

Legal Functions of the Concept of Significance in the Process of Environmental Impact Assessment

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Significance is an essential concept in the international, national and regional law texts that regulate the process of the Environmental Impact Assessment (EIA).¹ Nevertheless, there is no clear definition of the concept of significance in such legal texts.² In other words, there is no clear legal definition of it; it is still undefined. It is important to stress that the concept of significance has a threshold/limit function in the EIA process. This threshold/limit function provides the acceptability of the possible negative impacts. In practice, it is common that traditional law is not able to find solutions with its traditional concept of damage nor it is possible to implement the concept of damage in a concrete case. Therefore, the concept of possible negative impact is contained in the legal texts as an alternative for the cases where the damages appear in the long term. The concept that legally provides the acceptability of possible negative impacts is the significance. Thus, the activity shall not be permitted even though there is no damage projected.

Moreover, the concept of significance has another function in the EIA process apart from that stated above. It also renders a flexibility, or discretion power, to the administration in the decision-making process.

This short article will stress the functions of the concept of significance. In the first section, the concept of significance will be explained from the aspect of the traditional discretion power of the administration. In the second section, the concept of significance will be evaluated within the dimension of environmental law and the EIA process.

The Concept of Significance from the Aspect of Administrative Discretion

The powers that the administration has are examined in two parts. In the jurisprudence, these powers are defined as the bound/related power and the discretion power.³ Since the concept of significance is related to discretion power, we should primarily explain significance in the context of the discretion power.

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1 For example, "significance" is mentioned in the Transboundary EIA Convention, the EU EIA Directive and the Turkish EIA Regulation.

2 Rob Sippe, "Criteria and Standards for Assessing Significant Impact," Handbook of Environmental Impact Assessment, Vol. 1, Judith Petts (ed.), Blackwell Science Pub., 1999, p. 74; Tracy Glynn, "Environmental Impact Assessment (EIA): A Guide for Reviewers", (http://www.cenrce.org/eng/caucuses/assessment/docs/eia_guide_for_reviewers.pdf), p. 12, (accessed on 09 November 2005); Alan Gilpin, Environmental Impact Assessment – Cutting Edge for the 21st Century, Cambridge University Press, 1999, p.6; Nigel Rossouw, "A Review of Methods and Generic Criteria for Determining: Impact Significance," 6 African Journal of Environment and Management, June 2003, p. 44; Jane Holder, Environmental Assessment (The Regulation of Decision Making), Oxford University Press, Great Britain 2004, p. 104.

3 Metin Günday, İdarenin Takdir Yetkisi [Administrative Discretion], Unpublished Phd Thesis, Ankara 1982, p. 1.

Discretion power means “the administration has the flexibility while making decisions and in its acts in that power grants the administration to choose one of the forms of those acts.”⁴ There are various appearances/forms of administrative discretion power. In the first form, the lawmaker has clearly defined the grounds for the administrative transaction and also has granted the administration the power to choose the means of the possible acts and transactions. In the other form, there is no clear definition of the grounds for the administrative transaction or act – either they are unclear or not defined at all.⁵

Huber compares the discretion power of the administration to a “Trojan Horse” and he finds it to be a breach of the principle of the rule of law.⁶ However, in accordance with the writings of Günday, the lawmaker has obliged the administration to find the most just and fair solution by granting the power of discretion to the administration.⁷ Briefly, the power of discretion grants the freedom to the administration to determine the grounds for the administrative transactions.⁸

After these observations, we should discuss whether the concept of significance is a reflection of the administration’s traditional discretion power or not.

In one aspect, the concept of significance is a way to express the traditional discretion power of the administration during the EIA process. Because in this aspect of administrative law, the administration is the body authorized to decide which planned event/act shall take place in the future. This power of the administration is a discretionary power. The possible future effect(s) of the event/act should be taken into consideration by the administration. The administration shall not give permission for the event/act if it thinks that such event/acts may cause any adverse effects. The administration can render a *contra verse* decision as long as it is an objective one and in compliance with the law. That discretion power of the administration, in the legal texts that regulate the EIA process, is expressed by the concept of significance. The EU Directive for EIA, is a good example to define the concept of significance in the context of the discretion power of the administration.

The EU Directive for EIA has established a dual system for acts which are subject to the process: the compulsory EIA and the discretionary EIA. Article 2(1) of the Directive for EIA states:

Member states shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made

⁴ *Id.* at 3., See Jürgen Schwarze, European Administrative Law, European Commission Pub., 1996, p.261-262.

⁵ Günday, *supra* note 3 at 4-7.

⁶ H. Huber, Niedergang des Rechts und Krise der Rechtswissenschaft [Decline of the Law and Crisis of Legal Science], Festgabe für Giacometti [Celebration for Giacometti], 1953.

⁷ Günday, *supra* note 3 at 15.

⁸ *Id.*, at 39.

subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4.

This article is very closely related to Articles 4(1),(2) of the Directive that define in detail all the projects which may have a severe impact on the environment. These are the projects listed in Annex I and Annex II. The member states shall try the possible precautions for the projects which are listed in Annex II, or go through them case by case or they shall establish a method composed of two alternatives.

Such structure provides to the member states a wide space to operate,⁹ especially for the projects which are subject to Annex II. However, the member states do not have such a wide space to operate in all areas. The member states are obliged to take into account some other criteria which are listed in Annex III of the Directive.¹⁰ In other words, they are restricted regarding the criteria that they may take into account while using the discretion power. If there are any possible serious impacts on the environment as a result of the project, the obligatory process from Annex I should be implemented. Nevertheless, the most important point here is the use of the discretion power by the decision-making authority. The misuse of the discretion power will be critical to determining whether the environment is fully protected or not.

The Function of the Concept of Significance in the EIA Process with Its Environmental Law Dimension

The concept of significance has, apart from its function as a part of the EIA process, other functions such as harmonizing the scientific criteria, standards and judgments in the EIA process and determining not only the moral values of the administration but of anyone who participated in the process. This means that the concept of significance has two functions, both as a traditional discretion power of the administration and as a tool to pressure for the individuals and groups who care about the environment. But at the end, the authority that will decide the significance is the authorized administrative body. The significance depends on the moral values of the officer that will decide that. Therefore, this shows the subjective side of the concept of the significance and it is very often criticized because of this feature.¹¹

The concept of significance is at the heart of the determining, anticipating, evaluating and decision-making processes of the EIA.¹² Therefore, the definition of significance must be done very well. Although there are no clear definitions in the legal texts, there are some definitions in the jurisprudence and some interpretations have been made as well.

⁹ Holder, *supra* note 2, at 107.

¹⁰ Criteria for projects are mentioned in Annex 3 under three titles: projects properties, projects locations and potential effects properties.

¹¹ Gilpin, *supra* note 2 at 6.

¹² See Rossouw, *supra* note 2, at 44-45.

In accordance with Duinker and Beanlands, the significance of environmental impacts has been centralized around the results of human activities and the importance of such results is determined by the moral values of the society concerned. On the other hand, Thompson attached the significance of an impact to the cost or value of an influence on the society. According to Thompson, the focus of the EIA should be a judgment that clearly defines the impact on the chosen groups that are elected to represent the society or the impact that directly affects the society's own moral values.

According to Sadler, the concept of significance has a subjective identity, carrying a moral value and is therefore bound with a condition. Moreover, he added that significance is related to the threshold values and therefore bound with the evaluations of the scientists.¹³

Apparently, all these statements are confusing and not clear at all. However, they also bring new dimensions and approaches in order to be able to frame the concept of significance. First of all, the concept of significance carries an inherent moral value. In other words, significance has the potential risk to be shaped and designated by the personal values, ideas, personal aspects of the authorized person, group or administrative body. The significance is also related to another concept, which is the character of the impact. Finally, the judgement of significance shall be designated in a system dominated by the anthropocentric approach.

In light of this information, it is said that the concept of significance has subjectivity and interpretation criticisms.¹⁴ If there is a wide space for the authorized body while making the decision whether an activity may have environmental impact or not, then here we can talk about the discretion power of the administration. While there are certain steps to take when making a decision, if the administrative body making this decision has interpreted some criteria, then we can obviously say that the administrative body has used its discretion power.¹⁵

We can now go one step further to understand in which phases the concept of significance is taken into consideration during the whole EIA process.

Significance is used in the different phases of the EIA process: pre-examination phase (screening), examination phase (scoping), preparation of the EIA phase and finally the decision-making phase.¹⁶ Significance has different meanings in all these different phases.¹⁷ We shall define these phases briefly. The meaning of significance in the pre-examination phase is whether it is necessary to execute the EIA process or not. The potential

¹³ For these views, see Sippe, *supra* note 2, at 78-80; see also Rossouw, *supra* note 2, at 46.

¹⁴ Holder, *supra* note 2 at 108.

¹⁵ *Id.* at 109.

¹⁶ For a detailed explanation of these process, see Abdurrahman Saygılı, Çevre Hukuku Açısından Çevresel Etki Değerlendirmesi [Environmental Effect Assessment for the purposes of Environmental Law], İmaj Yay., Ankara, 2007.

¹⁷ Ulf Kjellerup, "Significance Determination: A Rational Reconstruction of Decisions", 19 (3) EIA Review, 1999, p. 4.

risks of the project are evaluated in this phase. In the examination phase (scoping), the content of the important impacts are designated; the methods and approaches in this phase are facilitation (*kolaylaştırma*), stakeholder engagement (*paydaşların yükümlülüğü*), negotiation and compromise. The preparation of EIA phase is the most essential phase because all the authorities that are obliged to implement the EIA have to prepare a report regarding that. While preparing these reports, all the important documents and information are gathered together, the definition of impacts are used and all the significance criteria are united in order to submit to the authorized decision-making bodies. In this phase, some methods and approaches are generally used; designating in advance the criteria which shall be used in impact assessment, submitting professional judgments, mapping, and animation of the project on paper are the methods and approaches which are widely used. The last phase is the decision-making phase. The authorized decision-making bodies shall examine the impacts as to whether the consequences of these impacts shall be legally acceptable and then they shall render their final decision. It is important to balance and measure the positive and negative impacts very well before rendering any decisions. Or else, in the future, the affected or interested parties can file a lawsuit against this decision and have it cancelled.

CONCLUSION

As a legal tool, the EIA process has caused transformations in the traditional law but still many concepts of traditional law are being widely used in EIA. One of these concepts is the discretion of the administration. However, we do not encounter this concept when we examine the legal texts that regulate the EIA process; it is replaced with the concept of significance instead. The reason for such preference is not to stress that the EIA process is unique or to cause any confusion; the reason for that is due to the unique feature of the process – it demands the traditional institutions and demands to create some other new institutions. The most important and precious example of such new institutions in the EIA texts is the concept of significance. Apart from being the name of the traditional discretion power of the administration in the texts that regulate the process, it is also an alternative resolution to the environmental problems which show many differences from the regular ones. Significance is also important because it changes the approach and attitudes of the administration. It can be only possible that administrative bodies that use the discretion power can decide in favor of the environment by the methods and approaches that the concept of significance brings. Meanwhile, the environmentalist groups and individuals may participate in the EIA process by interpreting the concept of significance. In these aspects, the concept of significance, although having some negative aspects, can enrich the traditional discretion power in favor of the environment.