

Özet

Türk Çevre Hukuku'nun çevresel kalitenin korunması ve geliştirilmesi açısından yetersiz kaldığı ve etkili olmadığı yolunda ileri sürülen tüm görüşlerin aksine olarak, Türk Çevre Hukuku üzerinde yapılan araştırmalar Türk Çevre Hukuku'nun çevre kirliliklerinin, diğer çevre sorunlarının ve biyolojik çeşitlilikte azalmanın yarattığı sonuçlarla başa çıkabilecek yeterlikte ve güçte olduğunu göstermektedir. Bununla birlikte Türk Çevre Hukuku'nun çevresel kalitenin daha etkili bir şekilde korunması açısından içinde barındığı bazı yetersizliklerin de giderilmesi zorunlu görülmektedir. Bu bağlamda özellikle üzerinde durulması gereken iki nokta vardır: mevcut mevzuatın modernleştirilmesi ve mevcut kuralların daha etkili bir şekilde uygulanabilmesi için eksikliklerinin ve yetersizliklerinin giderilmesi. Mevcut kuralların mükemmellik düzeyinin artırılması açısından öne çıkan ilk nokta mevcut çevre yönetmeliklerinin AB çevre müktesebatı karşındaki görece yetersizliği ve yeşil vergiler, pazarlanabilir kirletici kotaları, ve piyasa türü araçlar gibi ekonomik ve finansal nitelikli çevre yönetimi araçlarının Türk Çevre Hukuk sistemi içinde yerlerini yeterince alamamış olmalarıdır. Bu araştırmanın amacı Türk Çevre Hukuku'nun zayıf ve güçlü noktalarına işaret etmektir. Bildirinin varsayımı ise şudur: Uygun şekilde yorumlanmaları koşuluyla Türk Çevre Hukuku'nun halen sahip olduğu düzenlemeler çevresel ve ekolojik sorunları önleyebilme açısından yeterlidir; AB çevre müktesebatına uyum bağlamında yapılan çalışmalar sadece var olan sistemin daha iyileştirilmesine ve geliştirilmesine hizmet edecektir.

Anahtar kelimeler: Türk Çevre Hukuku, AB Çevre Müktesebatına uyum.

Introduction and Background Information: Conditions in Turkey

Environmental problems inherently contain conflict amongst related parties. While a considerable portion of the society is creating a new source of wealth and prosperity for themselves by using the natural scarce resources freely and not paying the due cost, the remaining of the society is mandated to live under the negative impacts of environmental pollution and degradation. In "Pigouvian" economics doctrine this procedure is called as "externality" or more meaningfully "negative externality".

The common denominator of environmental problems is being a negative externality for the rest of the society and the economy. Some people get the advantage of polluting the environment and some others will pay the

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concerns over the environmental protection, rules the principle of best available technology for new investments, accepts the principle of polluter pays, determines the elements of the environmental crimes such as polluting the environment, describes the environmental responsibilities of the citizens, furnishes the local administrators with environmental authorities, eases the right of suing in the courts for environmental basis (a pioneering role in the whole World) and establishes the basis of environmental penal law in Turkey.

In addition to these the legislation on the protected zones has also been established and a new administration called the Administration of Protected Zones has been formed under the umbrella of the Ministry of Environment.

Under the mandates of the Code on Environment several regulations on the protection of air quality, water quality and the soil including the Regulation on the Environmental Impact Assessment have been put into effect.

Naturally, the decisions made by the constitutional and normal judiciary in regard to the implementation of this legislation have contributed considerably to the enrichment of legal assets, teaching and the doctrine on environment law in the country.

Additionally, Turkey so far has signed more than 50 bilateral and multilateral international environmental conventions on the protection of global and regional environment.

The brief explanation made above clearly underlines that Turkish environmental law was and is adequate to deal with the environmental problems and to curb down the level of environmental degradation before and after 1982. Public authorities were supplied with sufficient authority which ranges from issuing fines to permanent closure of the polluting premises.

What was missing in Turkey in this regard was the technical procedure for vertical and horizontal legislation, monitoring systems and laboratories, market type environmental management tools, environmental funds and effective enforcement organization to apply the environmental rules and regulations in the country. This basically deletes the counter arguments on explaining why environmental enforcement was not so strong in Turkey. It was quite possible to prevent the environmental crimes even before the adoption and approximation of the EU environmental *acquis*.

However, the basic deficiencies and insufficiencies should also be emphasized which also contributed to the effective enforcement of environmental rules and regulations. One of these is the inadequate reflection of

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In order to determine the performance level of the Turkish public environmental management I have carried out a study based upon the Delphi Technique several years ago. One of the components that I intended to measure was related to the adequacy of the environmental legislation in Turkey. The result of the survey which based upon Likert type of scaling (ranging 1=fully agreed to 5=fully disagreed) is given in the table below.¹

The above result clearly indicates that the experts questioned were unsatisfied with the adequacy of the environmental legal infrastructure. However, statistically speaking a consensus has not been achieved. The reasons given by the experts are summarized below:

Those experts who posed positive outlook on the issue stated that environmental legislation is adequate to deal with the environmental problems however some of the positive respondents indicated the need for upgrading. Some of them declared that the authorities vested in the hands of local governments are unnecessarily taken over by the central government officials in the same region. Therefore they believe that extra authorities should be given to the local governments to deal with the local environmental problems.

Those experts who stated that the existing penalties and sanctions for environmental crimes are severe enough to detriment the potential environmental wrong doers have based their statements to the practice made in the field and indicated that severe sanctions are being implemented after the control and inspection made in the polluting premises which includes the permanent closure of the premise till the effective remedies will be taken by the polluters. These experts believe that the existing penalties are severe enough provided that they will be implemented accurately and effectively.

Some of the positive respondents also believe that the lack of environmental inspection or police system is not important and they suggest that such a force should not be established. They said that further empowerment of existing regular police force in the field of environmental protection might result in higher performance and efficiency. These experts used the example of "*the Environmental Teams*" established in the Gendarmerie which fully

¹ Yasamis, Firuz D., Assessing the Institutional Effectiveness of State Environmental Agencies. Environmental Management. November 2006. 38(5). 823-836. (DOI 10.1007/s00267-004-2330-9)

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- But the international members of the panel, academicians and the representatives of NGOs have expressed negative outlook on the issue.
- While the private sector and the NGO representatives are not evaluating the lack of environmental police as a main bottleneck, international experts, sub governors, mayors and academicians sees it as major obstacle for an effective enforcement system. The governors have not expressed a consensus of the issue and were divided in their opinions.

The Turkish Environmental Law: A Brief Outlook of Public Law

Despite the result of my research mentioned above, I certainly come to the conclusion that the Turkish Environmental Law as it is and without the interference of the EU environmental acquis was good enough to solve the environmental disputes and conflicts amongst the private persons and between the public and the private persons. Further to that statement, I strongly believe that it is quite possible to protect the environment by all means with the existing legislation provided that they will be interpreted accordingly. This statement excludes the presence of market type tools. It actually means that Turkey is able to protect its environment and natural resources provided that there will be political will behind it and also provided that public officials including the judges and public at large are educated, trained and conscious over the environmental problems. This will be explained briefly below:

The Turkish Constitution of 1982 since it is rather young is one of the pioneering Constitutions in the World recognizing the right for healthful and stable environment. In the Article 56 of the Constitution the right of the environment is clearly spelt out for the citizens provided that the State will fulfill its obligations within the limits of economic and financial availabilities of the Country. Besides this main clause, the Constitution is rather generous in other rights related closely to the environment. The right free usage of the shores, fair distribution soil property, right for a descent shelter, protection of historical, cultural and natural assets, protection of forests, rational utilization of

have been regulated and sanctions have been attached to them in the article 41 titled as environmental pollution. These include the following:

- Unacceptable waste emission, disposal and discharge
- Waste disposal from catering premises
- Slaughtering facilities
- Construction debris
- Household item disposal
- Disposal of discarded vehicles
- Noise emission (Article 36)

Noise is also regulated by the **Law of Police Duties and Powers** in addition to the **Noise Regulation**. In the administrative law there are also numerous codes which provide legal solutions to environmental and ecological issues. **The Code on Provincial Administration** regulates the authorities of governors and sub governors. According to this Code provision of peace and security, protection of personal immunities and right of usage and exercise over personal properties, establishment of public well being are the duties of governors and sub governors. All of these clauses definitely cover the environmental concerns. Governors and sub governors may issue general orders on the areas where there is no legal arrangements and the people are obliged to obey to these orders. Otherwise they will be penalized by the courts for defying the orders of authorized public officials.

As far as the local governments are concerned, three main codes are rather important: **Municipal Code, Code of Greater Municipalities and the Code on Provincial Special Administrations**. The **Municipal Code** denotes the following as the municipal duty: town planning, water and sewerage, urban infrastructure, environment and environmental health, solid waste management, municipal police, recreational areas, forestation and shelter.

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The **Code on Pastures** (1998) also designed a new approach to the management of arid and semi arid lands such as pasture lands and grazing lands.

The Turkish administrative law and the **administrative procedures law** also provide very important tools for the protection of the environment. Turkey has a very strong administrative judiciary which has the power of suspension of the rules made by the administration and in which annulment and compensation cases can be launched against the administration by the negatively impacted people. There are thousands of cases on environmental issues.

What are most remarkable in this venue are the very modern approach of the government under sunshine and the related components of right of information and the right of petition. Turkish citizens now have the right of information and may get any information from the public administration. As far as the right of petition is concerned, the citizens may apply to related agencies and may place petitions. The right of petition for environmental concerns has been regulated in a very special manner (Code on Environment, article 30). This article gives the right of demand an action to stop the environmental pollution from the related public agencies. The requested public authorities are obliged to give an answer within the next 60 days. Lack of response will be accepted as denial or rejection which will automatically open the way for judicial intervention by the administrative judiciary. If at the end of the judicial trial, the plaintiff's case would be accepted then the related authority has to obey the court decision and to take necessary remedial actions. This provision which has been promulgated in 1982 is certainly beyond the Aarhus Convention.

It should also be emphasized that Turkey is also a signatory to almost all global and regional conventions on environment. And, according to the Turkish Constitution the international agreements will be an integral component of the domestic law once they will be ratified by the Assembly.

The Turkish Environmental Law: A Brief Outlook of Private Law

As far as the Turkish private law is concerned there are also considerable amount of legal documents on environmental issues. The most important of them is the **Code Civil** of (1926) which is renewed in 2001. Article 730 of the Code states that each property owner should discharge his/her authority over the personal belongings not to harm or not to pose harm to others and otherwise they will be asked to reconstitute the original conditions and to take necessary remedial actions by the Court. The judge is also authorized to

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- Investors should take into account the long range impact on the natural resources and the benefits of the project
- Right of participation is essential in environmental decision making
- Stopping the pollution at the source and reuse and recycling compatible with clean environment concept should be given due importance in polluting projects/activities
- Polluter pays principle
- Market type environmental management tools should be developed
- Ministries should try to spend maximum efforts to comply with the requirements of international agreements
- Areas to be protected should be well taken care of through the Protected Zones Administration of the MoEF
- Environmental impact assessment is mandatory for specifies projects
- Environmental enforcement/inspection authority will be exercised by the MoEF in cooperation and collaboration with other central and local government authorities
- Sanctions will be implemented on violators including the closure of the facility
- Polluters will be responsible for the pollution and right of compensation is reserved for the adversely impacted parties
- Environmental management units will be established by all potential polluters
- Environmental volunteers

The article 8 of the Code states the ban on pollution. Article states that emission and discharge of pollutants are banned and those who act contrary should stop and prevent the pollution and should to mitigate the adverse impacts on the environment.

The regulations put into effect by the MoEF for the implementation of the Environmental Code is given in the table below:

EU Environmental Approximation Endeavors: System and Procedures

The Commission of the European Union (herein and after will be named as Commission) has decided to launch an approximation procedure for the candidate countries for the environmental integration under the PHARE Program. This procedure aims at approximating the environmental legislation of these countries to the environmental *acquis communautaire* (will be named as *acquis*) of the European Union (EU). Accession negotiations have long been under way between Turkey and the EU. As a natural outcome of the membership procedure Turkey has been provided with a "road map" for full membership by the Commission. Turkey has responded to the road map with a "**National Plans for the Adoption of the Acquis**". The adoption process has been under constant surveillance through the annual Progress Reports of the Commission in which the overall conditions of the membership status have been assessed and evaluated.

The Environment General Directorate of the EU (later, as Environment DG) has developed several guiding and leading documents to help to ease the pains of candidate countries to adopt the environmental *acquis* of the EU.

Three of these documents are comparatively more significant: "**The Handbook on the Implementation of EC Environmental Legislation**", "**Progress Monitoring Manual**" and "**The Guide to Approximation of Environmental Legislation**".

The first document analyses the EU environmental legislative documents promulgated until 2003. Although it has been largely recognized as "out of date" it is still an important document to introduce and explain the environmental regulations, directives and decisions. However, the *acquis* accepted after 2003 should be integrated to the original document in order to update the candidate countries.

The second document, "Progress Monitoring Manual", has already been updated recently and provides very important insights on the adoption of the environmental *acquis*.

The third document, "The Guide to Approximation of Environmental Legislation", which is the newest one in the series of projects assisting candidate countries in their efforts to adopt the environmental *acquis* of the EU has been responded by these countries by developing their own approximation strategies. The Turkish Ministry of Environment and Forestry has published

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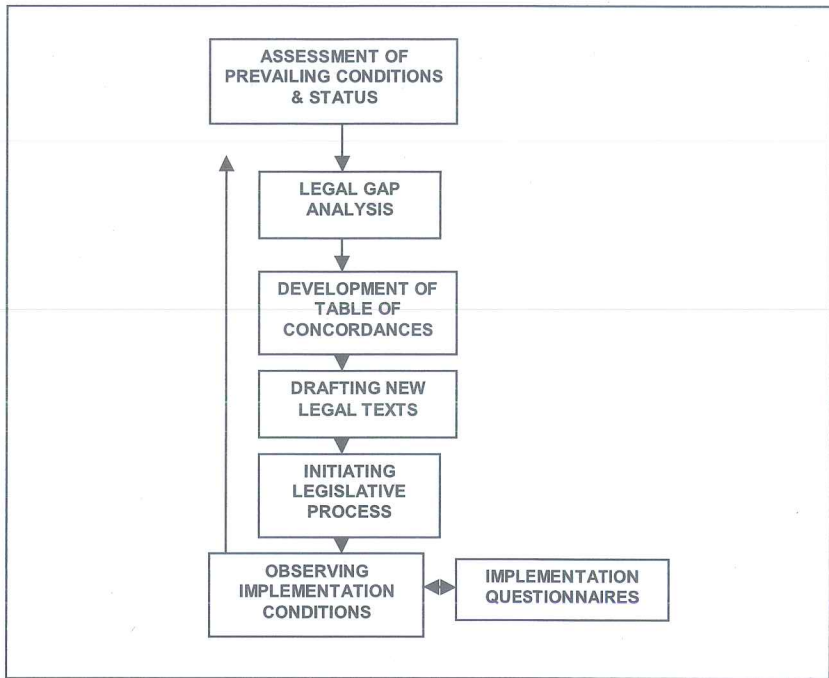


Figure 1: Summary of the Methodology

As indicated in the Figure 1, the developed methodology begins with the **analysis of the existing conditions** which tries to understand principles stated, technical solutions developed and the administrative mechanisms set up by the available legislative documents already promulgated and being implemented by the concerned countries. This search will inevitably create two results: existence of a national piece of legislation and absence of any similar legislative undertaking by the concerned countries.

The second step is **the comparison** to be made between the national document and the EU documents provided that there will be national counterpart of the EU legislation. In this case the national experts of the competent authority are assumed to identify the satisfactory and unsatisfactory

is usually vaguely defined thus causing the ineffectiveness and inefficiencies during the enforcement. The importance of this peculiar aspect is more than that is acknowledged by the relevant parties. To overcome this burden requires kind of actions which can be named as institutional ‘alignment’ or ‘fine tuning’ for the accurate implementation of the environmental *acquis*. Therefore, the term of “**administrative challenge**” should further be elaborated to the extent that the public institutions which are responsible to carry out the tasks deliberated in the legislation should be clearly spelt out and open and undisputable responsibilities and the authorities of these institutions must be secured. Otherwise, it is quite likely that the new legislation can stay on shelves without an effective implementation and enforcement.

The second issue is related to the implementation is **monitoring**. Environmental approximation is mainly related to two monitoring activities: **monitoring the transposition** and **monitoring the implementation**.

Although they look like intensely related to each other at the first glance, these two spheres are considerably distant from each other when looked at closer. “**Transposition**” is comprised of series of actions ranging from legal gap analysis to the promulgation of the legislative pieces either by the Parliament or by the Government. On the other hand, “implementation” is comprised of a different set of actions ranging from the strategy development, policy formulation, institutional set ups, financial availabilities, infrastructural amenities and human resources management. However, the issue of “implementation” relates itself to the issue of ‘**performance measurement**’ at the public environmental organizations which is a very complicated and difficult to solve in the field of environmental management. Therefore, the issue of “implementation” deserves further attention and clarification.

Strategy, Approach and the Methodology for Approximation

The approximation procedure/activities should include the following:

- Listing of EU environmental *acquis*
- List of national environmental legislation
- Developing a matrix for comparison / reconnaissance

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- Compare the normative requirements of each provision of EC legislation with any national legislation currently in force or in draft form with a view to identifying all gaps in formal legal transposition.
- Perform a brief state of affairs review with regard to the implementation of existing national legislation and its capacity to meet EU standards and practices.
- Directive by directive, assess which legislation and rules are in place, what approximation activity has been performed and what still needs to be done in terms of legal gap analysis.
- Perform a broad stakeholder analysis, including roles and responsibilities, as well as actual capacities and needs.
- Define the roles and responsibilities within existing institutions and identified stakeholders for the further legal transposition and implementation of the directives.
- Identify, in consultation with all relevant stakeholders, gaps or challenges in relation to implementation of the relevant legislation and in relation to investment.
- Detailed Legislative Gap Analysis Report: Identifies gaps in formal legal transposition and challenges in implementation and investment and covers all 10 environmental sectors.
- The report should include:
 - o State of affairs baseline assessment report.
 - o Legal baseline assessment report.
 - o Stakeholder analysis report.

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heavy job to be done. This work is now underway since 2007 and with a fund secured by the EU a consultancy team has been hired and still working. The outcome of this Project will determine the actual status quo of the Turkish environmental law compared to the environmental *acquis* of the EU.

In this regard the best source will be the EU itself. In its latest progress report on Turkey the EU states the following for environmental approximation:

*“Good progress can be reported on **horizontal legislation**. Turkey has ratified the Kyoto Protocol. The Environmental Impact Assessment (EIA) Directive has been transposed to a large degree. However, procedures for public and transboundary consultations have not been fully aligned. Some articles of the Environment Law, related to the exclusion of petroleum, geothermal resources and mine exploration from environmental impact assessment, has been cancelled by the Constitutional Court in order to improve environmental protection. Turkey is not a party to the Espoo and Aarhus Conventions. The Emissions Trading Directive has not been transposed. A greenhouse gas emission trading scheme has not yet been established. Transposition of the Strategic Environmental Assessment (SEA) Directive is at an early stage. There has been no progress on transposition of the *acquis* on environmental liability, public participation and public access to environmental information. Nor has Turkey yet started negotiations on the memorandum of understanding on its participation in the Community civil protection financial instrument. Limited progress can be reported on **air quality**. Turkey has adopted legislation on the air quality framework legislation and daughter directives, but its alignment with the *acquis* remains to be confirmed. However, the administrative capacity for implementation of the directive on regional air quality is not sufficient. The clean air centre in Marmara has not yet been established. Some progress can be reported on the trade of ozone depleting substances and the legislation related to sulfur content of certain liquid fuels. No progress has been made legislation related to the *acquis* on emissions of volatile organic compounds and national emission ceilings. Limited progress can be reported in the field of **waste management**. New legislation on packaging waste was adopted. As regards implementation, there have been complaints by EU companies about the implications of the by-law, adopted last year, restricting use of certain hazardous substances in electrical and electronic*

³ EU. Progress Report 2009.

environment agency. Responsibility for nature protection is not clearly defined between the various competent institutions. Administrative capacity needs further strengthening, including coordination between the relevant authorities at all levels. Mainstreaming environmental protection into other policy areas and ensuring that new investments comply with the environmental acquis are at an early stage. Some of the existing legislation, such as the Mining Law, the Law establishing the Directorate-General for State Hydraulic Works and the tourism legislation are still a major concern for natural areas.

Conclusion: *Turkey has made progress in the field of chemicals and on horizontal legislation by signing the Kyoto Protocol. Some progress can be reported on waste, air quality, industrial pollution and risk management and chemicals. However, the overall level of alignment remains insufficient. Turkey has made no progress in the areas of water quality, nature protection and GMOs. Non-establishment of fully fledged EIA procedures is hampering further improvements in implementation and enforcement of the EIA Directive."*

What are Missing in Turkey Compared to Acquis Communautaire

When compared to the EU's environmental *acquis communautaire* the followings seem to be missing in the Turkish Environmental Law:

- *Precautionary principle:*⁴

The precautionary principle is not defined in the Treaty, which prescribes it only once - to protect the environment. But *in practice*, its scope is much wider, and specifically where preliminary objective scientific evaluation, indicates that there are reasonable grounds for concern that the potentially dangerous effects on the *environment, human, animal or plant health* may be inconsistent with the high level of protection chosen for the Community. The precautionary principle should be considered within a structured approach to the analysis of risk which comprises three elements: risk assessment, risk management, risk communication. The precautionary principle is particularly relevant to the management of risk. The precautionary principle, which is essentially used by decision-makers in the management of risk, should not be confused with the element of caution that

⁴ EU. Communication from the Commission on "the precautionary principle". Commission of the European Communities. Brussels, 2.2.2000. COM(2000)

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Non-compliance fees
Performance bonds
Liability payments
Subsidies

These type tools did not yet get any kind of legal document in Turkey. In the approximation procedure the main emphasis should be placed on these issues.

- ***Environmental insurance and liability:***

Insurance against environmental accidents and risks have not been developed yet in Turkey. Bhopal like environmental disaster will result in huge economic losses for the companies. Similarly, environmental liabilities of the polluters have not been regulated in detail. Turkey should initiate an attempt to regulate the environmental insurance and liability system.

- ***Administrative capacity:***

Likewise and also stated in the EU Progress Report of 2009, the administrative capacity for environmental enforcement in Turkey has considerable space for improvement. My study on the assessment of effectiveness of public environmental enforcement agencies has also confirmed the above mentioned statement.

CONCLUSION

The Turkish Environmental Law system is well developed in time. The existing legislation is sufficient to protect the environment and ecology in the Country. Even some legal arrangements are more progressive than other countries including the EU environmental *acquis*. In this regard a different approach, more environmentally oriented and concerned way of interpretation is needed for the environmental and ecological principles and the rules. However, a perfect approximation with the *acquis* will definitely contribute to the enhancement of the Turkish Environmental Law system.