

Regulation and Public Law in Comparative Perspective

Susan Rose-Ackerman

Michael Trebilcock is a pioneer in applying law and economics insights to the study of developing and emerging economies. He has struck a balance between respect for a society's traditional ways of managing property and resolving disputes, on the one hand, and the recognition that traditions can be dysfunctional by promoting violence and revenge and by undermining entrepreneurial incentives, on the other. His position contrasts with that of Robert Cooter who emphasizes the necessity of shaping reform efforts to underlying social realities (Cooter 1997). This seems either too optimistic or too pessimistic, depending upon the situation. It is too optimistic if it implies that any existing set of social practices and traditional regimes can be massaged into one that promotes growth. It is too pessimistic if it assumes that the only societies that can reform are those few with the "right" underlying structures. Trebilcock, in contrast, acknowledges that existing practices, however culturally entrenched, can be deeply dysfunctional so that reformers need, at least, to attempt reforms that do not flow from these practices (Trebilcock 1997). Of course, Cooter is correct that reform will be easier if it can be tied to existing behavior and presented as an incremental change, but limiting reform to such situations is likely to condemn some portions of the world to perpetual poverty and violence. Interestingly, both Trebilcock and Cooter have studied Papua New Guinea, an often violent and very poor society (Trebilcock 1984; Cooter 1991). Trebilcock's policy recommendation maintains some features of customary law while creating new legal structures that respond to modern realities. This mix, although requiring difficult and subtle choices, seems the only feasible route to practical reform.

My remarks for this conference are, I hope, compatible with Michael's eclectic approach. My topic, however, is not property rights or the control of violence. Rather, I will discuss administrative law and policymaking. I hope to contribute to the ongoing debate on convergence versus divergence in public law and to reflect on the implications of that debate for administrative law reform in emerging democracies throughout the world, but especially in Latin America and Eastern Europe. If all advanced public law systems are converging to a similar set of legal principles and practices, there may be few

options for the rest of the world. Emerging democracies must accept the growing consensus modified only by their own lack of financial and human resources. In contrast, if alternative operational models exist, nation states can pick and choose. Colonial heritage need not determine present day reform, and the diversity of options will give locally based reformers a way to resist overly doctrinaire proposals from both insiders with a vested interest and outsiders in the aid and lending community.

In what follows I take a democratic constitutional structure as given, with elections and a representative legislature. However, democracies cannot realistically limit policymaking to the legislature. Pressing contemporary issues are too technically complex, too dynamic, and too numerous for busy, non-expert legislators to resolve in detail. Delegation under broad, framework statutes is essential for effective government, but it does not eliminate the need for democratic responsiveness. Given that conclusion, democracies, new and old, need to work toward the public accountability of all policymaking—not just in the legislature, but in other institutions as well. Periodic elections are not a sufficient popular check on government. Policymaking, wherever it occurs, should be transparent and accountable to those affected by the policy. Call this “policymaking accountability”.¹

Administrative law can provide a framework for the achievement of policymaking accountability. Although it is unlikely to be the first order of business in emerging democracies, administrative law reform must eventually be part of the process of democratic consolidation (Rose-Ackerman 2005). Administrative law must move beyond review of the formal legality of state actions toward the study of rules and principles that can enhance political accountability and competent policymaking. Protecting the rights of individuals and businesses against an overarching state is not enough. Public law should also help to contain excess assertions of executive power and to monitor private or quasi-public entities that carry out public functions.² These constraints are likely to be

¹ (Rose-Ackerman 2005) pp. 5-6 distinguishes between performance accountability and policymaking accountability. The former concerns the competent implementation of a given policy. Jerry Mashaw distinguishes between political, managerial, and legal accountability (Mashaw 2005; Mashaw 2006). His political and my policymaking accountability are closely related as are his managerial and my performance categories. See also (Bovens 2005).

² Justice Stephen Breyer, quoting Benjamin Constant, refers to this as “active liberty” or the people’s right to “an active and constant participation in collective power.” (Breyer 2006) .

especially important in countries emerging from a period of authoritarian rule where executive power was unchecked.

After outlining the key issues in part I, part II develops the relationship between substantive policy and administrative practice. With this background, part III discusses the role of the courts in overseeing executive policymaking.

I. Aspects of Reform

Public law can help organize and manage consultation consistent with the competent provision of services and the effective regulation of the economy. In assessing the democratic legitimacy of the policymaking processes, three linked issues frame the reform agenda: the forms of consultation and participation, the balance between technocratic expertise and political accountability, and the line between public and private actors. The judiciary and other oversight bodies may monitor a system's resolution of these issues, but I defer a discussion of the courts' role until part III, following a fuller discussion in part II of the balancing options.

I.A. Public accountability and participation

Across nation-states, consultation and participation in rulemaking vary in their legal status and in the nature of public input. At one extreme, the law mandates such processes [United States Administrative Procedures Act (USAPS), 5 USC. § 553]. At the other, public hearings represent an illegitimate effort to override the political will of the legislature.³ An intermediate case is one where hearing are permitted but with no legal recourse if they do not occur.⁴

The process of involving the public can range from notice and information requirements that cast outsiders in a watchdog role, through acceptance of public

³ See, for example, the classical German view of the *Rechtstaat* under which the administration is subordinate to the law and the route for public involvement is through legislative elections based on party competition (Johnson 1983). See (Henne 2003) for a review of (Rose-Ackerman 1995) that expressed this view.

⁴ This is generally the case, for example, in Argentina where a 2003 Executive Decree (Decree 1172/2003, ADLA 2004-A, 174) established a discretionary participatory process for administrative rulemaking (Volosin 2009). In parliamentary systems the discussion of public participation often focuses on the drafting of statutes in the executive and the legislature. Thus, in Poland the Sejm amended its bylaws in February 2006 (Articles 70a-70i; M.P. 2006, No. 15, item 194) to permit, but not require, Sejm committees to vote to hold hearings. (Dobrowolski, Gorywoda et al. 2007). See also (Czapanskiy and Manjoo 2008) for discussion of a case from the South African Constitutional Court upholding participation rights for legislation.

comments as part of the rulemaking process, to negotiated consensual rules.⁵ The law may require governmental bodies not only to consult but also to explain the reasons for their choices [e.g. USAPA, 5 USC § 553 (c)]. Consultation may be open-ended or with a closed list of stakeholders. If the law specifies the represented groups, the government may pick the individual participants, or the groups themselves may select them. The state may finance all participation or only subsidize the participation of less wealthy and well-organized groups. Conversely, it can simply make the process available to interested people or groups.

The strongest form of public participation is one where a consensus of the stakeholders makes the policy choice. However, only in a very narrow range of circumstances will consensual processes be consistent with majoritarian democracy (Rose-Ackerman 1994). Furthermore, even in those cases, regulatory negotiation requires a prior technocratic exercise that frames the issue. Stakeholders should not negotiate about the facts. In the common case where consensus is not feasible, a public hearing is an alternative route that pushes government policymakers to take account of options that have strong public support and to explain their reasons for accepting or rejecting them. Hearings, however, may expose conflicts between government policy preferences and the wishes of outside interest groups and concerned citizens.

1.B Balancing Expertise and Public Participation

The second dimension concerns the relative status of experts and the analytic techniques they use to assess policy options. For regulatory policies that seek to correct market failures, policy analysts recommends the use of cost-benefit analysis or related concepts such as risk assessment or cost-effectiveness analysis (Arrow, Cropper et al. 1996).

These are not, however, uncontroversial techniques.⁶

Recently, United States presidents have required cost-benefit analyses of major government regulations under White House oversight.⁷ The European Commission is pushing a “Better Regulation” agenda in member states of the European Union that

⁵ Compare (Bignami 2001) who outlines the development of participation rights in the European Union from a focus on enforcement procedures against individuals or firms to the beginnings of participatory processes in the promulgation of general rules.

⁶ See, for example, (Richardson 2000).

⁷ Exec. Order No. 12,866, 3 C.F.R. 638 (1993). Revisions to that E.O. are under consideration; see http://www.whitehouse.gov/omb/inforeg_regmatters/. For an overview see (Dudley Summer 2009)

includes what it calls “impact analysis”, a rather general term loosely related to cost-benefit analysis and risk assessment.⁸ In the United Kingdom a number of regulatory agencies also engage in impact analysis with mixed results.⁹

At one level, advocacy of impact analysis is an unobjectionable call to seek information about costs and benefits before making a policy decision. However, its proponents often presuppose that citizens have accepted particular norms of substantive policy—for example, net benefit maximization—when they, in fact, have not. The project fails to come to grips with the distinction between purely technical issues and those which imply particular normative views of good policy. The term, Better Regulation, assumes that any thoughtful person would accept the Commission’s proposals as an improvement over the status quo, but, in practice, this assumption is not obviously correct.

Problems of public accountability can arise from the overuse of technocratic techniques. A skeptical public may be difficult to convince if complex policies depend on esoteric science and social science. However, the difficulty goes deeper. Even if no one had any problem understanding the details of a cost-benefit analysis, it does not follow that all would agree with its policy implications. Some will bear the costs; others may want a distribution of benefits skewed toward the poor; still others may weigh aesthetic or cultural values more highly than the analyst. The mere use of analytic methods will seldom resolve controversial issues. Analysis, however competent, cannot eliminate deep disagreements over values.¹⁰ Expertise and public input may be in tension over desirable policy so that modern democratic governments need to find ways to strike a balance.

I. C. Public/private boundaries

Many countries have a long history of using private or quasi-governmental organizations to set standards. Sometimes the nation’s courts enforce these standards as law. In Germany, for example, the German Institute for Norms (DIN) operates under a government charter, and it has regulatory powers under a number of statutes (Rose-

⁸ (European Commission, 2006 #148; http://ec.europa.eu/governance/better_regulation/index.en.htm). The initiative also advocates more participatory processes, less paperwork, simpler rules, and exploration of alternative regulatory models. See also (Weiner 2006),(Alemanno 2009),(Dorbeck-Jung and Vrielink-Van Heffen 2007).

⁹ (National Audit Office 2007);(Munday 2008).

¹⁰ See (Adler and Posner 2006) for a recent attempt to modify CBA to take account of some its purported difficulties and (Sinden, Kysar et al. 2009) for a critique of that effort. See also (Nou 2008).

Ackerman 1995), 63-65. In most countries the professions regulate themselves through associations with exclusive mandates under rules that generally have legal force. For example, Polish law has created 19 self-governing groups, mostly in the legal and health professions. Some of these groups must be consulted by the government before it issues regulations that affect the group's members.¹¹ Here, the mixture of public and private roles sometimes produces hybrids that fail both as publicly accountable bodies and as effective private associations.

II. Models of Policymaking Accountability

Looking at policymaking processes outside the legislature, one finds that states follow very different strategies as they balance public participation, expertise, politics, and private professional norms. Out of this experience, I distill four stylized models. Call them the political model, the expertise model, the partisan-balance model, and the privatized model. The *political* model builds in accountability by entrusting the ultimate decision to those with political affiliations. The *expertise* model delegates authority to neutral or expert decision-makers. Under the *partisan-balance* model, a politically accountable appointment process leads, in the ideal, to neutral, impartial choices. The *privatization* model delegates policymaking to a quasi-private body that is largely independent of the government.

II.A: Political Decisionmakers

In the political model, the legislature, a political body, delegates policymaking authority to another politically responsible actor—be it the president, the prime minister, or an individual cabinet member. The civil service may help to frame issues, and legislation may require consultation with experts or the public. However, decisions are in the hands of political actors. The route for redress is the ballot box or a lobbying campaign to amend the statute or replace the politically responsible officials.

An extreme form of political delegation is the power of presidents or prime ministers to issue decrees with the force of law in the absence of explicit delegation by statute. These decrees have external effect on society; they are not just internal orders to the bureaucracy. The most salient present-day examples are the decree powers of some Latin American presidents and of the Russian president. In most cases, these powers are

¹¹ (Kisilowski 2004)

time limited and must eventually be submitted to the legislature. Even these, more limited, cases, however, give the executive a first-mover advantage (Carey and Shugart 1998).

II.B. Expert Decisionmakers

Some issues are not politically contentious. The legislature may safely delegate them to experts inside a government department or in an independent body. For example, a statute might appropriate funds for basic scientific research and leave it to an expert agency to apportion the funds.

But many policies, although highly dependent on expertise, generate wide-ranging controversy. In these cases, even if experts have the authority to make the final decision, they often must engage in formal consultation. A common response is to set up a broad-based advisory body that government officials must consult but which has no legal right to decide. The ultimate choice is left to technical experts.

This model, of course, only makes sense when politicians and their constituents believe that the experts both have the relevant information and are motivated to act in the public interest as seen by the legislature. To bring expertise in line with political interests, the implementing statute might specify the framework for expert choice. For example, a statute might require the use of cost-benefit analysis (CBA) to set priorities and mandate broad consultation. Experts in CBA would promulgate the final rule, but consultation would help them to obtain information on costs and benefits unavailable from published sources. They could also gather opinions, both expert and lay, on contested issues with no “right” answers.

The pathological version of the expert-led model is regulatory capture. Experts might tilt their choices in favor of the regulated industry in the hope of subsequent employment or, in the extreme, as a response to outright bribes (Stigler 1971). More subtle problems arise when the expert’s own knowledge is not sufficient to make an informed choice. Then, biased consultation, dominated by the regulated industry, could affect the good faith decisions of experts.

II.C. Partisan Balance

The partisan-balance model explicitly acknowledges the tension at the heart of modern regulatory policy—the conflict between political accountability and expertise. I consider

three variants. Call them the *institutional-constraints model*, the *partisan-balancing model*, and the *impartial-generalist model*. The first two are common in the United States; the third is familiar in the UK.

In the first, institutional-constraints, model, one or more political bodies—the legislature, the president, the senate, the political parties—appoint the decision makers. Sometimes, as for US federal judges, the process requires the consent of two or more partisan bodies. In other cases, appointments require a supermajority, a method that incorporates minority party preferences.¹² Although political factors may dominate at the appointment stage, once appointed, institutional constraints limit the political pressures on sitting officials and prevent narrow self-seeking for personal gain. These institutional factors may include long or life terms, fixed minimum salaries, earmarked sources of budgetary funds, overlapping terms for multi-member bodies, removal only “for cause,” and restrictions on subsequent employment by the regulated industry. In its pure form, the body makes impartial choices even given a purely partisan or self-interested appointment process. The agency is impartial because its members have no interest in biased results. Of course, the flip side is the risk that the regulators will have an idiosyncratic, minority view of good policy that they impose on the polity with little hope of correction. The government loses influence.

The second, partisan-balancing, model might also include institutional constraints—as in most US independent regulatory agencies. However, it has some distinct characteristics. Its basic form is a multi-member agency which decides policy issues by majority or supermajority vote. To contrast the two models, imagine a multi-member agency that is not insulated from short-term partisan influence. Partisan appointees represent their political supporters, and political actors can easily remove them. In a two-party state, for example, a five-member commission might be limited to three members from one party. The commission, operating by majority rule, could sideline those affiliated with the minority party, but that could undermine the perceived legitimacy of its rules and policies.

¹² For example, in Hungary Justices of the Constitutional Court, the Ombudsmen, and the President of the Audit Office all must obtain the support of 2/3 of the Parliament. (Rose-Ackerman 2005), pp. 57-60.

The third, impartial-generalist, model relies on commissions of inquiry composed of people with reputations for probity and no personal stake in the issue. Thus, impartiality results from the political appointment of people who claim to be able to consider matters objectively. The danger is that they are also ignorant. Policy recommendations might be neutral but ill-informed. To counter this problem, regulated entities and other stakeholders may have a leading role in presenting material to the commission. On the model of a common law judge, experts and groups who have a narrow private interest in the outcome advise the commission but have no decisionmaking authority. A member of the cabinet may then vet the commission's recommendations before issuing them as binding rules or submitting them to the legislature for approval.

II.D. Privatization

The privatization model delegates rulemaking authority to a private or quasi-governmental body. The statute that out-sources authority may specify the institution's form and membership and may require consultation with outsiders. Alternatively, it may simply delegate authority to the group and permit it to set its own internal rules and make substantive policy with few constraints. In a pure case, consultation and oversight are limited to the group in question.

Privatizing policymaking raises delicate questions about the reach of the state. In some cases, a law gives official status to an existing body with a history of self-regulation. In others, a statute creates a new body, sometimes applying the template of an established group to a new regulatory area. A profession may point to a long history of self-regulation and the possession of esoteric knowledge, as with medical doctors or engineers. Even so, the professional association may impose rules that put overly strict limits on entry and overly lax constraints on service quality. Professional norms may conflict with public interest goals.

Under the corporatist or consensual variant, potentially conflicting interests negotiate to make binding regulations, with or without government input. These decisions may have an impact outside of those at the bargaining table. In the labor-management area, the Scandinavian countries provide the archetypal examples where corporatist structures are strong and labor union membership is high. Few workers and businesses

lack representation although even there the practice may fall short (Gorges 1996) (Lewin 1994). In other countries the national labor union/business bodies have doubtful legitimacy. For example, in Hungary and Poland labor union membership is in decline, and the composition of the national committees is an artifact of the transition process that has not kept track with evolving economic realities (Rose-Ackerman 2005) 131-137).

III. Judicial Review

Oversight of government policymaking is pervasive and multi-faceted. The legislature holds hearings on budgets and statutory amendments and can set up special commissions of inquiry. Special commissions may operate inside or outside the legislature. Some systems permit the legislature to veto rules that they find objectionable.¹³ Audit, control, and accountability offices are a route for oversight. Supreme audit offices and ombudsmen provide oversight and usually report directly to the legislature. Both are frequently able either to initiate legal challenges directly or to refer cases to the public prosecutor. Beyond specialized oversight bodies, however, the courts—both special administrative tribunals and ordinary courts—have a central role. They can enforce principles of administrative and constitutional law as they apply to policymaking outside the legislature.

However, in many systems guidelines for rulemaking procedures either do not exist or are just recommendations. Then, neither administrative nor ordinary courts review process unless it violates principles of “natural justice” –a concept that is seldom applied to administrative rulemaking. Review involves either challenges to the law as applied in particular cases or constitutional challenges. An exception is the United States, where federal courts review rulemaking processes under the Administrative Procedures Act and have expanded on the Act’s bare-bones procedural requirements.¹⁴ Executive departments and independent agencies can issue many kinds of documents, from guidelines to interpretive rules to policy statements. However, if they want the document to have the force of law, they must use a process that is relatively transparent and open to anyone who wants to participate and that leaves a record of reasoned choice. Judicial

¹³ The legislative vetoes was declared unconstitutional by the U. S. Supreme Court, *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

¹⁴ USAPA §§ 701-706. (Strauss 1996).

review then checks that the process was sufficient, that the outcome is consistent with the statute, and that the substantive choice is not arbitrary and capricious. Otherwise the policy can be open to challenge in subsequent enforcement proceedings [*McLouth Steel Products Corp. v. Thomas*, 838 F. 2d 1317 (D.D.Cir. 1988)]

Judicial review of the rulemaking process seldom occurs in parliamentary democracies. It would require new statutes or constitutional amendments as well as a change in the judges' view of their role (Rose-Ackerman 1995; Rose-Ackerman 2005).

If challenges to rulemaking do get into court, the intensity of review varies. Do the courts review both legal substance and the administrative process? Do they usually defer to government bodies' interpretation of statutes, or do they view themselves as the definitive interpreters of the law? In the United States, for example, courts struggle to determine the deference they should give to an agency's interpretation of its underlying statutes [*Chevron, U.S.A., v. Natural Resources Defense Council*, 467 U.S. 837 (1984); (Cohen and Spitzer 1994; Eskridge and Baer 2008)]. Justice Breyer strikes a balance that captures my view of how courts can assure policymaking accountability. Under his concept of "active liberty", courts should recognize the functional reasons why the legislature delegated policymaking to agencies. The judiciary should then defer to agency interpretations of statutes so long as they seem consistent with what the reasonable member of Congress would want (Breyer 2006).

In some situations courts review facts as well as law. Lower level German administrative courts review both facts and law, providing *de novo* review of cases involving individual applications of a regulation (administrative acts), but they seldom review rules themselves on either ground (Rose-Ackerman 1995). In the United States review is seldom *de novo* although, in practice, the fact/law distinction is often difficult to draw with clarity and some argue that, since *Chevron* review of fact may even be more stringent than review of law.¹⁵

Courts also decide cases that do not challenge individual rules but rather challenge the separation of powers or the exercise of independent power by an executive body or the president. Some courts have developed a formalist separation of powers

¹⁵ (Breyer, Stewart et al. 2006) pose this question at the end of their chapter on the scope of judicial review, p. 403.

jurisprudence; others are more functionally oriented. Cases involve the limits on executive orders that have no prior statutory grant of authority and challenges to assertions of executive privilege. Litigants ask courts to decide if agenda setting is a purely executive function or whether lawsuits can force the government's hand.

Most constitutions permit delegation but attempt to limit its reach. In the United States, the delegation doctrine has few teeth, but, in principle, provided a weak constraint on the statutory drafting [*Whitman v. American Trucking Assns. Inc.*, 531 U. S. 457 (2001)]. An official cannot promulgate a legally binding rule without statutory authorization, but the legislature is free to grant very broad discretion to the agency. Review of substance is permissive, and review of process centers on its democratic legitimacy both in terms of the administrative process and for consistency with the democratically enacted statute. This structure strikes a balance between judicial deference to the political choices of the legislature—including its choice of how much to delegate—and more searching oversight of the procedures that inform and involve the public. Crucially, it leaves the ultimate policy choice in the hands of the public authority. Similarly, the German constitution includes a delegation clause that the Constitutional Court has interpreted to permit delegation subject to constraint (Rose-Ackerman 1995).

If legislation creates a new institution not contemplated in the explicit constitutional text, is the innovation constitutionally acceptable? In the United States independent regulatory agencies have survived constitutional challenges to their legitimacy [*Humphrey's Executor v. United States*, 295 U.S. 602 (1935)] and the Supreme Court has approved the constitutionality of hybrid institutions such as the Federal Sentencing Commission, and the Independent Counsel [*Mistretta v. United States*, 488 U.S. 361 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988)]. In Europe most countries have struck a compromise where the agencies regulating privatized public utilities are organized as separate entities that are legally responsible to a cabinet minister even if they operate with considerable de facto independence (Dohler 2003, Elgie, 2006 #160; Bertelli 2008).

Sometimes an entity is placed in the private law category to avoid separation of powers concerns. That may solve the structural problem in a formal sense, but if the entity is actually carrying out public functions, this has the cost of limiting judicial

oversight or perpetrating a false analogy to wholly private activities (Craig 1997; Ruffert 2007: 34).

Accountable administrative processes are costly and time consuming. Major rulemakings in the United States can take years to complete, followed by court review (Kagan 2007). These practical difficulties, however, do not undermine the basic principle that administrative law needs to be concerned with effective democratic control of the administration. If given authority by the constitution or by statute, the judiciary can have a key role in affecting the extent and nature of delegated authority and the processes required for rules to have legal force. It must walk a tightrope that facilitates good policies and competent administration without turning the courts into a forum for meddling with political choices.

IV. Implications and Conclusions

All democracies face common problems of legislative drafting, delegation and oversight. However, a strong form of convergence is unlikely because of the various democratic structures that provide the background for reform. Identical problems can produce divergent responses, no one of which is obviously superior.

Nevertheless, policymaking accountability is central to the democratic legitimacy of emerging modern states, and administrative law is one route to such accountability. To achieve that goal, the contrasting models mix public accountability and expertise in different ways. All of them are encountered in various forms and combinations in established democracies. Even so, there are important gaps and inconsistencies in existing law and practice. The pursuit of policymaking accountability in both established and emerging democracies faces predictable challenges that depend on constitutional and administrative design.

As an empirical matter, one ought to expect cross-country differences that result from differences in constitutional structures and the incentives they create for politicians. Those interested in strengthening democracy should not be content with the patterns of delegation, consultation and oversight that arise from the self-interested behavior of politicians in either parliamentary or presidential systems. The executive has wide-ranging policy discretion in all democracies and, in some, private bodies exercise public

functions. Modern states need to expand rights to participate beyond a predetermined group of stakeholders and to make these rights legally enforceable in court. These include rights to know about regulatory initiatives, rights to present data and opinions, and rights to a public, reasoned decision from both public agencies and from quasi-private bodies with regulatory functions. These rights will not arise spontaneously; they need strong advocates in civil society.

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