will be aware of the planned regulations beforehand. If the agencies need to promulgate a rule that they did not include in the regulatory agenda, it should be possible to modify it, but it should also be subject to a new approval.

3. Ex post evaluations: Ex post evaluations for statutes and for all kinds of regulatory instruments should be mandatory within a specified time limit. These would help to ensure that rules are consistent with the needs of the society.

4. Better Regulation Executive: A better regulation executive should be established and should have the authority to direct and oversee all kinds of administrative rulemaking efforts under its sole authority.

V. Conclusion

As I explained in this paper, the Turkish administrative rulemaking system needs to be improved to ensure public participation, transparency and accountability of administration. The US establishes a good example for Turkey to follow in administrative rulemaking as well as the EU. The US rulemaking system is very well developed and ensures that every interested person is able to participate in the rulemaking process.

The rules are based on strong reasoning, and the impact assessments are prepared according to the type and content of the regulation to help decision makers. Agencies have to make sure that the likely benefits of such a system outweigh its costs. All steps in rulemaking are subject to judicial review. The judiciary plays an important role in rulemaking by reviewing rulemaking procedures followed by agencies. Courts repeal the regulations if they are not

put into effect pursuant to existing rules. Most importantly, all these steps are done transparently.

Turkey also has a well established system in rulemaking, but it does not provide enough channels for affected citizens to take part in the rulemaking process. The rulemaking process is not performed transparently. There is no regulatory agenda even within agencies, therefore public and even administrative staff cannot anticipate what regulations will be promulgated. Additionally, proposed rules are not published. Even though some agencies publish the proposed rules voluntarily, nobody knows to what extent their comments affect the rulemaking process. The rulemaking agency does not need to answer public comments, even though it has to show the reasons for not following the other agencies' comments. Therefore, Turkey needs to improve public participation in rulemaking.

The Turkish rulemaking system can be improved by adopting transparent rulemaking procedures by assuring public participation, having a centralized website to publish every step of rulemaking to keep public up to date about the process and providing mechanisms to act decision makers act accountable. For the reasons mentioned above, I believe that these changes can increase the legitimacy and applicability of such regulations.

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