Chapter 2
The Place of Regulation Within the Public Law in Turkey

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2.1 Introduction

From a general perspective, Turkish public law has not really been coherent with the economic notions. The majority of public lawyers, including administrative tribunal judges, have usually had a tendency to disregard the economic aspects of legal conflicts. Thus, economic analysis in public law works and judgments is extremely uncommon. *Regulation* is a part of the economy-based notions that have generally been neglected by Turkish public law doctrine and jurisprudence. However, things have begun to change since the last few decades as a result of globalization, locating the economy and even the public law disputes at the "centrum" of politics.

2.2 How Does the Turkish Public Economic Law Perceive the Regulation?

The Turkish public law doctrine had not been using the term "regulation" until the 1990s, when the concept of regulation penetrated into Turkish law via French law despite the fact that the notion is of Anglo-Saxon origin.[1] We can explain this indirect penetration by the fact that the Turkish administrative system had adopted the French style "unitary" system instead of a "federal" system and embraced the "civil law" system instead of "common law." Thereby, Turkish legal doctrine has preferred to grant to French legal doctrine the honor of "facing" this "American invention" of regulation. Since adapting that unfamiliar notion of common law to the civil law system is an important issue.

[1] The first academic works about regulation and regulatory agencies in Turkish legal doctrine directly refer to the French legal doctrine (Duran 1998; Tan 1996; Erkut 1998; Ulusoy 2003).

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In this context, regulation is perceived in Turkish law as the establishment of rules concerning a specific field, and ensuring their compliance by applying sanctions if necessary.

The Turkish legal doctrine seems to apprehend the regulation in a broader sense than the economic theory. Lawyers talk about regulation in the following three situations:

- Subordinating to public rules and control a former legal monopoly subject to open competition (e.g., fix telephone operating service).
- Subordinating to public rules and control a natural monopoly (e.g., electricity transmission and distribution activities).
- Realizing a public control mechanism toward an economic activity in order to ensure fair competition and protect the public interest (e.g., electricity generation and mobile telephone operating service).

Regulation has actually become a key notion in public economic law because of the transformation of the role of the state as a result of globalization. In this recent paradigm, the fundamental mission of the state is not the direct undertaking of responsibility for the main public necessities but the performance of the duty of referee and organizer of public life. In lieu of being an armed deterrent force, the state acts in its new role to show a conciliatory, moderate, and guiding moral authority.

Establishing rules and sanctions for "regulating" does not constitute a primary objective but just an instrument to be used in case of emergency. Before applying a sanction, the general tendency is warning and using persuasive methods toward economic actors. Reducing the legal norms or at least rendering the rules more flexible, as called "deregulation," is also being accepted. In the process, economic actors gain a broader margin of action.

The essential aim of regulation is to secure efficiently the common needs of humanity through a public control mechanism. In this context, a connection similar to socialism and social democracy seems to be created between liberalism and regulation. Considering that social democracy assumed the mission of rationalizing socialism by "taming" it, regulation could probably perform the same mission with regard to liberalism.

Regulation is understood, in the Turkish public law, as rulemaking and control activity performed by independent regulatory agencies (IRA) that stay out of conventional administrative bureaucracy and are independent of the political power.[2] Despite the several privatizations realized during the last decade in Turkey, the state still operates many economic activities that bear a public service character. Thus, the state functions as a direct producer of goods and services. Moreover, it competes with the private sector with regard to several public utilities, e.g., the generation, wholesale and retail of electricity, banking, internet service providing, radio–TV broadcasting, postal service, etc.

Referring to the idea that the state cannot be a fair referee if it is a player in the same game, the Turkish public opinion is convinced that the regulation of the main

[2] Regulation has also been conceived as the same manner in French public law (Rapp 2001; Guedon 1991; Gazier and Cannac 1984; Hubac and Pisier 1988; Teitgen-Colly 1988; Chevallier 1986).

public economic activities should be done by IRA, being more autonomous and neutral institutions vis-à-vis the government.

Concerning d*eregulation*, this notion has not been used to mean a total withdrawal of the regulations but rather as rendering them "softer." Therefore, deregulation requires the loosening and, occasionally, the annulment of the rules applicable to economic actors (Turkkan 2001: 12).

2.3 The Constitutional Framework of the Regulation in Turkey

The Turkish Constitution does not contain any general provision about the economic regulation. Nevertheless, the Constitution requires an administrative control over any type of public entities including public economic entities and activities. This mandatory administrative control over public economic entities and activities results from the principle of the unity of the public administration having the constitutional authority. The principle of the unity of the public administration is formulated by the article 123/1-2 of the Constitution which states "*The administration forms a whole with regard to its structure and functions… The organisation and functions of the administration are based on the principles of centralization and local administration…*"[3]

Furthermore, "The central administration has the power of administrative trusteeship over the local governments in the framework of principles and procedures set forth by law with the objective of ensuring the functioning of local services in conformity with the principle of the integral unity of the administration, securing uniform public service, safeguarding the public interest, and meeting local needs, in an appropriate manner," in accordance with the Article 127/5 of the Constitution.

Those constitutional provisions expose that a regulation over the economic activities of the state and the public enterprises is made mandatory in the name of the constitutional principle of unity of the public administration. This type of regulation should be effectuated by the administrative agencies under the hierarchical structure of the administration and the principle of administrative tutelage.[4]

On the other hand, Article 167/1 of the Constitution imposes an obligation on the public authorities to take proper measures in order to ensure and promote a

[3] "*IV. Administration/A. Fundamentals of the Administration/1. Integral Unity and Public Legal Personality of the Administration/ARTICLE 123*. The administration forms a whole with regard to its structure and functions, and shall be regulated by law. The organization and functions of the administration are based on the principles of centralization and local administration. Public corporate bodies shall be established only by law or by the authority expressly granted by law."

[4] Under the principle of administrative tutelage, the central government has the power of control over the local authorities and the public enterprises. Contrary to the hierarchical control, the administrative tutelage involves a limited and exceptional power of control (Gozubuyuk and Tan 2008; Gozler 2009).

better functioning of the money, credit, capital, goods, and services markets. They shall also prevent the formation of monopolies and cartels in the markets.[5]

Besides, Article 172 empowers the public authorities to take measures to protect and inform consumers and to encourage their initiatives to protect themselves.[6]

There is, finally, no doubt that regulating the public economic activities is a constitutional obligation with regard to Articles 123/1-2 and 127/5. However, whether Articles 167/1 and 172 of the Constitution could form a legal basis for raising the issue that regulation of all kinds of economic activities is a constitutional necessity under Turkish public law is an open-ended question.

Nevertheless, the delegation, on the constitutional level, of duty toward the public authorities for ensuring "orderly functioning of the money, credit, capital, goods, and services markets" is in our view an undeniable legal necessity of regulation.[7] Otherwise, we cannot see how the consumers could be protected without the regulation of the economic activities and the provision of competition in the markets. In fact, the Turkish Constitutional Court has, referring to Article 167/1 of the Constitution, affirmed the constitutionality of the power of "regulation" of the *Tobacco and Alcohol Market Regulatory Body* in the foregoing market.[8]

However, the constitutional obligation of regulation with regard to the public and private economic activities does not mean that regulation should be effectuated by IRA. Actually, the legislator has discretionary power to implement regulations via IRAs or conventional administrative agencies (Ulusoy 2003: 140–141). The Constitution does not reveal any preference concerning the "origin" of regulation. The question of "who shall regulate?" does not constitute a problem of the Constitution.

2.4 The IRA in Turkey

2.4.1 The Appearance of IRA in the Legal Environment

The main reason of the appearance of IRA in the Turkish legal environment is certainly the necessity for an independent and reliable regulation. The sensible

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[5] "*II. Supervision of Markets and Regulation of Foreign Trade/ARTICLE 167*. The state shall take measures to ensure and promote the sound, orderly functioning of the money, credit, capital, goods, and services markets; and shall prevent the formation, in practice or by agreement, of monopolies and cartels in the markets. In order to regulate foreign trade for the benefit of the economy of the country, the Council of Ministers may be empowered by law to introduce or lift additional financial impositions on imports, exports, and other foreign transactions in addition to tax and similar impositions."

[6] "*VI. Protection of Consumers, Small Traders and Craftsmen/A. Protection of Consumers/ ARTICLE 172*. The state shall take measures to protect and inform consumers; shall encourage their initiatives to protect themselves."

[7] Turkish legal doctrine has disregarded to discuss this matter.

[8] Constitutional Court, November 20, 2003, E.2002/32, K.2003/100, *Official Gazette*, August 11, 2004.

fields in common everyday life such as energy, telecom, banking, stock market, public procurement, broadcasting, and economic competition should be free from the influence of politics and politicians, and also from the "capture" of the economic actors. The best way of such regulation seems to be to perform it via IRA, as "councils of sages" (Sabourin 1983: 292).

In addition, we can describe two more reasons that confirm the appearance of IRA in Turkey. First, the inefficiency of the conventional administrative structure in preventing the widespread corruption, especially in some key sectors such as banking and energy, provoked the lawmakers to call upon IRA as "corruption rescuers." In this context, the creation of BDDK (Banking Regulation Authority) following a huge corruption wave in the banking sector in the early 2000s, and also the founding of the EPDK (Energy Market Regulatory Agency) after several corruption operations, in which the personnel of the Ministry of Energy had been involved at the end of the 1990s, confirm this thesis.

On the other hand, some IRA seemed to be created under the influence of international economic public opinion and international economic organizations in order to attract more international investment. In this context, we could mention, as examples, the creation of the Telecommunication Authority, the Tobacco and Alcohol Market Regulatory Authority, and Sugar Market Authority (Ulusoy 2003: 7).

The influence of the international economic organizations such as IMF or World Bank in creating some IRA had also been sensed by a section of Turkish public opinion as an example of the exploitation and domination of the emerging countries' markets by the international or "supranational" economic powers.

IRA depart from the conventional administrative agencies on two points:

- The lack of the typical administrative control mechanisms, as hierarchy and administrative tutelage, of the central government over board members and their decision power.
- The mission of regulation, rather than management, of public services or other sensible private activities.

Indeed, IRA do not undertake any public service or other activities as operators. Their competence is limited by regulating a designated field. On the other hand, IRA benefit from a much broader administrative autonomy compared with conventional administrative agencies.

2.4.2 The Reactionary Points of the Conventional Administrative Structure Toward IRA

The surprising and sudden appearance of IRA in the Turkish administrative structure has attracted a lot of criticism, which could be classified into two groups.

The first preoccupation is about the erosion of the centralist and also unitary character of the state via IRA.

The Turkish Constitution imposes a unitary state system. The Constitution literally gives a discretional power to lawmakers for upholding a centralized or decentralized administration.[9] However, The Constitutional Court seems to smell a rat in the decentralization of the state in the name of its unitary character. In this context, the Court invalidated a recent law that had been giving more power to local authorities.[10]

Taking inspiration from this jurisprudence, a number of doctrines allege that the presence of IRA is a different way of decentralization, by transferring the power of central administration to atypical administrative agencies, which benefit from more administrative autonomy without the control of tutelage.

The second concern about the presence of IRA is more theoretical. By the proliferation of IRA, bureaucracy acquires more ground and decision making powers in the public life to the detriment of politicians. This effect causes a democracy problem. Elected people lose ground against appointed bureaucrats as IRA use more important powers than the other administrative agencies. The big part of those powers should normally be used by the legislative agencies. The main concern is whether IRA's "coup d'Etat" concerning the essential competence in the context of weakened political power poses a democracy problem.

2.5 Conclusion

The regulation has become actually a key notion in the Turkish public economic law because of the transformation of the role of the public authority as a result of globalization. For the public law doctrine, the objective of regulation is to secure efficiently the common needs of society through a public control mechanism. In the Turkish public law, the regulation of the main public utilities has been generally performed by IRA.

The Turkish Constitution requires an administrative control over any type of public entities including public economic entities and activities under the Articles 123/1-2 and 127/5. The necessity for an independent and reliable regulation of the public utilities and the other key public services has obliged the appearance of IRA in the Turkish legal environment. However, the Turkish legal doctrine discusses whether IRA erode the centralist and unitary character of the state and IRA "pamper" the bureaucracy to the detriment of politicians.

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[9] Article 123 of the Constitution: "The administration forms a whole with regard to its structure and functions, and shall be regulated by law. The organization and functions of the administration are based on the principles of centralization and local administration. Public corporate bodies shall be established only by law, or by the authority expressly granted by law."

[10] Constitutional Court, February 4, 2010, E.2008/27, K.2010/29; E.2008/28, K.2010/30, *Official Gazette*, June 21, 2010.

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