

# **FROM THE LACK TO THE REQUIREMENT: The Public Consultation Reform in Saudi Arabia<sup>1</sup>**

Saud M. Alholiby & Zakaria A. Almulhim

## **ABSTRACT**

Since the foundation of the Kingdom of Saudi Arabia, there had been a lack of public involvement in the decision-making process. Interestingly, however, the Saudi government has recently introduced a new requirement for most proposed laws and regulations: public consultation (PC). Among the first to address the reform in the Kingdom, this Article offers an overview of the PC concept and its development. This Article compares the U.S. and Saudi PC experiences and further analyzes the Saudi PC adoption to achieve three goals. First, the Saudi reader will gain a better understanding of the PC concept by introducing the U.S. experience (the notice and comment). Second, the U.S. reader, unfamiliar with the Saudi legal system, will gain a better understanding of the Saudi experience, along with a brief but necessary constitutional background. Third, the comparison provides an opportunity to make observations about the two experiences, which paves the road to propose critical recommendations for the Saudi policymaker to realize a meaningful PC implementation. Moreover, this Article documents and analyzes PC practices conducted by Saudi government agencies before and after the adoption of PC in the Kingdom.

## **ABOUT THE AUTHORS**

Saud M. Alholiby is a faculty member at Imam Mohammad Ibn Saud Islamic University (IMSIU) and King Faisal University. He is an S.J.D. candidate at the University of Florida Levin College of Law. He also obtained an LL.M. degree in International Taxation at the University of Florida (2019) and an LL.B. from Imam Mohammad Ibn Saud Islamic University (2015).

Zakaria A. Almulhim is an assistant professor at Institute of Public Administration in Saudi Arabia. He obtained his S.J.D. from the University of Minnesota Law School, from where he also obtained an LL.M. (2018). He earned his LL.B. from Imam Mohammad Ibn Saud Islamic University (2015).

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## INTRODUCTION

Vision 2030 is a bold yet achievable blueprint for an ambitious nation. It expresses our long-term goals and expectations and it is built upon our country’s unique strengths and capabilities.

—Crown Prince Mohammad bin Salman Al-Saud<sup>2</sup>

Throughout the Kingdom’s history, laws and regulations were issued lacking noticeable public involvement. Competent authorities with the power to make rules had no legal obligation to consult the public in the regulatory and legislative process. However, in the past few years, the Kingdom made some unprecedented procedural changes. In 2014, the Council of Ministers issued the first resolution that facilitated the introduction of the public consultation (PC) concept. The Council of Ministers’ resolutions that followed were explicit, as

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2. Official statement of Crown Prince Mohammad bin Salman Al-Saud, as published by the Saudi Arabian Cultural Mission to the U.S. *Vision 2030*, SAUDI ARABIAN CULTURAL MISSION TO THE U.S. (n.d.), <https://www.sacm.org/ksa/vision2030>.

they adopted and mandated this concept in the lawmaking and rulemaking procedure. In different words, the Council of Ministers did not impose PC only on regulations; rather, laws and other rules that are of a regulatory nature also fell under the same requirement.

Because of the novelty of this concept to the Saudi legal system, this Article is among the first to address the adoption of PC. The literature on this topic in the Saudi sphere is nonexistent. Therefore, this Article offers an overview of the concept of PC as adopted by the Council of Ministers' resolutions in Saudi Arabia. This Article also seeks to introduce the reader (unfamiliar with the concept of PC) to the U.S. experience commonly known as notice and comment requirements. Moreover, this Article analyzes early PC practices conducted prior to the Council of Ministers' resolutions and some highlights of current practices after adopting the PC requirement.

Most recent unprecedented changes are emanating from the Saudi Vision 2030 ("the Vision"). The Vision is an ambitious economic plan to end the Kingdom's dependency on oil revenues by diversifying its sources of income.<sup>3</sup> The Vision is not the first ambitious plan in the Kingdom's history, but no plan had a clearer roadmap and trackable progress than the Vision.<sup>4</sup> Indeed, the Vision is about much more than creating a healthier economy. After all, reforming the economy embodies other major reforms that have an impact on individuals' lives.

To make this unprecedented transformation embraced by the Vision possible, the Kingdom has amended, passed, and even rescinded numerous laws and regulations under the Regulations Review Program.<sup>5</sup> The notion is that the legal framework and governmental apparatus must be compatible with the Vision's programs and objectives. In fact, regulatory review has extended to rescinding unnecessary laws and regulations.<sup>6</sup> The fascinating aspect of this type of review

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3. KINGDOM OF SAUDI ARABIA, VISION 2030 (n.d.), available at [https://www.vision2030.gov.sa/media/rc0b5oy1/saudi\\_vision203.pdf](https://www.vision2030.gov.sa/media/rc0b5oy1/saudi_vision203.pdf) (hereinafter "the Vision").

4. See generally, Steffen Hertog, *Challenges to the Saudi Distributional State in the Age of Austerity*, MIDDLE E. INST. (National University of Singapore) (2016), [http://eprints.lse.ac.uk/68625/13/Hertog\\_challenges\\_to\\_the\\_Saudi\\_distributional\\_conference\\_paper\\_author\\_LSERO.pdf](http://eprints.lse.ac.uk/68625/13/Hertog_challenges_to_the_Saudi_distributional_conference_paper_author_LSERO.pdf).

5. The Regulations Review Program of the Vision mentioned a few examples of reviewed laws and regulations, including the Company Law, the Non-governmental Organizations' Law, the Law Concerning Fees on Unused Lands, and the General Authority for Endowments (*Awqaf*) Law. See, KINGDOM OF SAUDI ARABIA, *supra* note 3, at 81.

6. For example, the Ministry of Commerce proposed rescinding the licensing requirements for debt collectors and transaction brokerage providers for PC. The Ministry's proposal referenced easing citizens' ability to practice business professions and to enhance the Saudi business environment. See, The Ministry of Commerce Media Center, *The Ministry of Commerce is Surveying the Opinions of the Public and those Interested about Cancelling the Licensing Requirement for Debt Collection Activity*, MINISTRY OF COMMERCE (Oct. 26, 2020), <https://mci.gov.sa/en/mediacenter/news/pages/26-10-20-02.aspx>; The Ministry of Commerce Media Center, *Proposal for Transaction Brokerage at Government Agencies*, MINISTRY OF COMMERCE (Oct. 25, 2020), <https://mci.gov.sa/en/mediacenter/news/pages/25-10-20-01.aspx>

is that the Kingdom is unfamiliar with notions of deregulation (without substituting rules).

Moreover, the Kingdom has restructured the whole government by establishing new agencies and dissolving or merging existing ones. The establishment of new agencies is certainly associated with the enactment of new laws and regulations and covering areas that had been untouched by the government. For example, the Zakat and Income Authority was converted into the General Authority of Zakat and Tax (GAZT);<sup>7</sup> this reform accompanied the introduction of new taxes on citizens for the first time, including the value-added tax (VAT).<sup>8</sup> In other words, extending the government's reach to unregulated areas could be a serious sign of transforming the Kingdom from a welfare or rentier state into a regulatory state.

However, the more persuasive signs of the regulatory state in the Kingdom are found in the ongoing efforts to privatize sectors and services that were traditionally controlled and provided by the state.<sup>9</sup> The Vision has a whole program of privatization that aspires to increase the private sector's contribution to the national economy through:

paving the way for investors and the private sector to acquire and deliver services - such as health care and education - that are currently provided by the public sector. We will seek to shift the government's role from providing services to one that focuses on regulating and monitoring them and we will build the capability to monitor this transition.<sup>10</sup>

Yet, what constitutes the regulatory state is sometimes disputed and varies from one state to another.<sup>11</sup> As Karen Yeung puts it, the concept of the regulatory state "has always been a rather fuzzy edged heuristic, rather than a precisely formulated term of art."<sup>12</sup> Consequently, the manifestation of the regulatory state in the Kingdom might be slightly different when compared to other regulatory states, especially knowing that many newly-privatized sectors are indirectly under the state's control through the total or partial ownership by the Saudi Public Investment Fund (the PIF).<sup>13</sup>

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(last visited Nov. 29, 2020).

7. The name of GAZT has recently been changed again into Zakat, Tax and Customs Authority (ZATCA) by the Council of Ministers' Resolution No. 570, dated 1442/09/22 (May 4, 2021). Mainly, the resolution approved merging GAZT and the General Authority of Customs into one authority and introduced a new *tandheem* for the new authority.

8. See generally, *About ZATCA*, ZAKAT, TAX AND CUSTOMS AUTHORITY (n.d.), <https://zatca.gov.sa/en/AboutUs/Pages/default.aspx> (last visited Oct. 17, 2021).

9. Karen Yeung, *The Regulatory State*, in *THE OXFORD HANDBOOK OF REGULATION* 64, 65–68 (Robert Baldwin et al. eds, 2010).

10. KINGDOM OF SAUDI ARABIA, *supra* note 3, at 45.

11. Yeung, *supra* note 9, at 68.

12. *Id.*

13. For example, the PIF announced ARAMCO's successful acquisition of 70 percent of SABIC, which means a state's strategic control of the Saudi energy and petrochemical

Fortunately, one of the principles that the Vision promotes is involving the public in the policy and decision-making process. The Vision seeks to “deepen communication channels between government agencies on the one hand and citizens and the private sector on the other.”<sup>14</sup> The Vision emphasized the need to “give everyone the opportunity to have their say so the government can serve them better and meet their aspirations.”<sup>15</sup> Hence, the Vision acknowledges two things: (1) the public’s essential role in achieving the Vision’s objectives and (2) the government’s duty to consider the public’s input and feedback.<sup>16</sup> Finally, though the Vision does not explicitly refer to the concept of PC in the rulemaking process, it sets the tone for such a mechanism. Part of setting the tone is committing to enhance the Kingdom’s ranking in several global indexes, including the UN E-Participating Index, as discussed later in the Article.<sup>17</sup>

This Article is organized as follows. Part I explains and defines PC in general in the Saudi context. Part II provides an overview of the notice and comment experience in the United States, along with an analysis of the motives and values behind adopting this requirement. Part III of this Article offers a brief explanation of the Saudi lawmaking and rulemaking process from the constitutional standpoint. It then discusses the stages through which the PC was adopted in the Kingdom. Moreover, Part III analyzes variant PC practices before and after the official requirement of PC in the Kingdom. Finally, Part III examines the motives and values used to justify the serious and sudden introduction of PC in the Kingdom. Part IV compares the Saudi and U.S. PC experiences under 6 categories, including values and motives, scope, and judicial review.

## I. PUBLIC CONSULTATION (PC) IN GENERAL

Consulting the public in the rulemaking process has gained international attention.<sup>18</sup> Many international organizations focusing on developmental and

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industries. Although ARAMCO is not owned by the PIF, it is still owned by the Saudi government, meaning that all these entities are owned by the government. See *ARAMCO Completes its Acquisition of a 70% Stake in SABIC from the Public Investment Fund (PIF)*, PUB. INV. FUND (June 16, 2020), <https://www.pif.gov.sa/en/Pages/NewsDetails.aspx?NewsId=183>.

14. KINGDOM OF SAUDI ARABIA, *supra* note 3, at 65.

15. *Id.* (emphasis added).

16. The Vision also created the Decision Support Center at the Royal Court to support decision-making through analytical and evidence-based information and reports. *Id.* at 83.

17. See, Section C of Part III: Values and Motives: Global Competitiveness & Business Environment.

18. There are 37 state parties in the Organisation for Economic Co-operation and Development (OECD) who work to improve, among other things, their decision-making process. See *Our Global Reach*, OECD, <https://www.oecd.org/about/members-and-partners> (last visited Mar. 12, 2021); OECD, DIGITAL GOVERNMENT INDEX: 2019 RESULTS (2020), <https://www.oecd-ilibrary.org/docserver/4de9f5bb-en.pdf?expires=1634523321&id=id&accname=guest&checksum=1311902264451D88F5CFB5D4B4490E62>.

economic programs promote the concept of PC.<sup>19</sup> An indirect technique to motivate states to adopt a PC procedure has been to launch competitiveness reports in areas related to PC, including open government and transparency.<sup>20</sup> Needless to say, some states have had a head start implementing PC, particularly states that have constitutional or cultural incentives or requirements. This Article includes a bird's-eye view of one of these state's PC apparatus, namely, the U.S.

Since the concept of PC is internationally widespread, it has various practices and definitions. Therefore, the definitions cited in this section should narrow the numerous meanings of PC and provide the reader with a precise idea about the use of this concept in Saudi Arabia (and this Article). The Organisation for Economic Co-operation and Development (OECD) defines the public's participatory role within the concept of PC as the "active involvement of interest groups in the formulation of regulatory objectives, policies and approaches, or in the drafting of regulatory texts."<sup>21</sup> The OECD characterizes PC as a means utilized to improve transparency, efficiency, and effectiveness in the rulemaking process.<sup>22</sup> Some scholars define public participation as the involvement of interested or impacted groups or individuals in "a proposed project, program, plan or policy that is subject to a decision-making process."<sup>23</sup> Though these two definitions give a helpful idea about PC, they are somewhat broad and extend beyond the rulemaking process.

On the Saudi level, no uniform official definition of PC can be detected. The Council of Ministers Resolutions establishing PC do not offer a definition of this concept. The only PC definition found is a regulatory definition. The Capital Market Authority's Guide<sup>24</sup> on PC defines the term as "A request for public comments on an implementing regulations project."<sup>25</sup> The same guide restricts the scope of "implementing regulations" to rules issued by the Capital Market Authority for the implementation of its law(s).<sup>26</sup> Obviously, this PC

19. Examples: The OECD, UN, World Bank, WAREG (European Water Regulators). This is not exclusive for non-profit organizations, for-profit companies have also entered this arena. See e.g., Darzin Software, *Public Consultation Guide: From Planning to Implementation*, DARZIN SOFTWARE (n.d.), <https://www.darzin.com/public-consultation#section9> (last visited Nov. 29 2020).

20. See, *E-Participation Index*, *infra* note 236.

21. See, DELIA RODRIGO & PEDRO ANDRÉS AMO, OECD, BACKGROUND DOCUMENT ON PUBLIC CONSULTATION 1 (n.d.), <https://www.oecd.org/mena/governance/36785341.pdf> (last accessed Feb 18, 2021).

22. Other tools include Regulatory Impact Analysis (RIA), regulatory alternatives and improved accountability arrangements. *Id.*

23. Pierre André et al., *Public Participation International Best Practice Principles*, Special Publication Series No. 4., INT'L ASS. FOR IMPACT ASSESSMENT (Aug. 2006) [https://www.researchgate.net/publication/322603480\\_Public\\_Participation\\_International\\_Best\\_Practice\\_Principles](https://www.researchgate.net/publication/322603480_Public_Participation_International_Best_Practice_Principles) (last visited Nov. 19, 2020).

24. See full citation at *infra* note 131.

25. *Id.* Article 2(c).

26. *Id.*

definition is narrow in terms of subject-matter, being tailored to a specific agency's jurisdiction. In addition, this definition is limited in its scope to the Authority's implementing regulations. Hence, the above definition stops short at its limited jurisdiction and does not paint a unified picture of PC in the Kingdom. For the purposes of this Article, PC is the official process that enables stakeholders to comment on proposed laws or regulations.<sup>27</sup> Finally, the term used in this Article is PC since it is the chosen name of the Saudi official unified platform launched for this purpose.<sup>28</sup> PC is also the term that had been used by some agencies prior to introducing the PC concept governmentwide in the Kingdom.<sup>29</sup>

## II. THE U.S. EXPERIENCE

This Article compares the U.S. and Saudi PC experiences and analyzes the Saudi PC adoption to achieve three goals. First, the Saudi reader will gain a better understanding of the PC concept by introducing the U.S. experience (the notice and comment).<sup>30</sup> Second, the U.S. reader, unfamiliar with the Saudi legal system, will gain a better understanding of the Saudi experience, along with a brief but necessary Saudi constitutional background. Third, the comparison provides an opportunity to make observations about the two experiences, which paves the road to proposing critical recommendations for the Saudi policymaker to realize a meaningful PC implementation.

Although this Article is focused on the nascent Saudi PC experience, this part provides a brief overview of the U.S. rulemaking experience. Needless to

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27. The literature, national laws, and international organizations use different terms in the PC context, such as public (or citizen) participation (or consultation), and notice and comment. The use of these terms gives an indication that they are generally used interchangeably. Also, it does not seem as though there has been a robust effort to distinguish these terms and unify their meaning in the international sphere. For the purposes of this Article, these terms are interchangeable with PC. For example, this Article offers an overview of the notice and comment process as a similar application of PC in the United States. *See*, Part II. The U.S. Experience.

28. *See infra* note 119 for information about the recently launched PC platform.

29. Although the relevant Council's resolutions did not label the process or pick any of the mentioned terms, several agencies had already been using PC to describe the official process of seeking the public's input on proposed laws and regulations. Examples of these agencies include the Capital Market Authority, Communications and Information Technology Commission, the General Authority of Zakat and Tax, and the Ministry of Commerce.

30. Discussion of the notice and comment and the Administrative Procedure Act in detail is beyond the scope of this Article; for more discussion and analysis on the notice and comment and the Administrative Procedure Act *see, e.g.*, Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285 (2014); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2016); Kent H. Barnett, *How the Supreme Court Derailed Formal Rulemaking*, 85 GEO. WASH. L. REV. ARGUENDO 1 (2017); William Funk, *Slip Slidin' Away: The Erosion of APA Adjudication*, 122 PENN ST. L. REV. 141 (2017); Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237 (2014); Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807 (2018).

say, both the United States and the Kingdom of Saudi Arabia have their unique set of values and legal framework through which the undertaking of PC should be assessed. The newness of the Saudi experience in allowing the public to participate in the lawmaking and rulemaking proceedings requires Saudi decision-makers, judges, scholars, and lawyers to have a broad understanding of the concept of PC in other countries and the policy considerations for such an essential undertaking.

### A. *The Establishment of PC*

Administrative law is not for sissies—you should lean back, clutch the sides of your chairs, and steel yourselves for a pretty dull lecture.

—Justice Antonin Scalia<sup>31</sup>

The U.S. Constitution does not confer legislative powers to federal agencies, nor does it explicitly allow Congress to delegate legislative powers to the president and federal agencies. Article I of the U.S. Constitution provides that all legislative powers shall be vested in Congress.<sup>32</sup> Although the Constitution does not explicitly prohibit Congress from delegating all its legislative authority to other actors, such a rule is implied in the construction of the Constitution and the principle of the separation of powers.<sup>33</sup> Due to the authority of Article I of the Constitution and the separation of powers principle (rooted in the Constitution),<sup>34</sup> the Supreme Court, under the nondelegation doctrine, prohibited

31. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. (1989).

32. U.S. CONST. art. I, § 1. Article I also directs that all bills shall pass the House of Representatives and the Senate in order to become a law.

33. Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 389 (2017), [https://scholarship.law.upenn.edu/penn\\_law\\_review/vol165/iss2/3](https://scholarship.law.upenn.edu/penn_law_review/vol165/iss2/3). Discussion of the nondelegation doctrine in detail is beyond the scope of this Article; for more discussion and analysis on the nondelegation doctrine, see, e.g., Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 8–17, 63–67 (1982); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 335–43 (2002); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1249–74 (1985).

34. Discussion of the separation of powers in detail is beyond the scope of this Article; for more discussion and analysis on separation of powers, see, e.g., Martin H. Redish & Elizabeth Cisar, *“If Angels Were to Govern”: The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449 (1991); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U PA. L. REV. 1513, 1522–31 (1991); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225 (1991); Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VIR. L. REV. 1253 (1988); Cass R. Sunstein, *Constitutionalism after the New Deal*, 101 HARV. L. REV. 421, 493–96 (1987); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—a Foolish Inconsistency?* 72 CORNELL L. REV. 488 (1987); Thomas O. Sargentich, *The Contemporary Debate about Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 433 (1987).

Congress from delegating excessive discretionary powers to the president and federal agencies.<sup>35</sup> Congressional delegations of legislative authority thus constituted a violation of the Constitution and the separation of powers principle. In *Field v. Clark*, the Court said that the notion that Congress cannot delegate legislative powers to the president is a universally recognized principle that is essential to preserve democracy.<sup>36</sup>

Yet, the Court clarified that the Constitution and the nondelegation doctrine did not prohibit all types of congressional delegations of discretionary authority, namely rulemaking authority.<sup>37</sup> The notion has been that relying on Congress to regulate specialized and complicated issues is unrealistic. In a series of rulings, the Supreme Court developed a test that requires any congressional statute conferring an agency with discretionary functions to specify an “intelligible principle to which the person or body authorized to [act] is directed to conform.”<sup>38</sup> The intelligible principle test distinguished transferring legislative powers prohibited in the Constitution from delegating permissible regulatory or rulemaking powers under the nondelegation doctrine.<sup>39</sup> One legal justification for delegating agencies with rulemaking power is that functions pertaining to the execution of the law have an inherent discretion that permits the delegation of confined discretion.<sup>40</sup> Hence, as long as statutes provide agencies with standards and specific directions under which agencies must act, the delegation provisions of rulemaking powers would be upheld. Some of the caselaw historical overview, including

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35. See, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), (confirming that Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested). A contrary argument stating that because Congress owns the original legislative authority, then Congress may delegate such authority as it wishes, can also be raised.

36. *Field v. Clark*, 143 U.S. 649 (1892).

37. See, *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935) (sticking down an impermissible delegation under the nondelegation doctrine and explaining that “The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits.”). In *Gundy v. United States*, 139 S. Ct. 2116 (2019), the Supreme Court refused to resurrect the nondelegation doctrine. The significance of this case is that it had no majority vote as Justice Brett Kavanaugh did not have a vote on this case since he had not been confirmed for the Supreme Court yet. Hence, given the recent ideological shift in the Supreme Court, including the confirmation of Justice Kavanaugh and Justice Amy Coney Barrett (who replaced the late Justice Ruth Bader Ginsburg), there is now more than ever potential to resurrect the nondelegation doctrine.

38. *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928). Prior to the development of the intelligible principle test, the Supreme Court acknowledged that Congress, as an owner of the legislative power, can entrust rulemaking power in the executive under appropriate direction in *United States v. Grimaud*, 220 U.S. 506 (1911).

39. *Id.*

40. JACK M. BEERMANN, *INSIDE ADMINISTRATIVE LAW: WHAT MATTERS AND WHY* 22 (2nd ed., 2020).

the establishment of the intelligible-principle test in 1928, predates any congressional effort to establish mechanisms and procedures with which agencies have to conform if they decided to regulate.

The essential legislative effort to standardize and organize the rapidly growing regulatory state is the Administrative Procedure Act (APA) of 1946.<sup>41</sup> The APA is the main statute that governs an agency's actions (when having the necessary congressional authorization), and is somewhat a "constitution" in the realm of administrative law.<sup>42</sup> The APA was enacted as a compromise between opponents of the regulatory state and its proponents.<sup>43</sup> The APA comprises several sections that define important administrative law terms, impose default requirements on agencies' actions, and among other things, establish judicial review of agencies' actions.<sup>44</sup>

Section 553 of the APA sets forth the basic or default procedures of an agency's informal rulemaking, also known as the notice and comment proceedings, with which an agency has to comply.<sup>45</sup> The notice and comment proceedings include three main procedural requirements. First, an agency has to give general notice of proposed rulemaking and publish it in the Federal Register.<sup>46</sup> The general notice must include a statement of the time, nature, place of the rulemaking proceeding, the legal authority under which the rule is proposed, and "either the terms or substance of the proposed rule or a description of the subjects and issues involved."<sup>47</sup> Second, the agency must give the public an opportunity to comment on the proposed rule by submitting data and arguments.<sup>48</sup> The comment period is not decided in the APA, but agencies typically allow at least 30 days for public comment.<sup>49</sup> To facilitate PC, the eRulemaking Program (established under Section 206 of the 2002 E-Government Act) launched a unified platform so the public can view and comment on proposed rules, and comments are made public and accessible on this website: [regulations.gov](https://www.regulations.gov).<sup>50</sup>

Third, after consideration of the presented comments, "the agency shall incorporate in the rules adopted a concise general statement of their basis and

41. 5 U.S.C. §§ 551 *et seq.*

42. Discussion of the notice and comment and the APA in detail is beyond the scope of this Article; for more discussion and analysis, *see supra* note 30.

43. Clark Byse, *The Federal Administrative Procedure Act*, 1 J. INDIAN. L. INST. 89, 91–92, (1958).

44. 5 U.S.C. §§ 551 *et seq.*

45. 5 U.S.C. § 553.

46. 5 U.S.C. § 553(b).

47. *Id.*

48. 5 U.S.C. § 553(c).

49. In some cases, the comment period extends to 180 days due to its importance. CONG. RES. SERV., THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW 6 (2013), [https://www.everycrsreport.com/files/20130617\\_RL32240\\_28514e3341f73f827c7bf0091745ecf638a47449.pdf](https://www.everycrsreport.com/files/20130617_RL32240_28514e3341f73f827c7bf0091745ecf638a47449.pdf).

50. *About the eRulemaking Initiative*, REGULATIONS.GOV (n.d.), <https://beta.regulations.gov/about> (last visited Nov. 4, 2020).

purpose.”<sup>51</sup> In other words, the agency may choose to proceed with the proposed rule, issue a modified rule proposal, or, in some cases, withdraw the proposal *after* responding to significant comments. Hence, the concise general statement represents a record or a preamble, in which the agency will show its consideration of and response to significant public comments.<sup>52</sup> The Supreme Court explained the adequacy of the “concise general statement” requirement in substantive terms:

We do not expect the agency to discuss every item of fact or opinion included in the submissions made to it in informal rulemaking. We do expect that, if the judicial review which Congress has thought it important to provide is to be meaningful, the ‘concise general statement’ . . . will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.<sup>53</sup>

Figure 1: The Notice and Comment Process



Though the notice and comment rulemaking procedures are the default procedures (when the agency’s organic statute is silent regarding additional procedural requirements), the APA acknowledges a few subject matter exceptions to the notice and comment requirements. In particular, the APA states that Section 553 rulemaking requirements are inapplicable if the promulgated rule organizes military or foreign affairs or is a matter relating to “public property, loans, grants, benefits, or contracts.”<sup>54</sup> Hence, if a rule is issued under one of these exempted areas, the rule would have the force of law absent PC.<sup>55</sup> Furthermore, unless the agency’s statute requires a notice or hearing, the notice and comment requirements do not apply “to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice;” or when the agency for a “good

51. *Id.*

52. William L. Andreen, *An Introduction to Federal Administrative Law Part 1: The Exercise of Administrative Power and Judicial Review*, 50 ALA. LAW. 322, 324 (1989).

53. *Automotive Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330, 338 (1968) (emphasis added).

54. 5 U.S.C. § 553(a). For more discussion on these subject matter exceptions see, Arthur Earl Bonfield, *Public Participation in Federal Regulation Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540, (1970).

55. *Hamlet v. United States*, 63 F.3d 1097, 1105 (Fed. Cir. 1995).

cause<sup>56</sup> decides not to follow the notice requirement.<sup>57</sup> Still, under the previous exception of procedural rules (also known as non-legislative rules), the agency must comply with other APA requirements, including petition requirements, publication, and public availability provisions.<sup>58</sup>

In addition to the notice and comment requirements, Sections 556 and 557 of the APA provide for lengthy and trial-like proceedings for formal rulemaking. If an agency is required to go through formal rulemaking, it must provide a party with the opportunity to present a comment through oral evidence and “conduct such cross-examination as may be required for a full and true disclosure of the facts.”<sup>59</sup> However, the Court narrowed this requirement by explaining that formal rulemaking proceedings are only invoked when the agency’s organic statute declares that rulemaking shall be “on the record after opportunity for agency hearing.”<sup>60</sup>

Regulations and other agency’s actions are subject to judicial review. The scope of judicial review of an agency’s action is articulated in Section 706 of the APA. Under the provided scope of review in Section 706, an affected party may challenge the agency’s actions when such actions are arbitrary or capricious.<sup>61</sup> Whether an agency’s action is arbitrary or capricious is a fact-based question.<sup>62</sup> In a landmark case, the Supreme Court found the National Highway Traffic Safety Administration’s decision to rescind a rule as arbitrary or capricious because the agency failed to explain the available evidence (contrary to its

56. *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, (D.C. Cir. 2012) (rejecting the EPA’s causes for not following the notice and comment procedures under the good cause exception); *Am. Fed. of Gov’t Emp. v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (holding that the good cause exception will be “narrowly construed and reluctantly countenanced”).

57. 5 U.S.C. § 553(b).

58. 5 U.S.C. § 552(a). For an extended discussion on the exception of procedural rules from the notice and comment procedure, see, Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, (2018), [http://www.administrativelawreview.org/wp-content/uploads/2018/10/ALR-70.2\\_Levin.pdf](http://www.administrativelawreview.org/wp-content/uploads/2018/10/ALR-70.2_Levin.pdf) (last visited Nov. 4, 2020).

59. 5 U.S.C. § 556(d).

60. *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 251 (1973). According to Section 559, the APA does not prohibit other statutes from imposing additional requirements on the agency rulemaking process, which shows that agencies’ organic statutes can have a significant authority over the agencies’ actions. Hence, due to the Court’s conclusion concerning the question of when formal rulemaking procedures are mandatory, agencies rarely adopt Sections 556 and 557 formal rulemaking procedures unless explicitly required by their organic statutes. See, TODD GARVEY, CONG. RES. SERV., A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 3 (2017) (overviewing rulemaking procedures and the concept of judicial review of final agency’s actions, including rules), <https://fas.org/sgp/crs/misc/R41546.pdf> (last visited Nov. 4, 2020).

61. See GARVEY, *supra* note 60, at 13–15.

62. *Troy Corp. v. Browner*, 120 F.3d 277, 284 (D.C. Cir. 1997) (“the question of sufficiency of an agency’s stated reasons under the arbitrary and capricious review of the APA is fact-specific and record-specific.”).

decision) and failed to offer “a rational connection between the facts found and the choice made.”<sup>63</sup>

Like the APA, other statutes, Supreme Court precedents, and executive orders impact federal agencies’ rulemaking process. One important statute that impacted the rulemaking process is the Congressional Review Act (1996), which requires agencies to submit their rule to Congress and allows Congress to repeal a rule through the passage of a joint resolution.<sup>64</sup> Moreover, because of the vagueness of the APA’s language, the Court was faced with numerous challenges, including the “concise general statement” requirement.<sup>65</sup> This vital function of the Supreme Court (of decoding the APA) applies to most disputes regarding the meaning and interpretation of the APA’s language. Along with these authorities, and due to the president’s control over federal agencies, executive orders have also impacted rulemaking procedures. For instance, Executive Order 12866 provides the procedures by which the president can exercise regulatory review of agencies’ rulemaking.<sup>66</sup> Also, Executive Order 12866 requires agencies to conduct a cost-benefit analysis for new regulations.<sup>67</sup>

#### B. *Values and Motives: Democracy vs. Efficiency*

This subsection builds on what was implicitly stated at the beginning of the previous subsection concerning constitutional challenges to the expansion of the regulatory state in the United States. Specifically, this subsection attempts to establish a connection between the constitutional challenges invoked to contest an agency’s rulemaking authority and the measures imposed on an agency’s rulemaking proceeding (in the APA and other authorities) as a consequence of these challenges. The significance of this subsection’s discussion will manifest when comparing the U.S. rulemaking procedure and the nascent Saudi PC experience.

The legislative history of the APA tells the story of the policy considerations of the concept of PC in the United States. The enactment of the APA followed a compromise between proponents and opponents of the regulatory state. In a political battle between the two opposing views seeking to influence the APA—to either water down its procedures or impose more procedural requirements and strengthen the judicial review of agency actions—neither party triumphed, nor lost, and the battle is still ongoing.<sup>68</sup> Each party had its persuading reasons;

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63. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 168 (1962).

64. 5 U.S.C. §§ 801–802.

65. *Boyd*, 407 F.2d at 338.

66. Exec. Order No. 12,866, 50 Fed. Reg. 51,735 (Oct. 4, 1993); CONG. RES. SERV., *supra* note 49, at 25–26.

67. *Id.*

68. See, e.g., KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., *FEDERAL ADMINISTRATIVE LAW: CASES AND MATERIALS* 19 (2nd ed. 2014). For more about the ongoing debate, *supra* note 30 and 33.

the opponents of the so-called “headless fourth branch of government” advocated for a statute that would limit agency discretion and enable judicial review.<sup>69</sup> Proponents of the regulatory state argued that the need for a capable and efficient federal government is vital, and Congress cannot keep up with the detailed and complicated needs of the American people.<sup>70</sup> In other words, political disagreement and rivalry benefited and helped shape the PC experience in the United States. As a result of this compromise, the APA, other congressional acts, and executive orders aimed to achieve an uneasy balance between the pressing needs of an efficient government and the fundamental values of democracy derived from the Constitution.

These rulemaking requirements have a clear purpose: to ensure that agencies and their unelected administrators are accountable to the public and that the rulemaking process is compatible with a participatory democracy. Hence, the concept of PC in the notice and comment requirement is an essential means to achieve the value of democracy. In the Final Report of the Committee on Administrative Procedure (1941), the Attorney General concluded that the rulemaking processes of federal agencies “should be adapted to giving adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses.”<sup>71</sup> A commonly cited argument that advocates for procedures derived from American democratic values states that an agency’s expertise and specialized knowledge is rarely sufficient to acquire all the facts and data necessary to promulgate rules; thus, consulting the public becomes vital to fill any gaps in an agency’s knowledge.<sup>72</sup> A separate principle that is also derived from democracy is subjecting most agencies’ actions to judicial review.<sup>73</sup> As mentioned in the previous section, Congress and the president also have mechanisms to check agencies’ regulations.<sup>74</sup> But procedures and checks derived from democratic values soften where the other considerations begin, namely, efficiency.<sup>75</sup>

The efficiency motive, in this context, is the capacity of agencies to identify and achieve their goals quickly and affordably. Several considerations continuously accompany the efficiency motive, including the expectation that federal

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69. Opponents of powerful agency argued that such agencies would abuse their vast powers and interfere with the free market. *Id.*

70. *Id.*

71. ROBERT H. JACKSON, FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941).

72. *Id.*

73. 5 U.S.C. § 702. (This amendment to the APA is a waiver of sovereign immunity in suites against federal agencies). *See generally*, Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207 (2015).

74. 5 U.S.C. § 802; Exec. Order No. 12,866, *supra* note 66.

75. Democratic values do not necessarily conflict with efficiency since a balance can be achieved between efficiency and the consideration of public input.

agencies function expeditiously, effectively, and inexpensively.<sup>76</sup> Historically, federal agencies were (and still are) expected to accomplish what Congress could not, given their special expertise and accumulated knowledge of the actual issues in their fields.<sup>77</sup> For example, agencies were chiefly relied upon to save the U.S. economy from the Great Depression.<sup>78</sup> In that era, the regulatory state expanded significantly as Congress delegated unprecedented discretionary powers to federal agencies.<sup>79</sup> To ensure that agencies retain discretionary powers necessary for an efficient government, Franklin D. Roosevelt introduced the unprecedented plan to pack the Supreme Court.<sup>80</sup> In line with the efficiency motive, an agency is mostly allowed to choose between formal rulemaking—an expensive and time-consuming process—or informal rulemaking, a less burdensome procedure.<sup>81</sup> Such leeway in choosing between rulemaking procedures clearly showcases the importance of efficiency to administrative agencies and the importance of achieving a balance between democracy and efficiency in the American regulatory state.

### III. THE SAUDI EXPERIENCE

#### A. Overview of Lawmaking and Rulemaking Process

According to the relevant Council of Ministers' resolutions, PC applies to both lawmaking and rulemaking processes in Saudi Arabia. Therefore, this subsection answers the question of *who* can issue laws and regulations in the Kingdom and *how*.<sup>82</sup> In short, legislative power is shared by the King, Council of

76. Bonfield, *supra* note 54, at 543.

77. Frankly, there are numerous advantages the agencies have over Congress other than expertise. For example, the agency is mostly free from the political pressure that halts the enactment of many statutes.

78. Yeung, *supra* note 9, at 72.

79. The advancement of the New Deal reforms was not limited to legislations, executive orders were also an important instrument to ensure the success of the New Deal. HICKMAN & PIERCE, *supra* note 68, at 17–18.

80. See, Barry Cushman, *The Judicial Reforms of 1937*, 61 WM. & MARY L. REV. 995 (2020) <https://scholarship.law.wm.edu/wmlr/vol61/iss4/4>; MARIAN C. MCKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937 (2002).

81. See, *United States v. Florida East Coast Railway*, 410 U.S. 224 (1973), (finding that unless the agency's organic statute invokes formal rulemaking language in the APA, notice and comment procedure would be sufficient).

82. Discussion of the Saudi legal and constitutional system, the government structure, and the relationship between the government branches is beyond the scope of this Article; for more discussion and analysis on these topics, see, e.g., MOHAMMAD AL-MARZOUQI, *السلطة التشريعية في المملكة العربية السعودية* [THE LEGISLATIVE BRANCH IN THE KINGDOM OF SAUDI ARABIA] (Obeikan 1st ed. 2004); Ibrahim M. Alhudaithy, *الاختصاص التنظيمي للملك في المملكة العربية السعودية* [Legislative Jurisdiction of the King in Saudi Arabia], 32 J. OF KING SAUD U. (L. AND POL. SCI.) 61 (2020); ABDULRAHMAN AL-SHULHOOB, *المقارن النظام الدستوري في المملكة العربية السعودية بين الشريعة الإسلامية والقانون المقارن النظام الدستوري* [THE CONSTITUTIONAL SYSTEM IN THE KINGDOM OF SAUDI ARABIA BETWEEN ISLAMIC SHARIA AND COMPARATIVE LAW] (Alshegry for Publishing & IT 3rd ed.

Ministers (the Council), and *Shura* Council (the *Shura*). While the King and the Council are unilaterally capable of issuing binding rules, the *Shura* is not. With respect to the regulatory power, it is vested in the executive branch, either the Council in general, a competent minister, or an agency board, according to the associated legal authority. Hence, the brief overview in this subsection focuses on two government branches: the legislative<sup>83</sup> and executive.

Interestingly, after establishing the three government branches (authorities) by Article 44 of the Basic Law of Governance (“the Basic Law”),<sup>84</sup> Article 67 of the same law allocates the legislative power to both councils: the Council and the *Shura*. Article 67 reads as follows:

The legislative authority shall have the power to promulgate laws and regulations conducive to the realization of public interest or warding off harm to State affairs in accordance with the principles of Sharia. It shall exercise its powers in accordance with this Law, the Law of the Council of Ministers and the Law of the *Shura* Council.

A mere reading of the aforementioned Article alone yields two outcomes with respect to the Council. First, the Council, which is typically the representation of a government’s executive branch, assumes an undeniably significant role in legislation in the Kingdom. At the very minimum, the Council can be described as a partner in legislation with the *Shura*. This conclusion also means that the latter does not exercise the legislative authority exclusively. The second outcome is the dual nature of the Council’s resolutions, an inevitable consequence of giving the Council a legislative character. The dual nature of the Council’s resolutions is confirmed by a Board of Grievance’s decision, in which the administrative court denied review of a challenge to the Council’s resolution because the administrative court deemed that resolution legislative.<sup>85</sup>

The legislative role of the Council has been confirmed in the Law of the Council of Ministers (“the Council’s Law”).<sup>86</sup> For instance, each minister is

2012); NA‘IMAH QUWAYNAS, *النظام الدستوري والمؤسسات الدستورية في المملكة العربية السعودية* [THE CONSTITUTIONAL SYSTEM AND CONSTITUTIONAL INSTITUTIONS IN THE KINGDOM OF SAUDI ARABIA] (Dār al-Kitāb al-Jāmi‘ī lil-Nashr wa-al-Tawzī‘ 1st ed. 2018).

83. Note that there is confusion caused by using the term “*regulatory* authority” instead of “*legislative*” as one of the three government branches in Article 44 of the Basic Law of Governance. However, when translated, Article 67 quoted above used the term “*legislative* authority.” The reluctance to use the term *legislation* is not uncommon in the formal legal language in the Kingdom, and it could be attributed to religious and political reasons whose discussion is beyond the scope of this Article.

84. Issued by Royal Order No. A/90 dated 1412/08/27 (Mar. 1, 1992) and published in 1412/09/02 (Mar. 6, 1992): Saudi Arabia Basic Law of Governance. (hereinafter “Constitution” or “Basic Law” or “Basic Law of Governance”). A translated version is available on the National Center for Archives & Records (NCAR) website: <https://ncar.gov.sa/Documents/Details?Id=QOjITuDWZEW1yFNp2Y4szw%3D%3D>.

85. The Board of Grievances’ Decision (affirmed by appellate committee) No. 3441/2/q and dated 1426 (2005).

86. Issued by Royal Order No. A/13 dated 1414/03/03 (Aug. 20, 1993) and published

granted “the right to propose a draft law or regulation related to the affairs of his ministry . . .”<sup>87</sup> Also, the Council reviews “draft laws and regulations brought before it and vote[s] on” them.<sup>88</sup> Furthermore, as indicated earlier, the Council can unilaterally issue binding rules without including its legislative partner, the *Shura*. A broad reading of the “establishing and organizing public institutions” clause,<sup>89</sup> along with the Council practices, leads to this conclusion. For this purpose, the Council uses an instrument called *tandheem*, which means organic statute or enabling law, to establish agencies and specify their powers and scopes.<sup>90</sup>

In the same vein, the Law of the *Shura* Council (“the *Shura*’s Law”)<sup>91</sup> addresses the *Shura*’s role and, at the same time, asserts the legislative role of the Council. For example, Article 15 states that the *Shura* “shall express its opinion” on what is “referred to it by the Prime Minister.” Its right then does not exceed reviewing and providing comments and recommendations.<sup>92</sup> However, Article 17 made “[t]he *Shura* Council’s resolutions . . . be brought before the King, who shall decide the resolutions to be referred to the Council of Ministers.” Moreover, although Article 23 establishes the *Shura* right “to propose and review a new draft law or an amendment to an existing law” without prior reference or mandate by the King or Prime Minister, its decisions do not have the force of law until approved by the King.

With exceptions, the typical journey of a bill includes the two councils and the King. Article 18 of the *Shura*’s law, which exactly matches Article 70 of the Basic Law, provides a roadmap for laws issuance and amendment: “Laws, treaties, international agreements, and concessions shall be issued and amended by royal decree after review by the *Shura* Council.” By its definition, a royal decree is an instrument that crowns bills after passing through both councils (or, in

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in 1414/03/10 (Aug. 27, 1993). A translated version is available on the NCAR website: <https://ncar.gov.sa/Documents/Details?Id=1%2BcZCVxZKh%2BiYPCbOVALTg%3D%3D> (hereinafter “Council’s Law”).

87. Article 22 of the Council’s Law.

88. *Id.* Article 21.

89. *Id.* Article 24(2).

90. AL-MARZOUQI, *supra* note 82, ¶ 408 (for more about legislative regulations “Tandheem”).

91. Issued by Royal Order No. A/91 dated 1412/08/27 (Mar. 1, 1992) and published in 1412/09/02 (Mar. 5, 1992). A translated version is available on the NCAR website: <https://ncar.gov.sa/Documents/Details?Id=TD206h6RCVECA6Eo%2B0MPMA%3D%3D> (hereinafter “*Shura*’s Law”).

92. Article 15 of the *Shura*’s Law.

some cases, the Council of Ministers alone)<sup>93</sup> and makes them applicable laws<sup>94</sup> (after publication).<sup>95</sup> The Council's Law<sup>96</sup> includes the same article quoted above but with a slightly different ending: “. . . shall be issued and amended by royal decrees upon review by the Council of Ministers, without prejudice to the Law of the Shura Council.”<sup>97</sup> In fact, Article 19 of the Council's law explicitly and generally, while addressing the Council's powers, establishes that “it shall review Shura Council resolutions.” Hence, the Council of Ministers is not only a partner in the legislative process but might be deemed superior to the Shura because it is the “reviewer” of the latter's decisions and the council that is “presided over by the King.”<sup>98</sup>

Figure 2: The Saudi Lawmaking Process



Finally, the King also has a substantial role in legislation. To be accurate, the King's legislative powers are greater than those of the two councils.<sup>99</sup> The King does not “only ratify proposed laws . . .” using the royal decree instrument

93. From the year of 1402 (1982) to 1412 (1992), the *Shura* Council was suspended, and the Council of Ministers had all the legislative power for itself. See, *Shura in the Kingdom of Saudi Arabia, A Historical Background*, THE SHURA COUNCIL, <https://shura.gov.sa/wps/wcm/connect/ShuraEn/internet/Historical+BG> (last visited Dec. 2, 2020). Laws during this era have not been reviewed by the *Shura*. But this exclusion is also noticed in a few laws that were issued after the end of the *Shura* suspension and the issuance of its new law in 1412 (1992). For instance, according to Article Fifty-two of the *old* Companies Law, laws creating national joint-stock companies are issued by royal decrees based on a Council of Minister's resolution. See e.g., The Telecommunication (telecom) Law issued by Royal Decree M/35, dated 24/12/1418 (1998), (not citing the *Shura*'s Law nor any *Shura* Council's resolution in its preamble). Articles Sixty and Sixty-five of the new Companies Law, however, changed this rule and allowed national joint-stock companies to be created by a ministerial resolution. Also, some national joint-stock companies (applied for after the issuance of the new Companies Law) can be created by a royal decree that is based on a *Shura* Council's resolution. See, e.g., the Organic Law of ARAMCO Company issued by Council of Ministers' Resolution No. 180, dated 01/04/1439 (2017) (including a *Shura* resolution in the preamble).

94. Alhudaithy, *supra* note 82, at 65.

95. Article 71 of the Basic Law of Governance reads “[l]aws shall be published in the Official Gazette and shall be effective on the date of publication unless another date is specified therein.” Similarly, but more specifically about decrees, Article 23 of the Law of the Council of Ministers states that “[a]ll decrees shall be published in the Official Gazette and shall enter into force on the date of publication unless another date is stipulated.”

96. The current Council's Law was enacted two years after the Basic and *Shura* Laws.

97. Article 20 of the Council's Law (emphasis added).

98. *Id.* Article 1.

99. Alhudaithy, *supra* note 82, at 62.

as illustrated above, “but also assumes huge authorities derived from constitutional custom in the Kingdom, including issuing laws by royal orders,” without presenting them to any of the two councils.<sup>100</sup> By extrapolation, legal jurisprudence reached an interpretation that the royal order instrument is historically used in issuing laws of a constitutional nature,<sup>101</sup> such as the Basic Law, the Council’s Law, and the *Shura’s* Law.<sup>102</sup> Nonetheless, this inductive rule does have exceptions.<sup>103</sup>

Like the legislative authority’s lawmaking process, the executive authority’s rulemaking process is also subject to PC. The Kingdom’s rulemaking process has almost too many actors; the King, the Council, the *Shura*,<sup>104</sup> and agencies, all of which play a role in promulgating rules. But the two chief players are the Council (presided by the King) and government agencies. Thus, the remainder of this subsection is devoted to these two main players’ role in the rulemaking process.

The Basic Law and the Council’s Law vest the Council with the executive power and declare it “the final authority in the financial and administrative affairs of all ministries and other government agencies.”<sup>105</sup> Considering the Council’s dual nature—being the Cabinet and a partner in the legislative authority—articles

100. *Id.*

101. The Council of Ministers’ Resolution No. 114, dated 1412/08/26 (Feb. 29, 1992) justifies the issuance of four laws (including the three referred to here) by royal orders, instead of royal decrees, because they are “basic laws.”

102. See e.g., AL-MARZOUQI, *supra* note 82, at 356 (defining the royal order as “a legal instrument that takes a specific written form that expresses the will of the King alone without a prior decision from any other authority.” The author also states that the royal order, an executive instrument that has been used for purposes like appointing judges and ministers, gained a new legislative function by issuing the aforementioned laws).

103. Many examples of royal orders that have a legislative/regulative nature and have never been presented to both councils can be provided. To name a few, see Royal Order No. A/44 dated 1435/04/03 (Feb. 3, 2014) that imposes penalties for participating in hostilities outside the Kingdom or belonging to extremist religious and ideological groups, <https://ncar.gov.sa/Documents/Details?Id=4vFtQ1C7g0LKSh8aPiFvcQ%3D%3D> (last visited Nov. 10, 2020); Royal Order No. 6801, dated 1439/02/11 (Oct. 31, 2017), and titled National Cybersecurity Authority’s *Tandheem*, <https://ncar.gov.sa/Documents/Details?Id=90MqUsSPf4vivid%2B6siDTEA%3D%3D> (last visited Nov. 10, 2020). While the previous examples concern the issuing of new laws, there are also some examples of amending laws (issued by royal decrees) using the instrument of royal order. For instance, the Value-Added Tax Law was issued by Royal Decree No. M/113 dated 1438/11/02 (July 25, 2017), amended by Royal Decree No. M/52 dated 1441/04/28 (Dec. 25, 2019), and then amended by Royal Order No. A/638 dated 1441/10/15 (June 6, 2020) to increase the tax rate to 15%. See “*Zakat and Income*”: *The VAT Rate of 15% Comes into Effect*, ZATCA (July 1, 2020), [https://zatca.gov.sa/ar/MediaCenter/News/Pages/News\\_342.aspx](https://zatca.gov.sa/ar/MediaCenter/News/Pages/News_342.aspx) (last visited Aug. 30, 2021).

104. The *Shura* Council is not an essential rulemaking player. Its role is limited to the case of legislative regulations where the *Shura* issues a resolution. Indeed, the main player in issuing legislative regulations is the Council, whose resolutions are the final step in this rulemaking process.

105. Article 19 of the Council’s Law and Article 56 of the Basic Law.

stipulating its right to legislate are generally understood to authorize it to regulate.<sup>106</sup> The Council issues a few types of binding rules characterized under its rulemaking functions, such as implementing regulations,<sup>107</sup> legislative regulations,<sup>108</sup> Council of Ministers' resolutions (of regulatory nature),<sup>109</sup> and *tandheemat*<sup>110</sup> or organic statutes. The distinction between these rules is nuanced and beyond the reach of this Article.<sup>111</sup> The same can be said about *who*, besides the Council or independent of it, has the power to issue these rules.

Government agencies are the typical producer of regulations. Agencies generally have an organic statute that prescribes their power to promulgate rules. For example, Article Two of the Ministry of Tourism's Organic Statute provides that considering tourism's essential role in the Saudi economy, the Ministry is the primary regulator of the tourism field.<sup>112</sup>

Surveying the legislative language in this regard, there are two notable methods of delegation for agency rulemaking. The first is the "restricted delegation" method in which an agency must propose a draft regulation to the Council or another authority to receive the legal approval.<sup>113</sup> In this method, the agency does not have the authority of issuance but proposal, and the regulation does not have the force of law unless approved by specified authorities.<sup>114</sup> The second method is the "unrestricted delegation" that authorizes the head of an agency, *e.g.*, a minister or a chairman of an agency board, to issue an implementing regulation without prior approval from the legislative authorities.<sup>115</sup>

106. See Articles 21 and 22 of the Council's Law.

107. See, *e.g.*, The Implementing Regulation of Arbitration Law issued by the Council of Ministers Resolution No. 541, dated 26/8/1438 (2017), <https://ncar.gov.sa/Documents/Details?Id=kTb76WmTWRQdgEVZdfX2VQ%3D%3D>.

108. See, *e.g.*, The Legislative Regulation for the Imams and *Muazzins* in the Two Holy Mosques issued by the Council of Ministers Resolution No. 405, dated 12/7/1440 H (2019). Although this Legislative Regulation was issued by a Council's resolution, the *Shura* did also issue a resolution concerning promulgation of this Regulation. The *Shura* role is likely due to the legislative nature of the Regulation, which makes it distinguished from implementing regulation.

109. The Board of Grievances' Decision (affirmed by appellate committee) No. 3441/2/Q dated 1426 (2005).

110. See, *e.g.*, The Ministry of Tourism Organic Statute issued by the Council of Ministers' Resolution No. 96, dated 5/2/1442 (2020).

111. See, AL-MARZOUQI, *supra* note 82, at 358–61; Ibrahim M. Alhudaithy, *إنشاء وترتيب المصالح العامة في المملكة العربية السعودية* [Establishing and Organizing Public Institutions in the Kingdom of Saudi Arabia], 39 KUWAIT J.L. (2015) (discussing the creation agencies in the Saudi legal system and the different authorities' capacity over this function).

112. The Ministry of Tourism Organic Statute, *supra* note 110.

113. For example, Article 74 of the Law of the Judiciary authorizes the Minister of Justice to issue the public notaries regulation after the Supreme Judicial Council's approval.

114. *Id.*

115. For example, Article 44 of the Code of Law Practice, issued by Royal Decree No. M/38 dated 28/7/1422 (2002), authorized the Minister of Justice to issue an implementing regulation to the Code, without requesting the Minister to consult other authorities. As a result,

## B. *The Establishment of PC*

The adoption and requirement of the PC concept in the Kingdom can be attributed to three recent Council of Ministers' resolutions (the Three Council's Resolutions). The first is Council's Resolution No. 265, dated 1435 (2014) (the First Council's Resolution).<sup>116</sup> The second is Council's Resolution No. 713, dated 1438 (2017) (the Second Council's Resolution),<sup>117</sup> which substantially updated the previous one. The third is Council's Resolution No. 476, dated 1441 (2020) (the Third Council's Resolution),<sup>118</sup> which brought some technical and practical amendments that have been recently implemented, including launching a unified PC platform under the name of the Public Consultation Platform (PC Platform), *Istitlaa*.<sup>119</sup>

The following analytical subsections are ordered chronologically to provide an overview of the development of PC in the Kingdom, and to highlight some practices in their time and legal context. Therefore, the next subsections are broken down into three stages:

Stage 1: before the 1435 (2014) Council of Ministers' Resolution;

Stage 2: between 1435 (2014) and 1438 (2017) Council of Ministers' Resolutions; and

Stage 3: after the 1441 (2020) Council of Ministers' Resolution.

### 1. Stage 1: Before the 1435 (2014) Council of Ministers' Resolution

Public consultation is not a topic in the study of administrative law in Saudi Arabia. Unlike the notice and comment requirement in the United States, it could also be argued that PC is not rooted in the Saudi legal system since it has not been derived from constitutional values, as discussed below. None of the basic laws referred to above mandate that the Councils, ministries, or agencies consult the public regarding proposed laws and regulations. Likewise, the lower laws and

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a year after the enactment of the Code, the Minister promulgated the Code's Implementing Regulation.

116. Controls (Rules) to be Observed in the Preparation and Study of Draft Laws and Regulations and the like, Council of Ministers' Resolution No. 265, dated 21/06/1435 (Apr. 21, 2014), <https://ncar.gov.sa/Documents/Details?Id=0mHmXqggbTxC%2B2hSqfsHvg%3D%3D>.

117. Controls (Rules) to be Observed in the Preparation and Study of Draft Laws and Regulations and the like (updated), Council of Ministers' Resolution No. 713, dated 30/11/1438 (Aug. 22, 2017), An English version is available at <https://ncar.gov.sa/Documents/Details?Id=PaZFObMG4VAJXhLITkseCg%3D%3D>.

118. Amendments to the Controls (Rules) to be Observed in the Preparation and Study of Draft Laws and Regulations and the like, Council of Ministers' Resolution No. 476, dated 15/07/1441 (Mar. 10, 2020). The decision includes establishing the Laws and Regulations Support Unit under the NCC, *see* <https://ncar.gov.sa/Documents/Details?Id=gBT4opFh1ZZXqIKgWRQK2Eg%3D%3D>.

119. One of the most important amendments has been the launching of the Public Consultation Platform under the National Center for Competitiveness in November 2020, which can be found at <https://istitlaa.ncc.gov.sa/ar/About/Pages/default.aspx>.

regulations related to preparing and issuing laws and regulations, especially by the Council of Ministers, did not require PC. For instance, neither the Legislative Regulation of the General Committee of the Council of Ministers and its amendments,<sup>120</sup> the Internal Regulation of the Bureau of Experts at the Council of Ministers,<sup>121</sup> nor the modern *Tandheem* of the Council of Ministers' Bodies and its amendments<sup>122</sup> touches on PC when addressing how draft laws and regulations must be prepared and referred from one body to another until they reach the Council for vote. Accordingly, many ministries and agencies did not conduct PC.

Nonetheless, PC had been used by several ministries and agencies in the Kingdom before the Council's resolutions, although not as commonly as now. In other words, the Council's resolutions did not introduce a brand-new concept, but only made it a governmentwide requirement. However, due to the unfortunate phenomenon that many governmental websites do not keep records of the previous PC announcements and draft laws and regulations, tracing PC history based on what is available prevents producing accurate conclusions. In fact, some agencies eliminate drafts and the whole announcement webpages after the consultation period ends.<sup>123</sup> Consequently, to overcome this obstacle, The Authors have contacted a random group of ministries and agencies. They were asked to provide information about past PCs for research purposes; to date, no response has been received.<sup>124</sup>

Luckily, the Authors were able to identify a few governmental websites that keep records of previous consultations. The unearthed records reveal that earlier practices could be traced at least to 2005,<sup>125</sup> i.e., a decade before the relevant First Council's Resolution.<sup>126</sup> However, perhaps the most accurate description of this stage is that it had witnessed some individual practices by some ministries

120. Issued by Council of Ministers' Resolution No. 166, dated 20/10/1402 (Aug. 10, 1982), <https://ncar.gov.sa/Documents/Details?Id=5Q0D0BihRrQudqek6qGD%2Fw%3D%3D>.

121. Issued by High Order No. 431, dated 16/11/1394 (Nov. 30, 1974). See also AL-MARZOUQI, *supra* note 82, ¶ 392 (for an overview of the tasks of and relationships between these Council of Ministries' bodies and the General Secretariat of the Council of Ministers).

122. Issued by Council of Ministers' Resolution No. 196, dated 20/04/1436 (Feb. 9, 2005), <https://ncar.gov.sa/Documents/Details?Id=T3KW831W8ZruHhgEBdiutA%3D%3D>. This *Tandheem* was issued after the First Council's Resolution.

123. Multiple examples of this odd practice will be provided in the Second Stage.

124. Specifically, an email was sent to the Ministry of Commerce, the Ministry of Justice, the General Authority of Zakat and Tax, the Capital Market Authority, and the Communications and Information Technology Commission. They were contacted using the official Saudi university email (between Oct. 19 to Nov. 25, 2020).

125. According to the records shown on their websites, the first PC announcements for the Communications and Information Technology Commission and the Capital Market Authority were in January 2005 and May 2006, respectively. Their PC announcements are available at [https://www.citc.gov.sa/en/new/publicConsultation/Pages/Archived\\_PublicConsultation.aspx](https://www.citc.gov.sa/en/new/publicConsultation/Pages/Archived_PublicConsultation.aspx) and <https://cma.org.sa/RulesRegulations/Consulting/Pages/default.aspx>.

126. See *supra* note 116 for full citation.

and agencies. These practices are not uniform, harmonized, or comprehensively standardized nationwide.

Those early practices raise the question: what was the authority or motive to consult the public if the law did not require doing so? The first thought that comes to mind is a question rather than an answer: why not? Indeed, the relevant laws did not require ministries and agencies to adopt the PC process, but these laws also did not prevent them from doing so. Consequently, one cannot identify a trend or a general rule of when and how PC is conducted and by which agencies. So, it seems like these ministries and agencies, which have conducted PC before the 1435 (2015) Council's Resolution, were entrepreneurs and ahead of the law in adopting the PC concept. This can be seen through their early practices, where there was no specific legal authority to cite in the preamble of some of their notices or announcements. Instead, they had been citing generic terms, such as enhancing legislative/regulatory quality, public good, public participation in decision-making, and transparency. Moreover, the second thought that comes to mind to explain early practices is the possibility of international obligations. Such obligations could be imposed or adopted through multilateral agreements and international organizations' resolutions. While this approach is not stated explicitly by Saudi agencies, many of them generally refer to the relevant international organizations' resources.<sup>127</sup>

Below is a brief discussion of two examples of those early practices: the Capital Market Authority (CMA) and the Communication and Information Technology Commission (CITC). Among the factors that led to choosing these two agencies are the relatively early practice and availability of previous PCs on their websites. Additionally, maintaining a level of consistency in practice and keeping a decent record of it by the two agencies represent a degree of respect for PC and allow the analyst to draw reasonable conclusions. The goal of having these two examples is to document these agencies' practices, their strengths, and shortcomings.

#### *a. The CMA Exception*

Contrary to this stage's general lack of legal requirement of PC, there is a distinctive exception: the CMA. The CMA was established by the Capital Market

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127. For example, the Kingdom is a member of the International Organization of Securities Commissions (IOSCO) since 2010 through the Capital Market Authority. The membership means adhering to the IOSCO principles. Regardless of the obligatory nature of these principles, the fourth one states that "[t]he Regulator should adopt clear and consistent regulatory processes." In its *Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation*, the IOSCO explained the principle by stating that "[in the formulation of policy, the regulator should: have a process for consulting with the public including those who may be affected by the policy." See IOSCO, *METHODOLOGY FOR ASSESSING IMPLEMENTATION OF THE IOSCO OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION 33* (2017) <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD562.pdf>.

Law in 2003.<sup>128</sup> In the second chapter devoted to establishing the CMA and specifying its tasks and powers, Article 5(b) allows (but does not mandate) the CMA to publish its draft regulations and rules prior to their issuance or amendment. Despite the fact that Article 5(b) does not explicitly refer to PC or detail the process of publication, the CMA has been citing it as legal authority for PC since its first announcement in 2006.<sup>129</sup> After finding this Article, an assumption was made that perhaps in this stage (before the 1435 Resolution) the way of mandating PC was different. Instead of having one law or authority that governs the PC requirement governmentwide, maybe there was a relevant article in each law and *tandheem* to mandate or authorize the related governmental body to apply PC in relation to any new regulation or amendment. To prove the veracity of this assumption, many laws and *tandheems* issued in that same time period were surveyed.<sup>130</sup> Unfortunately, no similar article was found. Hence, Article 5(b) of the Capital Market Law remains a mystery.

Moreover, the uniqueness of the CMA example goes beyond having such an article to adopting its own PC rules. These rules were issued by a Board of the CMA resolution<sup>131</sup> and titled The Procedures Guide for Public Consultation on the Implementing Regulations Projects (the Guide). As a side note, the issuance of this Guide occurred only 12 days before the 1435 (2014) Council's resolution. It was also issued after conducting 9 PCs, according to the CMA website records. Moreover, it is not clear whether this PC Guide was subject to PC itself, especially since the CMA considers it an implementing regulation on their website and since it was issued as such (using the same legal instrument).<sup>132</sup>

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128. Issued by Royal Decree No. M/30, dated 02/06/1424 (July 31, 2003) and published 1424/07/01 (Aug. 29, 2003), [https://cma.org.sa/RulesRegulations/CMALaw/Documents/CMA\\_Law.pdf](https://cma.org.sa/RulesRegulations/CMALaw/Documents/CMA_Law.pdf).

129. Based on the CMA website records, its first PC announcement is available at [https://cma.org.sa/Market/NEWS/Pages/CMA\\_N221.aspx](https://cma.org.sa/Market/NEWS/Pages/CMA_N221.aspx) (last visited Mar. 1, 2021).

130. The following are some examples:

- *Tandheem* of the General Authority for Investment, issued by the Council of Ministers' Resolution No. 2 and dated 05/01/1421 (Apr. 9, 2000), <https://ncar.gov.sa/Documents/Details?Id=fywJ4U6iQSluu5O2zuQwLw%3D%3D>.

- Health Law, issued by Royal Decree No. M/11 and dated 1423/03/23 (June 3, 2002), <https://ncar.gov.sa/Documents/Details?Id=gFcZwv%2F8YXsATRwmfZdRhg%3D%3D>.

131. Issued by the Board of CMA Resolution No. 2–20–2014 and dated 09/06/1435 (Apr. 9, 2014). An English translation of the Guide is available at <https://cma.org.sa/en/RulesRegulations/Regulations/Documents/PC%20procedures%20-%20EN.pdf> (last visited Mar. 3, 2021). Whether this Guide is overruled by the national PC framework developed by the Three Council's Resolutions is unclear. The Guide is still published on the CMA website. The CMA was one of the agencies that have been contacted by the Authors but there has been no response. See *supra* note 124.

132. All CMA's implementing regulations, including the Guide, are available at <https://cma.org.sa/en/RulesRegulations/Regulations/Pages/default.aspx>. (hereinafter "Guide") (last visited Nov. 11, 2020).

Several salient points in the Guide capture the analyst’s attention. The first point is that the Guide was adequately detailed. It touched on various areas, such as definitions of essential terms, methods of consultation and comment submission, periods of consultation, publication of draft regulations and comments, and confidentiality of commenters’ information.

The second salient point is that the Guide gives unjustifiably different treatment to the creation of new regulations vs. the amendment of existing ones. Although the CMA is not statutorily required to go over the PC process when issuing or amending regulations and rules, as discussed above, it chose to generally bind itself to do so according to Article 3(a) of the Guide. That paragraph states that the CMA “shall carry out a [PC] in relation to *any new*” regulation. However, Article 3(b) comes to possibly narrow the obligation to conduct PC by granting the CMA the right to “. . . determine the need to carry out a [PC] in relation to [ . . . ] *amending an existing*” regulation. Hence, Article 3(b) makes conducting PC in the case of amending existing regulations subject to the CMA’s discretionary determination. Whether this determination (and others, such as the following points) is subject to judicial review is a legitimate question.

The third point is that the Guide sets the PC period as 30 calendar days unless otherwise determined.<sup>133</sup> Any deviation from this period limit must be “in line with the nature of” the draft regulation.<sup>134</sup> This general language means that the CMA can make the PC period either longer or shorter than 30 days based on its own discretion without requiring any justification.<sup>135</sup> This broad discretion raises an important question: what is the point of designating a minimum period if the same agency could later shorten it? Generally, this 30-day approach is consistent with the later Council’s Resolutions discussed in the following subsections (and consistent with the U.S. practice).<sup>136</sup>

Finally, one of the most important points is that the Guide addresses the publishing of public comments. Article 7(a) states that the CMA “shall publish on its website a summary of the major public comments it received” after the CMA Board approval of (1) the regulation and (2) the method of publishing comments. Hence, whether or not to publish (at least a summary of) the comments should not be a question for the CMA. The question per this very paragraph is only *how*. Article 7(b) includes a non-exhaustive list of publication methods:

1. publishing major comments in the regulation approval announcement;<sup>137</sup>

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133. Article 5 of the Guide.

134. *Id.*

135. For an example of a CMA regulation that was available less than 30 days, *see* the announcement of the draft Central Counterparties Regulations (14 calendar days), [https://cma.org.sa/en/Market/NEWS/Pages/CMA\\_N\\_2634.aspx](https://cma.org.sa/en/Market/NEWS/Pages/CMA_N_2634.aspx) (last visited Nov. 1, 2020).

136. Although the comment period is not set by the APA, agencies typically maintain a minimum of 30 days. *See supra* note 49.

137. For an example of publishing comments using this method, *see* the last paragraph of the following approval announcement of several amendments of multiple regulations: <https://>

2. publishing the original text of the comments as received; or
3. preparing a public comments report.<sup>138</sup>

Although there might be no textual contradiction between the two paragraphs, unfortunately, there is a contradiction between the text and reality. While some approval announcements have indirect references to the key suggestions and opinions, which might be in line with the first method's vague wording, other announcements do not even satisfy the Guide's minimum publication requirements.<sup>139</sup> As a result, the CMA appears to have bound itself to an excellent requirement (publishing comments), but it does not consistently implement it. Once again, the approach of publishing a summary of major comments is consistent with the later Council's Resolutions discussed in the following subsections (but inconsistent with the U.S. approach).<sup>140</sup> In conclusion, despite the noticeable irregularities in the CMA's PC application, its experience represents an intriguing story of the overall PC requirement in Saudi Arabia.

#### a. *The CITC Exception*

According to the CITC website records, the first PC conducted by the Commission was in 2005.<sup>141</sup> In an attempt to find a legal authority, the relevant laws and regulations were surveyed. Neither the Telecom Act<sup>142</sup> nor the CITC Ordinance<sup>143</sup> (*Tandheem*)<sup>144</sup> mandates the Ministry of Communications and Information Technology or the CITC to conduct a PC concerning any new

[cma.org.sa/en/Market/NEWS/Pages/CMA\\_N\\_2764.aspx](https://cma.org.sa/en/Market/NEWS/Pages/CMA_N_2764.aspx) (last visited Nov. 1, 2020).

138. Examples of the second and third methods could not be found.

139. For an example of *not* publishing comments by any method, please refer to the same regulation mentioned in *supra* note 135 of which the approval announcement is available at [https://cma.org.sa/en/Market/NEWS/Pages/CMA\\_N\\_2687.aspx](https://cma.org.sa/en/Market/NEWS/Pages/CMA_N_2687.aspx). Another example can be found at [https://cma.org.sa/en/Market/NEWS/Pages/CMA\\_N\\_2577.aspx](https://cma.org.sa/en/Market/NEWS/Pages/CMA_N_2577.aspx) where the reference to the received comments is made in the very cliché statement: “[i]t’s worth mentioning that the views of the public, specialists and interested parties were taken into consideration when preparing these amendments.” (last visited Nov. 1, 2020).

140. *Compare About the eRulemaking Initiative*, REGULATION.GOV (n.d.), <https://beta.regulations.gov/about> (last visited Nov 4, 2020) (describing the concise general statement of basis and purpose requirement in the APA), *with* the publication requirement in the (CMA) Guide and Council’s PC Resolutions.

141. Based on the CITC website records, its first PC announcement is available at <https://www.citc.gov.sa/en/new/publicConsultation/Pages/a2.aspx> (last visited Mar. 1, 2021).

142. Issued by Royal Decree No. M/12 and dated 1422/03/12 (June 3, 2001). An English version is available at [https://www.citc.gov.sa/en/RulesandSystems/CITCSystem/Documents/LA%20\\_001\\_E\\_%20Telecom%20Act%20English.pdf](https://www.citc.gov.sa/en/RulesandSystems/CITCSystem/Documents/LA%20_001_E_%20Telecom%20Act%20English.pdf).

143. The reader should be advised that the inconsistency of using terms like law or act, *tandheem* (organic statute) or ordinance represents mere translation choices that could be different depending on the source. Nonetheless, it has no legal difference or consequence.

144. Issued by the Council of Ministers Resolution No. 74 and dated 1422/03/05 (May 27, 2001). An English version is available at [https://www.citc.gov.sa/en/RulesandSystems/CITCSystem/Documents/LA\\_002\\_E\\_CITC%20Ordinance.pdf](https://www.citc.gov.sa/en/RulesandSystems/CITCSystem/Documents/LA_002_E_CITC%20Ordinance.pdf).

regulations or rules. Therefore, no specific legal authority is cited in the CITC PC announcements.

However, the Implementing Regulation of the Telecom Act<sup>145</sup> (“the Telecom Regulation”) allows (but again does not mandate) the CITC to consult the public in several situations. For instance, the CITC is *allowed* to consult the public before issuing, reviewing, or canceling any class license<sup>146</sup> by publishing a proposed draft of the license, including the conditions required to provide the licensed services.<sup>147</sup> Another example on *allowing* PC is regulating telecom rates.<sup>148</sup> The only situation in which the CITC must consult the public according to the Telecom Regulation is before issuing any decision specifying a controlling service provider<sup>149</sup> for competition purposes.<sup>150</sup>

Nonetheless, a few observations apply to each of the three cases. First, although the Telecom Regulation gives the CITC the authority to conduct PC in some situations, the CITC cites no specific article in its announcements and documents.<sup>151</sup> The CITC refers only to generic terms, such as providing participants the opportunity to express their opinions. Second, the PC process is not standardized. The Telecom Regulation does not provide a specific way or detailed procedures to conduct PC. Unlike the CMA, the CITC does not have a published guide for this purpose. Therefore, many aspects of the CITC’s PCs seem arbitrary. To name a few, there is no reference to comment publication, comment period, and consultation methods at all in the Telecom Regulation. Third, the

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145. Issued by the Minister of Communications and Information Technology Decision No. 4 and dated 1442/01/29 (Sept. 16, 2020), [https://www.citc.gov.sa/ar/RulesandSystems/Bylaws/Documents/LA\\_005\\_%20A\\_Telecom%20Act%20Bylaw.pdf](https://www.citc.gov.sa/ar/RulesandSystems/Bylaws/Documents/LA_005_%20A_Telecom%20Act%20Bylaw.pdf) (“the Telecom Regulation”).

146. Class license is defined in Article 1(8) of the Telecom Regulation as a telecommunication license issued by the CITC which authorizes all qualified telecom service providers within the category defined in the license to provide telecommunication services in accordance with the conditions specified in the license.

147. Article 15(6) & (15) and Article 16(2) of the Telecom Regulation. The following are two examples of PC regarding the regulation of licensing:

- PC regarding Licensing of Wireless Trunking Services (2005), <https://www.citc.gov.sa/en/new/publicConsultation/Pages/a5.aspx> (last visited Nov 11, 2020).

- PC regarding Licensing for Construction and Operation of Submarine Cable Landing Stations (2005), <https://www.citc.gov.sa/en/new/publicConsultation/Pages/a8.aspx> (last visited Nov 11, 2020).

148. Articles 49(2) and 52(1) of the Telecom Regulation. The following is an example of PC regarding Regulating Telecom Rates (2016), <https://www.citc.gov.sa/ar/new/publicConsultation/Pages/143701.aspx> (last visited Nov. 11, 2020).

149. The terms “control” and “controlling service provider” are defined in Articles 1(13), and 28(1) & (2) of the Telecom Regulation.

150. *Id.* Article 28(5).

151. Only one example was found where there was a cliché reference (no specific law/reg article): “The CITC, according to its entrusted authorities given by the Act, invites comments on . . .”. PC regarding Licensing of Wireless Trunking Services, *supra* note 147. For examples of not citing anything, *see, e.g.*, the PCs cited in *supra* note 147.

CITC is not bound by the comments it receives, a piece of information usually emphasized in the CITC's announcements and PC documents.<sup>152</sup> In fact, the Telecom Regulation is silent about this point except in one situation; according to Article 15(6), the CITC is only required to "observe" the comments it receives regarding draft class licenses.

However, one of the positive and advanced practices that the CITC maintains is that of publishing the so-called PC document (PCD). A PCD is an extra document that the CITC prepares for each PC to provide participants with more information and context about the draft regulation or rule.<sup>153</sup> A typical PCD contains several sections, such as an introduction, PC goals and procedures, global experiences considered, options available, and a statement that CITC is not bound by received comments. Sometimes the PCD includes the proposed regulation or rule, and sometimes they are published separately.

Also, even though publishing of received comments was not addressed in the Telecom Regulation, most of the CITC's PCDs include a short and vague statement addressing the agency's publication policy. For example, the CITC states in a PCD that it "may consider publishing all or parts of the information provided pursuant to this Document unless the respondent requests that [identity or comment] should be kept confidential."<sup>154</sup> Despite the typical use of terms, such as *may* and *consider*, that affords an agency more freedom, this statement's overall wording gives the impression that comments are published unless participants elect out. In fact, that exact impression is more emphasized in the wording of a whole detailed section of ten paragraphs in another PCD where a mere electing out is not sufficient.<sup>155</sup> In the first paragraph of that section, the CITC straightforwardly establishes that it "*will* publish a copy of the comments on [its] website unless a participant confirms, at the time of submitting their comments, that some or all parts of the document are required to be confidential."<sup>156</sup> The section then lists the requirements and scenarios in which the CITC grants confidentiality for comments and participants' information. Although this PC was the second PC on the same subject, the CITC published none of the comments received during the first PC with the announcement of the second PC.

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152. *See, e.g.*, CITC, PC regarding Licensing for Construction and Operation of Submarine Cable Landing Stations, *supra* note 147, at 2 ("Ownership of the answers and comments provided in this Document will be transferred to the CITC and *will not bind the CITC*") (emphasis added).

153. All cited examples of the CITC's PCs include PCDs.

154. *Id.*; *Supra* note 147, at 2.

155. *See* CITC, A Second PC Document on Designation of Telecommunications Markets for Dominance (2008–2009), <https://www.citc.gov.sa/en/new/publicConsultation/Pages/a22.aspx> (last visited Nov. 20, 2020).

156. *Id.* at section 1–4–1 of the PCD (emphasis added).

Nevertheless, the draft report not only claimed that the comments were considered and were “very helpful,”<sup>157</sup> it also, in several places, referred and responded to some of the comments and suggestions.<sup>158</sup> Although the comments were not made public as the CITC had stated in the PCD, discussing the comments and suggestions received in the draft report (and later in the final report issued in 2010)<sup>159</sup> to such an extent is a very mature and rare approach compared to other agencies’ practices in the Kingdom. In general, the PCD concept is somehow similar to the “explanatory note” requirement specified by the later Council’s Resolutions discussed in the following subsections (and similar to the general notice requirement in the United States).<sup>160</sup>

As usual, this excellent practice (i.e., discussing comments and suggestions) has not been consistently performed in the CITC’s PCs. For instance, in another PC, when the approval of the second version of the National Numbering Plan was announced in 2011,<sup>161</sup> the CITC neglected to mention the PC that was conducted the previous year in that regard,<sup>162</sup> let alone publish or discuss the received comments in any depth. In general, it is unfortunate that no received comments can be found in the CITC website’s records.

Another distinguishing practice of the CITC is their method of using questions. Under this method, the CITC usually lists specific questions to be answered by participants after each group of articles or paragraphs.<sup>163</sup> This method is interesting because it gives the public a hint as to where the agency

157. *Id.* at section 1 of the draft report.

158. *See e.g., Id.* at sections 3.3(d), 3.4(b), and 3.11(b) of the draft report.

159. CITC, MARKET DEFINITION DESIGNATION AND DOMINANCE REPORT (2010), <https://www.citc.gov.sa/en/reportsandstudies/Reports/Pages/MarketReport.aspx> (last visited Nov. 20, 2020).

160. *See*, 5 U.S.C. § 553(b).

161. *The CITC Board of Directors Approves the Second Edition of the National Numbering Plan*, CITC (2011), [https://www.citc.gov.sa/ar/mediacenter/pressreleases/Pages/PR\\_PRE\\_059.aspx](https://www.citc.gov.sa/ar/mediacenter/pressreleases/Pages/PR_PRE_059.aspx) (last visited Nov. 20, 2020). An updated version of the Plan is available at [https://www.citc.gov.sa/ar/RulesandSystems/RegulatoryDocuments/Numbering/Pages/Numbering\\_Plans.aspx](https://www.citc.gov.sa/ar/RulesandSystems/RegulatoryDocuments/Numbering/Pages/Numbering_Plans.aspx) (last visited Nov. 24, 2020).

162. PC regarding the National Numbering Plan for the Kingdom of Saudi Arabia - Version 2.0 (2010–2011), <https://www.citc.gov.sa/ar/new/publicConsultation/Pages/143205.aspx> (last visited Nov. 20, 2020).

163. For examples of this method, *see* PC regarding Licensing of Wireless Trunking Services (2005), *supra* note 147. After addressing National and International Facilities and Signaling in the PCD 7th section, the CITC listed the following questions for consultation:

Q8. Please comment on the desired extent and timeframe (when and how much) required by the new WTS provider(s) to build their national network facilities.

Q9. Please comment on any rights, obligations or conditions, of the provisioning of national telecommunications facilities, that are considered necessary for the development of efficient WTS provider(s) networks in the Kingdom.

Q10. Please provide your views with respect to network roll-out strategy in the first 3 years, specifically the percentage or the amount of built and owned kilometres of infrastructure of national telecommunications facilities.

needs the public's input the most. With this approach, the agency is probably facilitating the process for the public who would appreciate a straightforward experience. Of course, answering all of the questions is not mandatory; participants are welcome to provide general comments and answer only a few of the questions.<sup>164</sup>

To conclude, considering the general absence of a PC requirement before the Three Council's resolutions, the CMA and CITC's (along with other less significant) experiences can be characterized as an anomaly. On the one hand, the CMA has more advanced experience in terms of legal authority and standardization by its having a legal article and a PC Guide. On the other hand, the CITC maintains the publishing of PCDs with each PC and uses a questions method that directs participants to the most important points in the draft. However, due to the general lack of binding authority and detailed procedures for PC, along with the CMA and CITC's significant discretion in applying PC, both agencies demonstrate a considerable degree of inconsistency in different aspects of their practices. Notwithstanding their shortcomings, the CMA and CITC practices have been among the most advanced and organized early PC practices. Unfortunately, these practices were the exception, not the norm.<sup>165</sup>

#### 1. Stage 2: Between 1435 (2014) and 1438 (2017) Council of Ministers' Resolutions<sup>166</sup>

Despite the previous stage of individual practices by some agencies, it can be said that a new framework of PC has recently been evolving in the Kingdom.

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164. In the PC regarding Licensing of Wireless Trunking Services (2005), *supra* note 147, at 4, the CITC states the following:

The CITC invites comments on all issues related to the WTS licensing process that are discussed in this [PCD]. The CITC particularly invites comments and responses to the specific numbered questions set out in the [PCD]. . . . In providing their comments, [participants] are requested to indicate the consultation question number in this [PCD] to which their comment relates, even if they do not comment on all questions.

On a side note, this method is one of the PC methods recognized by the CMA's Guide as well. *See*, the CMA's PC Guide, *supra* note 131, at Article 4(3). However, no example of its usage could be found in the CMA records.

165. While evaluating Saudi agencies' implementation of PC is beyond the scope of this Article, it is definitely an opportunity for future work. For more information about PC evaluation and best practices in general, *see e.g.*, E-Participation Index, *infra* note 236; OECD, *Annex A: The 2017 OECD Regulatory Indicators Survey and the Composite Indicators*, in OECD REGULATORY POLICY OUTLOOK 2018 (OECD, 2018); Pierre André et al., *supra* note 23.

166. This subsection (and the following one) have many references to the Three Council's Resolutions and accompanying rules. Translation of the terminology used in these references is derived, to a large extent, from the official English translation of the Second Resolution (the only resolution translated) published by the NCAR. Terms include the following:

- Instruction: a decision laid down in a Council's resolution.
- Attached Rules: the rules that were approved by the First Resolution and later repealed by the Second Resolution.
- Updated Rules: the rules that have been approved by the Second Resolution and later

That PC framework could be considered the first of its kind (on the national level). Therefore, the following subsections will provide an analytical reading for the First and Second Council's Resolutions and then some observations on selected current PC practices of multiple agencies with a special focus on the Zakat, Tax and Customs Authority (ZATCA).

*a. The First Council of Ministers' Resolution*<sup>167</sup>

In 1435 (2014), the Saudi Council of Ministers sought to standardize the procedures for (1) proposing draft laws and regulations and (2) amending ratified laws and regulations. The resolution title is Controls (Rules) to be Observed in the Preparation and Study of Draft Laws and Regulations and the Like (the Attached Rules). So, the First Resolution covers three categories: (1) laws, (2) regulations, and (3) the like, without providing definitions for any of them. The preamble of the resolution contains references to several documents, most of which, however, are inaccessible.<sup>168</sup>

The First Resolution is brief and straightforward. It has two instructions: first, to approve the Attached Rules (prepared by the Bureau of Experts), and second, to direct the Bureau of Experts to evaluate these rules after three years of the First Resolution's issuance date, i.e., by 1438/06/21 (Mar. 19, 2017). However, the resolution did not specify a guiding reference for such an evaluation. Just like the First Resolution, the Attached Rules are brief and do not exceed two pages.

Additionally, when issued, the First Resolution was a stand-alone in standardizing the procedure of preparing and proposing new laws and regulations or their amendments.<sup>169</sup> Since the preamble did not cite preceding laws or resolutions, and the resolution did not explicitly amend or repeal any previous authority that governs the procedures of proposing new laws and regulations, the assumption is that there had been no such authority. In fact, the only legal authority cited in the preamble is Article 22 of the Council's Law,<sup>170</sup> which states that the

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amended by the Third Resolution.

- Clause: an article or provision of the rules.

167. For full citation of the First Resolution, *see supra* note 116.

168. Analysis and observations regarding this resolution and the others are based on reading the resolution and the attachments solely, having no access to the referenced documents in the resolution's preamble. If these documents were available, they could provide further context, yield more observations, and either assert or modify some assumptions.

169. Other regulations and *tandheems*, such as those referred to in *supra* notes 120–122 govern general operations of the Council's bodies, their jurisdictions and interrelationships, and do not govern specifically draft laws and regulations. Therefore, even if some articles of these regulations and *tandheems* addressed some aspects of this area, such as Article 13 of the *Tandheem* of the Council of Ministers' Bodies (issued a year after the resolution), this resolution still was considered the cornerstone of this area until the issuance of the second resolution.

170. *See* full citation of the Council's Law in *supra* note 86.

Council “shall review draft laws and regulations brought before it and vote on” them “in accordance with the procedures set forth in the Internal Regulations of the Council.” But no internal regulations have been issued yet. Hence, this resolution came to fill the legislative gap in this regard.

Most importantly, the First Resolution did not touch on PC. Basically, PC was not one of the requirements with which an agency must comply.<sup>171</sup> The closest reference to the concept of PC is in the Seventh Clause of the Attached Rules, which allows agencies and the Bureau of Experts to consult national or foreign specialists and experts. Therefore, this resolution could be considered internal since its scope did not reach the public. The bottom line is that this resolution did not establish PC. However, it drew attention to standardizing and codifying the procedure of proposing new laws and regulations or amending existing ones. This conclusion can be proven by the following resolutions that are an outgrowth of the First Council’s Resolution.

Finally, the First Resolution specifies the obligations of three parties in the process: (1) the ministry or agency proposing the draft law, regulations, or their amendment, (2) the General Secretariat of the Council of Ministers, and (3) the Bureau of Experts. What is most relevant to this Article is the first party’s obligations. According to the First Clause of the Attached Rules, an agency proposing an amendment or a draft law, regulation, or the like to the Prime Minister must submit an explanatory note (memorandum) that includes the following elements:

1. a statement of the legal authority for proposing such a draft, its purpose, main elements, proposal justifications, and explanation of its articles;
2. an overview of the international experiences that were considered in preparing the draft;
3. a statement of the specific financial and functional impacts along with expected economic and social impacts if implemented;
4. if the proposal is an amendment, a list showing the text of current and suggested articles, and amendment justifications.<sup>172</sup>

*b. The Second Council of Ministers’ Resolution*<sup>173</sup>

Per the Second Instruction of the First Resolution, the Bureau of Experts was directed to evaluate the Attached Rules that the First Resolution approved three years after its issuance. Apparently, the Bureau of Experts evaluated the rules and suggested fundamental updates that led to issuing the Second Resolution in 1438 (2017) and its Updated Rules. Once again, the preamble cites several documents, some of which are inaccessible. No specific legal authority is cited, but the reference to the previous resolution indicates that they share the same legal authority, Article 22 of the Council’s Law.

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171. The First Resolution, *supra* note 116, the First Clause of the Attached Rules.

172. For an example of the explanatory note requirement, *see infra* note 193.

173. For full citation of the Second Resolution, *see supra* note 117.

It is in this Resolution that the Council embraced the PC concept and started to give it genuine consideration. This consideration is demonstrated by the fact that out of the nine clauses of the Updated Rules, the Council decided to highlight the PC requirement in the Resolution itself. This means that the Council has a special interest in the PC requirement, and that it is the core of the Updated Rules. This reflection is further confirmed by the difference in wording between the Third Instruction of the Resolution and the corresponding clause of the Updated Rules, the Second Clause, as illustrated below. The Third Instruction reads as follows:

Each government agency shall, when preparing a proposal relating to the economic and developmental affairs for draft *regulatory rules; regulations; or resolutions [of a regulatory nature]*<sup>174</sup> (and the like) *that is within its jurisdiction and does not require seeking permission*, publish such proposal on its website so as to enable stakeholders to provide their views and observations thereon. The agency shall then publish a summary of key conclusions of these views and observations. The relevant agency shall have discretion in publishing proposals relating to other affairs and the summary of views and observations provided in this regard.<sup>175</sup>

A couple of points here merit attention regarding the different wording between the two texts (the difference is italicized in the quote above). First, the Updated Rules (exactly as the previous ones) cover three categories: laws, regulations, and the like, in which government agencies must obtain the Council's permission. Yet, the Third Instruction of the resolution covers different categories: regulatory rules, regulations, or resolutions of a regulatory nature (and the like). The reason behind this altered wording is believed to be the following: the Updated Rules concern only types of lawmaking and rulemaking of which the Council is part, such as draft laws and (some) regulations. However, the Third Instruction of the Second Resolution came to address other types of rulemaking of which the Council is not part, such as regulatory rules, (some) regulations, and resolutions of a regulatory nature. Hence, extending the scope of PC application by the language of the Third Instruction of the Resolution is crucial

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174. This phrase is missing from the official English translation. However, it is an important constraint so not to subject all agencies' actions to PC.

175. The Third Instruction of the Second Resolution. For comparison purposes, the corresponding clause, the Second Clause of the Updated Rules is quoted below, with the different wording italicized:

[T]he government agency shall, when preparing a proposal for *a draft law or regulations* (and the like) relating to the economic and developmental affairs *or any amendments to effective provisions thereof*, publish such proposal on its website so as to enable stakeholders to provide their views and observations thereon. The agency shall also publish a summary of the key conclusions of these views and observations. The relevant agency shall have discretion in publishing proposals relating to other affairs and the summary of the views and observations provided in this regard.

because it covers not only more types of rulemaking, but types of rulemaking that are within the agency's jurisdiction and authority (where no Council permission is required).<sup>176</sup> Just because these types of rulemaking are out of the Updated Rules' reach does not make them free from the PC requirement, the Third Instruction emphasizes.

While the first point concerns the difference in the covered categories, the second point concerns the inconsistency in requiring PC in the case of amendments. On the one hand, the Second Clause of the Updated Rules states that PC is required when proposing not only new laws or regulations but also "any amendments to effective provisions thereof."<sup>177</sup> On the other hand, the Third Instruction of the Second Resolution does not indicate whether PC is required in the case of amending effective provisions of regulatory rules, regulations, and resolutions of a regulatory nature that are within the agency's jurisdiction and authority. Since there is no obvious explanation for not requiring PC in amending effective rules that have been issued without the Council's permission, one wonders if this lack of PC requirement may cause a legal loophole. Of course, laws and regulations that pass the Council have a great deal of significance to the extent that even amending them requires the same procedures (including PC), but this argument could be made for the (less significant) other types of rules as well. An agency that wants to overcome the PC obstacle to issue an unpopular rule could do that easily by using the amendment path, where PC is not required.

Furthermore, numerous observations are worthy of discussion when comparing the First and Second Resolutions. The following are a few examples that are related in some way to the PC concept. In terms of similarity, neither the Second Resolution's instructions nor the Updated Rules provide definitions of significant terms, such as laws, regulations, and the like, and economic and developmental affairs. Also, there is no indication that these rules came after an evaluation of early practices or a reference to a previous or current standardization of PC. Besides, it is unknown whether PC is required in the case of deregulation (or de-legislation).

In terms of differences between the First and Second Resolutions, the Second one expanded the clause that allows consulting national and foreign experts and enabled agencies to conduct "seminars and working sessions."<sup>178</sup> While there was no consideration of the *Shura* Council's role in the process in the First Resolution, the Second Resolution addresses the scenario where a proposal comes from the *Shura*.<sup>179</sup> Finally, as noted before, whereas the First Resolution did not repeal or amend any previous resolution or authority, the

176. The Third Instruction of the Second Resolution.

177. The Second Clause of the Updated Rules.

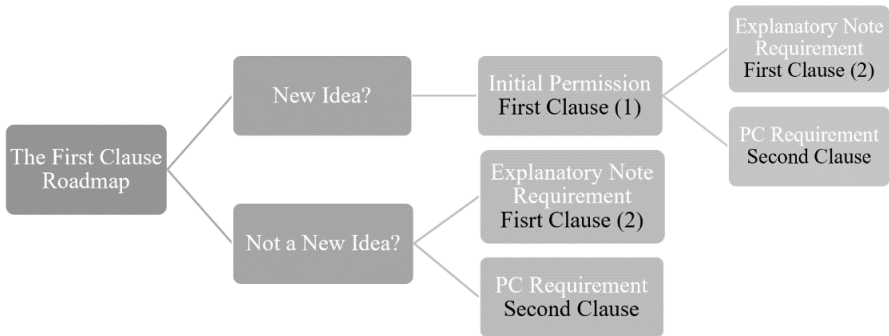
178. *Id.* at the Seventh Clause.

179. *Id.* at the Eighth Clause.

Second Resolution explicitly stated that it is a replacement for the First Resolution of 1435 (2015).<sup>180</sup>

Moreover, just like the First, the Second Resolution specifies the obligations of the three parties in the process (plus the General Committee of the Council). More specifically, like the First Clause of the First Resolution, the updated version of the First Clause here sets forth some of the obligations that an agency must comply with when preparing draft laws, regulations, or the like (the explanatory note and its elements). More details were added to the required elements, and a new element has emerged: a statement about the relevant international agreements (and the like) to which the Kingdom is party along with their binding commitments.<sup>181</sup> It should also be noted that, unfortunately, the relevant agency is not obliged to publish this valuable explanatory note and its associated elements, neither by the First nor the Second Clause. Additionally, the Updated Rules impose a new requirement if the proposed draft law or regulation (or the like) includes a new idea.<sup>182</sup> Accordingly, the relevant agency must seek initial permission before preparing the whole proposal in line with the rules.<sup>183</sup> The following figure provides a roadmap for the First Clause of the Updated Rules.

**Figure 3: Roadmap for the First Clause of the Updated Rules.**



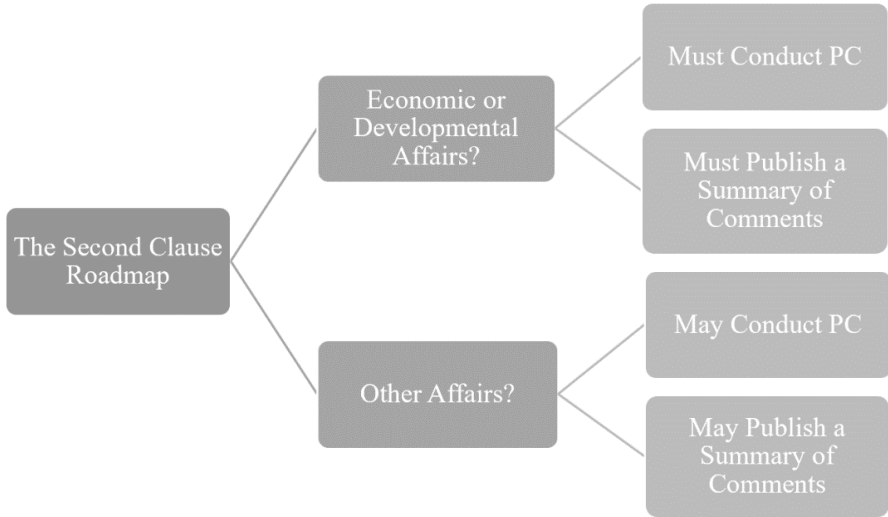
Furthermore, the Second Clause of the Second Resolution, i.e., the PC Clause, lays a roadmap for the PC requirement. Primarily, it differentiates between two types of draft laws, regulations, or the like depending on which affairs they belong to: (1) economic and developmental or (2) other affairs. Based on the proposal classification, PC could be required or discretionary for the agency. The following figure provides a roadmap for the Second Clause of the Updated Rules.

180. *Id.* at the Ninth Clause.

181. *Id.* at the First Clause, Paragraph 2(D).

182. *Id.* at the First Clause, Paragraph 1.

183. *Id.*

**Figure 4: Roadmap for the Second Clause of the Updated Rules**

However, the construction of the Second Clause of the Updated Rules results in noticeable shortcomings. While the discretion of conducting PC or publishing a summary of comments concerning other affairs is explicitly granted for the relevant agency,<sup>184</sup> it is unclear what governmental body would classify each proposal. Besides, even if the classification were assigned to a specific party or the courts were to review that decision (provided that there were a judicial review of the PC process), the Clause’s language is extremely unlikely to help. There are no definitions nor a test to distinguish between what is economic/developmental and what is not.<sup>185</sup> Assuming that the relevant agency is the decision-maker in this regard, it should have been required to justify its decision when it deems a proposal not economic and developmental and chooses not to conduct PC. Finally, it is noted that this Clause (and the Second Resolution generally) do not provide a detailed mechanism for conducting PC or any other minimum requirements, such as the comment periods and PC methods. The Second Clause only urges agencies to “publish a summary of key conclusions

184. The last sentence of the Second Clause of the Updated Rules states that “[t]he relevant agency shall have discretion in publishing proposals relating to other affairs and the summary of the views and observations provided in this regard.”

185. Today, one can comfortably argue that governmental measures and legislative regulations can directly or indirectly have an impact on the economy. Policy decisions can either boost or hinder a country’s development efforts. Hence, deciding whether a rule falls under the economic or developmental affairs rather than the field of other affairs should not be laid down in vague terms. Furthermore, PC is a vital requirement that should not be limited to rules of economic and developmental effect. In other words, if the PC requirement admittedly enhances the quality of laws and regulations, what is the rationale behind excluding laws and regulation of other affairs from the PC requirement?

of” the comments received.<sup>186</sup> Establishing that mechanism was deferred to the Third Resolution.

*c. Examples of PC Practices during the Second Stage:*

The previous analysis of the First and Second Council’s Resolutions covered what the law is. However, the following paragraphs provide a closer look at some PC practices conducted by three agencies, specifically the Saudi Bar Association (SBA), the Board of Grievances, and ZATCA. Special focus is given to the last as the main case study of the PC practices during this stage (before launching the unified PC platform). However, only one example is selected for the SBA and the Board of Grievances based on the available data and their unique practices to avoid redundancy.

Observing PC practices during the second stage allows for spotting some general trends. For instance, even after having the Council’s Second Resolution as an obligatory authority to conduct PC, government agencies still were not consistent regarding when to go through PC before issuing regulations or regulatory rules. Comments (or even a summary of comments) still were not published in the vast majority of PCs (until launching the unified PC platform). Also, most agencies that conduct PC publish only the draft proposal.<sup>187</sup> The mere publication of draft proposals does not give the public sufficient information and context, nor does it demonstrate that the agency did its homework to ensure the quality of the public comments. Another trend in some agencies’ practices, as mentioned before, was deleting draft laws and regulations from the official website after the PC period ends.<sup>188</sup> This conduct shows that some agencies did not take PC seriously because deleting the records makes it impossible for the public to evaluate the agency’s rulemaking process and policy choices.

Despite these negative observations, there are some positive practices that deserve credit. For example, besides conducting hearings and workshops to gather as much feedback as possible from lawyers regarding their practice of law, the SBA has established what it calls the Public Consultation Center.<sup>189</sup> Through the center, the SBA’s goal is to monitor draft regulations and policies that are available for PC and conduct workshops and discussion panels thereof.<sup>190</sup> Such

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186. The Third Instruction of the Second Resolution and the Second Clause of the Updated Rules.

187. For current examples, *see* the discussion of tax laws and regulations below.

188. Again, ZATCA could be a good example of this odd practice. Another example is the Ministry of Justice. The last proposed amendment of the Code of Law Practice (regarding regulating the practice of foreign law firms in the Kingdom) was published in June 2020 and then deleted from the website after the PC period.

189. A platform on the SBA’s website: <https://sba.gov.sa/public-consultation-center>. *Public Consultation Center*, SAUDI BAR ASS. (n.d.), <https://sba.gov.sa/public-consultation-center> (last visited Nov. 29, 2020).

190. *Id.*

a savvy idea could increase the involvement of lawyers and specialists in PC and produce comments prepared by a group of lawyers.<sup>191</sup> Regrettably, according to the center's webpage, only three events were conducted, the last of which was in May 2018.<sup>192</sup>

Another positive example is the explanatory note prepared by the Board of Grievances regarding the proposal of the Administrative Enforcement Law.<sup>193</sup> Although the Board of Grievances did not officially publish it, the circulated explanatory note seems legitimate, and many media outlets published and confirmed its content. The Board of Grievances has provided a perfect example of how an agency should incorporate every single element required in the explanatory note in accordance with the First Resolution. The note contained, for instance, an explanation of each article of the proposal and a comprehensive statement about the relevant international experiences considered from 10 Arabic and European countries. Sadly, the unofficial circulation of this explanatory note likely means that the Board of Grievances, like all other agencies, had no intention to publish it. The fact that there exists a public version of the Board's explanatory note is likely nothing but an honest mistake.

Furthermore, the ZATCA is one of the agencies that oversees a sensitive sector, taxation. As mentioned in the introduction, the ZATCA has expanded noticeably with imposing new taxes, such as the VAT<sup>194</sup> and Excise Tax,<sup>195</sup> on citizens for the first time in the Kingdom's history. With that substantial expansion, there have been no extra restrictions or additional procedures for issuing tax laws and regulations. So, the PC requirement in taxation, absent any other safeguards, may have a particular significance derived from the significance and sensitivity of taxation itself. In theory, the ZATCA should be subject to the same rules set by the Second (and later Third) Resolution, just like other agencies (including the PC requirement). In reality, the ZATCA implementation of PC, like that of other agencies, is not without major shortcomings. The following are some examples.

191. See e.g., the comments on the draft Regulation of the Bankruptcy Law. *Id.*

192. *Id.*

193. While there is no official copy to cite, many media outlets published a large part of the explanatory note content. See e.g., Adnan Al-Shabrawi, *Okaz publishes the bill - 7 years imprisonment for an employee who obstructs the enforcement of sentences against ministries*, OKZA (Sept. 1, 2019), <https://www.okaz.com.sa/local/na/1744356> (last visited Nov. 29, 2020).

194. Imposed in 2018, based on the Common VAT Agreement of the States of the Gulf Cooperation Council (GCC) and the VAT Law issued by Royal Decree No. M/113 and dated 1438/11/02 (July 25, 2017), <https://ncar.gov.sa/Documents/Details?Id=mbELn3pnZDC9Z5Tqh87A%3D%3D>.

195. Imposed in 2017, based on the GCC Common Excise Tax Agreement and the Excise Tax Law issued by Royal Decree No. M/86 and dated 1438/08/27 (May 23, 2017), <https://ncar.gov.sa/Documents/Details?Id=2vSqAMoCFHX%2B%2Fw916mrRHA%3D%3D>.

For example, the ZATCA does not cite the legal authority to conduct PC in its announcements.<sup>196</sup> Also, the ZATCA does not provide the public or specialists with anything (e.g., an explanatory note) except for the proposal.<sup>197</sup> Additionally, the ZATCA does not interact with commenters or publish received comments on its website (or even a summary of them).<sup>198</sup> Unfortunately, consistent with the pervasive trend discussed earlier, the ZATCA also deletes its proposals after the PC period ends. A quick visit to the “Regulations under Consultations” webpage<sup>199</sup> of the ZATCA’s website leads one to this conclusion. On top of that, ZATCA sometimes issues<sup>200</sup> or amends<sup>201</sup> regulations without even conducting PC.

### 1. Stage 3: Projections for Future Practices after the 1441 (2020) Council of Ministers’ Resolution<sup>202</sup>

Although there was no call or deadline for evaluating the current rules (like the First Resolution), the Third Resolution was issued in 1441 (2020). The preamble of the Third Resolution provides the following context:

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196. See e.g., *GAZT Invites the Public to Submit their Comments regarding the RETT Law*, ZAKAT, TAX, AND CUSTOMS AUTHORITY (Nov. 26, 2020), [https://zatca.gov.sa/ar/MediaCenter/News/Pages/New\\_516.aspx](https://zatca.gov.sa/ar/MediaCenter/News/Pages/New_516.aspx) (last visited Aug. 30, 2021).

197. *Id.* For another recent example, *PC for the Electronic Billing Regulation*, ZAKAT, TAX, AND CUSTOMS AUTHORITY (Sept. 17, 2020), [https://zatca.gov.sa/ar/RulesRegulations/UnderConsultations/Pages/Rule\\_002.aspx](https://zatca.gov.sa/ar/RulesRegulations/UnderConsultations/Pages/Rule_002.aspx) (last visited Nov. 29, 2020). Upon visiting the webpage on Apr. 13, 2021, it appears that the ZATCA has removed this PC from its website for an unknown reason.

198. The analysis in this section covers the period before launching the unified platform, *Istitlaa*. The Authors participated in the PC of the Electronic Billing Regulation (in Oct. 17, 2020), and have not received any response from ZATCA yet, not even a receipt confirmation. However, after developing *Istitlaa*, ZATCA published a summary of comments received on the platform in a public report. In the report, they selected and addressed only two of the comments that the Authors submitted.

199. *Regulation Under Consultation*, ZAKAT, TAX, AND CUSTOMS AUTHORITY (n.d.), <https://zatca.gov.sa/en/RulesRegulations/UnderConsultations/Pages/default.aspx> (last visited Aug. 30, 2021).

200. The most recent example is the issuing of the Real Estate Transaction Tax (RETT) Regulation by the Administrative Order No. 712 and dated 1442/02/15 (Oct. 2, 2020) the next day of the Royal Order No. A/84 and dated 1442/02/14 (Oct. 1, 2020) that introduced the RETT. The Royal Order mandated the GAZT (currently ZATCA) to prepare and propose a law for the RETT “in light of the [royal order’s] provisions” within 90 days. Besides the oddness of issuing the law after the regulation, the latter was issued without PC, while the former was issued after conducting a PC. See, *PC regarding Draft RETT Law*, ZAKAT, TAX, AND CUSTOMS AUTHORITY (Nov. 26, 2020), [https://zatca.gov.sa/ar/RulesRegulations/UnderConsultations/Pages/Rule\\_003.aspx](https://zatca.gov.sa/ar/RulesRegulations/UnderConsultations/Pages/Rule_003.aspx) (last visited Aug. 30, 2021).

201. See e.g., *GAZT Amends Awards for Whistleblowers Regulation to Include RETT*, ZAKAT, TAX, AND CUSTOMS AUTHORITY (Nov. 16, 2020), [https://zatca.gov.sa/ar/MediaCenter/News/Pages/News\\_400.aspx](https://zatca.gov.sa/ar/MediaCenter/News/Pages/News_400.aspx) (last visited Aug. 30, 2021).

202. For full citation, see *supra* note 118.

1. The Minister of Commerce and Investment, the former Chairman of the General Authority of Investment, sent a letter in 1439 (2018) suggesting a mechanism of implementing the Updated Rules of the Second Resolution.
2. The National Competitiveness Center (NCC) was established in 1440 (2019) by the NCC *Tandheem*,<sup>203</sup> and the Minister of Commerce became its Chairman.
3. The Third Resolution was issued in 1441 (2020), based on the above-mentioned letter, and established the Laws and Regulations Support Unit (the Unit) under the NCC.

Generally, the Third Resolution does not introduce a completely new version of the rules nor does it repeal its predecessor. Yet, the Third Resolution provides substantial amendments to the Updated Rules approved by the Second Resolution, specifically with respect to PC. Stated differently, the Third Resolution could be seen as an extension of the Second Clause of the Updated Rules (and the Third Instruction of the Second Resolution) and an implementation plan thereof. From that perspective, this Resolution could be called the PC Resolution.

The First Instruction of the Third Resolution established the Unit under the NCC and vested in it the oversight of PC.<sup>204</sup> For the first time, there is a competent authority in the Kingdom that coordinates and oversees the PC implementation on the national level. The Unit has been granted all the necessary functions in order to achieve its goals,<sup>205</sup> including the following:

1. creating and overseeing an electronic unified PC platform;<sup>206</sup>
2. preparing the consultation and impact evaluation forms for agencies;<sup>207</sup>
3. providing comments on the PC outcomes to the relevant agency upon its request;<sup>208</sup> and
4. raising awareness about the PC culture and the importance of participating in the evaluation of the regulatory effects of draft laws and regulations and the like.<sup>209</sup>

To ensure the efficiency and meaningfulness of the PC practice, the Third Resolution came with considerable additional amendments. First, the Unit's achievements and obstacles, as well as the extent of agencies' compliance with the PC requirement, would have to be incorporated into the NCC's annual report submitted to the Council.<sup>210</sup> Consequently, the Council would be informed of

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203. Issued by the Council of Ministers' Resolution No. 212, dated 1440/04/25 (Jan. 2, 2019), and available at <https://ncar.gov.sa/Documents/Details?Id=amulzNsF727P%2B8UU%2BYwNSA%3D%3D>.

204. The First Instruction of the Third Resolution, Paragraph 1.

205. *Id.* at Paragraph 2.

206. *Id.* at Paragraph 2(A).

207. *Id.* at Paragraph 2(B).

208. *Id.* at Paragraph 2(C).

209. *Id.* at Paragraph 2(F).

210. *Id.* at the Third Instruction.

the general status of the PC implementation across the government. Second, the outcomes of PC are given more weight. Although the Bureau of Experts is the body that drafts the final version of the proposals and ensures agencies' compliance with all of their obligations,<sup>211</sup> it was, oddly, not required to take the PC results into consideration. Now, an additional paragraph has been added to the Bureau of Experts obligations (in the Updated Rules) that directs the Bureau of Experts to consider the PC "summary and results," which the Unit prepares regarding each PC.<sup>212</sup> Third, the Third Resolution amended the Third Instruction<sup>213</sup> of the Second Resolution and the Second Clause of the Updated Rules<sup>214</sup> to make the publication of proposals (and summaries of comments) accessible on the later-launched unified PC platform instead of on the agencies' websites. However, only when amending the Second Clause of the Updated Rules, the Third Resolution added a special requirement: the 30-day minimum PC period.<sup>215</sup> The same amendment states that an agency may extend the PC period or conduct PC more than once in relation to the same proposal if needed.<sup>216</sup>

Furthermore, the Second Instruction of the Third Resolution directs government agencies to work with the Unit and sets a deadline for the latter to prepare a mechanism of action and governance.<sup>217</sup> The expected mechanism concerns how the electronic unified PC platform would work,<sup>218</sup> and that must be in accordance with the best international practices.<sup>219</sup> From the Resolution's date of issuance (1441/07/15, Mar. 10, 2020), the Unit was given a 180-day deadline to produce that mechanism, that is 1442/01/18 (Sep. 5, 2020). After a silence that lasted for several months, the NCC announced (on Jan 6, 2021) the platform launch under the name the Electronic Unified Platform for Public and Government Agencies<sup>220</sup>

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211. See the full obligations of the Bureau of Experts at the Fifth Clause of the Updated Rules (the Second Resolution).

212. The Seventh Instruction of the Third Resolution.

213. *Id.* at the Fifth Instruction.

214. *Id.* at the Sixth Instruction.

215. *Id.*

216. *Id.* Oddly enough, both amendments (the 30-day minimum and the ability to conduct more than one PC) concern the Second Clause of the Updated Rules but not the Third Instruction of the Second Resolution.

217. Between the Unit establishment by the Third Resolution and the official launch of the PC Platform, a temporary webpage was created on the NCC website for PC purposes. Then, a proposal would be published twice at the same time: on the NCC's just-mentioned webpage and on that of the relevant agency, and both of them would receive comments thereof as well (the Unit would forward the comments it received to the relevant agency after the comment period). See, NCC, Minister of Commerce launches "Istitlaa" platform, *infra* note 222.

218. The Second Instruction states that the expected mechanism is related to publishing draft laws and regulations, referencing the Fifth and Sixth Instructions of the same Resolution.

219. *Id.*

220. Note that the Third Resolution, in more than one place, stipulates that the consultation through the PC Platform is not limited to the public and private sector but also

Consultation “*Istitlaa*”<sup>221</sup> or the Public Consultation Platform “*Istitlaa*.”<sup>222</sup> Accordingly, the PC Platform is very recent. The Authors acknowledge the promising practices which have been evolving throughout the platform since its establishment. These practices include posting comments of individuals on the platform, allowing them to comment on each other, and voting on each comment. Another positive practice is cooperating with agencies to produce and publish the summaries of comments after each PC. These summaries contain information about each PC, statistics about participants, selected comments of individuals, private sector entities, as well as government agencies, and the actions the relevant agency took about those comments. On top of these practices, the platform keeps a decent searchable record of completed, in progress, and upcoming PCs. However, the Authors believe that assessing the performance of the PC Platform is premature at this time and may entail a future research project. Therefore, this Article provides no examples for this nascent stage.

In light of the amendments discussed above, a post-Third Resolution should be considered as a separate stage whose PC application is progressively distinguished from former stages, provided that these amendments become a reality. To ensure the continuous interest of the Council of Ministers in the PC matter in the future, the Third Resolution stated that the Unit’s job must be evaluated by the NCC’s Board of Directors after two years of assuming its competence, and the NCC’s Board of Directors must submit that evaluation to the Council.<sup>223</sup> This means that there might be upcoming amendments and developments in the Kingdom’s PC implementation in the near future.<sup>224</sup>

One of the expected developments came in the form of high order directed to all government agencies in the Kingdom.<sup>225</sup> The Order affirms that agencies must adhere to the PC requirement.<sup>226</sup> It is based on a correspondence of the NCC Chairman referring to the Third Resolution, which established the PC Platform extends to government agencies. However, it is unclear how an agency should comment on another agency’s proposal through the PC Platform. In the same vein, the NCC states that “[t]he platform aims to enable individuals, the private sector, and government agencies to express their views and comments . . .” See, NCC, *About the Platform*, *infra* note 234.

221. *Istitlaa* in Arabic revolves around the meanings of survey and poll.

222. See, NCC, *Minister of Commerce launches “Istitlaa” platform*, NATIONAL COMPETITIVENESS CENTER (Jan. 6, 2021), [https://www.ncc.gov.sa/ar/MediaCenter/News/Pages/news\\_016.aspx](https://www.ncc.gov.sa/ar/MediaCenter/News/Pages/news_016.aspx) (last visited Mar. 11, 2021).

223. The Fourth Instruction of the Third Resolution.

224. Recently, the Council of Ministers issued Resolution No. 200 and dated 04/04/1443 (Nov. 9, 2021) to amend the Updated Rules introduced by the Second Resolution. It introduced a timely amendment to the First Clause, Paragraph 2(B), concerning the explanatory note (memorandum), one of the requirements on the agencies when proposing an amendment or a draft law, regulations, or the like. The amendment basically instructs the agencies to illustrate the expected health impacts of their proposal along with previously required potential effects, such as social, financial, and economic.

225. High Order No. 22424 and dated 09/04/1443 (Nov. 14, 2021).

226. *Id.*

“Istitlaa” and urged all agencies to utilize it. The High Order echoes the NCC Chairman’s disappointment with some agencies non-compliance or negligence of the PC Platform when issuing several regulatory decisions. Those decisions, according to the NCC Chairman’s opinion, are (1) of a regulatory nature, (2) related to economic and development affairs, and (3) issued without conducting PC.<sup>227</sup> Such a practice, in the Chairman’s point of view, contradicts the goals for which the PC Platform was established.<sup>228</sup> Indeed, allowing some agencies to escape the governmentwide PC requirement weakens the meaningfulness of the PC implementation in Saudi Arabia.

As this section discussed the adoption and development of the PC requirement in the Kingdom, the following figures illustrate some of the section findings. Figure 5 compares the Three Council’s Resolutions in selected areas while Figure 6 simplifies the PC process in the Kingdom in light of the Three Resolutions.

**Figure 5: The Three Council’s Resolutions Comparison**

<i>Comparison Area</i>	<i>1st Resolution</i>	<i>2nd Resolution</i>	<i>3rd Resolution</i>
<b>Status</b>	Repealed	In-Force	In-Force
<b>National PC Requirement</b>	No	Yes	Yes
<b>PC Application</b>	No (except for early practices)	Yes	Yes
<b>Early Practices</b>	Not Recognized or Evaluated	Not Recognized or Evaluated	Not Recognized or Evaluated
<b>Rule Categories</b>	Laws, Regulations & the Like	Laws, Regulations, the Like, Regulatory Rules, Resolutions of a Regulatory Nature	Laws, Regulations, the Like, Regulatory Rules, Resolutions of a Regulatory Nature
<b>Deregulation</b>	Not Addressed	Not Addressed	Not Addressed
<b>Important Definitions</b>	No	No	No
<b>PC Scope</b>	N/A	Economic & Developmental Affairs	Economic & Developmental Affairs
<b>Shura Role</b>	Not Addressed	Addressed	N/A
<b>Judicial Review</b>	Not Addressed	Not Addressed	Not Addressed
<b>Comment Period</b>	N/A	Not Addressed	30-Day Minimum
<b>Target Groups</b>	N/A	Public & Private Sector	Public, Private Sector, & Gov Agencies
<b>Unified PC Platform</b>	N/A	No	Yes

**Figure 6: The PC Process**



227. *Id.*  
228. *Id.*

### C. *Values and Motives: Global Competitiveness & Business Environment*

The requirement of PC in the Saudi context may raise the question of whether it is derived from constitutional principles or other motives. The most relevant constitutional principle to the PC concept is the *Shura* principle, which emanates from *Shari'a*. The simple answer to this question is that there is no clear reference to constitutional values in the relevant Council of Ministers' resolutions adopting and mandating the concept of PC. Meanwhile, the resolutions and other official authorities' language reveal an international influence and motives to adopt PC procedures. Nevertheless, the constitutional justification of a PC approach should be established to inform the reader about the *Shura* principle.

Saudi Arabia is an Islamic country that cites Islamic law, the Quran (the Book of Allah), and the Sunnah (the prophetic traditions), as its constitution.<sup>229</sup> Islam recognizes a similar concept to PC, namely, the *Shura* principle. *Shura* requires the head of state to consult the public (or consultants, *ahl alhall wa alaqd*) before making a discretionary decision. In fact, Prophet Mohammed PBUH conducted *Shura* by consulting his companions in peace and war times. In this sense, one could argue that PC has its basis in Islam. Current and historical applications of the *Shura* principle, however, would not necessarily produce the current international or Saudi approach to PC in the rulemaking process.

After eliminating the *Shura* principle as the potentially constitutional motive, the primary motives for the adoption of PC in the Kingdom seem to consist of global competitiveness and enhancing the business environment. The relationship between these two motives is not one of contrast or competition (as in the case of the United States). One could say that these two motives are correlated since being amongst the top nations in global competitiveness indexes means that the Kingdom has enhanced its business environment. Furthermore, global competitiveness indexes have detailed programs that educate countries on how to reform their governments and other targeted areas. States that have high rankings are more likely to attract foreign investors who are looking for developed and stable economies.

Multiple indicators support the finding that the official stance recognizes global competitiveness and enhancing the business environment as the primary motives. In its Newsletter, the NCC cites reforming and improving the business environment as the reason behind establishing the Unit responsible for PC.<sup>230</sup> Upon launching the Unit, the NCC's VP said that PC "aims to activate

229. The Basic Law, the main constitutional law, along with numerous constitutional customs and royal statements assert that *Sharia* is the law of the land. See e.g., Article One of the Basic Law.

230. See, NCC, *NCC in Makkah Excellence Award*, NATIONAL COMPETITIVENESS CENTER THIRD QUARTER NEWSLETTER (2020), <https://ncc.gov.sa/en/MediaCenter/Publications/Documents/NCC-Newsletter-Q3-2020.pdf> (last visited Nov. 28, 2020).

communication between government entities and sectors *and* the private sector to answer inquiries, while restricting opinions on law and regulations projects” to address possible challenges.<sup>231</sup> Moreover, the preamble of the Third Resolution reveals that establishing the Unit under the NCC and introducing the mechanism to implement PC nationwide was suggested by the Minister of Commerce,<sup>232</sup> who became the NCC Chairman after its establishment. The fact that the NCC, the body created to enhance the business environment and monitor the Kingdom’s position in global indexes,<sup>233</sup> has been vested with the authority to conduct and oversee PC demonstrates the business and global competitiveness motives behind the adoption of PC. In fact, the motto of the PC Platform (*Isttilaa*) is “[s]hare your opinion and contribute to building a stable and attractive business environment.”<sup>234</sup>

Furthermore, the Saudi Vision 2030 has chosen a few global competitiveness indexes through which its progress can be measured. At least one global competitiveness index has a direct relationship with the concept of PC. For example, the Kingdom aims at becoming among the top five nations on the UN E-Government Survey Index.<sup>235</sup> More importantly, the E-Government Index references the E-Participation Index as a supplementary index.<sup>236</sup> The goal of E-Participation is to facilitate the public’s access to information and to promote PC in the decision-making process.<sup>237</sup> Particularly, within the UN E-Participation Index framework is E-Consultation, which means “[e]ngaging citizens in contributions to and deliberation on public policies and services.”<sup>238</sup> As an indicator for achieving one of their

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231. *Id.* at 6; *see*, Dr. Eiman Almutairi’s statement on the mechanism of PC, available at [https://www.ncc.gov.sa/ar/MediaCenter/News/Pages/news\\_015.aspx](https://www.ncc.gov.sa/ar/MediaCenter/News/Pages/news_015.aspx) (last visited Nov. 29, 2020) (emphasis added).

232. In his capacity as the former Chairman of the General Authority of Investment.

233. As a sign of taking global indexes seriously, the Kingdom created the NCC “in 2019 in aims to develop and enhance the Kingdom’s competitiveness environment and raise its ranking in global reports and indicators.” *See*, NCC, *About us, Objectives, Vision & Mission, competitiveness, International Reports, Partners, and Board of Directors*, NATIONAL COMPETITIVENESS CENTER (n.d.), <https://www.ncc.gov.sa/en/AboutUs/Pages/default.aspx> (last visited Nov. 29, 2020).

234. *See*, the homepage of the PC Platform, NCC, *Isttilaa Platform*, NATIONAL COMPETITIVENESS CENTER, <https://isttilaa.ncc.gov.sa/ar/Pages/default.aspx> (last visited Mar. 4, 2021). Similarly, the ‘About the Platform’ webpage states that “[t]he platform aims to enable individuals, the private sector, and government agencies to express their views and comments on [law and regulation] drafts related to economic and development affairs, which contributes to providing a safe and stable investment environment.” *See*, NCC, *About the Platform*, NATIONAL COMPETITIVENESS CENTER, <https://isttilaa.ncc.gov.sa/ar/About/Pages/default.aspx> (last visited Mar. 11, 2021).

235. Saudi VISION 2030, *supra* note 3, at 67.

236. *E-Participation Index*, UN E-GOVERNMENT KNOWLEDGE (n.d.), <https://publicadministration.un.org/egovkb/en-us/About/Overview/E-Participation-Index> (last visited Nov. 28, 2020).

237. *Id.*

238. *Id.*

main goals (ensuring that government agencies respond to the observations of their customers), the Kingdom officially aims to enhance its ranking in the E-Participation Index.<sup>239</sup> Setting such an index as a concrete standard for or an indicator of the Vision's success permits stakeholders to judge the application of PC through the index's parameters and requirements.

In general, international indexes are a means and not an end in and of themselves. Rather, a high ranking in many international indexes shows serious and compelling evidence of a nation's progress (in the index's subject matter) and attractiveness for foreign investments. Thus, international indexes and their suggested programs are comparative tools to demonstrate nations' economic, social, medical, governmental, and private sector readiness and efficiency. In sum, the focus on the Saudi private sector, business environment, foreign investors, and global competitiveness indexes is overwhelming in the official sources. Therefore, one could argue that PC is a means for reaching the higher global rankings vital for attracting foreign investments.

Finally, whatever the motives for adopting such a positive reform in the Kingdom, namely, PC, its other great values should not be overlooked. In other words, PC embodies significant values and motives that should be given more weight, such as promoting transparency and participation in the policy and decision-making process. Some Saudi agencies did cite these values even before the issuance of the Councils' Resolutions. So, one wishes that the Resolutions would have built on these early practices and conceptualization. One also wonders, why has PC been adopted in the absence of constitutional values or principles, such as the *Shura* principle? Indeed, global indexes and enhancing the business environment are important reasons for adopting PC, but they should not be the only motives for this important reform.

#### IV. BETWEEN THE TWO EXPERIENCES

After examining the PC experiences of the United States and Saudi Arabia, a discussion about the resemblance and distinction between the two experiences is in order. Indeed, recognizing other nations' experiences is vital for any country when preparing new laws or regulations, and the PC concept is no exception. Still, in some cases, even after adopting a specific legal framework, the international experiences remain very relevant, at least until developing solid cumulative legislative, executive, and judicial precedents that foster a degree of self-sufficiency from foreign experiences and understanding.<sup>240</sup> This does not suggest that the

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239. Executive Plan for the National Transformation Program 2018–2020, at 68, <https://perma.cc/6MBN-RE3H> (last visited Nov. 27, 2021).

240. For example, the Saudi legal system is often compared to the Egyptian legal system. The rationale behind this comparison is that, like many other Arab countries, the Kingdom adopted (and in some cases copied) several Egyptian laws. Also, it is not disputed that the Egyptian legal system went through a similar process with the French legal system. In this

Saudi implementation of PC is intended to follow the U.S. example since this is an unprovable claim. However, it is a general approach that is supported by the requirement of considering best international practices at least in two places in the Three Council's Resolutions: (1) when the agency prepares the proposal of laws, regulations, and the like,<sup>241</sup> and (2) when the Unit is instructed to prepare the PC mechanism.<sup>242</sup> Therefore, even if the U.S. experience is not officially relevant, it is absolutely one of the international practices that must be considered from policy-making and scholarly perspectives.

Accordingly, the comparison between PC in the Kingdom and the notice and comment requirement in the United States focuses on areas of relevance. These areas include (1) values and motives, (2) legal authority and its obligatory nature, (3) scope, (4) process and requirements, (5) implementing mechanism, and (6) judicial review. The discussion of each of these areas would vary based on the available data and significance for the purposes of this Article.

Since values and motives are what provoke reform, they are the first to be addressed in this comparison. The legislative history of adopting the APA in the United States shows the interesting compromise that was struck to pass the APA. Besides legislative history, several Supreme Court cases suggest two competing motives or values that justify the notice and comment requirement: democracy, being a constitutional value, and efficiency, being a necessity for government work. Although there are scarce data surrounding the conditions of the PC requirement's adoption in the Kingdom, there is compelling evidence demonstrating what caused this reform. The Saudi 2030 Vision and the NCC reports, as well as other data (discussed in the above section) suggest two complementing motives: global competitiveness and business environment. Unlike the motives for adopting the notice and comment in the United States, the Kingdom's are clearly not constitutionally derived nor in line with the Kingdom's general political and legal realities. In fact, other valid constitutional values, such as the *Shura* principle, have not been mentioned in any official authority.

The notice and comment requirement and the PC requirement were adopted by distinct authorities. Whereas the notice and comment requirement is part of a congressional legislation (the APA) in the U.S, the PC requirement was adopted

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sense, Saudi Arabia adopted many civil law doctrines and theories that originated in France. Hence, such comparison serves the interest of tracing back legal doctrines and understanding their nature in their home countries. See, e.g., Maren Hanson, *The Influence of French Law on the Saudi Legal System*, ARAB L.Q. 272 (1987); Mohamed S. E. Abdel Wahab, *An Overview of the Egyptian Legal System and Legal Research*, GLOBALEX, <https://www.nyulawglobal.org/globalex/Egypt.html> (last visited Apr. 2020); Zakaria A. Almulhim, *Judicial Review of Governmental Actions: A Constitutional Transformation of the Acts of State Doctrine in Saudi Arabia* (University of Minnesota S.J.D. dissertation) (on file with author).

241. The First Clause, Paragraph 1 of the Attached Rules (the First Resolution); the First Clause, Paragraph 2(A) of the Updated Rules (the Second Resolution).

242. The Second Instruction of the Third Resolution.

in Saudi Arabia by resolutions of the Council, without the involvement of its legislative partner, the *Shura*. Although the Council's resolutions can have a legislative effect, they are not laws, neither in their process, nor in their binding nature and abundance of details. Hence, the PC requirement in Saudi Arabia is at a disadvantage in terms of its adopting authority. Also, from a constitutional law standpoint, using the instrument of law is more suitable for codifying PC in the Kingdom, especially since it covers not only regulations and rules but also laws, which are higher in the legislative hierarchy and require the involvement of more authorities than the Council's Resolutions.

Another distinction between the two experiences is the scope of application, which could be compared from two angles: covered categories of rules and subject matter. In terms of the first angle, each experience has different coverage. While the notice and comment apply to *most* regulations and regulatory rules in the United States, PC in the Kingdom applies to a wider variety of rules, including laws. The APA exempts some rules from the notice and comment requirement, including the "good cause" standard, interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice.<sup>243</sup> Since ensuring democratic representation in the rulemaking process is a main reason to adopt the notice and comment requirement in the U.S, it is normal to not cover laws, which are issued by elected lawmakers. However, in Saudi Arabia, where both the Council and *Shura* members are appointed by the king,<sup>244</sup> it is important to extend PC coverage to laws. To some extent, one could argue that requiring PC on laws, along with other regulations and rules, may mitigate the lack of democratic representation in the Saudi legislative process. However, this argument is not supported by any official available data.

As to the subject matter scope of application, the APA and the Three Council's Resolutions adopt distinct approaches. The APA's approach requires all types of regulations regardless of their subject matter to follow the notice and comment requirement, with some exceptions. These exceptions from the notice and comment requirement are military and foreign affairs, as well as affairs relating to "public property, loans, grants, benefits, or contracts."<sup>245</sup> This approach is somewhat straightforward because it names all subjects that should not be covered by the notice and comment requirement. Conversely, the Three Council's Resolutions approach has been somewhat vague in exclusively subjecting economic and developmental affairs to the PC requirement. There has been no clarification as to what would constitute an economic and developmental affair. Also, since agencies and the NCC's Unit practice are fairly recent, there is very limited data to extrapolate any definition. In sum, it can be said that the APA and the Council's

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243. 5 U.S.C. § 553(b). See *Mack Trucks*, 682 F.3d at 87; *Block*, 655 F.2d at 1156.

244. Article 57 of the Basic Law; Article 3 of the *Shura's Law*; Article 8 of the Council's Law.

245. 5 U.S.C. § 553(a).

Resolutions approaches to the subject matter scope of application are antithetical to each other: the APA names what is not covered whereas the Council's Resolutions vaguely describe what is covered.

Conversely, there are some similarities when it comes to the adopted process and requirements and the implementing mechanism in the two experiences. For instance, both systems require the agency to have a legal authority that enables the agency to propose a new regulation or set of rules.<sup>246</sup> Also, both systems list a number of elements to be prepared upon the rulemaking proposal: the general notice in the United States and the explanatory note in Saudi Arabia. The only difference here is that the APA mandates U.S. agencies to publish these elements as part of the general notice while the Saudi agencies are not required to publish the explanatory note.<sup>247</sup> Finally, regarding implementation mechanisms, both systems have dedicated electronic platforms for PC (eRegulation and *Istit-laa*), which provide accessibility not only to agencies' proposals but also to the public comments thereon. Both experiences also have a minimum comment period of 30 days.<sup>248</sup>

However, the two experiences have a critical distinction regarding judicial review. It is unclear whether the judiciary in Saudi Arabia, specifically the Board of Grievances, would have (and exercise) the jurisdiction to review the PC process as an administrative procedure. The Three Council's Resolutions did not address the judicial review issue: it did not stipulate the competent court to adjudicate such disputes nor did it determine who has the standing to challenge the agencies' implementation of PC. By contrast, Section 706 of the APA clearly addressed this issue by explicitly permitting interested persons to challenge the agency's rules and procedure. Under the provided scope of review in Section 706, an affected party can challenge the agency's actions when such actions are arbitrary or capricious.<sup>249</sup> Generally, when comparing the U.S. notice

246. 5 U.S.C. § 553(b); the Second Clause, Paragraph 2 of the Updated Rules (the Second Resolution).

247. *Id.*

248. The comment period is not decided in the APA, but U.S. agencies typically allow at least 30 days for public comment. *The Federal Rulemaking Process: An Overview*, *supra* note 50. In Saudi Arabia, the Sixth Instruction of the Third Resolution amends the Second Clause of the Updated Rules (the Second Resolution) and provides explicitly for 30 days minimum while granting the agency the ability to extend the period or to conduct PC more than once.

249. *See*, GARVEY, *supra* note 60 at 13–15; *Troy Corp. v. Browner*, 120 F.3d 277, 284 (D.C. Cir. 1997) (“the question of sufficiency of an agency's stated reasons under the arbitrary and capricious review of the APA is fact-specific and record-specific.”). Also, the APA provides that “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” 5 U.S.C. § 553(e). Though this Section has no correlation to judicial review, it basically gives interested persons the right to petition an agency for the purpose of issuing, amending, or repealing a rule. In this case, a petitioned agency must consider and respond to the received rulemaking petition. Nevertheless, agencies have considerable discretion in considering and processing such petitions, and agencies vary in terms of their petitioning process. In general, an agency is required to process and respond

and comment to the Kingdom’s PC requirement, judicial review could be the most significant area in which PC is lacking.

**Figure 7: PC and Notice and Comment Comparison**

<i>Comparison Area</i>	<i>PC Requirement</i>	<i>Notice &amp; Comment</i>
<i>Values &amp; Motives</i>	Global Competitiveness & Business Environment	Democracy vs. Efficiency
<i>Legal Authority</i>	Council’s Resolutions	Legislative Act
<i>Covered Rules</i>	Lawmaking & Rulemaking	Rulemaking Except for “Good Cause,” Interpretive Rules, General Statements of Policy, or Rules of Agency Procedure
<i>Subject Matter</i>	Required on Developmental & Economic Affairs	Required on all Except for Affairs Relating to Military, Foreign, Contracts, Loans, Grants, Public Property & Benefits
<i>Process &amp; Requirements</i>	Explanatory Note—Agencies Are not Required to Publish it	General Notice—Agencies Are Required to Publish it
<i>Comment Period</i>	30-Day Minimum	30-Day Minimum—Customary
<i>Implementation Mechanism (e-platform)</i>	<i>Isttilaa.ncc.gov.sa</i>	Regulation.gov
<i>Judicial Review</i>	Not Addressed	Addressed & Enabled (§ 507)

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## CONCLUSION

Scholarship is, in a sense, an act of faith that writing can make a difference.

—*Erwin Chemerinsky*<sup>250</sup>

Without a doubt, adopting PC in the Kingdom is one of the boldest and underrated recent reforms. However, the Three Council’s Resolutions that introduced the PC requirement did not introduce a novel concept to the Kingdom; rather, they made the few agencies’ exceptional practice (*e.g.*, CMA and CITC) the new norm. The overview of the Saudi experience proves that there is a new evolving framework for PC nationwide. The current status of this framework is the launching of a governmentwide PC platform (*Isttilaa*) with more unified and standardized procedures to propose and amend laws, regulations, and rules. Generally, unlike the U.S. experience with the notice and comment requirement that has been motivated by two somewhat conflicting main poles (efficiency and democracy), the Saudi experience with PC has been developed

(but not to adopt) a petition in timely manner. Conversely, the Three Council’s resolutions do not recognize any petitioning right to stockholders. In fact, and as has been repeatedly mentioned in this Article, many agencies did not respond to the Authors numerous emails, which is a disappointment. For more discussion about the right to petition under the APA *see generally*, MAEVE P. CAREY, PETITIONS FOR RULEMAKING: AN OVERVIEW, CONG. RES. SERV. (Jan. 23, 2020), <https://sgp.fas.org/crs/misc/R46190.pdf>.

250. Erwin Chemerinsky, *Why Write?*, 107 MICH. L. REV. 881 (2009), <https://repository.law.umich.edu/mlr/vol1107/iss6/1>.

and motivated by complementary considerations: global competitiveness and business environment.

Furthermore, the analysis of multiple agencies' implementation of PC in Saudi Arabia shows a variety of advancement and commitment levels. Unfortunately, that applies to both early and recent practices (before and after the Three Council's Resolutions). There are advanced practices that lack consistency, and there are fundamental flaws that must be remedied to reach a meaningful implementation of PC. Some of these inconsistencies and flaws are evident in the challenges faced in writing this Article. For example, the Authors encountered several difficulties in terms of gaining access to relevant data.<sup>251</sup> Most agencies do not keep basic archives (let alone comprehensive data) of their PC practices. Agencies that break this norm would have some inconsistency or inadequacies in their practices. This shortcoming in agencies' transparency and open government negatively impacts researchers' and the public's ability to access important data, as well as the Kingdom's effort to improve the legislative and regulatory environment let alone enhancing the business environment. The latter, being a primary motive of adopting PC, would also benefit from greater accessibility to information and consistency in practice.

In short, Saudi legislative and executive branches still have a long way to improve and enrich the implementation of PC in the Kingdom. Hopefully, the recent Council's resolutions and the efforts of the NCC will pave the road to that destination. This section concludes with some considerations/ideas that should be studied by Saudi decision-makers in future PC updates and by scholars in future research pertaining to PC in the Kingdom:

(1) Enabling the judiciary: The Authors believe that to make PC meaningful, stakeholders should be granted standing to challenge the PC process. Enabling judicial review limits the agencies' discretion and affords several safeguards, such as publishing comments, taking comments into consideration when codifying the final law/regulation, urging agencies to respond to major comments, and reviewing agencies' classification of the proposal (whether it is economic and developmental or other affairs).<sup>252</sup>

(2) Making it a Law: Having a law, instead of the Council's Resolutions to regulate PC is perhaps the most suitable way to standardize the process since it also covers laws (not only regulations and rules). Also, having a whole law about PC would most likely make PC comprehensively organized and more respected

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251. One of the fundamental differences that might make this Article different from similar U.S. papers is the information availability and accessibility. A Saudi researcher often deals with scarce amount of information, has to make more assumptions, and has to draw conclusions based on very limited data. On the other hand, a U.S. researcher is often privileged to deal with abundance of information available.

252. This point concerns all types of rules except laws. Since they go through more complex procedures, involving the king, laws can be excluded from judicial review.

by agencies. In addition, the long procedures of issuing a law would subject it to further study since it would have to pass both the *Shura*, the Council, and the King's approval in issuance and amendment.

(3) Publishing already-prepared materials: In order to increase the quantity and quality of participation, it is essential to provide stakeholders with more information and context. Ministries and agencies should be required to publish more than just a draft law or regulation by making other materials accessible, such as a summary, a cost and benefit analysis, a study of similar international practices, and impacts on other laws and regulations. These materials are already required to be prepared per the Second Council's Resolution in the form of an explanatory note. In other words, agencies have prepared these materials; they just need an obligation to make them public. PC should be a two-way street integrating public information and public participation.

(4) Building on early practices: PC practices (and their values, such as participation and transparency) before the Council's Resolutions should be revisited. Strengths and shortcomings of the agencies' early practices are worth studying before evaluating the use of the current rules in the future. Agencies like the CMA and the CITC have considerable experience from which the NCC, the Council of Ministers, and the Bureau of Experts could benefit.

(5) PC means more than business environment: Other values embodied in PC should be given more weight. The Kingdom could kill two birds with one stone: using PC as a means to increase the Kingdom's ranking in global indexes while promoting other values, such as the *Shura* principle, transparency, and public participation in decision-making.

(6) Expanding the PC scope: The Second and Third Resolutions remarkably expanded the typical scope of PC to cover laws and ministerial resolutions of a regulatory nature (and the like). It would be more outstanding to further expand PC to cover national programs and initiatives. Furthermore, PC should explicitly apply to agencies' amendments of regulatory rules, regulations, and resolutions of a regulatory nature (covered in the Third Instruction of the Second Council's Resolution) that fall under their authority and do not require the Council's permission.

(7) Defining the important terms: The Three Resolutions include crucial terms whose legal interpretation significantly affects the PC application. Terms, such as economic and developmental affairs, laws, regulations, regulatory rules, resolutions of a regulatory nature, and the like should be precisely defined. Otherwise, the implementation of PC would be subject to each agency's understanding and discretion absent judicial review.

